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# CONSTITUTIONAL COURT AND EUROPEAN INTEGRATION: THE GERMAN EXPERIENCE

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## 1. THE CONSTITUTION AS A BASIS FOR THE INTEGRATION PROCESS

### a) The transfer of competences as a limitation of sovereignty

The European Union is a supranational organization based on a legal order which has been created by the transfer of internal competences by the member states. This transfer means a limitation of sovereignty, by giving the supranational institutions the permission to act in these fields of competence politically, in particular to make legislation with direct normative effect in the internal order of the member States. The German Constitutional Court explains the consequences of such a transfer: State sovereignty opens, the legal order of the state is no longer exclusively national and closed but opened so that supranational law can enter directly into the national legal order. The State no longer claims the exclusive validity of its own laws on its territory. National law and supranational law, both have legal effect within the State.[1]

The transfer of internal competences to the European Communities and later to the European Union has been effectuated by treaties of the member States, the foundation treaties as well as the various reform treaties, which have attributed these competences to the supranational institutions. The consent of the member States to these treaties have been given by parliamentary acts which are the internal legal basis for the competence transfer. Thus, we can state a double dimension of this transfer: the internal parliamentary act which approves the treaty, in which the competences of the supranational institutions are enumerated.

[1] Federal Constitutional Court (FCC) vol. 37, 271, 280.

This act of approval (*Zustimmungsgesetz*), as an act of the national Parliament, is the basis for the constitutional justice control. The act is of great importance for various reasons: it reflects the will of Germany to accomplish integration within the finalities formulated in the treaty. The so-called integration program[2] is determined by this treaty to which the national act of approval refers. If the supranational institutions would act outside the integration program, this action would be *ultra vires*.[3] This means in particular that an action of these institutions without a competence transferred by the treaty would not be covered neither by the treaty nor by the act of approval to this treaty and therefore not compatible with Constitutional law.

We can therefore state:

1. The Constitution gives the permit to transfer national competences to the supranational organizations; the relevant articles are 23.1 for the period from the creation of the European Union in 1993 on and 24.1 for the period before.

2. The transfer is effectuated by an *international (or better: supranational) treaty* between the member States determining the supranational competences for Europewide legislation and the *national act of approval* to this treaty, which realizes the constitutional transfer permit.

3. The act of approval has various functions: (a) it enables the State President to ratify the transfer treaty, (b) it determines the “integration program” which is the normative framework for the actions of the supranational institutions and must be strictly observed by them, (c) it is the reason for the normative validity (*Geltungsgrund*) of supranational law,[4] and (d) the basis for the supranational structure of the EU (former: EC) legal order, in particular for its direct normative effect in the member States and for its primacy over national law.[5]

## b) The concept of supranationality

Furthermore, we can state that *supranationality*, the characteristic of the European Union (and formerly of the EC), is composed of three elements:[6]

(1) EU law constitutes an autonomous legal order created by the transfer of national competences, (2) supranational law has direct normative effect (validity and applicability) within the member States, and (3) supranational law has primacy of over national law.

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[2] FCC vol. 123, 267, 398

[3] FCC vol. 89, 155, 188; vol.123, 267, 354-355.

[4] FCC vol. 37, 271, 280; vol. 85, 191, 204; vol.123, 267, 347-348, 349.

[5] FCC vol. 75, 223, 244-245; vol. 85, 191, 204; vol. 123, 267, 400.

[6] See ECJ 4/64 [1964] ECR 585.

Constitutional Courts have to safeguard the Constitution. This is the primary task of Constitutional Courts, the internal dimension of Constitutional law. However, there is also an external dimension of it, which means that the legal order of the State is, as it has been already pointed out, not a closed but an "opened" order. This fact is due to the mentioned transfer of competences which means, in the words used by the German Basic Law (BL), the transfer of *sovereign powers* ("*Hoheitsrechte*"). Other European Constitutions have a different terminology: limitation of sovereignty, transfer of sovereignty, transfer of the exercise of competences, transfer of competences.[7] However, all these constitutional provisions which are the basis for the integration treaties common to all the member States have the same effect of building up a supranational order. Therefore the semantic divergence of these constitutional provisions is not decisive because the result of realizing these provisions is the creation of the supranational system which has been defined by the European Court of Justice (ECJ) very early, in 1964, by the famous decision Costa/ENEL.[8]

It shall also be mentioned that the term "supranational" used in the Treaty on the (no longer existing) European Coal and Steel Community 1951 for characterizing the High Authority (the predecessor of the EC/EU Commission) as independent from member States influence being therefore a real Community institution. Later this term was extended to the qualification of the EC/EU for distinguishing these organizations from traditional international bodies. As to the terminology of the German Federal Constitutional Court (FCC) we can state first a certain reservation to use this term but then, in the 2009 decision on the Treaty of Lisbon, the Court did not hesitate to speak of supranationality. However, at the same time the FCC characterized the EU as "intergovernmental", as a "*Staatenverbund*",[9] and reduced by this the concept of supranationality, as it has been defined by the ECJ.

## 2. THE POSITION OF THE FCC TOWARDS EC/EU INTEGRATION

### a) The initial phase of acceptance

The FCC was aware of the importance of the European integration of post-war Germany. The preamble of the Basic Law of 1949 clearly puts forward as a main finality of the Federal Republic to become a member of the world community and to take part actively in the integration of Europe.

[7] See Rainer Arnold, The Integration Clauses in the Constitutions of the Member States (in Czech), ), Evropské právo, 1/1998, 2-4

[8] See note 6.

[9] FCC vol. 123, 267, 348

This new orientation corresponds to the already mentioned external dimension of the Constitution, to the “open statehood” (“*offene Staatlichkeit*”) which is a characteristic element of the State.[10]

The initial phase of the FCC integration jurisprudence is characterized by a prompt obedience of the ECJ position. Costa/ENEL is expressly accepted[11] so that the supranational structure of the Community has been declared conform to the Constitution. The particular nature of Community law and with that its autonomy, the direct effect of this law within the member States as well as its primacy over national law have been confirmed by the FCC. The Court has even used the term of Constitutional law for the definition of the supranational order (without calling it supranational).[12]

The fact that the Court confirmed the autonomy of Community law has had the procedural consequence that an individual constitutional complaint (“*Verfassungsbeschwerde*”) against supranational law was regarded as inadmissible for its autonomous character not being German law.[13] This position has been abandoned, insofar as the question of supranational *ultra vires* acts are concerned, in the Maastricht treaty decision of 1993 where the FCC had the intention to expand its control also to supranational law for its serious impact on the national sphere.[14]

Furthermore, the direct effect of EC directives as it has been developed by the ECJ was confirmed by the FCC which accepted the power of the ECJ to interpret the text of the then article 189.3 EEC Treaty in this way. The FCC has given preference the ECJ jurisprudence even against the opinion of the Federal Fiscal Court.[15]

Furthermore, the FCC confirmed that the ECJ is included into the guarantee of the legal judge (article 101.1 BL) for the reason that the supranational court has been functionally connected with the German court system. This means that the omission to ask the ECJ for a preliminary question violates, under certain circumstances, this fundamental constitutional guarantee.[16]

## b) The first reservation: fundamental rights

The question of the fundamental rights protection of the individual with regard to the Community order was an important subject of the CCF jurisprudence. The problem arised from the fact that a high percentage of supranational law has to be executed by national authorities. Therefore it was initially unclear whether German fundamental rights had to be applied for actions of German

[10] See Karl-Peter Sommermann, Offene Staatlichkeit: Deutschland, in: Armin von Bogdandy/Pedro Cruz Villalón/Peter M. Huber (eds.), Handbuch Ius Publicum Europaeum, vol. 2, 2008, S. 3-35.

11 FCC vol.22, 293 /2.c)

[12] Ibidem

[13] Ibidem

[14] FCC vol. 89, 155

[15] FCC vol. 75, 223

[16] FCC vol. 82, 159

authorities based on EC law. On the one hand, national authorities have to respect national fundamental rights as laid down in the national Constitution, on the other hand, the national authorities are obliged to execute supranational law as being different from national law. This fundamental problem was dealt with in the two famous "*Solange*" decisions of the FCC, rendered in 1974[17] and, 12 years later, in 1986.[18]

The first of these two decisions confirmed the application of the German fundamental rights for the reason that no fundamental rights protection existed on the Community level and therefore the fundamental rights of the national Constitution had to take over this protection. The FCC regarded the protection of the individual by fundamental as indispensable. The Court accepted that the ECJ would assume the protection task as soon as an adequate fundamental rights protection system would have been established on the supranational side.

In the second decision of 1986, the FCC regarded the judge-made protection of fundamental rights which has been developed in the meantime by the ECJ as equivalent to the guarantees laid down the German Constitution, the Basic Law. For this reason the Court declared no longer to apply the German fundamental rights and to leave it to the ECJ to review supranational secondary law for its conformity with the supranational fundamental rights. It shall be mentioned that the ECJ judges had elaborated numerous fundamental rights which they qualified as general principles of Community law resulting from the common Constitutional tradition of the member States.[19]

This position of the FCC confirmed by the banana market decision in 2000[20] has been upheld until now. The competence to review supranational legal acts is within the hands of the ECJ while the FCC watches over the supranational protection standards in general. This means that the Germany Constitutional Court would renew its control of supranational legislation if the ECJ would essentially reduce these standards or even abolish them. With the entry into force of the EU Fundamental Rights Charter in December 2009 it seems nearly impossible that this would happen.

As a summary it can be said that the *Solange* jurisprudence of the FCC has the following essential contents:

1. The fundamental rights protection of the individual is regarded to be indispensable and is considered to be an element which identifies the German constitutional order. The supranational system established by the transfer of competences according to article 24.1 and (since 1993 to article 23.1) BL must guarantee the freedoms and rights of the individual as the BL does.

2. The FCC recognizes that the supranational order itself shall protect the individual concerned by supranational legal acts which are executed by German authorities. This is a consequence of the autonomy of the EC /EU legal order.

[17] FCC vol. 37, 271

[18] FCC vol. 72, 339

[19] See for example the *Hauer* case, ECJ 44/79, ECR 1979, 3727

[20] FCC vol. 102, 147

3. As far as the protection is not assured by supranational fundamental rights, the FCC has to apply the German fundamental rights.
4. FCC and ECJ cooperate in the above-mentioned sense (the Maastricht decision speaks of a “relationship of co-operation” between these courts[21]).
5. The new concept of constitutional identity as developed by the FCC in the Lisbon Treaty decision[22] introduces a further reservation which even could override the *Solange II* approach. This means that the application of the supranational fundamental rights would be hindered if this would be contrary to the German constitutional identity. This could happen in a case in which the interpretation of the supranational personality rights would be seriously and manifestly contrary to the German concept of human dignity.

### c) The reservation of constitutional identity

The FCC, which has accepted since long the primacy of supranational over national law including national Constitutional law, has clearly established, in its Lisbon Treaty decision, an ultimate limit of primacy, namely the German constitutional identity.

The identity concept which the FCC has developed has two main elements: (1) The German Constitution does not allow to abolish the German State by integrating it into a European Federal State. A *new* Constitution, either German or European, would be necessary for this step. Continuing as a State requires to be able to make own political decisions, that is to adopt, in a substantive way, own legislation on various fields of major importance.[23] These fields are enumerated by the FCC. This first element of identity can be called the element of “remaining statehood”.

(2) Furthermore, constitutional identity has been connected by the FCC with the so-called ”eternity clause” (article 79.3 BL). This provision of the Constitution excludes certain matters from being changed by a formal constitutional reform. These matters are what is written down in article 1 BL (dignity of human being) as well as in article 20 BL (the State defining principles concerning Federation, Republic, Social State orientation and Rule of Law, especially with the aspect of legality and constitutionality of State actions as denominated in article 20.3 BL). Constitutional reform cannot modify these matters (though changes had been accepted to a certain extent by the FCC[24]). This barrier is also applicable for supranational law affecting national constitutional law. Article 23.1 BL, the constitutional basis for a transfer of internal competences to the supranational organization, makes an explicit reference to article 79.3 BL, what corresponds with the doctrine qualifying the supranationalization of State power as a ”substantive constitutional reform”.

[21] FCC vol. 89, 155, 174-175, 178.

[22] FCC vol. 123, 267

[23] FCC vol. 123, 267, 357-358.

[24] FCC vol. 30, 1 CI2c

While the *formal* reform of the Constitution is effectuated by a two thirds majority in the Federal Parliament as well as in the Federal Council, connected with the modification of the Constitution text, the *substantive* reform is based on the transfer of competences formerly belonging to the State and attributed by the transfer to supranational institutions giving them the power to make Europewide legislation with a direct effect within the German internal legal order. This has an essential impact on the constitutional order as created by the BL in 1949. It is easily understandable that such a transfer of internal competences changes essentially the legal order as originally foreseen by the German Constitution. It is therefore justified to qualify this transfer as a substantive reform of the BL.

The consequence is that the limits for a formal reform of the Constitution must also be respected for a substantive reform of it.

It can be doubtful whether it is possible to define the concept of constitutional identity exclusively with reference to article 79.3 BL. Constitutional identity is a dynamic, not a static concept. During a more than 60 years jurisprudence of the FCC new elements of identification have been elaborated. The principle of "open statehood" has been pointed out by the Court, an aspect which indicates that constitutional identity is not only defined by internal constitutional law but also by international and in particular supranational law. National constitutional identity is the identity of an "integrated State" whose sovereignty is relative and based on a legal order composed of national and supranational law. Furthermore, article 79.3 BL does not refer to the existence of a system of constitutional justice with large competences as it is characteristic for Germany. It cannot be denied that this is an identifying element of the German constitutional order.

For these reasons article 79.3 BL seems not adequate for determining exactly what constitutional identity is. However, the constitutional jurisprudence is clear on this issue.

It should be mentioned here that the concept of constitutional identity has been referred to by the FCC in its jurisprudence connected with the financial crisis in 2011 and 2012. The core argument is that financial aid from Germany should not paralyze the budgetary power of the State which is basic for democracy and therefore an element of constitutional identity. The FCC respected in these decisions the discretionary power of the Parliament making financial aid laws as a matter of politics but clearly pointed out that an ultimate borderline should not be trespassed. In such a case the financial aid measures would be unconstitutional. This, however, has not yet occurred.[25]

## d) The "ultra vires" jurisdiction of the Maastricht and Mangold decisions

The main item the FCC dealt with in the Maastricht decision (1993) was the "ultra vires" question. The complainants argued that the Maastricht treaty establishing the European Union would give un-

[25] BVerfG, 2 BvR 987/10 vom 7.9.2011, Absatz-Nr. (1-142), http://www.bverfg.de/entscheidungen/rs20110907_2bvr098710.html and BVerfG, 2 BvR 1824/12 vom 12.9.2012, Absatz-Nr. (1-14), http://www.bverfg.de/entscheidungen/rs20120912_2bvr182412.html

limited competence to the EU. This would violate national sovereignty and give State quality to the EU. The FCC rejected this argumentation qualifying the EU not as a State (mainly because of its lack of the so-called "competence of competence" ("Kompetenz-Kompetenz"), that is the competence to create unilaterally whatever competence), but as an "association of States" ("Staatenverbund"), a supranational organization composed of member States with state-like instruments and mechanisms for its functioning.[26] Supranational institutions are not allowed, according to the EU Treaty, to act "ultra vires", beyond the competences transferred to them. The institutions have strictly to follow the EU treaty conforming to the principle of "competence conferral" (principle of "compétence attribuée"). If not, the supranational act would be illegal. The national act of approval of the EU treaty determines the competences transferred to the EU; it therefore indicates the so-called "integration program" ("Integrationsprogramm")[27] to which Germany consented by this treaty.

The question what *ultra vires* really means was the main issue in the *Mangold* decision of the FCC.[28] The Court explained that only a manifest and serious transgression of competence, which would entail a shift of the competence system provided for by the EU treaty, could be qualified as *ultra vires*. This decision has limited the *ultra vires* control to specific, obvious situations of transgression of competences.

## e) Who has the final word?

An important question was raised in the Maastricht as well as in the Lisbon decision: which court can ultimately say that a supranational act is ultra vires or incompatible with constitutional identity: the FCC or the ECJ? Which of these courts has the final word?

The FCC claims the final competence to say this and to declare, on the basis of such a statement, the supranational legal act concerned inapplicable on the German territory. This position can lead to a jurisdiction conflict because the ECJ claims the final word, according to article 267 TFEU, for the interpretation of EU law and the evaluation whether EU secondary law is incompatible with higher EU law and therefore void.

The FCC explains its position with detailed arguments in the Lisbon judgment.[29] It declares the right of the State to decide on whether its constitutional identity is violated by supranational law as a right which is inherent in statehood and not transferable to a supranational court.

[26] FCC vol. 89, 155.

[27] FCC vol. 123, 267, 398

[28] FCC vol. 126, 286

[29] FCC vol. 123, 267, 353-354.

As to the ultra vires concept, the FCC also confirms its own exclusive power to decide ultimately on this question. However, the Court expresses the necessity to make a preliminary question to the ECJ before its final decision.[30]

Insofar as constitutional identity is concerned, it must also be taken into consideration that article 4 TEU obliges the EU to respect the national identity (including constitutional identity) of the member States. This provision reflects the supranational perspective of constitutional identity. While the national Constitutional Court defines constitutional identity from a national perspective, the ECJ interprets national and constitutional identity of a member State from the supranational perspective expressed by article 4 TEU.

It falls within the competence of the national Constitutional Court to determine what national constitutional identity is. However, the competence to declare void or inapplicable secondary EU law is exclusively the hands of the ECJ. Therefore, the Constitutional Court has two make a preliminary question to the ECJ if it considers a supranational act as contrary to the member State's constitutional identity. The ECJ has to examine the validity of this act for a violation of the mentioned article 4. Hereby the court must be aware of the difference between the national and the supranational perspective of constitutional identity. The ECJ can declare a supranational legal act void only if this legal act is incompatible with article 4 TEU.[31]

## 3) CONCLUSION.

The German constitutional jurisprudence reflects central dimensions of modern constitutional law: to safeguard the basic legal order of the State and to adapt it to international and supranational law. The approach of the FCC is distinctly based on the idea of "open statehood" and clearly favors integration. Constitutional identity is the new term for the limits of supranational power. If politics would like to go beyond these limits and for example integrate Germany into a European Federal State, a new Constitution would be necessary.

[30] FCC vol. 126, 286; vol. 123, 267, 354-355.

[31] See Rainer Arnold, Verfassungsidentität und Letztentscheidungsrecht, in: Peter-Christian Müller-Graff, Stefanie Schmahl, Vassilios Skouris (eds.), Europäisches Recht zwischen Bewährung und Wandel, Festschrift für Dieter H. Scheuing, Nomos, Baden-Baden, 2011, 17–25