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“European Integration Through Law”
The Contribution of the Federal Constitutional Court

Abstract

This article discusses the Federal Constitutional Court’s contribution to European “integration through law” over the past decades. The Basic Law’s openness to integration and to European Law is examined, as well as the co-operation between the Federal Constitutional Court and the European Court of Justice in the execution of European Union law and the protection of fundamental rights. The author provides a number of examples to show how the instruments of identity review and *ultra vires* review developed by the Federal Constitutional Court secure the agenda of European integration as agreed upon in the European Treaties. He also shows how national governmental bodies are bound by the concept of responsibility with respect to the European integration process and how the Court ensures the necessary democratic legitimisation for the acts of European institutions by requiring the involvement of the German parliament in political decision-making processes related to the European Union. Finally, the author explores the idea of the legal community and the criticisms that have been levied against this concept. He concludes by positing that the European Union can only preserve itself by remaining a legal community, and that the rule of law in EU law is indispensable, particularly in times of crisis.

Keywords: European legal community; Openness to European law; Openness to integration; ECJ’s development of the law; Consistent application of the law; Juridification of the European process of integration; Procedure for a preliminary ruling; Union’s fundamental rights; Identity review; Ultra vires review; National constitutional identity of responsibility with respect to integration; Re-involvement of parliaments.

A. The idea of a European legal community

THE EUROPEAN UNION has come under pressure. Seventy years after the end of the Second World War, the bright promise of freedom, peace, prosperity and solidarity with which the European

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process of integration once shone seems to have been lost. The major challenges of the sovereign debt crisis and the financial crisis have not only uncovered structural errors and shifts of power at an institutional level,¹ but they have also variously revealed national egotism in the Member States and have allowed doubts to arise as to the European Union's inner cohesion. These centrifugal forces are further intensified by challenges the European Union faces in view of the unabating influx of refugees. Particularly in this time of uncertainty,² it might help to recall the achievements of the integration process to date.

Probably one of Europe's greatest successes in the last decades is the development of a functioning European legal community.³ There is a reason for this: the preservation of the values on which the European Union is founded⁴ and the achievement of the Union's objectives cannot be realised in a group of 28 Member States with highly diverse historic, cultural, social and economic characters if the rules with which the European Union has endowed itself are not observed. Against this background, law fulfils several functions at the European level: it provides direction, helps avoid and overcome conflicts, and provides legitimisation by assigning competences and establishing procedures for decision-making. Precisely in the European Union, where cohesive forces are rather unpronounced to begin with on account of the differing interests of the Member States, the integrative capacity of law becomes manifest. Thus, even in times of crisis, it remains Europe's most stable foundation.⁵

Many stakeholders are involved in implementing the idea of legal community, which had already been so emphatically called for by Walter Hallstein.⁶ Among these are the governments of the Member States, which negotiate and develop the European treaties; the European Parliament and the Council, which, together with the Commission, enact secondary law; the European Court of Justice, which ensures observance of the law in the interpretation and application of the treaties;⁷ the national parliaments, administrations and courts, which for their part are responsible for the implementation of

¹ Cf., e.g., most recently Rodi [2015: 737 *et seq.*].

² With radical consequences, for instance STREECK [2015].

³ Expressly Volkman [2014: 1061 *et seq.*]. In detail Voßkuhle [2015: 135 *et seq.*] with further references.

⁴ In greater detail Calliess [2004: 1033 *et seq.*]; Sommermann [2014: 287 *et seq.*] with further references.

⁵ With doubts, for instance, Paul Kirchhof [2012]; *id.* [2013: 3]; Graf Kielmannsegg [2012]; Schmidt [2013: para. 60]: "The present financial crisis has been caused by a disregard of the law"; *id.*, [2012]; HUBER [2015].

⁶ Hallstein 1962 [341 *et seq.*].

⁷ With regard to the ECJ's tasks in the crisis, cf. specifically Everling [2015: 85 *et seq.*].

European law; and, not least, the citizens, who may participate in the legal discourse in various ways, for example through associations and citizens' initiatives. In and of itself, the number of actors involved demonstrates that the establishment and development of the European legal community takes place within an extremely complex process characterised by a high level of interconnectedness and interdependency. It is a process in which the conditions for success and the dangers entailed can only ever be reflected in parts. It is against this background that I would like to take a closer look at the Federal Constitutional Court's contribution to European "integration through law"⁸ over the past decades by considering ten central juridification impulses (B). A few thoughts on possible limits to the idea of the legal community (C) will round out these reflections.

B. Juridification impulses in the case-law of the Federal Constitutional Court

I. Opening the Constitution to integration, and legal guiding of the integration process

Let us start with a famous example of juridification: the insertion of Art. 23, known as the "Europe Article," into the Basic Law in 1992. During the re-drafting of this Article, the constitution-amending legislature closely followed the key principles of the Federal Constitutional Court's case-law on European integration.

As early as 1967, the Federal Constitutional Court held that the then European Economic Community was a community of a special nature, engaged in a process of ongoing integration to which the Federal Republic could transfer sovereign rights on the basis of Art. 24 of the Basic Law.⁹ Thus, at a very early stage, the Court emphasised the Basic Law's openness to integration. Its statements served as a model for fixing the establishment of a united Europe as a fundamental national objective, and for the constitutional mandate to implement this objective in Art. 23 sec. 1 sentence 1 of the Basic Law, reinforcing the corresponding commitment in the Preamble of the Basic Law.

At the same time, in its *Solange I* decision of 1974, the Federal Constitutional Court developed legal guidelines for the internal

⁸ Coining the term: Cappelletti, Seccombe and Weiler [1986].

⁹ Cf. Decisions of the Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts* [BVerfGE 22: 293-296]).

process of integration, and conditioned the permissibility of the transfer of sovereign rights upon the observance of certain structural requirements.¹⁰ These concerned the protection of the national constitutional identity, the protection of fundamental rights, as well as the allocation of competences. The Court held that the fundamental-rights part of the Basic Law belonged to the “essential features” of the Basic Law and thus championed an integration that is committed to human and civil rights.¹¹ The observance of democratic principles forms an important part of the constitutional identity; in its *Solange I* decision, the Federal Constitutional Court diagnosed a deficit at the European level in this respect. This was evidenced by the fact that the Community did not have a parliament directly elected by general suffrage that possessed legislative powers, and to which the Community organs empowered to legislate were fully responsible.¹² With regard to the allocation of competences between the Community and the Member States, the Court further stressed in its *Kloppenburg* decision of 1987 that the transfer of competences could not be permitted to lead to a renunciation of sovereign statehood, since the Member States were “masters of the treaties”.¹³ This underlines the fact that, according to the principle of conferral, the present Union may only regulate competences for those matters that have been transferred to it, and that it is subject to the principle of subsidiarity when regulating those matters.

These essential requirements developed in the case-law were later codified and further specified by the constitution-amending legislature in what is referred to as the “structure safeguard clause” (*Struktursicherungsklausel*) of Art. 23 of the Basic Law. It requires the Union to observe democratic, constitutional, social and federal principles, to respect the principle of subsidiarity, and to ensure a level of protection of fundamental rights which is essentially comparable to that afforded by the Basic Law.

II. *Validating and securing the ECJ's development of the law*

Contrary to what commonly heard phrases such as “the war of the judges”¹⁴ or “a fight for the last word”¹⁵ might suggest, the Federal Constitutional Court, at an early stage, constitutionally validated and secured the competence of the European Court of Justice (ECJ) to

¹⁰ Cf. *BVerfGE* 37, 271–279 and 280.

¹¹ Cf. *BVerfGE* *loc. cit.*: 280.

¹² Cf. *BVerfGE* *loc. cit.*

¹³ Cf. *BVerfGE* 75: 223–242.

¹⁴ Karpenstein, interview on Deutschlandfunk radio on 10 August 2009, last consulted on 1 October 2015 at www.dlf.de.

¹⁵ Cf., in this vein, Schwarze [2005: 3459].

develop the law and emphasised the key role of the Court in the development of the legal community.¹⁶ This brings me to my second point.

In the early 1960s, the ECJ began interpreting its task assigned by the Treaty of “ensur[ing] that in the interpretation and application of the Treaties the law is observed” (Art. 19 sec. 1 Treaty of the European Union (TEU)) in a manner that was particularly open towards integration. By supplementing and further developing the law in its decisions, the ECJ promoted integration and thereby also strengthened its own position within the institutional system.¹⁷

A first milestone for the ECJ was its decision in the case of van Gend & Loos in 1963. Therein the Court released the Community from its classic corset under international law and postulated that, with regard to the Member States, Community law constituted an independent legal order and was directly applicable in the Member States without a national implementing measure.¹⁸ A year later, in its *Costa v ENEL* judgment, the ECJ continued to develop its case-law along pro-European lines and decided that, in case of a collision between the directly applicable Union law and national law, the former was to be given precedence.¹⁹ Both decisions symbolise how integration by means of (case-)law works: the European legal order opens itself for citizens and grants them rights such as fundamental freedoms which they can then enforce even against national bodies. This establishes the requisite conditions for the unhindered cross-border movement of goods, persons, services and capital, as a consequence of which economic, social and cultural interdependencies arise that are elementary for the achievement of the objectives of the European Union, namely peace, freedom and prosperity. At the same time, the principle of precedence enables the coordination of great bodies of law between Union law and national law, and secures a consistent application of the law.

At the national level, the Federal Constitutional Court did not put the brakes on the ECJ as a “motor of integration,” but rather even encouraged it at times by recognising its jurisprudence. In 1967 it concurred with the classification of Community law as a legal order distinct from international and national law.²⁰ Moreover, in 1971,²¹ and thus relatively early in comparison with the constitutional or

¹⁶ For an extensive discussion on that point cf. Mayer [2005: 456 *et seq.*].

¹⁷ Expressly, e.g., Grimm [2014: 1047 *et seq.*]. Cf. in addition, for instance, Tamm [2013: 22 *et seq.*].

¹⁸ Cf. ECJ, Judgment of 5 February 1963, Case 26/62 (van Gend and Loos v

Netherlands Inland Revenue Administration), European Court Reports [ECR] 1963: 1-25.

¹⁹ Cf. ECJ, Case C-6/64 (*Costa v ENEL*), ECR 1964: 1251-1270.

²⁰ Cf. *BVerfGE* 22: 293-296.

²¹ Cf. *BVerfGE* 31: 145-174 and 175.

highest courts of other countries,²² it constitutionally validated and secured the principle of precedence of Union law, even though it chose a different dogmatic legal reasoning than that of the ECJ. Finally, in 1987, it generally, and for the first time expressly, accepted the method of judicial development of the law by the ECJ, citing the centuries-old tradition of judicial creation of law in Europe, reaching from Roman law to German labour law.²³

Now the task of ensuring the enforcement of European and national law falls mainly to the national administrations and courts. On account of the decentralised implementation model, national regular courts are important players in the implementation of Union law.²⁴ In this respect, the procedure for a preliminary ruling according to Art. 267 of the Treaty on the Functioning of the European Union (TFEU) is absolutely fundamental for the juridification of the European process of integration.²⁵ It procedurally secures the obligation of the national courts to grant precedence to Union law over conflicting national law, and reflects the sharing of responsibility in an association in which the two levels, Union law and national law, are linked.²⁶

III. The implementation of the obligation to refer a matter to the ECJ

The preliminary ruling procedure would, however, be ineffective in part if the obligation to refer a matter to the ECJ were not subject to review. Thus, the Federal Constitutional Court, from the outset—and this is my third point—has striven for its constitutional effectuation.²⁷ If a German court arbitrarily fails to meet its obligation to make a reference for a preliminary ruling, in the view of the Federal Constitutional Court this (also) infringes the guarantee of the lawful judge of Art. 101 sec. 1 sentence 2 of the Basic Law. The parties therefore have a right to have a matter decided under European law by the ECJ. In case the obligation to refer a matter is handled in a manifestly untenable manner by a court, this may be challenged by means of a constitutional appeal before the Federal Constitutional Court.

²² For a comparative legal analysis, Grabenwarter [2009: 124 *et seq.*].

²³ *Cf.* BVerfGE 75: 223–242 *et seq.*

²⁴ In greater detail: Gärditz [2004: para. 1].

²⁵ Expressly, e.g., Skouris [2008: 344 *et seq.*] and Karpenstein [2014: para. 1].

Cf. in addition, e.g., Proelss [2014: 172 *et seq.*] with further references.

²⁶ In greater detail: Voßkuhle [2010a: 1 *et seq.*]. *Cf.* also Ludwigs [2014: 273 *et seq.*]. Critical, for instance, Biaggini [2014: 29 and 30].

²⁷ In greater detail: Britz [2012: 1313 *et seq.*]. See generally Voßkuhle and Lange [2014: paras. 19 *et seq.*] with further references.

This shows that the interaction of the Federal Constitutional Court with the Court of Justice is carried out in association. Thus, it was in following with its own stance that early last year, in the context of the ECB's Outright Monetary Transactions (OMT) programme, the Second Senate of the Federal Constitutional Court referred several questions to the Court of Justice for a preliminary ruling, for the first time in this Court's history.²⁸

IV. Impulses for the development of the protection of fundamental rights

This brings me to another important juridification impulse. Even where the Federal Constitutional Court did set limits on the precedence of Union law, and on the surface of things thereby seemed to slow the process of legal integration, it ultimately promoted that process. Its case-law provided decisive impulses for the development of the protection of fundamental rights within the Union. The starting point was the *Solange I* decision of 1974, mentioned above. In this decision, the Federal Constitutional Court still restricted the precedence of Union law in cases where it was in conflict with the fundamental rights of the Basic Law. In this decision, the Federal Constitutional Court argued that Union law did not have a catalogue of fundamental rights equivalent to that of the Basic Law.²⁹ On the basis of its own understanding as a citizens' court, the Federal Constitutional Court's aim was to strengthen the protection of fundamental rights as a basic element of the rule of law at the level of the European Union.³⁰ The ECJ accepted this challenge and, since the early 1970s, it has consistently elaborated a non-codified catalogue of fundamental rights, by invoking the constitutional traditions common to the Member States as well as the European Convention on Human Rights.³¹ Against this background, in 1986, the Federal Constitutional Court, in its *Solange II* decision, held that the condition set forth in the earlier *Solange I* decision had been fulfilled in substance. The Federal Constitutional Court now only exercises its jurisdiction when a level of protection essentially equivalent to that provided by the Basic Law cannot be ensured in Union law.³²

²⁸ Cf. *BVerfGE* 134: 366.

²⁹ Cf. *BVerfGE* 37: 271-285.

³⁰ Cf. Limbach [2001: 2916].

³¹ Cf., e.g., ECJ, 11/70 (*Internationale Handelsgesellschaft v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*), ECR 1970: 1125-1135.

³² *BVerfGE* 73: 339-376, 387 (*Solange II*); continued in *BVerfGE* 89: 155-174 and 175 (*Maastricht*); *BVerfGE* 102: 147-167 (*Common organisation of the market in bananas*); *BVerfGE* 123: 267-335 (*Lisbon Treaty*).

The ECJ's case-law on the Union's fundamental rights, for its part, provided an important impulse for the elaboration of a catalogue of fundamental rights in the Charter of Fundamental Rights (the Charter), which entered into force on 1 December 2009.

Currently, the equilibrium of the system for the protection of fundamental rights threatens to become less stable. In its *Åkerberg Fransson* decision of 2013, the ECJ interpreted a provision on the scope of the Charter (Art. 51 sec. 1 of the Charter) so broadly that practically any act by a Member State with any connection to Union law could be subject to its review of fundamental rights.³³ Thereupon, the Federal Constitutional Court, in a judgment on the counter-terrorism database dated April 2013, warned that the *Åkerberg* decision was not to be understood and applied in such a way that the Charter of Fundamental Rights would be binding as soon as any connection in a provision's subject-matter to the mere abstract scope of Union law could be established, or purely incidental effects on Union law could be made out.³⁴ The aim of the Federal Constitutional Court, thereby, was also to maintain an effective protection of fundamental rights at the European level. For there is a risk that, due to a general shifting of the protection of fundamental rights from the national to the supranational level, a supposedly higher degree of protection is gained at the expense of accuracy and proximity to the cases. In "multipolar" fundamental rights relationships, in which several fundamental-rights positions must be balanced against one another, conflicts may also arise if the ECJ finds that a fundamental-rights position of the Charter takes precedence over an opposing national fundamental right.³⁵

Irrespective of this, the following aspect should also not be neglected: the centralisation of the protection of fundamental rights in a single court would run counter to the concept of a federal legal community with shared responsibilities. It would potentially lead to uniformity in various legal matters, from data protection to insurance law to criminal law, which is not entirely compatible with the division of competences and therefore does not carry the support of the Member States' will. Such "formalistic egalitarianism"³⁶

³³ ECJ, Judgment of 26 February 2013, C-617/10 (*Åkerberg Fransson*), NJW 2013: 561 and 562 paras. 17 to 27; *cf.* with regard to criticism on the ECJ's interpretation of Art. 51 of the Charter on Fundamental Rights, e.g., Frenzel [2014: 18 *et seq.*]. On the necessity for the ECJ to further concretise the criterion of "implementing" Union law *cf.* Hancox [2013: 1425 *et seq.*]. The subsequent case-law

developed by the ECJ's chambers is not clear, *cf.*, e.g., Franzius [2015a: 390] with further references.

³⁴ *BVerfGE* 133: 277-316 para. 91. For a nuanced reconstruction of the Federal Constitutional Court's case-law *cf.* Britz 2015 [275 *et seq.*] with further references.

³⁵ Lange [2014: 173].

³⁶ Hallstein [1962: 347].

through law narrows political margins of manœuvre and imposes itself upon a protection of fundamental rights in the Member States that is finely balanced and has evolved historically.³⁷ All this can have a rather disintegrative effect and is therefore contrary to the objectives of the Union.

Against this backdrop, a merger of the spheres of fundamental rights, too, does not appear expedient. The proposal that the Federal Constitutional Court first examines a case under the fundamental law aspects of the Basic Law, but in doing so should, as regards the substance, converge upon the standards of the Charter of Fundamental Rights and the European Convention on Human Rights (ECHR) and, in case of conflict, give precedence to Union law,³⁸ would only be acceptable if the ECJ were to exercise a strongly restrained review,³⁹ for which, in my view, there are however currently very few indications.⁴⁰

At the same time, the complexity of the protection of fundamental rights in the multi-level European system should not deter us. This also holds true with regard to the accession of the European Union to the ECHR as envisaged in Art. 6 sec. 2 TEU, as a consequence of which legal acts and judgments of Union bodies would be subject to judicial review by the Strasbourg Court. In its opinion of 18 December 2014,⁴¹ however, the ECJ came to the conclusion that the draft agreement on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms was not compatible with European primary law.⁴² The question of whether the ECJ has rightfully been reproached in the legal literature for only wanting to thus secure its own prerogative of interpretation on questions of fundamental rights in the EU⁴³ shall be left open here. What we can say is that the inclusion of a specialised international court on human rights would raise the overall legitimacy and credibility of the system of protection of human rights.

³⁷ Clearly expressed in Masing [2015: 486]. In addition, cf. Ohler [2013: 1438]. On the pluralism of fundamental rights in general, see, for instance, the contributions in Avbelj and Komárek [2012].

³⁸ In this sense, see Thym [2015: 57]. For a more radical approach cf. Bäcker [2015: 410 *et seq.*]. For an instructive analysis of the debate cf. Franzius [2015a: 383 *et seq.*].

³⁹ In the same vein, see also Franzius [2015b: 152].

⁴⁰ Exemplary, however, for instance ECJ, Judgment of 14 October 2004, C-36/02

(Omega), ECR 2004: I-9609, paras. 23 *et seq.*; on a fundamental rights-review by the ECJ that is exercised with restraint following the *Solange II* decision cf. Ferdinand Kirchhof [2014: 272].

⁴¹ *Opinion (2/13)* of the Court (Full Court) of 18 December 2014, European Commission, *Official Journal C* 65 of 23 February 2015: 2.

⁴² For a critical analysis of the Opinion see Wendel [2015: 921].

⁴³ Cf. F.C. Mayer [2015a: 122]; Tomuschat [2015: 137 and 139]; Schorkopf [2015: 783].

V. Securing the observance of the European integration agenda

Aside from the review of fundamental rights, the Federal Constitutional Court has developed two further instruments aimed at securing the agenda of European integration as agreed upon in the European Treaties: the identity review and the *ultra vires* review.⁴⁴

By means of the identity review, the Federal Constitutional Court examines whether the inalienable core of the Basic Law (Art. 23 sec. 1 sentence 3 in conjunction with Art. 79 sec. 3 of the Basic Law) has been respected. Art. 23 sec. 1 sentence 3 of the Basic Law expressly sets limits to the transfer of sovereign rights to the European Union. Accordingly, as mentioned, the fundamental structural principles of our state, such as the principle of democracy, the rule of law, the social welfare state, the republic, and federalism, may not be relinquished. The same applies to the guarantee of human dignity and those fundamental rights that are—to put it succinctly—part and parcel of human dignity.⁴⁵ Here the following applies: that which is beyond the grasp of the constitution-amending legislature is also not open to integration.⁴⁶ European legal acts that affect this inalienable core of the Constitution are not applicable in Germany.⁴⁷ Thereby, integration and identity are mutually linked. They are two sides of the same coin; two values to be protected constitutionally and under Union law, the safe-guarding and furtherance of which go hand in hand. This follows not least from the EU-Treaty itself. Art. 4 sec. 2, sets forth: “The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.”⁴⁸

The *ultra vires* review is to be distinguished from the identity review. The *ultra vires* review is based on the idea that the Union, unlike a state, may not generate its own competences. In Art. 5 sec. 2 sentence 1 TEU, the Member States have obliged the Union institutions to respect the limits of the sovereign rights conferred upon them.

⁴⁴ Cf. *BVerfGE* 134: 366-382 *et seq.*, paras. 22 *et seq.*, summarising its previous case-law. For a description of the development of these two instruments for retaining the competence to review certain acts, and their reception by the courts of the other Member States cf., for instance, Wendel [2011: 462 *et seq.*; 471 *et seq.*] with further references, respectively. Kahl [2013: 197 *et seq.*], rightly emphasises the compensatory

role of these two instruments. However, lately a critical stance was taken, for instance, by Schwerdtfeger [2015: 290 *et seq.*].

⁴⁵ Cf. *BVerfGE* 123: 267-348.

⁴⁶ Cf. *BVerfGE* *loc. cit.*

⁴⁷ Cf. *BVerfGE* 123: 267-400; 126: 286-302.

⁴⁸ In greater detail, cf., e.g., Wischmeyer [2015: 415 *et seq.*] with further references.

A teleological application of the competence rules, guided primarily by the aim of the functionality and the efficiency of the Union and not subject to effective judicial review,⁴⁹ runs the risk of undermining the contractually agreed integration agenda and thus ultimately the risk of turning its back on the law, which leads to disintegration. The *ultra vires* review is intended to limit the manifest overstepping of boundaries.⁵⁰

As early as its *Maastricht* judgment of 1993, the Federal Constitutional Court reserved its own jurisdiction to assess whether legal acts of the European institutions and bodies were either within those boundaries or outside them.⁵¹ In the *Lisbon* judgment of 2009, the Federal Constitutional Court, for the first time, spoke of an *ultra vires* review and restricted its exercise to a manner that is open towards European law.⁵² In the *Honeywell* decision of 6 July 2010, the Federal Constitutional Court further specified the requirement of openness to European law. It held firstly that before finding that an act is *ultra vires*, the ECJ must be given the opportunity of interpreting the Treaty and ruling on the validity and the interpretation of the acts in question in proceedings for a preliminary ruling.⁵³ Secondly, an *ultra vires* review only comes into play if there is a manifest overstepping of competences by the European institutions resulting in a structurally significant shift at the expense of the competences of the Member States.⁵⁴

The first time the Federal Constitutional Court agreed to hear such a matter was with regard to the decision of the European Central Bank's (ECB's) Governing Council to allow the purchase of government bonds of selected Member States without any limitation (known as the OMT decision).⁵⁵ As already mentioned, it referred the question to the ECJ whether the OMT decision was compatible with the ECB's monetary policy mandate (cf. Art. 119 and 127 *et seq.* TFEU) or if it violated the prohibition on monetary financing of the budget (cf. Art. 123 sec. 1 TFEU). In its judgment of 16 June 2015,⁵⁶ the ECJ answered these two referred questions in the negative; however, at the same time it emphasised that, contrary to the assumptions of the Member

⁴⁹ Cf. Klein [2014: 185].

⁵⁰ See also Ludwigs [2015: 537].

⁵¹ *BVerfGE* 89: 155-188, 209 and 210; see also *BVerfG*, Decision of the First Chamber of the Second Senate of 17 February 2000 (2 *BvR* 1210/98), *NJW* 2000: 2015-2016 [Alcan]; from the many critical voices in legal doctrine, see, as an example Zuleeg [1994: 3 *et seq.*].

⁵² *BVerfGE* 123: 267-354.

⁵³ A critical stance on a request for a preliminary ruling in this case is taken by: Paul Kirchhof [2013: 5].

⁵⁴ *BVerfGE* 126: 286-303 *et seq.*

⁵⁵ Cf. *BVerfGE*: 134, 366.

⁵⁶ ECJ, Judgment of 16 June 2015, C-62/14 (Gauweiler and Others), *JZ* [2015: 785 *et seq.*].

States and certain voices in legal doctrine,⁵⁷ the acts of the ECB were also subject to judicially reviewable limits, and that the prohibition on the monetary financing of the budget in particular may not be circumvented.⁵⁸ On this basis, the Second Senate of the Federal Constitutional Court must now render its final decision in the OMT proceedings.

VI. The principle of openness to European law

As explained above, the review competences of the Federal Constitutional Court for safeguarding integration are limited to manifest exceptions. The reason for this is that the exercise of these competences is subject to the principle of openness to European law. The Federal Constitutional Court developed this principle in its *Lisbon* judgment. It derives from an overall view of the constitutional mandate for the realisation of a united Europe in Art. 23 sec. 1 of the Basic Law and the Preamble of the Basic Law. The principle of openness to European law can be seen as further proof of the Court's pro-integration stance in its case-law. According to that stance, the Basic Law calls for participation in the European integration process and the international peace order.⁵⁹ All constitutional organs must serve this principle, including the Federal Constitutional Court. It cannot yet entirely be foreseen how much directive power the postulate of openness to European law will have in individual cases. However, if one considers other general principles such as, for example, the *effet utile*—a method the ECJ employs in the interpretation of Union law, in order to achieve the greatest possible level of practical effectiveness—one should not underestimate its influence. In any event, the principle of openness to European law is not simply a non-binding promise of goodwill in matters of European integration.

VII. The concept of responsibility with respect to integration

It should be more and more clear by now that governmental bodies, in implementing the idea of the legal community, are faced with a difficult balancing act. On the one hand, they are to further the

⁵⁷ Taking a critical stance: Schmidt [2015: 326 with further references].

⁵⁸ Positively emphasising that the competences of the ECB were curtailed by law: F.C. Mayer, [2015: 2002 and 2003]. For a similar

view: Ohler [2015: 1004 *et seq.*]. Relativising this view, however: Klement [2015: 754 and 755].

⁵⁹ Cf. *BVerfGE* 123: 267-346 and 347.

integration process in accordance with the openness of the Basic Law to European law; on the other hand, they are to preserve the national constitutional identity.⁶⁰ In order to avoid one-sided dynamics involving the risk that either Union law or national law is neglected, the Federal Constitutional Court strived to give effect to the concept of responsibility with respect to the European integration process in its *Lisbon* judgment.⁶¹ On that basis, responsibility with respect to integration signifies taking on lasting and sustainable responsibility in regard to European integration, first when transferring sovereign powers and developing the European decision-making procedures⁶² and, at a later stage, when dynamically developing the Treaty and its subsequent administrative implementation.⁶³ In sum, this concerns the juridification of the process accompanying integration. Besides the institutions of the European Union, the responsibility with respect to integration is incumbent on the Member States and their constitutional bodies.⁶⁴ In its order for reference in the OMT case, the Federal Constitutional Court listed examples of the concrete requirements that might result from this. As a consequence of the responsibility with respect to integration, the *Bundestag* and the Federal Government are thus obliged to ensure the observance of the integration agenda. In cases of manifest and structurally significant overstepping of competences on the part of European institutions, these must not only refrain from acts of participation or implementation, but they must also actively work towards the observance of the integration agenda.

VIII. Strengthening the re-involvement of parliaments in European political decision-making processes

In particular since the onset of the sovereign debt crisis, strong forces are at work which, on the basis of the maxim “necessity knows no law,” seek to solve problems outside the scope of legal requirements, at a political level.⁶⁵ Instead of transparent parliamentary procedures,

⁶⁰ Aply observed by Lenaerts [2015: 353]: “Therefore, neither uniformity nor diversity can lay claim to absolute validity. The European Union must continuously take into account both aspects, since neither of them alone suffices to secure the integration project.”

⁶¹ *BVerfGE* 123: 267, headnote 2. In greater detail: Voßkuhle [2010b: 229 *et seq.*]; Nettesheim [2010: 177 *et seq.*]; Callies [2012:

55 *et seq.*]; taking a critical stance: von Bogdandy [2010: 3].

⁶² *BVerfGE loc. cit.*: 356.

⁶³ *BVerfGE loc. cit.*: 435.

⁶⁴ See also *BVerfGE* 134: 366-395 para. 48 with further references.

⁶⁵ Critical, in addition to those mentioned in footnote 5, for instance: Müller-Franken [2015: 356 *et seq.*].

short-term politically motivated crisis management by the executive quickly steps in and must take into account very diverse interests and constraints. In several decisions, the Federal Constitutional Court has therefore called for the democratic re-involvement of European political decision-making processes, and thereby strengthened the juridification of the integration.⁶⁶

Already in its *Maastricht* judgment of 1993, the Federal Constitutional Court pointed out that in the association of states of the European Union, democratic legitimisation necessarily also results from the involvement of the parliaments of the Member States in the acts of European institutions.⁶⁷

The decisions in the context of the sovereign debt crisis mainly concerned the securing of Parliament's budgetary sovereignty. In its decision on aid for Greece and the Euro rescue package of September 2011, the Federal Constitutional Court found that a parliament must not relinquish its financial margin of manoeuvre. Therefore, the decision-making competence with regard to public revenue and public expenditure must remain with the German *Bundestag*.⁶⁸ The right to decide on the budget is a central element of the democratic development of informed opinion. The *Bundestag* must specifically approve every large-scale measure of aid of the Federal Government taken in a spirit of solidarity and involving public expenditure on the international or European Union level.⁶⁹

The decision-making process may not be structured in a way that excludes a large part of the Members of Parliament from the exercise of the overall budgetary responsibility. The particular confidentiality or urgency of decisions, for example with regard to emergency measures for overcoming the sovereign debt crisis, does not justify the delegation of decision-making authority to subsidiary bodies. In a 2012 decision, the Federal Constitutional Court thus found that the delegation of authority to a special committee of the *Bundestag*, comprising nine members, was not justified. This committee had been delegated the authority to exercise, by way of exception, parliamentary participation rights in matters concerning the European Financial Stability Facility,

⁶⁶ In greater detail most recently: Daiber [2014: 809 *et seq.*] with further references. On this general line of case-law see Emmenegger [2011: 447 *et seq.*].

⁶⁷ Cf. *BVerfGE* 89: 155-185.

⁶⁸ Cf. *BVerfGE* 129: 124-177; cf., for instance, the summarising analysis of the

standards of the decision on the aid for Greece by Kube [2012: 205 *et seq.*].

⁶⁹ On this topic as a whole cf. *BVerfGE loc. cit.*: 180. For an analysis of the protection of the budgetary sovereignty see, for instance, Nettesheim [2011: 771]; Ruffert [2011: 847 *et seq.*]. See now also the standard set forth in *BVerfGE* 132: 195-238 *et seq.*, paras. 105 *et seq.*

the predecessor of the permanent rescue fund known as the European Stability Mechanism (ESM).⁷⁰ With regard to the ESM, the Federal Constitutional Court, in September 2012, in a first step, largely rejected the requests for a temporary injunction aimed at prohibiting the Federal President from signing the German acts approving the ESM Treaty.⁷¹ In a summary examination, the Court affirmed the constitutionality of the Act approving the ESM Treaty. At the same time, the Court however did not simply “wave through” this rescue measure. For its ratification, the Federal Constitutional Court stipulated, among other things, the condition that, under international law, all payment obligations of the Federal Republic of Germany under this contract would have to be limited to the amount of approximately 190 billion euros; thereby no provision of the Treaty would be allowed to be interpreted in a way that established higher payment obligations for the Federal Republic of Germany without the consent of the German representative in the bodies of the ESM.⁷² This also signifies that there can be no increase in the liability of the Federal Republic without the renewed approval of the *Bundestag*. At the same time, the Federal Constitutional Court held that the “Fiscal Compact”, which obliges the parties to introduce a debt brake, was compatible with the principle of democracy. In its decision in the principal proceedings on the ESM Treaty and the Fiscal Compact of 18 March 2014, the Court followed the line set out in its preliminary ruling.⁷³

IX. Advance effects of the Federal Constitutional Court's case-law

Particularly through the context of European rescue measures, a further significant juridification impulse of the decisions of the Federal Constitutional Court has come to light: the advance effects of its case-law. The fact that in the context of crisis management the ESM Treaty and the Fiscal Compact were even possible constitutes a considerable success for the ideal of the law. In a most difficult situation, politics opted against informal *ad hoc* agreements and chose juridification and democratic re-involvement with regard to instruments dealing with the crisis. The speculation that the case-law of the Federal Constitutional Court on securing the budgetary sovereignty of the parliament may

⁷⁰ Cf. *BVerfGE* 130: 318.

⁷¹ *BVerfGE* 132: 195 *et seq.* Cf. on this Herrmann [2012: 805 *et seq.*]; Kahl [2013: 197]; Lepsius [2012: 761 and 762]; Müller-Franken [2012: 3162 *et seq.*]

(comments on the judgment *BVerfGE* 132: 195); Schorkopf [2012: 1273 *et seq.*]; Tomuschat [2012: 1431 *et seq.*].

⁷² *BVerfG*, *loc. cit.*: 257 para. 149.

⁷³ Cf. *BVerfGE* 135: 317.

have promoted this process seems obvious to me if one takes a closer look at the different elements in the architecture of the stability mechanism. The ESM Treaty, for example, in order to safeguard the overall budgetary responsibility of the national parliaments, stipulates a limit to the payment obligations of the Federal Republic and prescribes that, in key budgetary matters, decisions may not readily be taken against the vote of the representatives of large Member States that bear the main burden of the financial aid measures.

The obligation of the Member States, laid down in the Fiscal Compact, to submit a balanced budget and to introduce a national debt brake also borrows from the case-law of the Federal Constitutional Court. It aims at maintaining budgetary discipline and therefore takes account of the constitutional requirement to safeguard the parliaments' budgetary sovereignty.

X. A realistic view of the law

The last point I would like to highlight in the present context is the Federal Constitutional Court's realistic view of the law in its decisions with regard to integration. This view sharpens understanding of the drafting, the functioning and the deficits of the European Treaty. As a rule, crisis and conflicts constitute a litmus test for law. Therefore, the Federal Constitutional Court often thinks in terms of the "worst-case-scenario." In the *Maastricht* judgment, for instance, it pointed out that the failure of the efforts to achieve stability might lead to fiscal concessions of the Member States with unforeseeable consequences throughout the European Union.⁷⁴ In its Lisbon judgment, it found among other things that the basic democratic rule of equality in electoral franchise ("one man, one vote") was not maintained at the European level, with consequences for the democratic legitimisation of decisions and their acceptance.⁷⁵ In the ESM decision, it ordered the Federal Government to close gaps with regard to debt limitation in the ESM Treaty.⁷⁶ In its order for reference to the ECJ, it warned against circumventing the prohibition of monetary financing of the budget (Art. 123 sec. 1 TFEU).⁷⁷ This list could be extended. Quite often these and other statements in the reasons have been perceived as "carping" and "anti-European"; as obviously lacking empathy for the European project and its institutions. It is said

⁷⁴ Cf. *BVerfGE* 89: 155-205.

⁷⁵ Cf. *BVerfGE* 123: 267-371 and 372.

⁷⁶ Cf. *BVerfGE* 132: 195 *et seq.*

⁷⁷ Cf. *BVerfGE* 134: 366-411 *et seq.* paras.

84 *et seq.*

that already the entire style of the reasoning, regardless of the respective legal results, is steeped in such an attitude. And indeed, the “sound” of the decisions of the Federal Constitutional Court is, at first sight, not very engaging. The extensive and often very detailed statement of facts is followed by the complex process of deriving the standards to be applied from existing normative material and the Court’s own case-law with numerous distinctions and differentiations.⁷⁸ This is followed by the application of the law to the specific case, which may appear to be rather technical. Whether this very dogmatic style⁷⁹ is always sufficiently agreeable with other courts’ ways of reasoning and thinking, especially in European and international contexts, may be doubted in spite of the broad reception of the case-law of the Federal Constitutional Court. Conversely, one must caution against too affirmative a European rhetoric. It cannot be the task of the courts to—casually speaking—“put a positive spin on things”. Rather they shall contribute, by means of a realistic and sober analysis of the case to be decided, to strengthening the legal foundations of European integration.

C. Counter-currents: Is the idea of the legal community overstrained?

This concludes my *tour d’horizon* through 50 years of the Federal Constitutional Court’s case-law on Europe. One could certainly say more about each decision referred to, including criticisms. My main aim, however, was to show a connecting line between the different rulings, each of which is founded in faith in the integrational force of the European legal community. “Integration through law!?” But isn’t this concept, in the end, and in spite of its legal international imprint,⁸⁰ a very German concept that has reached its limits in the finance and sovereign debt crisis?⁸¹ There is no lack of scepticism, as illustrated in the following points often heard from critics:⁸²

- The law does not touch upon the real causes of the crisis. On account of its abstract character it must necessarily leave

⁷⁸ Taking a critical stance: Lepsius [2011: 59 *et seq.*].

⁷⁹ On its origin see Bumke [2014: 642 *et seq.*]. For further details on the differentiation between the dogmatics of usage and of science (*Gebrauchs- und Wissenschaftsdogmatik*) see Kaiser [2014: 1105].

⁸⁰ Cf. footnote 8.

⁸¹ Expressly Rodi [2015: 737]: “With the financial crisis the legal dress of the Economic and Monetary Union has become too tight—substantively and institutionally”; in addition, cf. the contributions in Möllers and Zeitler [2013].

⁸² For a more detailed discussion of the following topic see Voßkuhle [2015: 137 *et seq.*] with further references.

out a range of needs and particularities. It therefore does not adequately deal with the complexity of the sovereign debt crisis and the multi-layered interests of the parties and states involved.

- In addition, it is argued that the conflict solutions provided by law are too rigid. The law is “binarily coded”—“somewhat unlawful” is just as impossible as “somewhat pregnant”. Especially in times of crisis, however, partial solutions and compromises are needed.
- Furthermore, supposedly neither the national nor the European legislatures nor the courts can react with the necessary promptness, particularly since the requisite amendments of the Treaties at the European level hardly appear politically feasible.
- The overwhelming complexity and dynamic of the sovereign debt crisis, and closely linked global effects and risks, is not something for which the legislature or the courts have the knowledge necessary for creating reasonable legal solutions, it is said.⁸³ At best, it is the executive that is likely to have the necessary information. Even better placed are specialised institutions, such as, for example, the various European agencies, the ECB or the private sector.
- And in any case, the argument goes, many actors at the European level do not adhere to the law (anymore). The apparent violation of the stability criteria, in particular also by Germany and France, or the non-observance of the requirements of the Dublin-system, provide excellent proof of this claim.⁸⁴

The list of objections could be further extended. However, in my opinion, most of these arguments fail to convince.

Certainly the fact that the law leaves many aspects of a conflict out of consideration may be perceived as “harshness” and an inability to deal with complexity. The great advantage of this distance, however, is that it allows a degree of abstraction with regard to the diversity of people or states. Distance from personal and political conflicts is one of law’s specific strengths. By means of this distance, the law can create a common basis even where a community is characterised by cultural differences. Law expresses universally applicable ideas of justice for a pluralistic community upon which agreement has been reached in spite of all differences. Therefore, in a Europe of diversity, law plays such a significant role for the European integration process.

This significance becomes particularly clear if we recall the alternatives. What would happen if each conflict between the Member States

⁸³ On the “*ad hoc* technocratisation” caused by the financial and the sovereign debt crisis *cf.* Enderlein [2013: 724 *et seq.*].

⁸⁴ In greater detail Palm [2004: 71 *et seq.*].

were to be decided politically? Not only would there be a race for the short-term advantage, but also all those factors that the law successfully leaves out of consideration—for instance the size and economic clout of the Member State concerned, the party the respective government belongs to, any alliances formed in the past, affronts remembered or expectations let down—would come into play. Within a very short time, the European Union would be faced with a crucial test, one it would hardly survive. The negotiations concerning the Greek bailout provide a rather good demonstration of this.

Compared to political confrontations, the law offers a significant advantage: while the agreement on a legal framework is admittedly the result of political debate⁸⁵, the law is set before the conflict takes place. Not in every case, but as a general rule, the politicisation of a specific dispute is thereby prevented. This constitutes one of the significant integrational achievements of the law for Europe.

In the view of the founding fathers, economic cooperation (i.e.: the European Coal and Steel Community) and political cooperation (i.e.: the European Defence Community) were meant to constitute the basis for the process of European integration. Both aims were and are naturally subject to conflicts of interest and are correspondingly fragile. It is only through the unifying power of the Treaty that, in the words of Walter Hallstein, the rule of law replaces “power and its manipulation [...] of the balance of forces, the striving for hegemony and the play of alliances” and does away with “the use of force and political pressure”.⁸⁶ The establishment of the ESM and the Fiscal Compact mentioned above serves as an example of how politics, even in times of crisis, can act rapidly and efficiently in using the instruments of the law.

That fact that even in legal communities violations of law occur is in certain respects a platitude and does not discredit the idea itself. Dangers only arise if the law is systematically disregarded or if its claim to validity is generally denied. In view of the vast number of legal operations touched by European law, this can hardly be said to be imminently the case in the European Union, in spite of different legal cultures and the lax handling of legal requirements in certain areas⁸⁷. Apart from that, claims of violations of the law, upon closer examination, quite often turn out to be a conflict regarding the proper interpretation of open-worded provisions that need to be fleshed out.⁸⁸ These conflicts are, however, for their part a constitutive element of a legal community. Nonetheless, the

⁸⁵ In greater detail Baer [2015: 141 and 142].

⁸⁶ Hallstein [1962: 344, 348].

⁸⁷ Cf. the references in footnote 5.

⁸⁸ The same view is held, correctly, by Volkman [2014: 1062].

early signs of a partial forgetting of the law should not be ignored. If the impression, expressed not only in Germany, that, in central conflicts, European law becomes elastic or a *quantité négligeable* persists, this not only endangers the legal community but also the central basis of European integration.

D. Conclusion

I therefore close with a quotation from the doyen of European law in Germany, Thomas Oppermann: “The larger the EU becomes, the more it needs the regulative power of its law. State force is not available to the Union. It can only preserve itself as a legal community. The Rule of Law in EU law is indispensable for the realisation of the European idea. This also applies, in particular, to the tackling of the financial crisis since 2010.”⁸⁹

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⁸⁹ Oppermann [2016: para. 19].

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Résumé

Cet article étudie la contribution de la Cour constitutionnelle fédérale à l'intégration européenne « par le droit » au cours des dernières décennies. L'ouverture de la Loi fondamentale à l'intégration et au droit européen est examinée ainsi que la coopération entre la Cour constitutionnelle fédérale et la Cour européenne de justice dans l'exécution du droit de l'Union européenne et la protection des droits fondamentaux. À partir d'un certain nombre d'exemples, l'auteur montre comment les instruments de contrôle (identité, *ultra vires*) développés par la Cour constitutionnelle fédérale contribuent à garantir le respect de l'agenda de l'intégration européenne défini par les traités européens. Il montre en particulier comment les instances gouvernementales nationales sont liées par le concept de responsabilité vis-à-vis du processus d'intégration européenne mais également comment la Cour assure la nécessaire légitimation démocratique pour les actes des institutions européennes en exigeant l'implication du parlement allemand dans les processus décisionnels politiques liés à l'Union européenne. Enfin, l'auteur discute le concept de communauté juridique et les critiques généralement adressées à ce concept. Il conclut en affirmant que l'Union européenne ne peut se préserver qu'en restant une communauté juridique et que le respect de l'Etat de droit dans le droit communautaire est indispensable, en particulier en temps de crise.

Mots-clés : Communauté de droit en Europe ; Ouverture au droit européen ; Ouverture envers l'intégration ; Droit prétorien de la CJUE ; Application cohérente du droit ; Juridicisation du processus d'intégration européenne ; Procédure préjudicielle ; Droits fondamentaux de l'Union ; Contrôle de l'identité constitutionnelle ; Contrôle de l'*ultra vires* ; Identité constitutionnelle nationale ; Responsabilité d'intégration ; Ré-implication des parlements.

Zusammenfassung

Der Artikel zeigt den Beitrag des Bundesverfassungsgerichts zur europäischen "Integration durch Recht" in den letzten Jahrzehnten auf. Dabei werden die Integrationsoffenheit und Europarechtsfreundlichkeit des Grundgesetzes ebenso in den Blick genommen wie das Zusammenspiel zwischen Bundesverfassungsgericht und Gerichtshof der Europäischen Union bei der Durchsetzung des Unionsrechts einerseits und beim Grundrechtsschutz andererseits. Der Verfasser zeigt anhand vieler Beispiele auf, wie die vom Bundesverfassungsgericht entwickelten Instrumente der Identitätskontrolle und der *Ultra vires*-Kontrolle der Sicherung der Einhaltung des in den Europäischen Verträgen vereinbarten Integrationsprogramms dienen, wie das Gericht durch das Konzept der Integrationsverantwortung nationale staatliche Stellen bei der Begleitung des Integrationsprozesses in die Pflicht nimmt und wie es die zur Vermittlung demokratischer Legitimation erforderliche parlamentarische Rückanbindung europapolitischer Entscheidungsprozesse sicherstellt. Abschließend geht der Verfasser noch auf die Idee der Rechtsgemeinschaft und die hieran geäußerte Kritik ein. Er kommt zu dem Ergebnis, dass die Europäische Union sich nur als Rechtsgemeinschaft zu erhalten vermag und dass die *rule of law* gerade in Zeiten der Krise unentbehrlich ist.

Schlüsselwörter : Europäische Rechtsgemeinschaft; Europarechtsfreundlichkeit; Integrationsoffenheit; Rechtsfortbildung des EuGH; Einheitlichkeit der Rechtsanwendung; Verrechtlichung des europäischen Integrationsprozesses; Vorabentscheidungsverfahren; Unionsgrundrechte; Identitätskontrolle; *Ultra vires*-Kontrolle; Nationale Verfassungsidentität; Integrationsverantwortung; Parlamentarische Rückanbindung.