



Robert Schuman

EU Constitutionalism and the German Basic Law

-Rudolf Geiger



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INTRODUCTION

The Relevance of European Integration for Germany

European integration has always constituted a substantial part of German politics ever since the end of the Second World War. This was true from the very beginning, even before the formal establishment of the Federal Republic, and it is still so today. It is easy to understand why Germany was so interested in European integration when the whole process started after the War.

On the one hand, there was, as in the other European states, a keen desire for a lasting peace and for reconstructing the devastated continent, the same desire that found expression in the United Nations Charter where the founding states declared in the Preamble that their peoples were determined:

“to save succeeding generations from the scourge of war, which twice in their lifetime has brought untold sorrow to mankind.”

And on the other hand, it was Germany’s objective to eventually lose the status of an outcast, regain an honorable reputation, and be accepted on an equal footing again in the family of European states.

Article 24 of the Basic Law

When on September 19th, 1946, the British Prime Minister Winston Churchill said in his historic speech to university students at Zurich, Switzerland, that Germany and France should join with other States on the Continent in “building a kind of United States of Europe,” it was a dream drawing a picture of an extremely distant future. But it still was a very welcome psychological paving stone on the way to – as Churchill put it – “a re-creation of the European family,” just like the Marshall Plan of the U.S. Government was on the economic plane.

When West-Germany drafted and enacted its own provisional Constitution in 1949, it declared in the Preamble of this “Basic Law”, that it was

“inspired by the determination to promote world peace as an equal partner in a united Europe”.

And it continued by providing in Article 24, section 1:

“The Federation may, by statute, transfer sovereign powers to international institutions.”

This very simply drafted provision formed the constitutional basis for concluding Treaties on the establishment of supranational organizations like the European Communities, starting with the European Community for Steel and Coal in 1951, and continuing with the EEC and EURATOM in 1958.

Communities invested with supranational powers

^φ This paper was first presented by Dr. Rudolf Geiger as the keynote address at a conference on the EU Constitution held at the European Union Center, University of Miami, on April 15, 2004.

The European communities were constructed not as international institutions, as that term is traditionally understood, but as supranational organizations. The founding treaties, however, did not expressly lay down concrete and complete provisions on the relationship between the Community and its Member States. Thus they left ample room for the European Court of Justice to step in.

In a long sequence of now classical judgments, that Court held that European law had priority over national law. In 1970 it declared [in *Internationale Handelsgesellschaft*] that even constitutional provisions of Member States had to cede vis-à-vis conflicting acts of Community organs. It was only a question of time before the courts of the Member States, when applying their domestic law would try to set limits to these concepts.

In Germany, the main battlegrounds were the fields of human rights, the general limitations of the transfer of legislative powers, and the problem of the democratic legitimacy of the Community's new powers.

I want to talk about the developments in these three fields from the point of view of the German Constitution, and then about their possible impact on the draft Treaty on the European Constitution.

German Constitutional Law and European Integration

In looking at the development of German constitutional law in these matters, we may distinguish two phases:

Phase 1: Protecting Fundamental Rights

a. Solange I

The Federal Constitutional Court had construed Art. 24 section 1 Basic Law as a provision not only permitting the transfer of sovereign rights to international institutions, but also as laying down the duty of state organs to observe European law notwithstanding opposing national law.

In 1974, however, it was seized with the *Internationale Handelsgesellschaft* case where complainant asserted that European Law and the preliminary judgment which the ECJ had already passed in this case were in contradiction with the principle of proportionality guaranteed by the German Constitution, a principle which – as I am told (Dinage/Murphy, p. 161) – is found in the Fifth Amendment of the US Constitution as part of the concept of due process. Now the Constitutional Court had to decide on the scope of Article 24 of the Basic Law.

The Court ruled that:

as long as the integration process has not progressed so far that Community law also receives a catalogue of fundamental rights decided on by a parliament and of settled validity, which is adequate in comparison with the catalogue of fundamental rights contained in the German Constitution, the Constitutional Court will rule on the applicability of the relevant rule of Community law, in so far as it conflicts with one of the fundamental rights in the Constitution.

Although in its decision on the merits, the Federal Constitutional Court ruled that the Council regulation in question did not conflict with any such constitutional rights, the majority of the authors in German literature did not agree. But the judgment seemed to have had a very favorable consequence. The European Court of

Justice, apparently in reaction to this judgment as well as to similar judgments of the Italian Constitutional Court, now further developed its theory:

- that the European law which it had to apply consisted not only of written law but also of unwritten law emanating from the constitutional traditions common to the member States,
- that respect for human rights was part of these traditions, and
- that the human rights which had been agreed upon in the European Convention of human rights and basic freedoms had evidential value for constructing this unwritten EU law.

b. Solange II

Twelve years later, this development on the EU level gave the Federal Constitutional Court the opportunity to revise its 1974 opinion.

Although there still was no catalogue of human rights in European Union law, the Court held in 1986, after extensively dealing with the guarantees of European human rights and the jurisprudence of the ECJ concerning them, that from now on constitutional complaints based on a violation of German constitutional rights by EU acts would be considered inadmissible:

as long as the European Communities, especially the jurisprudence of the ECJ, generally guarantee an effective protection of fundamental rights which can be considered as being essentially equal to the protection afforded by the Basic Law, it will not exercise its jurisdiction any more.

This has been the Constitutional Court's position ever since. Thus, as a principle, domestic law must cede to Community law. As to fundamental rights guaranteed in the German Constitution, the Court will no longer accept complaints based merely on the assertion that such rights had been infringed in a concrete case. There must be more to it. In 2000, the Court's "Banana market decision" added requirements which make it practically impossible to prove that such a deterioration of the ECJ jurisprudence has actually taken place.

The Court said it would resume its jurisdiction only if the claimant could show that the ECJ was in general either not able or not willing to continue to fulfill its duty of protecting civil rights against infringements by European organs and thereby would no longer guarantee a level of protection comparable to that provided by the German constitution.

Phase 2: Protecting Constitutional Principles

Article 23 of the Basic Law

At the end of the eighties, as the plan for a European Monetary Union was becoming very concrete, the question of an "ever closer Union" and the limits of a transfer of sovereign powers set by German constitutional law were posed again.

Now there were nation-wide discussions about the pros and cons of a transfer of monetary sovereignty to European institutions, which meant losing the well known and cherished Deutsche Mark in exchange for a disputed new currency, the Euro. For many Germans, monetary powers seemed to be much more important than

the sovereign rights which so far had been transferred to the European Communities, say in the field of the free movement of persons and companies or in the field of the protection of the environment.

In this situation amending the Constitution was commonly held to be advisable. This idea was backed up by Germany's constituent states, which had long complained that they had been clandestinely deprived of legislative powers which the federal government kept transferring to the EC. As a consequence, a new provision, Article 23, was inserted into the Constitution. It is this new Article which now deals with the formation and development of the European Union.

The article expressly codified the limitations on a transfer of powers to EU institutions, and it does so by very closely following the Federal Constitutional Court's line of argument in the human rights cases. The first clause contains a list of qualifications which the EU must meet if a German transfer of power should be permitted. It states that Germany will

“participate in the development of the European Union, and that this Union must be committed to democratic, social, and federal principles, to the rule of law, and to the principle of subsidiarity, and it must guarantee a level of protection of basic rights essentially comparable to that afforded by this Basic law.”

This constitutional amendment went into force on December 25, 1992. So the Treaty of Maastricht, which formally created the European Union and which at the same time inserted provisions on the Economic and Monetary Union into the EC-Treaty, had to comply with this new constitutional provision.

The Maastricht (Brunner) Case

a. Background

At that time Mr. Brunner, the former chief of cabinet of a German member of the European Commission, had lodged a constitutional complaint against the German statute which enabled the Government to ratify the Treaty. One of his arguments was that the Treaty deprived the German Parliament of such important legislative powers that future Parliamentary elections would become politically meaningless. A law which contributed to the undermining of the essential legislative powers of the national Parliament would infringe his constitutional right to vote in parliamentary elections.

Surprisingly, the Court concurred that this complaint was admissible. Being composed of rather activist judges, it apparently wanted to seize the opportunity of making some basic statements on European constitutionalism and the Basic Law. Although in the end Mr. Brunner lost his case on the merits, he had achieved his aim of having the Court hand down its opinion about the general limits of a future European constitution-making process.

b. Retaining State Sovereignty

In this respect, the Court emphasized the principle that the powers of the EU institutions were limited to those specifically conferred on them. In the Court's own words: “The exercise of sovereign power through a system of states such as the European Union is based on authorizations from states which remain sovereign.” (BVerfGE 89, 155 [at 186].

And as a consequence it concluded:

“If European institutions ... were to treat or develop the Union Treaty in a way that was no longer covered by the Treaty as it stood at the time when it was approved by the German parliament, the resulting European law-making would not be legally binding within the sphere of German sovereignty. The German authorities would be prevented, for constitutional reasons, from applying them in Germany.

Accordingly, the Federal Constitutional Court announced that it would review legal instruments of European institutions ... to see whether they remained within the limits of the sovereign rights conferred on them or whether they may be considered to exceed those limits” (33 ILM 388 (1994); BVerfGE 89, 155 [at 188]).

This meant that developing European law by later practice was acceptable under German constitutional law only in so far as this practice was foreseeable at the time when the original Treaty or the instrument of amendment had been approved by the German Parliament.

Substantial changes in the content of the Treaty necessitate a new parliamentary approval. And the German Parliament was not permitted to authorize supranational organs without limits to make laws with direct effect in Germany’s domestic sphere.

c. Democratic legitimacy

Besides this problem of a limitation of a transfer of powers, the Court was especially interested in the complainant’s view that the exercise of transferred powers lacked a sufficient democratic legitimacy.

In this respect the Court set forth the standard that in a supranationally organized Union of States there are two ways in which sovereign acts of the Union could be based on the will of the governed. One way led via the national parliaments and governments to the European Council, the other provided legitimacy via the European Parliament.

There the Court made a difference in the comparative value of these two ways. As long as the member States remain the “masters” of the Treaty, it is the national parliaments by which democratic legitimacy is mainly provided.

The European Parliament, on the other hand, only plays a supportive role in providing legitimacy in the current phase of integration. The fact that there are direct elections does not prove the contrary. Democracy is not simply a formal concept of people going to the ballots.

The concept of democracy – according to the Constitutional Court – is also based on some material preconditions which at present do not exist on the European plane.

So far a truly European society has not yet developed, where people communicate regardless of political and language barriers as would be the case within a single state, where there is a vivid interaction of social forces, interests, and ideas, in the course of which political objectives are also clarified and modified, and as a result of which public opinion moulds political policy.

This statement, however, does not exclude the possibility that additional important powers will be assigned to the Union and that the position of the European Parliament will become more important. The decisive factor– as I would interpret the Court’s opinion – is that the “ever closer Union” must be reflected in

the European society developing closer factual ties and a more intense feeling of solidarity. The political problems with which we are confronted right now—as sad as they may be – may contribute to accelerating this process.

The Draft Treaty on a European Constitution

Now we have before us the draft Treaty on the European Constitution, which is designed to replace the present Treaty system by a single Treaty and thus to form a new basis for an ever closer European Union. How should we assess this draft Treaty in the light of German constitutional law? Well, as the President of the Federal Constitutional Court recently told a UK Parliamentary Committee in a written opinion answering their questions, “the expert public in Germany has almost unanimously welcomed the Constitutional Treaty because it is expected to make the state of integration that has been achieved more visible and to be conducive to a simplification of decision-making procedures.”

I would agree with that, but let me make some comments on the main topics which have been frequently discussed in this connection.

Fundamental Rights

I have no doubt that the protection of human rights will be enhanced by the insertion of the European Charter on Human Rights as Part II of the new Treaty. This “bill of rights” was elaborated by a convention of representatives of national and European Parliaments, of national governments and the EU Commission and thus may be expected— on the whole – to contribute to the stability of the human rights protection vis-à-vis acts of the European Union.

Delimitation of the EU Competences

One of the concerns of the Federal Constitutional Court in the Brunner case was that often there is no clear-cut delimitation of the EU legislative powers from those retained by the Member States. Given the rather activist jurisprudence of the ECJ, this results in the EU organs encroaching more and more into the sphere of action which the Member States thought they had reserved for themselves. Political leaders in Germany still feel very uneasy about that.

Just to give an example:

In January 2000 the ECJ handed down a preliminary ruling for which it had been asked by a German court in the case of Tatjana Kreil.

Ms. Kreil, a young woman who had just finished her education as a technical engineer, applied for employment with the German armed forces. She thought she could be very useful in an Army repair shop for tanks. Her application was refused, because the German constitution expressly provided that women were excluded from participating in combat. The matter was made more difficult by the professional philosophy

prevailing in the armed forces, that everyone serving there must be prepared to participate in combat. Even the cook must be ready – in times of crisis – to throw away his spoon and take up a gun. An engineer could not be spared, either. This was why women could not be admitted to these kinds of activities.

Ms. Kreil went to court, arguing that – whatever the German constitution might say – there was an EU directive on equal treatment of men and women in professional life. The ECJ agreed with her. It held that military service was part of professional life, and the restrictions set out in the Basic Law did not pass the test of proportionality. Thus, the relevant part of the Basic Law provisions on the armed forces was set aside by an EU directive.

Now what was the problem in legal and political commentaries? It was not so much that women now could become soldiers. Times have changed. Neither was it that a constitutional provision was set aside. It had been clear that the relevant provision was not part of the core of constitutional principles which the new Article 23 of the Basic Law had declared to be untouchable. It was rather the surprisingly wide construction of an EU directive's sphere of application which had been meant to regulate common market issues. Now it included the field of military service, with further consequences for military politics, like the problem of compulsory military service – should it be extended to women?

German politicians – in commenting on the project of a European Constitution Treaty – have again and again pleaded for clear-cut delimitations of the EU's legislative powers through a restrictive assignment of competences. They wanted these powers listed in an exhaustive catalogue. Such a catalogue has not been adopted in the draft Constitution. The President of the Constitutional Court, in his opinion given to a UK Parliamentary Committee, expressed his disappointment about the new Treaty because – as he said – it did not unfold much restrictive power.

I do not quite join this reservation.

First, I think that the Draft's rules on principles and categories of Union competences [in articles I-9 to I-17] show an important progress in comparison to the present EC-Treaty; it is a first step into a distribution of powers very similar to that of a federation. Moreover, much of the problem could be solved if the member governments in the European Council when they adopt regulations or directives expressly clarified the sphere of application of these instruments.

And, secondly, in many cases the principle of subsidiarity can be brought into play. In this respect, the very important achievement of the draft Treaty is that the national parliaments have a right to give reasoned opinions to legislative proposals of the Commission. They must automatically be informed simultaneously with the European Parliament and the Council and – in addition – they are equipped with a right to bring an action to the ECJ on grounds of infringement of the principle of subsidiarity by a legislative act.

I believe that this new role for national parliaments in the EU decision making-process is even more important in practical politics than any material limitations that might have been included in the Treaty itself, which must necessarily be vague and therefore are open for extensive interpretation.

Democratic Deficit?

One problem not yet finally solved, however, is the so-called democratic deficit. This deficit has several roots. I only want to mention a few aspects.

a. First, there is the problem of the equality of EU citizens in the lawmaking process. I'll illustrate the problem by commenting on the failure of the Conference of the Heads of States and Governments to adopt the draft Treaty in December 2003, when Spain and Poland refused to sign it. This was due to contrasting views on

their representation in the European Council. Spain and Poland wanted to keep their strong position as a potentially “blocking minority” in cases where a “qualified majority” was needed.

(1) According to the Treaty of Nice, Spain and Poland were assigned 27 votes each, whereas the so-called four big powers have 29. Spain and Poland have a population of around 40 million each, but each of them has almost as many votes as Germany, which has a population which is more than twice as large. This seems to me acceptable if you consider the Union mainly under the aspect of sovereign states, not of democratic government. If, however, we emphasize that democratic legitimacy is derived from the citizens, then the number of these citizens represented by each government should be taken into account. It would amount to a circumvention of the principle of equal vote, if the size of the population represented by a government would be neglected.

(2) Of course one could alternatively provide legitimacy by the European Parliament. However, at present, the members of the European Parliament, also represent vastly different numbers of citizens. The voters in smaller states have much more weight than the voters in bigger states. For example: Germany has 99 seats in the EP, Luxemburg has 6. But Germany has 82 million citizens, whereas Luxembourg has 440 000. That means that for Germany it takes 828 000 citizens for one seat in the European Parliament, whereas for Luxemburg 73 000 citizens are sufficient. That is not even one tenth of what the population in Germany needs for one seat.

(3) What can be done to balance these deficiencies? It will not be possible to create constituencies for the European Parliament representing an equal number of citizens. In this case neither Malta nor Luxemburg would have a representation of their own at all. That could only be accomplished if the size of the European Parliament would reach Chinese dimensions.

A compromise must be found which – as we are confronted with a supranational Union of States, not a federation – admittedly would be quite different from what we know from State legislatures.

In this situation I think the drafters of the Treaty on the EU Constitution found an acceptable way out, when they designed the system of a double majority in the EU Council. There a law would be adopted by a majority vote of the member States, which must represent a certain percentage of the population of the Union. In this indirect way citizens would be counted equally.

I think this concept of a double majority would be a big leap forward from a Union of States to a Union of the People.

b. Another very important step to enhance the democratic legitimacy of EU institutions, which the Constitutional Court has asked for, can be found in the President of the Commission being elected by the European Parliament [art. I-26.1]. This may substantially intensify the relationship between the Parliament and the citizens.

Nowadays, whenever elections for the European Parliament approach, it is very hard to draw the attention of the voters even to important European topics. The campaigns led by national parties concentrate on national issues; they are mostly conceived as testing grounds of the popularity of the various political parties on the national level.

This will probably change, if the President of the EU Commission will be elected by the newly convened European Parliament on a proposal by the Council, which in making this proposal has to take into account the elections to the European Parliament.

In this case the political parties represented in the European Parliament will present their candidates

- who will campaign in every Member State,
- who will advocate a specific all-European program, and
- who will –at the same time – personalize the issues he or she stands for.

I think this will greatly help in developing the atmosphere of trans-frontier discussions of common problems which the Constitutional Court was missing in the Brunner case.

A Clash of Jurisdictions?

After all these rather positive items, there is still one fundamental problem in the relationship between the German Constitution and European constitutionalism that has not yet been solved. I think it has hardly been talked about. That is the question about who finally decides whether European law is intolerably encroaching national constitutional principles, whether European organs are violating their duty to respect the member states' national identity (Art. I-5.1).

Who has the last word? Is it the European Court of Justice or is it – in Germany – the Federal Constitutional Court. Each of these Courts clings to its exclusive jurisdiction in the matter. Fortunately so far this has been a theoretical problem. I can hardly believe that such a clash would happen in practice. However, if it should in fact happen, then the time of the judges will have ended and the hour of far-sighted politicians will have come.