European Integration

and the Bundesverfassungsgericht

Sir Thomas More Lecture at the Honourable Society of Lincoln`s Inn

London, 31 October 2013

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A. Introduction

Your Excellencies, My Lords, Ladies and Gentlemen!

It is a special honour and great pleasure for me to be able to speak to such a distinguished audience here today.

As the present British Ambassador in Berlin, Simon McDonald, once told me, there are three main questions the British have when they think of Germany:

Why do Germans always drive on the wrong side of the road?
Why are Germans always the first to get to the beach?
Why do they (almost) always win at football?

But he said that a fourth question had emerged in the course of the European sovereign debt crisis, one to which he also had no good answer:

Why do Germans always insist on the need for a Federal Constitutional Court, the Bundesverfassungsgericht, and what is the role of this Court with regard to European Integration?

If you'll bear with me, I'd like to try and give an answer to at least the fourth question, though it is admittedly not easy!

It is a great challenge for me as President of the Federal Constitutional Court to stand here before an audience that has grown up with Dicey and his principle that no-one, least of all a judge, has the right to annul a law.[1] But nullifying unconstitutional laws is one of the main jobs undertaken by the Federal Constitutional Court. So I might be so bold as to suggest that constitutional jurisdiction is to you what cricket and the Common Law are to us Germans – a complete puzzle.

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[1] Dicey, A.V.: Introduction to the Study of the Law of the Constitution, 10th ed. 1962, p. 60.

B. The Federal Constitutional Court in a nutshell

So before I set out the guidelines for the case law of the Federal Constitutional Court on European integration for you, I would first like to try to describe the court to you "in a nutshell". For this purpose, let us stay with cricket for a moment. Every game needs rules and somebody to see that the rules are being adhered to and whose decisions are accepted by all the players. It is similar in the political process. There, too, rules are needed, as well as an institution to guarantee that the rules are heeded. In the United Kingdom, Parliament is not only the central place for political debate, but has also since the Seventeenth Century taken on the role of umpire. These political arrangements have mostly worked very well indeed. Things are different in Germany. In 1933 it was the Reichstag, the former parliament, and the Reich President themselves who suspended the constitution of the Weimar Republic. The rest, as they say, is history.

The experience of dealing with a largely ineffective constitution and a self-destructive democracy led the mothers and fathers of the *Grundgesetz*, or Basic Law, our written constitution since 1949, to set up the Federal Constitutional Court. This was intended as a strong and independent guardian of the Constitution. The legislator decided to banish the court far away from the day-to-day business of politics to the village-like solitude[2] of Karlsruhe in the south-west of Germany – just about as geographically convenient as, say, Plymouth. In spite of this banishment, though, the inauguration of the court on 28 September 1951 was the start of an unparalleled success story. Nowadays, everybody in Germany knows what is meant by the phrase "to go all the way to Karlsruhe". It shows what great trust the German people have in their Federal Constitutional Court as the final guarantor of their constitutional rights.

What gives a court trust and acceptance among the people is mainly the involvement of as many interested parties as possible in proceedings and the transparency, cour-

[2] Cf. the letter from the President of the Bundesverfassungsgericht of 13 October 1951 to the Federal Minister of Justice, printed in Leibholz: *Jahrbuch des Öffentlichen Rechts der Gegenwart*, 1957, p. 100 (156).

age and consistency of its decisions and the reasoning behind them. An institution such as the Federal Constitutional Court is especially dependent upon this acceptance, because it regularly makes rulings affecting political matters and with significance beyond the individual case[3]. There is no "political question doctrine" in Germany such as there is in the US, which permits the *Supreme Court* the discretion not to make a decision on certain cases.[4]

The Federal Constitutional Court acts as an umpire watching over observance of the Basic Law. The Basic Law is directly binding upon the state legislative, executive and judicial authorities. A central component of our Constitution is a list of fundamental rights, comparable to the provisions of your Human Rights Act and the Charter of Fundamental Rights of the European Union. The Basic Law moreover includes the commitment to democracy, the rule of law and the republican form of government. It sets out the rules for the organisation of the state in such matters as the tasks of the parliament, the federal government and the federal president. And it establishes that the federal flag must be black, red and gold. This last point is a clear illustration of what a written constitution can be good for.

So what way leads to Karlsruhe and how can the court be invoked?

There are three types of proceedings at the core of the work of the Federal Constitutional Court:

Firstly, there are what we call *Organstreit* proceedings. These are disputes between supreme federal bodies such as the *Bundestag*, or federal parliament, and the federal government about their constitutional rights and duties, which the court is called upon to settle.

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[3] Cf. regarding the dependence of the Bundesverfassungsgericht on acceptance merely Voßkuhle, in: v. Mangoldt/Klein/Starck: *GG* [Basic Law], 6th ed. 2010, Art. 93 margin no. 34; Möllers: 'Legalität, Legitimität und Legitimation des Bundesverfassungsgerichts' in: Jestaedt/Lepsius/ Möllers/Schönberger, *Das entgrenzte Gericht – eine kritische Bilanz nach 60 Jahren Bundesverfassungsgericht*, 2011, p. 283 (303 et seq.).

[4] Cf. Voßkuhle, NJW [New Juridical Weekly Journal] 2013, 1329 (1332) with further references.

The second major kind of proceedings is what is known as concrete legal review. This entails the Federal Constitutional Court reviewing the compatibility with the constitution of an ordinary statute if called upon to do so by a criminal court, a civil court or an administrative court.

But the bulk of the workload of the Federal Constitutional Court is the review of some six thousand constitutional complaints each year, which make up 95% of all proceedings.[5] This is the third and, in practice, the most important kind of proceedings dealt with by the court. Any citizen may take a constitutional complaint to the court with a claim that he or she has suffered an infringement of his or her fundamental rights through an act of the public authorities. For a constitutional complaint to be considered by the Federal Constitutional Court, it is a necessary requirement that the applicant must first go through the ordinary courts and exhaust the remedies available there. The Federal Constitutional Court itself is not – unlike the Supreme Court here in the United Kingdom or in the United States of America – part of the regular structure of court instances, but is organisationally independent. It reviews acts by the three branches of state authority purely from the point of view of constitutionality.

Ladies and Gentlemen,

US President Thomas Jefferson may well have shouted on learning of the famous decision of the US Supreme Court in *Marbury v. Madison*[6], "That´s just not cricket!" This was the decision in which the Supreme Court granted itself the power to review federal laws for constitutionality, and marked the birth of constitutional jurisdiction. Jefferson later wrote angrily that the judges were now acting like "ultimate arbiters on

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5 Cf. the annual statistics of the Bundesverfassungsgericht for 2012 at www.bverfg.de, accessed on 8 August 2013

6 Cf. Marbury v. Madison, 5 U.S. 137 (1803)

all constitutional questions" and subjecting the citizens to the despotism of an oligarchy of judges.[7]

There may be one or two of you here in the room who perhaps agree with Thomas Jefferson and are asking yourselves with an eye to the powers of the Federal Constitutional Court who these "ultimate arbiters" of constitutional law in Germany are, and have they in reality established a despotic tyranny?

So let us first have a look at the composition of the Federal Constitutional Court. There are sixteen judges in all, sitting in two Senates. Half are elected by the Bundestag and half by the second chamber, the *Bundesrat*, to sit for twelve years. The Court´s President and Vice-President are also elected directly by the Bundestag and the Bundesrat - and not, as in the European Court of Justice (ECJ), for example, by the judges themselves. To guarantee the judges' independence and avoid any possible personal domination by individual judges, judges cannot be re-elected. At least three judges in each Senate must previously have sat as professional judges in a supreme federal court. To be elected to serve in the Federal Constitutional Court, a judge must moreover be at least forty years old and have passed the Second State Examination in Law. Professors of law have frequently been appointed as judges in the Federal Constitutional Court.

Now, I referred before to the fact that, in order to ensure the primacy of the constitution, the Federal Constitutional Court can declare laws passed by Parliament to be unconstitutional and invalid. After the experiences of the Weimar Republic, the authors of the Basic Law did not regard parliamentary self-oversight, which is the foundation of the British principle of parliamentary sovereignty, to be adequate. I think I may be able to hear some of you saying now, "You guys are definitely driving on the wrong side of the (constitutional) road". Judicial review of laws means that Parliament is subject to the arbitrary will of eight judges, you might be wondering.

[7] Cf. letter from Thomas Jefferson to the American diplomat William Jarvis of 28 September 1820, reproduced in: H.A. Washington (ed.): *The Writings of Thomas Jefferson*, Vol. III, 1859, p. 177 et seq.

So let me deal briefly with this important objection by putting to you three arguments. Firstly, the Federal Constitutional Court does not exist separately to or above the Constitution, but, like all other public bodies, is bound by it. So a judge who wants to succeed in having a point accepted in its deliberations needs to have a strong constitutional argument for doing so. Reference to previous decisions by the court plays an important part, even though German law does not know the principle of case-law as binding precedent. Secondly, the court cannot choose which cases it wants to hear since this depends on the cases brought and on strict admissibility requirements. And thirdly, the Federal Constitutional Court respects the parliament's legislative freedom. It is not the court's job to review whether the directly authorised, democratically-elected legislator has created the best possible and fairest provision in each case; its task is limited to establishing the constitutional framework for political decisions.[8]

C. Guidelines of the case law of the Federal Constitutional Court in the process of European integration

Ladies and Gentlemen,

So much for the position and duties of the Federal Constitutional Court.

Now, European integration is a constant source of both unity and conflict - somewhat similar to cricket.

What role does the Federal Constitutional Court play in this process?

The Federal Constitutional Court has been committed to the process of integration for many years. The coming into force of the Lisbon Treaty in 2009[9] and the various

[8] Cf. Voßkuhle, in: von Mangoldt/Klein/Starck, *GG*, 6th ed. 2010, Art. 93 margin no. 43 et seq. with futher references.

[9] Summary of its content in e.g. Möstl: *Vertrag von Lissabon*, 2010.

measures undertaken to combat the European sovereign debt crisis[10] have been the main factors leading to a number of new landmark decisions.

What has been the dominant thread running through these decisions? What limits does the Basic Law set on integration? Does EU law have primacy over national law? Who has the "last word" in relations between the Federal Constitutional Court and the European Court of Justice? In the following, I want to go into these questions with the help of four propositions, which are at the same time intended to demonstrate the fundamental threads followed in the case law of the Federal Constitutional Court. I am afraid you will have to bear with me. My British fellow judges are blessed with a gift of speaking vividly, amusingly and yet precisely on complicated topics. I am afraid I do not share that gift. However, I shall try as far as possible to avoid succumbing to the tendency of German professors of law to perform gymnastic exercises on the high bar of legal jargon.

I. Openness of the Basic Law towards European law

Good news to start with – and also my first proposition: the Basic Law is open, or as we say friendly, to European law (*Europarechtsfreundlichkeit*).

The constitutional task of making a united Europe a reality is expressed in the Preamble to the Basic Law and in Art. 23 section 1, the so-called "Europe Article". The Preamble states expressly that the German people have adopted this Basic Law, "inspired by the determination to promote world peace as an equal partner in a united Europe"[11]. The Federal Constitutional Court developed from these two provisions its principle of openness to European law, as stated in its judgement on the Lisbon

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10 Analysis of these measures in e.g. *Häde*, JZ [Jurists' Journal] 2011, p. 333 et seq.; *Kube/E. Reimer*, ZG [Journal for Legislation] 2011, p. 332 et seq.; *Wollenschläger*, NVwZ [New Journal for Administrative Law] 2012, p. 713 et seq.; *Möllers*, JZ 2012, p. 693 et seq.; *Lorz/Sauer*, DÖV [The Public Administration] 2012, p. 573 et seq.; *Sester*, EWS [European Financial and Tax Law] 2012, p. 18 et seq.

11 Cf. http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0567 accessed on 4 October 2013

Treaty in 2009.[12] According to this principle, the Basic Law calls for the participation in the process of European integration and an international peaceful order. But please do not conclude that this principle is simply opium being handed out to European lawyers by the Federal Constitutional Court. As I will be showing in a moment, the principle of openness to European law also involves duties.

II. Preservation of the national constitutional identity

Ladies and Gentlemen,

Lord Denning was, as we have known since his famous ruling in *Miller* v. *Jackson* in 1977, a friend of the game of cricket.[13] One may assume that he would probably have been a friend of the Federal Constitutional Court today as well. In the proceedings brought by the English cider producer *Bulmer* against the French Champagne producer *Bollinger*, which after all involved protecting the English description "Cham-

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12 Cf. BVerfGE [Decisions of the Federal Constitutional Court] 123, 267 <346 et seq.>.

13 Cf. the summing-up in Miller v. Jackson [1977] 3 WLR 20 per Lord Denning:

> "In summertime village cricket is the delight of everyone. Nearly every village has its own cricket field where the young men play and the old men watch. In the village of Lintz in County Durham they have their own ground, where they have played these last seventy years. They tend it well. The wicket area is well rolled and mown. The outfield is kept short. It has a good club-house for the players and seats for the onlookers. The village team play there on Saturdays and Sundays. They belong to a league, competing with the neighbouring villages. On other evenings after work they practice while the light lasts. Yet now after these 70 years a Judge of the High Court has ordered that they must not play there anymore, lie has issued an injunction to stop them. He has done it at the instance of a newcomer who is no lover of cricket. This newcomer has built, or has had built for him, a house on the edge of the cricket ground which four years ago was a field where cattle grazed. The animals did not mind the cricket. But now this adjoining field has been turned into a housing estate. The newcomer bought one of the houses on the edge of the cricket ground. No doubt the open space was a selling point. Now he complains that, when a batsman hits a six, the ball has been known to land in his garden or on or near his house. His wife has got so upset about it that they always go out at weekends. They do not go into the garden when cricket is being played. They say that this is intolerable. So they asked the Judge to stop the cricket being played. And the Judge, I am sorry to say, feels that the cricket must be stopped: with the consequences, I suppose, that the Lintz cricket-club will disappear. The cricket ground will be turned to some other use. I expect for more houses or a factory. The young men will turn to other things instead of cricket. The whole village will be much the poorer. And all this because of a newcomer who has just bought a house there next to the cricket ground."

pagne cider"[14], he saw a British kingdom defenceless before the onslaught of European law. To quote *Lord Denning*: "But when we come to matters with a European element, the [European] Treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back."[15]

Now, while the Federal Constitutional Court and the Basic Law do not put up flood barriers to stop the tide of European integration, the Basic Law does put limits on integration to preserve the identity of our constitution. This is my second proposition.

1. No European federal state

In its Lisbon Decision, the Federal Constitutional Court established that the Basic Law does not permit accession to a European federal state. Such an accession would mean relinquishing the state sovereignty of the Federal Republic of Germany. To do this would mean, in Germany, a rewriting of the Constitution, a matter which is subject to the will of the German people[16]. Until then, the Lisbon Treaty in principle adheres to the idea of the European Union as a supra-national organisation to be permanently upheld by the Member States as "masters of the treaties". They, the peoples, that is, the citizens of the Member States, give the exercise of public authority at European level legitimation by means of elections and referenda[17].

2. Inviolability of the core content of the constitutional identity

In sentence 3 of its Article 23 (1), the Basic Law expressly establishes a second limit to the transfer of sovereign powers to the European Union. This provision states that

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[14] Cf. HP Bulmer Ltd. v. Bollinger SA (1974) 2 All ER 1226, accessed at www.bailii.org: "Cider from apples. […] We English do know something about these. At any rate, those who come up from Somerset or Herefordshire."

[15] HP Bulmer Ltd. v. Bollinger SA (1974) 2 All ER 1226, accessed at www.bailii.org.

[16] Cf. BVerfGE p, 123, 267 <364>. Regarding criticism, cf. exemplifying many Nettesheim: *Der Staat 51* (2012), p. 313, 318 et seq. with further references.

[17] Cf. BVerfG loc. cit. p. 348.

the fundamental structural principles of our state, such as the democratic, social, federal and republican principles and the rule of law may not be relinquished. They are the core content of the constitutional identity of the Basic Law. The same is true of the guarantee of human dignity and those fundamental rights which, in short, are part and parcel of human dignity[18]. These minimum standards must also be adhered to by the German legislator in adopting any amendment of the Basic Law. This is why we call the relevant provision in Section 3 of Article 79 of the Basic Law the "Eternity guarantee".

III. Multilevel cooperation of courts (*Gerichtsverbund*) and competencies for review exercised by the Federal Constitutional Court

Ladies and Gentlemen,

does anything last eternally? you may ask. What certainties can there be? This is where I come to my next point. Everybody in England, and one or two in the rest of Europe, knows where the Ashes urn has been kept since time immemorial. Where the "last word" in legal matters in Europe is spoken, whether by the European Court of Justice in Luxembourg or by the national courts, is something people are less sure of. Many people in Germany fear a "war of the judges"[19], were the Federal Constitutional Court and the European Court of Justice to arrive at opposing opinions on the same matter of law.

Well, let's do some rhetorical disarmament. You'll have to go to the cinema if you want to see any duels, I'm afraid. There won't be any power struggle in the house of Europe between the Federal Constitutional Court and the European Court of Justice. So we come to my third proposition, which is: the relationship between the two courts is not one of supremacy and subordination. Instead it should be seen as a sharing of responsibility within a complex multilevel cooperation of courts. We call this cooperation the *Gerichtsverbund*. The Federal Constitutional Court supports the process of

[18] Cf. BVerfG loc. cit. p. 348.

[19] Cf. Karpenstein, interview on Deutschlandfunk radio on 10 August 2009, accessed at www.dlf.de.

European integration within the material scope of the Basic Law, while the European Court of Justice operates purely according to the yardstick of EU law. This does not rule out conflicts, but all in all we have managed very well so far. Let me now outline a few strategies used by the Federal Constitutional Court and the European Court of Justice to work together in this *Gerichtsverbund* in the spirit of division of labour.

1. Primacy of EU law

Let us begin with the relationship between EU law and national law. As you know, the European Court of Justice established more than fifty years ago in its groundbreaking *van Gend & Loos* decision that EU law is an independent legal system and applies directly in the Member States[20]. Of course, this means that collisions with the national law of a Member State cannot be ruled out. In their case law, the Federal Constitutional Court and the European Court of Justice fundamentally agree, however, that EU law is in principle accorded primacy over national law. They give different reasons for this primacy. The European Court of Justice argues that it derives from the autonomous nature of the EU legal system and the need for uniform application of EU law in all Member States.[21] The Federal Constitutional Court's argument is a less apodictic but more dogmatic one, namely that the primacy of EU law is established in the Basic Law. Article 23 of the Basic Law permits the transfer of sovereign powers to the European Union by means of an act of parliament authorising the transfer. If on the basis of this empowerment institutions and bodies of the EU issue legal acts, those legal acts then as a matter of principle have primacy over German national law, even its constitutional law. This means, therefore, that the German law authorising the transfer of powers is de facto ordering that EU law shall apply in the national judicial area.[22] German law does not permit the *express* or *implied repeal* of EU law by

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[20] Cf. ECJ, Judgement of 5 February 1963, Case 26/62 (van Gend & Loos v. Netherlands Inland Revenue Administration), European Court Reports (ECR) 1963, p. 1 <25>.

[21] Fundamentally ECJ, Case 6/64, Costa v. E.N.E.L., ECR 1964, p. 1251; cf. further ECJ, Case 11/70, Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel, ECR 1970, p. 1125, para. 3; ECJ, Case 106/77, Amministrazione delle Finanze dello Stato v. Simmenthal, ECR 1978, p. 629, para. 13 et seq.

[22] Cf. in this regard esp. BVerfGE 73, 339 <374 f.> – Solange II.

the subsequent passing of a national law contradicting the older EU law. Nor does our legal system recognise the principle of *parliamentary sovereignty* that obtains in the United Kingdom.

2. Dialogue between courts in the preliminary ruling procedure

So does the primacy of EU law over national law necessarily mean that the European Court of Justice is superior to the national courts? Can the Basic Law be interpreted to mean that the European Court of Justice is the final instance and thus highest court in Europe?

The answer is, of course, no. The relationship between the European Court of Justice and the national courts is one of cooperation and collaboration. An essential instrument in this process is the preliminary ruling procedure under Article 267 of the Treaty on the functioning of the European Union (TFEU). This procedure permits the European Court of Justice to preserve the uniform interpretation and application of EU law. National courts of last instance are as a matter of principle obliged to refer unresolved matters of EU law that are relevant for a decision to the European Court of Justice for a preliminary ruling.[23] The interpretation and application of national law and the final ruling on the case are a matter for the relevant national court.

The Federal Constitutional Court has its own role in this fruitful dialogue between the European Court of Justice and the national courts. It ensures that compliance with the duty of referral is subject to constitutional review. If a German court arbitrarily violates its obligation under EU law to refer a matter for a preliminary ruling, it is (also) in breach of German constitutional law. For the parties have the right to have the issue of European law clarified by the European Court of Justice in accordance with the right to a lawful judge as set forth in sentence 2 of section 1 of Art. 101 of the Basic

[23] Cf. Art. 267 sec. 3 TFEU; with regard to exceptions to the referral obligation see ECJ, Case 283/81, ECR 1982, p. 3415, margin no. 13 et seq. (C.I.L.F.I.T.).

Law. Any such violation of fundamental rights may be made the subject of a constitutional complaint to the Federal Constitutional Court[24].

The Federal Constitutional Court, too, is subject to the duty of referral, but has so far not yet referred a legal question to the European Court of Justice for a preliminary ruling.[25]

3. Protection of fundamental rights in the European Union

So, in view of the primacy of EU law over national law, is anything left of the protection of fundamental rights under the German constitution? Is it, to use Lord Denning's image, simply washed away by the incoming tide of EU law? The answer to this is a clear: "We will see!". In its famous *Solange I* decision of 1974, the Federal Constitutional Court reserved the right to review European Community legislation by the standard of fundamental rights contained in the Basic Law as long as Community law did not yet show the level of protection of fundamental rights as offered by the Basic Law[26]. Since the early 1970s, the European Court of Justice has been steadily expanding the protection of fundamental rights[27]. As a result, the Federal Constitutional Court will now, since the *Solange II* decision of 1986, only exercise its jurisdiction if effective protection of fundamental rights is no longer ensured "as against the sovereign powers of the European Union which can be regarded as substantially similar to the protection of fundamental rights required unconditionally by the Constitution"[28]. In

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24 In more detail *Britz*, NJW 2012, p. 1313 et seq.

25 Cf. BVerfGE 37, p. 271 <282>; 52, p. 187 <200>; 104, p. 214 <218>; 125, p. 260 <308>.

26 Cf. BVerfGE 37, p. 271 <285>.

27 Cf. just ECJ Case 11/70 (Internationale Handelsgesellschaft/Einfuhr- und Vorratsstelle für Getreide und Futtermittel), ECR 1970, p. 1125 <1135>.

28 BVerfGE 73, p. 339 <376, 387> – *Solange II*; continued in: BVerfGE 89, p. 155 <174 f.> – *Maastricht*; BVerfGE 102, p. 147 <167> – *common organisation of the market in bananas*; BVerfGE 123, 267 <335> – *Lisbon Treaty.*

view of the standard of protection of fundamental rights achieved within the European Union and the Charter of Fundamental Rights, this has been a merely theoretical option for a long time now.

Two new decisions rendered by the European Court of Justice at the end of February this year – *Åkerberg Fransson*[29] and *Melloni*[30] – may, however, prove to be a new bone of contention between the constitutional courts of the Member States and the European Court of Justice. In the *Åkerberg* case, to which I shall limit myself for reasons of time, the scope of application of the European Charter of Fundamental Rights is in dispute. Sentence 1 of Art. 51 (1) of the Charter provides that the Charter shall apply to Member States "only when they are implementing Union law".

In *Åkerberg Fransson*, the European Court of Justice, against the proposal of Advocate General *Cruz Villalón*[31] and dissenting from the legal opinions of the Commission and nearly every government involved, interpreted the term "implementing Union law" in such a way that practically every act by Member States relating to Union law is subject to its oversight of fundamental rights.[32] [33] This led the First Senate of the Federal Constitutional Court to point out, in a decision in April this year, that just because a provision has some connection with the abstract scope of EU law or just in-

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29 ECJ, Judgement of 26 February 2013, Case C-617/10 (*Åkerberg Fransson*), NJW 2013, p. 561 et seq.

30 ECJ, Judgement of 26 February 2013, Case C-399/11 (*Melloni*).

31 Closing statements by Attorney General Cruz Villalón of 12 June 2012, Case C-617/10 (*Åkerberg Fransson*), margin nos. 56 to 64.

32 ECJ, Judgement of 26 February 2013, Case. C-617/10 (*Åkerberg Fransson*), NJW 2013, p. 561 et seq. margin nos. 17 to 27; concurring Lenz, EWS [European Financial and Tax Law] 2013, No. 3, First Page; Weiß, EuZW [European Journal for Financial Law] 2013, p. 287 et seq.; with a more sceptical attitude to the "double application" striven for by the ECJ of the Charter of Fundamental Rights and national fundamental rights, see Thym, NVwZ [New Journal for Administrative Law], 2013, p. 889 (895).

33 For a broad interpretation of Art. 51 CFR, cf. also UK Supreme Court, Judgement of 21 November 2012, *Rugby Football Union* [2012] UKSC 55, margin no. 28 per Lord Kerr: "Although the Charter thus has direct effect in national law, it only binds member states when they are implementing EU law - article 51(1). But the rubric, "implementing EU law" is to be interpreted broadly and, in effect, means whenever a member state is acting "within the material scope of EU law."

cidentally interacts with EU law, this is not sufficient to trigger the application of the Charter.[34] The extent to which the *Åkerberg Fransson* decision will bring about a re-calibration of the *Solange* case law of the Federal Constitutional Court is something only time will tell. The prospect of a European guardian of fundamental rights may seem attractive to an EU Member State with a weak constitutional jurisdiction or a low standard of fundamental rights; for a country such as Germany, which enjoys a very high standard of fundamental rights that is appreciated throughout the world, it most certainly does not.

4. Protection of fundamental rights, identity review and *ultra vires* review

Vladimir Ilyich Lenin, Ladies and Gentlemen, was a lawyer and otherwise, too, a man of moderate intellect. To him is attributed the quote, “Trust is good, but control is better” As President Ronald Reagan, an American, put it more pithily: “Trust but verify”.[35]

In its case law on European integration the Federal Constitutional Court does not just limit itself to setting benchmarks and simply trust that they will be complied with. On the contrary, it is prepared - although, it should be noted, only in exceptional cases - to exercise powers of review. We have just seen this in the area of the protection of fundamental rights.

Moreover, the Federal Constitutional Court reviews whether the inviolable core content of the constitutional identity is respected when sovereign powers are being transferred. You will recall that I mentioned just now that fundamental principles in the organisation of the state, such as democracy and the rule of law, and elementary fundamental rights must not be allowed to fall victim to the process of integration. The term we use in this connection is identity review.

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[34] BVerfG, Judgement of the First Senate of 24 April 2013 – 1 BvR 1215/07 –, NJW 2013, p. 1499 <1501>.

[35] Cf. http://www.youtube.com/watch?v=As6y5eI01XE

We need to distinguish this identity review from *ultra vires* review. *Ultra vires* review means that the Federal Constitutional Court reserves the right to subject legal acts by European institutions and bodies to review to see that they remain within the limits of the sovereign powers granted to them or whether they break out beyond these limits.[36] This *ultra vires* review also has to take account of the principle of the openness of the Basic Law to European law, to which I would like to come back again. Specifically, this means that, firstly, the Federal Constitutional Court is obliged, before assuming an act to be *ultra vires*, to give the European Court of Justice the opportunity to interpret the treaty and rule on the validity and interpretation of the act in question through a preliminary ruling.[37] Secondly, *ultra vires* review only comes into play if there is an obvious overstepping of competencies by European institutions or bodies resulting in a structurally significant shift detrimental to the competencies of the Member States.[38] Once again, we can see here that the Federal Constitutional Court is not set on a course of confrontation with the European Court of Justice, but rather one of cooperation.[39]

As President *Skouris* has emphasized repeatedly, the instruments for *ultra vires* review and identity review developed by many national constitutional courts over the years are regarded by the European Court of Justice as something of an imposition. We may have a certain understanding for this point of view. But there are three things we should not forget. Firstly, no big disagreements have as yet occurred between the European Court of Justice and the national constitutional courts; the fear that the uniformity of European law would be put at risk by the powers of review exercised by the

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36 BVerfGE 89, p. 155 <188, 209 et seq.>; cf. also BVerfG, Decision by the 1st Chamber of the Second Senate of 17 February 2000 – 2 BvR 1210/98 –, NJW 2000, p. 2015 <2016> – *Alcan*; as an example of the many critical opinions in the literature *Zuleeg*, JZ 1994, p. 1 <3 ff.>.

37 For a critical opinion against referral in this case: *P. Kirchhof*, NJW 2013, p. 1 <5>.

38 Cf. regarding the whole matter BVerfGE 126, p. 286 <303 et seq.> – Honeywell.

39 Under what circumstances a preliminary ruling by the ECJ on the basis of a referral by the FCC could subsequently be regarded by the FCC as an act that breaks the limits is currently the subject of academic discussion in connection with the assessment of the legality of the purchasing of bonds by the ECB; cf. *Müller-Franken*, NJW 2012, p. 3161 et seq.; *Thym*, JZ 2013, p. 259 (263).

national constitutional courts has proved to be unfounded. As far as we can see, only the Czech Constitutional Court has so far handed down a judgement in which it considers what it judges to be the erroneous interpretation and application of an EU Regulation in a preliminary ruling procedure by the European Court of Justice to be an *ultra vires* act.[40] The European legal community can and must be able to withstand such decisions. Secondly, knowing that they are themselves subject to a certain degree of oversight has a beneficial effect on judges in the way they make their decisions. I can say this from my own experience as a judge in the Federal Constitutional Court with regard to the European Court of Human Rights (ECtHR) and the European Court of Justice. The institution of the multilevel cooperation of courts, the *Gerichtsverbund*, encourages humility and restraint in judges! And thirdly and finally, these powers of review at national level create trust with the citizens of the Member States. They do not need to see themselves as being subject to the whims of some distant European court, but can take solace in the knowledge that when push comes to shove their national constitutional identity will be preserved. This in turn encourages their openness to further integration.

"So much for pathos".[41]

IV. Democratic endorsement of the integration process

Let us go back to the Nineteenth Century. *Albert Venn Dicey* believed that the principle of parliamentary sovereignty and the existence of a constitutional court with the power to reject laws were mutually exclusive.[42] If we look back at the development of European integration in the Twenty-First Century, we can see that this view can no longer really be upheld. If fundamental political decisions are taken at European level it may become necessary for a constitutional court to protect a national parliament from the loss of its sovereignty. This is not always regarded favourably at European

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40 Cf. Czech Constitutional Court, Decision of 31 January 2012, Pl.ÚS 5/12, accessed at http://www.concourt.cz on 30 August 2013.

41 Cf. Monty Python´s Flying Circus: The Marriage Counselor, 1969.

42 Dicey: *Introduction to the Study of the Law of the Constitution*, 10th ed. 1962, p. 60.

level. We are reminded of the telling occasion when Christine Lagarde, when she was French Minister for the Economy and Finance, uttered at a central crisis meeting the *bon mot*, “If anyone else here says the words Federal Constitutional Court I shall leave the room immediately!”

And so I come to my fourth and final proposition – that national parliaments need to be involved in the various stages in the process of European integration and decision-making. The Federal Constitutional Court describes this as democratic endorsement. This is crucial to the endeavour to strengthen trust in the process of European integration. Only where this endorsement exists and citizens are able to have a say in decisions at European level by means of elections and the like will they be prepared in the long term to support further steps in the integration process.

Over the past two years, the Federal Constitutional Court has had several opportunities to make statements on the rights of participation vested in the Bundestag. I would like to give you a brief summary of three of these decisions.

1. Decisions reserved for the Bundestag

In its decision concerning the bail-out package for Greece and the euro rescue package of September 2011, the Federal Constitutional Court found that a parliament may not give up its freedom of action in financial matters. Any decision about public finances must remain the responsibility of the German Bundestag.[43] This budgetary right is a central element in the democratic process. Any large-scale international or intra-Union financial assistance rendered in solidarity from the public purse by the federal government must be approved separately and in detail by the Bundestag.[44].

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[43] Cf. BVerfGE 129, p. 124 <177>; cf. the analysis summarising the criteria set in the judgement on the rescue programme for Greece in e.g. Kube: AöR [Archive of Public Law Journal] 137 (2012), p. 205 et seq.

[44] With regard to the whole matter: BVerfG loc. cit. p.180. The protection of budgetary sovereignty in the judgement is analysed by e.g. Nettesheim, in EuR [European Law Journal] 2011, p. 765 <771>; Ruffert, in EuR 2011, p. 842 <847 et seq.>. See also now the criterion set in BVerfG, Judgement by the Second Senate of 12 September 2012 – 2 BvE 6/12 publ in *inter alia* NJW 2012, p. 3145, margin no. 208 et seq.

2. Rights of information as the basis of parliamentary participation

The Parliament must of course possess sufficient information if it is to participate in any decisions regarding the use of budgetary resources in European Union matters.

In a decision of 19 June 2012, the Federal Constitutional Court found occasion to clarify the scope of the right of the Bundestag to be provided with information by the federal government.[45].

What was this about? One of the parliamentary party groups in the German Bundestag had complained of not having been given sufficient information by the federal government regarding the negotiations for the European Stability Mechanism (ESM) and the Euro Plus Pact. Although the federal government had provided the Bundestag with verbal and written information a few times during the course of the many months of negotiations, it did not make the draft text of the treaty available to the Bundestag. In the oral hearing before the Federal Constitutional Court, the federal government argued that the preparation of the draft involved confidential material, which meant that it was only possible to provide information verbally. This argument was not particularly convincing, however. Members of the Austrian parliament, who had received the drafts of the treaty from "their" government, had been passing them on to their German colleagues. So as you can see: the saying, "What happens in Vegas, stays in Vegas," does not apply to treaty negotiations in Brussels.
This is how the Federal Constitutional Court saw it too. In its judgement, it made it clear that Article 23 of the Basic Law gives the Bundestag wide-ranging rights of participation and information in affairs of the European Union. The Bundestag must be informed at an early stage in order to be able to influence the decision-making process of the federal government.[46] The federal government had violated these requirements by failing to keep the Bundestag fully informed of the setting up of the ESM

[45] BVerfGE 131, p.152 et seq.; cf. also the discussion by: Kielmansegg in EuR 2012, p.654 et seq.

[46] Cf. regarding the whole matter: BVerfG loc. cit. p. 203.

and the planned Euro Plus Pact from the earliest possible moment by forwarding the drafts of the treaty[47].

3. The Decision of the Federal Constitutional Court of 12 September 2012 on the ratification of the ESM Treaty and the European Fiscal Compact

So now I come to what is for the time being the latest great decision of the Federal Constitutional Court in connection with overcoming the sovereign debt crisis. It dealt in particular with the coming into force of the ESM Treaty, under which it is intended to establish a permanent crisis mechanism to safeguard the financial stability of the euro area as a whole.[48]

Before I discuss the proceedings in the Federal Constitutional Court, you should know that such international treaties are not binding upon the Federal Republic of Germany until they have been signed by the Federal President. So the aim of the applicants to the Federal Constitutional Court was to obtain an injunction prohibiting the Federal President from signing the German laws consenting to the ESM Treaty.

In its tensely awaited judgement of 12 September 2012, the Federal Constitutional Court rejected these applications. In its review – albeit in summary form – the Court affirmed the constitutionality of the law consenting to the ESM Treaty. But the Federal Constitutional Court made ratification subject to two conditions. Firstly, it must be ensured in terms of international law that the Federal Republic of Germany's payment obligations under this treaty may not exceed 190 billion euros; no provision of the treaty may be interpreted to justify higher payment obligations without the consent of

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47 Cf. with regard to the whole matter: BVerfG loc. cit. p. 215 et seq.

48 BVerfG, Judgement of the Second Senate of 12 September 2012 – 2 BvE 6/12 inter alia –, NJW 2012, p.3145 et seq.; in more detail: Frenz, in: EWS, 2012, First Page; Herrmann, in: EuZW 2012, p.805 et seq.; Müller-Franken, in: NJW 2012, p.3162 et seq.; Schorkopf, in: NVwZ 2012, p.1273 et seq.; Tomuschat, in: DVBl [German Administrative Gazette]. 2012, p.1431 et seq.

the German representative in the governing bodies of the ESM.[49] What this means is in effect that there can be no increase in the liability of the Federal Republic without the renewed approval of the Bundestag. In a way, this is an application of Dicey's principle that "Parliament cannot bind its successor".[50] No parliament may restrict the freedom of action of future parliaments with unlimited liability commitments which are binding under international law and which would undermine their budgetary rights.
The second condition concerned the right of the Bundestag to be informed. It thus links in with the decision of June 2012 that we discussed just now. This means that it must be ensured in terms of international law that the provisions concerning the inviolability of ESM documents and the professional confidentiality obligations of members of ESM bodies do not stand in the way of the Bundestag and the Bundesrat being comprehensively informed about ESM matters.[51]

The oral hearing in the main case took place in the Federal Constitutional Court on 12 and 13 June this year. The hearing also involved the European Central Bank (ECB)'s *Outright Monetary Transactions* programme, that is, the buying of government bonds by the ECB in the secondary markets. The origin of this programme was the announcement by the ECB's President *Draghi* on 26 July 2012, and I quote, "Within our mandate, the ECB is ready to do whatever it takes to preserve the euro. And believe me, it will be enough".[52] We are currently deliberating on whether this programme is compatible with the mandate of the ECB and the requirements we have been discussing for European integration.

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49 Cf. BVerfG loc. cit. margin no. 253.

50 Cf. Dicey: *Introduction to the Study of the Law of the Constitution*, 10th ed. 1962, p. 39 et seq.

51 Cf. BVerfG loc. cit. margin no. 259.

52 Cf. Speech by Mario Draghi, President of the European Central Bank at the Global Investment Conference in London 26 July 2012, accessed at http://www.ecb.europa.eu/.

D. Conclusion

Ladies and Gentlemen,

What is my conclusion?
I came to you presuming that a nation that plays cricket is a patient nation. I am happy to say that I was right, as you have now been sitting here listening to me for more than forty-five minutes. So I thank you for your kind attention.

I hope I have been able to demonstrate to you that there is one fundamental idea at the heart of the German constitutional arrangements – that within the European multi-level system the development of political power still needs to be bound to fundamental rules in the form of a national constitution for the protection of the citizens. We believe that the best way to guarantee adherence to these rules is with the watchful oversight of an independent court.

It is only on secure constitutional foundations that promote European integration, strengthen the idea of *Gerichtsverbund*, make it possible to preserve national identity and compel constant referral back to national parliaments, that deeper integration can be possible. Nobody knows exactly how the process of integration will go in the next few years; but one thing is certain: Europe has a future only as a legal community with democratic legitimation ! And if I may be so bold as to close with a personal observation in an island nation that is inclined to be rather Eurosceptic: the European Union has a lot in common with cricket. It is difficult to understand; it seems rather slow-moving at times and the right team does not always win; but life without it would not be a happy prospect!

Thank you very much!
