Multilevel Cooperation of the European Constitutional Courts

*Der Europäische Verfassungsgerichtsverbund**

Andreas Voßkuhle**

Broad concept of constitutional jurisdiction – Triangle between Karlsruhe, Strasbourg and Luxembourg – European vocation of the German Constitutional Court and Basic Law – European Convention on Human Rights – Karlsruhe decisions can be reviewed in Strasbourg – Human rights-related constitutional court – European Court of Justice developed into constitutional court of the Union – *Verbund* between three courts – No simplistic hierarchy – *Verbund* techniques – Dialogue in Human Rights; Interplay in Integration – Federal Constitutional Court and European Court of Human Rights functionally comparable – Both Courts seek substantive coherence as *Verbund* technique – Federal Constitutional Court commits all German authorities to the Convention – Federal Constitutional Court and ECJ – Principle of openness to European Law – Sharing and assigning responsibilities in complex system – *Solange*, *ultra vires* and identity review – Responsibility for integration, due by Court and other German bodies – Federal Court contributes to common European Constitutional order – Europe-wide discursive struggle and 'Lernverbund'

In the past decades, the tableau of European constitutional jurisdiction has become more colourful and varied. When the Federal Constitutional Court commenced its activity in 1951, it could not foresee that it would have a unique position on the stage of constitutional law for only a comparatively short period of time. Only a few years later, two new institutions, the European Court of Human Rights in Strasbourg and the European Court of Justice in Luxembourg, entered the stage, institutions which to an increasing extent took on the functions of constitu-

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** Prof. Dr. Andreas Voßkuhle is President of the German Federal Constitutional Court.

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tional courts. As early as in the mid-1990s, Konrad Hesse, a major German legal scholar and former judge of the Federal Constitutional Court, therefore talked about 'a change of the Federal Constitutional Court's tasks, its position and its possibilities of action', which he attributed not least to the increased importance of the European courts.[1]

If one takes as a basis a broad concept of constitutional jurisdiction,[2] one can indeed refer to the courts in Strasbourg and Luxembourg as European 'constitutional courts'.[3] As I will show, both institutions have, by virtue of the functions vested in them, step by step taken on the role of constitutional courts, a role which in some respects is comparable to that of the Federal Constitutional Court.

What are the respective positions of the three constitutional courts towards each other in the European constitutional sphere? It was not least due to the current and controversial debate about the Federal Constitutional Court's Lisbon decision[4] that this fundamental question, which has found increasing interest for some years already,[5] has received fresh impetus.[6] The Lisbon judgment has at-

[1] K. Hesse, 'Verfassungsrechtsprechung im geschichtlichen Wandel', *Juristenzeitung* 1995, p. 265 at 269.

[2] Cf. along these lines P. Häberle, 'Grundprobleme der Verfassungsgerichtsbarkeit', in P. Häberle (ed.), *Verfassungsgerichtsbarkeit* (Darmstadt, Wiss. Buchges. 1976), p. 1 at p. 6 et seq.; R. Wahl, 'Das Bundesverfassungsgericht im europäischen und internationalen Umfeld', *Aus Politik und Zeitgeschichte* 2001, p. 45 at p. 48.

[3] Cf. for instance P. Häberle, 'Funktion und Bedeutung der Verfassungsgerichte in vergleichender Perspektive', *Europäische Grundrechte-Zeitschrift* 2005, p. 685 at p. 686; P. Häberle, *Europäische Verfassungslehre* (Baden-Baden, Nomos [u.a.] 2009), p. 478 et seq.; F.C. Mayer, 'Verfassungsgerichtsbarkeit', in A. von Bogdandy and J. Bast (eds.), *Europäisches Verfassungsrecht: Theoretische und dogmatische Grundzüge* (Dordrecht [u.a.], Springer 2009), p. 559 et seq.; S. Oeter, *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 66 (2007), p. 361 at p. 362-363.

[4] BVerfG (Federal Constitutional Court – *Bundesverfassungsgericht*), judgment of the Second Senate of 30 June 2009 – 2 BvE 2/08 et al. –, BVerfGE 123, 267<www.bundesverfassungsgericht.de> – *Lisbon* decision; an overview of the structure of the judgment is provided in I. Schübel-Pfister/ K. Kaiser, 'Das Lissabon-Urteil des BVerfG vom 30.6.2009 – Ein Leitfaden für Ausbildung und Praxis', *Juristische Schulung* 2009, p. 767 et seq.

[5] Cf. from among the recently published monographs F.C. Mayer, *Kompetenzüberschreitung und Letztentscheidung: das Maastricht-Urteil des Bundesverfassungsgerichts und die Letztentscheidung über Ultra-vires-Akte in Mehrebenensystemen; eine rechtsvergleichende Betrachtung von Konflikten zwischen Gerichten am Beispiel der EU und der USA* (München, Beck 2000); C. Lutz, *Kompetenzkonflikte und Aufgabenverteilung zwischen nationalen und internationalen Gerichten: erste Bausteine einer Weltgerichtsordnung,* (Berlin, Duncker & Humblot 2003); C. Dippel, *Die Kompetenzabgrenzung in der Rechtsprechung von EGMR und EuGH*, 2004 <http://edoc.hu-berlin.de/dissertationen/dippel-carsten-2004-06-08/PDF/Dippel.pdf, last visited 9 July 2010; K. Gebauer, *Parallele Grund- und Menschenrechtsschutzsysteme in Europa?: Ein Vergleich der Europäischen Menschenrechtskonvention und des Straßburger Gerichtshofs mit dem Grundrechtsschutz in der Europäischen Gemeinschaft und dem Luxemburger Gerichtshof* (Berlin, Duncker & Humblot 2007); C. Heer-Reißmann, *Die Letztentscheidungskompetenz des Europäischen Gerichtshofes für Menschenrechte in Europa: eine Untersuchung zum Verhältnis von EGMR und EuGH in Menschenrechtsfragen unter Berücksichtigung des Verhältnisses des*

tracted a lot of attention, and has been widely commented upon, not only in German, but also in French[7] and English.[8]

BVerfG zum EuGH (Frankfurt am Main [u.a.], Lang 2008); H. Sauer (2008), 'Jurisdiktionskonflikte in Mehrebenensystemen : die Entwicklung eines Modells zur Lösung von Konflikten zwischen Gerichten unterschiedlicher Ebenen in vernetzten Rechtsordnungen', *Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 195* (Berlin, Heidelberg: Max-Planck-Gesellschaft zur Förderung der Wissenschaften e.V.); J.H. Wiethoff, *Das konzeptionelle Verhältnis von EuGH und EGMR: unter besonderer Berücksichtigung der aktuellen Verfassungsentwicklung der Europäischen Union* (Baden-Baden, Nomos Verl.-Ges. 2008); K. Rohleder, *Grundrechtsschutz im europäischen Mehrebenen-System: unter besonderer Berücksichtigung des Verhältnisses zwischen Bundesverfassungsgericht und Europäischem Gerichtshof für Menschenrechte* (Baden-Baden, Nomos-Verl.-Ges. 2009).

[6] Cf. with an approving tendency K.F. Gärditz/C. Hillgruber, 'Volkssouveränität und Demokratie ernst genommen – Zum Lissabon-Urteil des BVerfG', *Juristenzeitung* 2009, p. 872 et seq.; D. Grimm, 'Das Grundgesetz als Riegel vor einer Verstaatlichung der Europäischen Union', *Der Staat* 2009, p. 475 et seq.; K. Schelter, 'Karlsruhe und die Folgen', *ZfSH/SGB* 2009, p. 451 et seq.; F. Schorkopf, 'The European Union as an Association of Sovereign States: Karlsruhe's Ruling on the Treaty of Lisbon', *German Law Journal* 2009, p. 1219 et seq.; F. Schorkopf, 'Die Europäische Union im Lot – Karlsruhes Rechtsspruch zum Vertrag von Lissabon', *Europäische Zeitschrift für Wirtschaftsrecht* 2009, p. 718 et seq.; R. Wahl, 'Die Schwebelage im Verhältnis von Europäischer Union und Mitgliedstaaten. Zum Lissabon-Urteil des Bundesverfassungsgerichts', *Der Staat* 2009, p. 587 et seq.; with a disapproving tendency for instance A. von Bogdandy, 'Prinzipien der Rechtsfortbildung im europäischen Rechtsraum', *Neue Juristische Wochenschrift* 2010, p. 1 et seq.; W. Frenz, 'Unanwendbares Europarecht nach Maßgabe des BVerfG?', *Europäisches Wirtschafts- und Steuerrecht* 2009, p. 297 et seq.; T. Oppermann, 'Den Musterknaben ins Bremserhäuschen! – Bundesverfassungsgericht und Lissabon-Vertrag', *Europäische Zeitschrift für Wirtschaftsrecht* 2009, p. 473; cf. furthermore C.D. Classen, 'Legitime Stärkung des Bundestages oder verfassungsrechtliches Prokrustesbett? Zum Urteil des BVerfG zum Vertrag von Lissabon', *Juristenzeitung* 2009, p. 881 et seq.; A. Fisahn, 'Bundesverfassungsgericht friert die europäische Demokratie national ein', *Kritische Justiz* 2009, p. 220 et seq.; M. Nettesheim, 'Ein Individualrecht auf Staatlichkeit? Die Lissabon-Entscheidung des BVerfG', *Neue Juristische Wochenschrift* 2009, p. 2867 et seq.; E. Pache, 'Das Ende der Europäischen Integration? Das Urteil des Bundesverfassungsgerichts zum Vertrag von Lissabon, zur Zukunft Europas und der Demokratie', *Europäische Grundrechte-Zeitschrift* 2009, p. 285 et seq.; M. Ruffert, 'An den Grenzen des Integrationsverfassungsrechts: Das Urteil des Bundesverfassungsgerichts zum Vertrag von Lissabon', *Deutsches Verwaltungsblatt* 2009, p. 1197 et seq.; J.P. Terhechte, 'Souveränität, Dynamik und Integration – making up the rules as we go along? – Anmerkungen zum Lissabon-Urteil des Bundesverfassungsgerichts', *Europäische Zeitschrift für Wirtschaftsrecht* 2009, p. 724 et seq.

[7] Cf. with an approving tendency Sénat français, *Rapport d'information fait au nom de la commission des affaires européennes sur l'arrêt rendu le 30 juin 2009 par la Cour constitutionnelle fédérale d'Allemagne (Cour de Karlsruhe) au sujet de la loi d'approbation du traité de Lisbonne*, 2009; cf. also F. Chaltiel, 'Le Traité de Lisbonne, Avant-Dernière Ligne Droite? À propos de la Décision de la Cour Constitutionnelle Allemande du 30 Juin 2009', *Revue du Marché Commun et de l'Union européenne* 2009, p. 493 et seq.; A. v. Ungern-Sternberg, 'L'arrêt Lisbonne de la Cour constitutionnelle fédérale allemande, la fin de l'intégration européenne?', *Revue de droit public* 2010, p. 171 et seq.

[8] Cf. with a mostly disapproving tendency the contributions in the special edition of the German Law Journal: C. Schönberger, 'Lisbon in Karlsruhe: Maastricht's Epigones At Sea', *German Law Journal*, Vol. 10 (2009), p. 1201 et seq.; F. Schorkopf, 'The European Union as An Association of Sovereign States: Karlsruhe's Ruling on the Treaty of Lisbon', *German Law Journal*, Vol. 10 (2009), p.

It calls for a deeper analysis of the triangle of jurisdiction between Karlsruhe, Luxembourg and Strasbourg as part of – and here I will indicate what I am to explain later – a 'multilevel cooperation of the European constitutional courts' (*europäischer Verfassungsgerichtsverbund*). Before dealing with the structures of the multilevel cooperation of the European constitutional courts, I would first like to introduce in greater detail the three actors whom I have just mentioned. In doing so, I will start with the Federal Constitutional Court as the mediator between the Basic Law (*Grundgesetz* – GG) and the European legal system.

The actors of multilevel cooperation of the European constitutional courts

The Federal Constitutional Court as the mediator between the Basic Law and the European legal system

German constitutional jurisdiction was born of the democratic idea of the primacy of the Constitution, whose fundamental rights bind all state authorities as

1220 et seq.; D. Halberstam/C. Möllers, 'The German Constitutional court says "Ja zu Deutschland!"', *German Law Journal*, Vol. 10 (2009), p. 1241 et seq.; C. Tomuschat, 'The Ruling of the German Constitutional Court on the Treaty of Lisbon', *German Law Journal*, Vol. 10 (2009), p. 1259 et seq.; A. Grosser, 'The Federal Constitutional Court's Lisbon Case: Germany's "Sonderweg": An Outsider's Perspective', *German Law Journal*, Vol. 10 (2009), p. 1263 et seq.; M. Niedobitek, 'The Lisbon Case of 30 June 2009 – A Comment from the European Law Perspective', *German Law Journal*, Vol. 10 (2009), p. 1267 et seq.; C. Wohlfahrt, 'The Lisbon Case: A Critical Summary', *German Law Journal*, Vol. 10 (2009), p. 1277 et seq.; P. Kiiver, 'German Participation in EU Decision-Making after the Lisbon Case: A Comparative View on Domestic Parliamentary Clearance Procedures', *German Law Journal*, Vol. 10 (2009), p. 1287 et seq.; S. Leibfried/K. van Elderen, '"And they shall Beat their Swords into Plowshares" – The Dutch Genesis of a European Icon and the German Fate of the Treaty of Lisbon', *German Law Journal*, Vol. 10 (2009), p. 1297 et seq.; cf. furthermore J.H.H. Weiler, 'The "Lisbon Urteil" and the Fast Food Culture', *European Journal of International Law*, Vol. 20 (2009), p. 505 et seq.; Editorial Comments, 'Karlsruhe has spoken: "Yes" to the Lisbon Treaty, but …', *Common Market Law Review* (2009), p. 1023 et seq.; D. Grimm, 'Defending Sovereign Statehood against Transforming the European Union into a State', *EuConst* 5(3) (2009), p. 353 et seq.; J.-H. Reestman, 'The Franco-German Constitutional Divide, Reflecctions on National and Constitutional Identity', *EuConst* 5(3) (2009), p. 374 et seq.; R. Bieber, 'An Association of Sovereign States', *EuConst* 5(3) (2009), p. 391 et seq.; T. Lock, 'Why the European Union is Not a State; Some Critical Remarks', *EuConst* 5(3) (2009), p. 407 et seq.; R. Raith, 'The Common Commercial Policy and the Lisbon judgement of the German Constitutional Court of 30 June 2009', *Zeitschrift für Europarechtliche Studien* (2009), p. 613 et seq.; D. Doukas, 'The verdict of the German Federal Constitutional Court on the Lisbon Treaty: Not guilty, but don't do it again!', *European Law Review* (2009), p. 866 et seq.; P. Kiiver, 'Reflections on the Lisbon judgement: how the judges at Karlsruhe trust neither the European Parliament nor their national parliament', *Maastricht Journal of European and Comparative Law*, Vol. 16 (2009), p. 263 et seq.; J. Kokott, 'The Basic Law at 60 – From 1949 to 2009: The Basic Law and Supranational Integration', *German Law Journal*, Vol. 11 (2010), p. 99 et seq.; F.C. Mayer, '"Rashomon in Karlsruhe", The German Constitutional Court's Lisbon decision and the changing landscape of European constitutionalism', will be published in I-CON 2010.

directly applicable and enforceable law. To secure the rule of the fundamental rights, the Basic Law has opted for the institutionalisation of a strong constitutional jurisdiction, which is unique in terms of the broadness and depth of competences both from a historical perspective and from that of comparative constitutional law.[9] All the same, the Federal Constitutional Court has had to find its role in the process of constitutionalisation, for instance as regards its relation to the supreme courts of the Federation.[10] In parallel, the Federal Constitutional Court has followed its European vocation because from the very beginning, its jurisdiction has been embedded in a sphere of international and European references. We owe this to the farsightedness, which from today's perspective is nothing short of prophetic, of the members of the Herrenchiemsee Constitutional Convention, which provided for the possibility of transfers of sovereign powers to intergovernmental institutions. The drafters of the Basic Law not only strove for integration into a peaceful supranational order but also for an international cooperation going beyond such integration. Safeguarding peace and strengthening the possibilities of political development through joint action are the central achievements of this unprecedented process of European integration. Accordingly, the Preamble of Germany's Basic Law emphasises the joint willingness to serve world peace as an equal partner in a united Europe.

Contrary to some allegations, the Federal Constitutional Court is not, nor has it been, a force of inhibition in this process. Quite the reverse: it has always worked towards an integration that is committed to human and civil rights. It is not without reason that the Constitution-amending legislature took the Federal Constitutional Court's case-law on the protection of fundamental rights as its orientation when revising Article 23 GG regarding the establishment of a united Europe. The Basic Law's 'Article on Europe' codifies the constitutional mandate to participate in the development of the European Union, a Union that is committed to democratic, rule-of-law, social and federal principles as well as to an adequate protection of fundamental rights. Thus, the Basic Law's constitutional principle of openness towards international law (*Völkerrechtsfreundlichkeit*) is complemented by the principle of openness towards European law (*Europarechtsfreundlichkeit*), which not only permits Germany's participation in European integration but, as has been

[9] Aptly observed by A. Rinken, in *Alternativkommentar zum GG* (E. Denninger, *Kommentar zum Grundgesetz für die Bundesrepublik Deutschland* (Neuwied [u.a.], Luchterhand 2001)), before Art. 93, marginal nos. 1 et seq. (cited instead of many other sources); cf. also K. Schlaich, S. Korioth & K. Schlaich, *Das Bundesverfassungsgericht: Stellung, Verfahren, Entscheidungen; ein Studienbuch* (München, Beck 2007), marginal nos. 1 et seq.

[10] On this, illustrative observations by G.F. Schuppert, C. Bumke & B. Schuppert, *Die Konstitutionalisierung der Rechtsordnung: Überlegungen zum Verhältnis von verfassungsrechtlicher Ausstrahlungswirkung und Eigenständigkeit des "einfachen" Rechts* (Baden-Baden, Nomos Verl.-Ges. 2000), p. 45 et seq.

emphasised by the Federal Constitutional Court in its *Lisbon* decision, even requires it as a constitutional obligation.[11]

The European Court of Human Rights as the guardian of the European Convention on Human Rights

The year 1958 marks the beginning of the era of the European Court of Human Rights, which reviews compliance with the binding guarantees of the European Convention on Human Rights (ECHR). The Convention was signed by the member states of the Council of Europe just one year after the entry into force of the Basic Law. As the first instrument of human rights protection under international law, it provides effective enforcement mechanisms through proceedings before a court. In the Federal Republic of Germany, the ECHR, which has constitutional rank in other States Parties to the Convention, in formal terms has 'merely' the rank of an ordinary law,[12] by virtue of the German Act approving it.[13] While at the beginning, the possibility of invoking the jurisdiction of the court in Strasbourg was used only hesitantly, the court's acceptance particularly increased with the fundamental reform of the Convention's system of legal protection by its Protocol No. 11.[14] Since 1998, the new permanent European Court of Human Rights has been ensuring compliance with the obligations arising from the Convention without the filtering function that the European Commission for Human Rights used to have.

The essential reason for the Europe-wide triumph of the ECHR is the individual application procedure, whose functions resemble that of the German constitutional complaint. Due to the right to make individual applications, which, in comparison to the former legal situation, is as revolutionary as it is effective, all citizens, irrespective of a special declaration of submission made by their state of origin, can seek legal protection in Strasbourg from violations of the Convention. The admissibility requirement of all applications under the Convention is the exhaustion of all domestic remedies, which include, *inter alia*, the constitutional complaint lodged before the Federal Constitutional Court.[15] Decisions rendered by

[11] BVerfG, *supra* n. 4, marginal no. 225.

[12] An overview of the ECHR's rank in the national legal systems is provided in C. Grabenwarter, *Europäische Menschenrechtskonvention: ein Studienbuch* (München [u.a.], Beck [u.a.] 2008), § 3, marginal nos. 2 et seq.; C. Grabenwarter, *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 60 (2001), p. 290 at p. 299 et seq.

[13] Act on the Convention for the Protection of Human Rights and Fundamental Freedoms (*Gesetz über die Konvention zum Schutze der Menschenrechte und Grundfreiheiten*) of 7 Aug. 1952, Federal Law Gazette (*Bundesgesetzblatt* – BGBl) 1952 II, p. 685.

[14] BGBl 1995 II, p. 579.

[15] Cf. only ECtHR, judgment of 12 June 2003 – Application No. 44672/98 –, Herz, *Neue Juristische Wochenschrift* 2004, p. 2209 et seq.

the court in Karlsruhe can thus be the subject of review before the court in Strasbourg.

The judgments of the European Court of Human Rights have a far-reaching significance, with their domestic effects depending on the respective law of the States Parties. The expansion of its territorial area of jurisdiction to the almost fifty States Parties to the ECHR to date has confronted the court with special challenges,[16] with regard to its caseload and when it comes to bringing together relatively heterogeneous legal systems. It at the same time provides an impetus to the development of a common European system of legal protection. The court in Strasbourg may therefore be rightly called a constitutional court, at least with regard to human rights.[17]

The European Court of Justice as the drafter of European legal unity

Unlike the Court of Human Rights in Strasbourg, the European Court of Justice, which was installed in Luxembourg as early as in 1952, is not a specialised court. On the contrary: substantively its area of jurisdiction is extremely broad. The contractual basis for this is the assignment of competences in Article 19(1) of the Treaty on European Union (TEU), pursuant to which the Court of Justice 'shall ensure that in the interpretation and application of the Treaties the law is observed.' In accordance with this instruction, the court in Luxembourg has given impulses to European integration in important areas and has decisively contributed to the European Union establishing itself as a legal order. Within the supranational legal order, the court has broad powers to review acts of the Union institutions– horizontally, so to speak – without neglecting the functional legal requirement of judicial self-restraint *vis-à-vis* the Union legislature's margin for manoeuvre.[18] At the same time, the court is vertically intertwined with the member states, whose legal systems are influenced by it in quite an extraordinary man-

[16] Cf. M. Keller, '50 Jahre danach: Rechtsschutzeffektivität trotz Beschwerdeflut? Wie sich der EGMR neuen Herausforderungen stellt', *Europäische Grundrechte-Zeitschrift* (2008), p. 359 et seq.; S. Schmahl, 'Piloturteile als Mittel der Verfahrensbeschleunigung beim EGMR', *Europäische Grundrechte-Zeitschrift* (2008), p. 369 et seq.

[17] Cf. on this E.G. Mahrenholz, 'Europäische Verfassungsgerichte', *Jahrbuch des öffentlichen Rechts der Gegenwart* 49 (2001), p. 15 at p. 21 ("Verfassungsgericht in funktionaler Hinsicht"); L. Wildhaber, 'Eine verfassungsrechtliche Zukunft für den Europäischen Gerichtshof für Menschenrechte?', *Europäische Grundrechte-Zeitschrift* (2002), p. 569 et seq.; Gebauer, *supra* n. 5, p. 217-218.

[18] Cf. ECJ, Case 92/71, *Interfood* v. *HZA Hamburg-Ericus*, *ECR* 1972, 231, marginal no. 5; ECJ, Case 149/77, *Defrenne* v. *Sabena*, *ECR* 1978, 1365, marginal nos. 19 et seq.; cf. on the intensity of review *vis-à-vis* the Community legislature *see* the recent judgment in the *Arcelor* case in which the European Court of Justice performs a review against the standard of relative equality, contrary to the mere review of arbitrariness proposed by the Advocate-General (ECJ, Case C-127/07, *Société Arcelor*, *Neue Zeitschrift für Verwaltungsrecht* (2009), p. 382 et seq.).

ner. Its decisions have frequently taken issues of economic law as their starting point, in particular the fundamental freedoms of the internal market. However, they have also had an effect on matters which have remained the competence of the member states, such as, for instance, education,[19] sports[20] and the organisation of the armed forces.[21]

With a view to the fragmentary character of European primary law, the Court of Justice has often complemented and further developed the law. The Court's competence to develop the law has been explicitly recognised by the Federal Constitutional Court.[22] In this respect, judgments of the Court of Justice which are remarkable from a methodological perspective are for instance those concerning the direct effect of directives for reasons of the '*effet utile*',[23] the member states' liability in case of non-implementation of directives and other infringements of Union law[24] and implicit Union competences for the conclusion of treaties under international law.[25] Due to its independent, 'dynamic' method of interpretation, which is open towards Europe, the Court of Justice has with good reason been labelled the 'motor of integration'.[26] One may not fail to realise, however, that time and again, phases of activism and phases of restraint have alternated in its case-law.[27] The Treaty of Lisbon has explicitly assigned the judicial monitoring of compliance with the subsidiarity principle to the Court of Justice.[28] This is

[19] Cf. e.g., ECJ, Case C-76/05, *Schwarz/Finanzamt Bergisch-Gladbach*, *ECR* 2007, I-6849, marginal no. 70 (deduction of the costs of a private school in another EU member state as special expenses).

[20] ECJ, Case C-415/93, *Union Royale Belge des Sociétés de Football* v. *Bosman*, *ECR* 1995, I-4921, marginal no. 94 (transfer clauses in professional football).

[21] ECJ, Case C-285/98, *Kreil* v. *Germany*, *ECR* 2000, I-69, marginal nos. 12 et seq. (armed service for women).

[22] Decisions of the Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 75, 223 at 242-243 – *Kloppenburg*).

[23] Since ECJ, Case 9/70, *Grad* v. *Finanzamt Traunstein* ("Leberpfennig"), *ECR* 1970, 825.

[24] ECJ, Joined Cases C-6/90 and C-9/90, *Frankovich and Bonifaci* v. *Italy*, *ECR* 1991, I-5357; ECJ, Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur* v. *Germany*, *ECR* 1996, I-1029; ECJ, Case C-224/01, *Köbler* v. *Austria*, *ECR* 2003, I-10239; ECJ, Case C-173/03, *Traghetti del Mediterraneo* v. *Italy*, *ECR* 2006, I-5177.

[25] ECJ, Case 22/70, *Commission* v. *Council* ("AETR"), *ECR* 1971, 263, marginal nos. 20, 22.

[26] Cf. on the interpretation methods of the European Court of Justice H. Kutscher, 'Thesen zu den Methoden der Auslegung des Gemeinschaftsrechts aus Sicht eines Richters', in: ECJ (ed.), *Begegnung von Justiz und Hochschule am 27. und 28. September 1976, Berichte Teil I*, 1976, p. I-1 et seq.; J. Anweiler, *Die Auslegungsmethoden des Gerichtshofs der Europäischen Gemeinschaften* (Frankfurt am Main; Berlin; Bern; New York; Paris; Wien, Lang 1997); I. Schübel-Pfister, *Sprache und Gemeinschaftsrecht; die Auslegung der mehrsprachig verbindlichen Rechtstexte durch den Europäischen Gerichtshof* (Berlin, Duncker & Humblot 2004).

[27] This is the assessment of U. Everling, 'Richterliche Rechtsfortbildung in der Europäischen Gemeinschaft', *Juristenzeitung* (2000), p. 217 at p. 224.

[28] Art. 8 of the Protocol on the Application of the Principles of Subsidiarity and Proportionality.

regarded as another important contribution to the Court's development into a constitutional court of the European Union.[29]

The concept of multilevel cooperation of the European constitutional courts

What is the position of these three European constitutional courts towards one another? To describe this complex relationship, which is characterised by unique involvements, it seems appropriate to me to use the term '*Verbund*'.[30] The term '*Verbund*' as a systematic concept ('*Ordnungsidee*', Schmidt-Aßmann)[31] is used in a wide variety of contexts. It may suffice to mention it as term for, for instance, the European Union as an association of sovereign states, which was coined in the *Maastricht* judgment and was used again in the *Lisbon* judgment, or the term of the (European) *Verfassungsverbund*[32] (multilevel constitutionalism). The concept of *Verbund* helps to describe the operation of a complex multilevel system without determining the exact techniques of the interplay. The term *Verbund* makes it possible to do without oversimplistic spatial and hierarchic concepts such as 'superiority' and 'subordination'. Instead, it opens up the possibility of a differentiated

[29] G.C. Rodríguez Iglesias, 'Perspektiven europäischer und nationaler Verfassungsgerichtsbarkeit im Lichte des Vertrags über eine Verfassung für Europa', in Walter-Hallstein-Institut für Europa (ed.), *Europäische Verfassung in der Krise – auf der Suche nach einer gemeinsamen Basis für die erweiterte Europäische Union*, Forum Constitutionis Europae Band 7, 2007, p. 107 at p. 110-111; cf. already G.C. Rodríguez Iglesias, 'Der Gerichtshof der Europäischen Gemeinschaften als Verfassungsgericht', *Europarecht* (1992), p. 225 et seq.; cf. furthermore for instance Mayer, *supra* n. 3, p. 559; Häberle (2009), *supra* n. 3, p. 478 et seq., and Oeter, *supra* n. 3, p. 362-363.

[30] Cf. also H. Brunkhorst, 'Zwischen transnationaler Klassenherrschaft und egalitärer Konstitutionalisierung. Europas zweite Chance', in C. Joerges, M. Mahlmann & U.K. Preuß (2008), '"Schmerzliche Erfahrungen der Vergangenheit" und der Prozess der Konstitutionalisierung Europas', Wiesbaden: VS Verlag für Sozialwissenschaften / GWV Fachverlage GmbH, Wiesbaden., p. 109, and H. Brunkhorst., 'Die Legitimationskrise der Weltgesellschaft. Global Rule of Law, Global Constitutionalism und Weltstaatlichkeit', in M. Albert & R. Stichweh (2007), 'Weltstaat und Weltstaatlichkeit: Beobachtungen globaler politischer Strukturbildung', Wiesbaden: VS Verlag für Sozialwissenschaften / GWV Fachverlage GmbH, Wiesbaden. at p. 77, who attributes the term '*europäischer Verfassungsgerichtsverbund*' to Udo di Fabio. Di Fabio makes reference to the '*Kooperation der Verfassungsgerichte im überstaatlichen Verbund*', cf. U. di Fabio, *Der Verfassungsstaat in der Weltgesellschaft* (Tübingen, Mohr Siebeck 2001), p. 78.

[31] Cf. E. Schmidt-Aßmann, 'Einleitung: Der Europäische Verwaltungsverbund und die Rolle des Europäischen Verwaltungsrechts', in *Der Europäische Verwaltungsverbund; Formen und Verfahren der Verwaltungszusammenarbeit in der EU* (Tübingen, Mohr Siebeck 2005), p. 1 at p. 7; *see also* E. Schmidt-Aßmann, *Das allgemeine Verwaltungsrecht als Ordnungsidee; Grundlagen und Aufgaben der verwaltungsrechtlichen Systembildung* (Berlin, Springer 2004), p. 1-2.

[32] Cf. I. Pernice, 'Der Europäische Verfassungsverbund auf dem Wege der Konsolidierung', *Jahrbuch des öffentlichen Rechts der Gegenwart* 48 (1999), p. 205 et seq.; I. Pernice, *Das Verhältnis europäischer zu nationalen Gerichten im europäischen Verfassungsverbund: Vortrag; gehalten vor der Juristischen Gesellschaft zu Berlin am 14. Dezember 2005* (Berlin, de Gruyter Recht 2006); cf. also P.M. Huber, *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 60 (2001), p. 194 at p. 199.

description on the basis of different systematic aspects such as unity, difference and diversity, homogeneity and plurality, delimitation, interplay and involvement. The idea of *Verbund* equally contains autonomy, consideration and ability to act jointly.[33]

Let me therefore henceforth speak of '*europäischer Verfassungsgerichtsverbund*', a concept I have translated with 'multilevel cooperation of the European constitutional courts.' It goes without saying that the mere translation of new terms and concepts such as *Verfassungsgerichtsverbund* into another language can prove to be highly problematic. Therefore I would like to point out that the concept of *Verfassungsgerichtsverbund* refers to the cooperative, non-hierarchical handling of multilevel constitutional issues by several constitutional courts, i.e., a composite multilevel structure of constitutional jurisdictions which entertain complementary and cooperative relationships. As the expression 'multilevel cooperation of the European constitutional courts' may not necessarily reflect all the aspects implied in the term *Europäischer Verfassungsgerichtsverbund*, I will sometimes use the German expression '*Verbund*' instead.

In the following, I will deal with the *Verbund's* functioning and structures with reference to the three protagonists I have introduced. In this context, it is important to focus on the different legislative and judicial instruments of concertation which are employed in the *Verbund*, for which I will use the term '*Verbund* techniques'. I will look at the human rights dialogue between the Federal Constitutional Court and the European Court of Human Rights before dealing with the interplay between the Federal Constitutional Court and the European Court of Justice in the context of European integration. This will bring me, by way of conclusion, to presenting the idea of a comprehensive, dynamic *Verbund* of the national, supranational and international constitutional courts in the European constitutional sphere.

The Federal Constitutional Court and the European Court of Human Rights in the international multilevel cooperation of the constitutional courts

The Basic Law's openness towards international law

From the perspective of German constitutional law, the guiding principle of the relationship between the Federal Constitutional Court and the European Court of Human Rights is the Basic Law's openness towards international law, which

[33] Cf., for an apparently similar concept, F.C. Mayer, 'Multilevel Constitutional Jurisdiction', in A. von Bogdandy, *Principles of European constitutional law* (Oxford [u.a.], Hart [u.a.] 2010), p. 399 et seq.

combines the exercise of state sovereignty with the idea of international cooperation. The precept for German state authorities, including the courts, of interpreting national law with due respect for international law characterises the fruitful human rights dialogue with the court in Strasbourg.

This international multilevel cooperation of the constitutional courts is characterised by formal as well as by substantive *Verbund* techniques. The arrangements regarding competences and subsidiarity which exist in the relationship between the two courts can be regarded as formal *Verbund* techniques. As I have already mentioned, against acts of German public authority, both the constitutional complaint according to the Basic Law and the individual application pursuant to the ECHR are possible, so that a parallel competence of the two courts exists *a priori*. All the same, no genuine conflicts of competence can arise between them from the outset. This is on the one hand due to the requirement of exhausting all domestic remedies before invoking the jurisdiction of the European Court of Human Rights in Strasbourg, and on the other hand to the different standards of review and decision-making. The Federal Constitutional Court finally and bindingly examines constitutional complaints lodged against acts of German public authority against the standard of the Basic Law. By contrast, the European Court of Human Rights establishes the existence or non-existence of an infringement of the Convention solely against the standard of the ECHR. Notwithstanding these different normative contexts of reference – state constitution on the one hand, international agreement on the other hand – the Federal Constitutional Court and the European Court of Human Rights are comparable institutions of jurisdiction as regards their functions, which adjudicate according to closely related catalogues of fundamental rights that are partly parallel and partly complementary.[34]

Substantive Verbund *techniques to ensure coherence of jurisdiction*

It goes without saying that divergences between the rulings of the two courts as regards their content are not ruled out. On closer inspection, however, they occur very rarely because generally infringements of human rights are remedied on the national level before they give rise to complaints on the European level. The few cases in which the Court in Strasbourg has ruled that German acts that had previously been regarded as being in conformity with the Basic Law by the Federal Constitutional Court were contrary to the Convention have attracted attention precisely due to their unique nature. These cases are essentially the ones dealing

[34] Cf. a detailed account in R. Grote, K. Meljnik & R. Allewedt (eds.), *EMRK/GG: Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz* (Tübingen, Mohr Siebeck 2006).

with the Baden-Württemberg fire service levy,[35] with the dismissal of a teacher on grounds of her activity for the German Communist Party[36] and the complaint of Caroline von Hannover on account of insufficient protection of her private life.[37, 38] Furthermore, Germany has been sentenced occasionally for excessive duration of proceedings.[39]

What are the substantive *Verbund* strategies with which both constitutional courts successfully delimit their respective judicial spheres? What must be mentioned first and foremost in this context is that both courts endeavour to ensure substantive coherence between their case-laws[40] by mutual concertation and homogenisation. Thus it was possible to settle occasional conflicts, either by amending the law or by the Federal Constitutional Court's concurring with the case-law of the European Court of Human Rights – precisely in the spirit of the primacy of openness towards international law.[41]

[35] ECtHR, judgment of 18 July 1994 – Application No. 13580/88 –, Schmidt, *Neue Zeitschrift für Verwaltungsrecht* (1995), p. 365 et seq.

[36] ECtHR, judgment of 26 Sept. 1995 – Application No. 17851/91 –, Vogt, *Neue Juristische Wochenschrift* (1996), p. 375 et seq.

[37] ECtHR, judgment of 24 June 2004 – Application No. 59320/00 –, von Hannover, *Neue Juristische Wochenschrift* (2004), p. 2647 et seq.

[38] Cf. furthermore the *Gäfgen* case in which the European Court of Human Rights categorises the threat of torture as inhuman treatment, and therefore as a violation of Art. 3 ECHR, but ultimately does not grant the relief sought: ECtHR, decision of 10 April 2007 – Application No. 22978/05 –, Gäfgen, *Neue Juristische Wochenschrift* (2007), p. 2461 et seq.; ECtHR, judgment of 30 June 2008 – Application No. 22978/05 –, Gäfgen, *Europäische Grundrechte-Zeitschrift* (2008), p. 466 et seq.

[39] Cf. for instance ECtHR, judgment of 9 Oct. 2008 – Application No. 10732/05 –, P.B., *Zeitschrift für das gesamte Familienrecht* (2009), p. 105-106; ECtHR, judgment of 5 Oct. 2006 – Application No. 66491/01 –, Grässer, *Europäische Grundrechte-Zeitschrift* (2007), p. 268 et seq.; ECtHR, judgment of 8 Jan. 2004 – Application No. 47169/99 –, Voggenreiter, *Neue Juristische Wochenschrift* (2005), p. 41 et seq.

[40] On the idea of coherence *see* in detail W. Hoffmann-Riem, 'Kohärenz der Anwendung europäischer und nationaler Grundrechte', *Europäische Grundrechte-Zeitschrift* (2002), p. 473 et seq.

[41] Cf. for instance BVerfGE 92, 91, which abandoned the previous case-law on the fire service levy as a result of the Strasbourg decision; *see* on this S. Mückl, 'Kooperation oder Konfrontation? – Das Verhältnis zwischen Bundesverfassungsgericht und Europäischem Gerichtshof für Menschenrechte', *Der Staat* (2005), p. 403 at p. 406 et seq., p. 425; cf. furthermore BVerfG, order of the First Senate of 26 Feb. 2008 – 1 BvR 1602/07 –, *Neue Juristische Wochenschrift* (2008), p. 1793 et seq. – Caroline II: approval under constitutional law of the change in the concept of protection of the Federal Court of Justice (*Bundesgerichtshof*); on this W. Hoffmann-Riem, 'Die Caroline II-Entscheidung des BVerfG – Ein Zwischenschritt bei der Konkretisierung des Kooperationsverhältnisses zwischen den verschiedenen betroffenen Gerichten', *Neue Juristische Wochenschrift* (2009), p. 20 et seq.; on the whole subject also U. Steiner, 'Zum Kooperationsverhältnis von Bundesverfassungsgericht und Europäischem Gerichtshof für Menschenrechte', in S. Detterbeck & H. Bethge (eds.), *Recht als Medium der Staatlichkeit : Festschrift für Herbert Bethge zum 70. Geburtstag* (Berlin, Duncker & Humblot 2009), p. 653 et seq.

In the vast majority of cases, the court in Strasbourg and the court in Karlsruhe have succeeded in preventing collisions. The Federal Constitutional Court contributes to achieving a far-reaching harmonisation by consulting the text of the Convention and the case-law of the European Court of Human Rights, which it has raised to the level of constitutional law (*see* below), as 'interpretation aids' for the determination of the content and scope of the fundamental rights and rule-of-law guarantees of the Basic Law.[42] In this manner, the fundamental decisions of the European Court of Human Rights have the effect of legal precedents and a function of normative guidance and orientation.[43] Vice versa, the court in Strasbourg, with its cautious case-law, has shaped a common European fundamental rights standard which is inspired not least by the case-law of the national constitutional courts. Its mature and sophisticated case-law shows a coherence in terms of content which overarches the national legal systems and which makes solutions possible that are as consistent as they are appropriate. Thus it was for instance possible for the Grand Chamber of the European Court of Human Rights to rule, in harmony with the Federal Constitutional Court's case-law and contrary to a former Chamber decision of the court in Strasbourg, that the expropriation of inherited land reform property entailed no violation of the freedom of property.[44]

Procedural steering of coherence

Apart from substantive *Verbund* techniques, both actors also use procedural means for a ensuring the coherence of their case-laws. The European Court of Human Rights leaves the States Parties the necessary margin of appreciation by leaving it to the national courts to fit its decisions into the differentiated national legal systems and casuistry.[45] From a constitutional law perspective, this takes place under the aegis of the openness of the German legal system towards international law as has been postulated by the Federal Constitutional Court in its landmark deci-

[42] This was already established – making reference to BVerfGE 35, 311 at 320 – in BVerfGE 74, 359 at 370; 82, 106 at 120, in both cases as regards the presumption of innocence according to Art. 6 para. 2 ECHR.

[43] Aptly observed by H.-J. Papier, *Europäische Grundrechte-Zeitschrift* 2006, p. 1; cf. already Decisions of the Federal Administrative Court (*Entscheidungen des Bundesverwaltungsgerichts* – BVerfGE 110, 203 at 210: function of normative guidance ('*normative Leitfunktion*').

[44] ECtHR, judgment of the Third Section of 22 Jan. 2004 – Application No. 72203/01 et al. –, Jahn and others, *Neue Juristische Wochenschrift* (2004), p. 923 et seq.; ECtHR, dec [GC] of 2 March 2005 – Application No. 71916/01 et al. –, von Maltzan and others, *Neue Juristische Wochenschrift* (2005), p. 2530 et seq.

[45] Cf. e.g., ECtHR, judgment of 29 Nov. 1991 – Application No. 44/1990/235/301 –, Vermeire, *Europäische Grundrechte-Zeitschrift* (1992), p. 12 at p. 13; ECtHR, judgment of 20 Sept. 1994 – Application No. 11/1993/406/485 –, Otto-Preminger-Institute, *Medien und Recht* (1995), p. 35 et seq.

sion in the *Görgülü* custody case.[46] In this decision, the Federal Constitutional Court indirectly[47] raised the ECHR to the status of a constitutional standard of review in spite of its formal rank as ordinary federal law, by not only committing the German state as a subject of international law but also all German state authorities and courts to the Convention. They have the constitutional obligation, deriving from the Basic Law's openness towards international law, to take account of the effect of the ECHR towards third parties when interpreting the German catalogue of fundamental rights. If they do not comply with this obligation, their acts can be challenged via a constitutional complaint, invoking the rule-of-law principle in conjunction with the relevant fundamental right. With this extremely effective leverage for protecting the observance of the guarantees of the Convention, the Federal Constitutional Court is, so to speak, 'indirectly in the service of enforcing international law'.[48]

The Federal Constitutional Court and the European Court of Justice in the supranational multilevel cooperation of the constitutional courts

The Basic Law's openness towards European Union law

In parallel to the openness towards international law which marks the dialogue between the Federal Constitutional Court and the European Court of Human Rights, I would like to place the complementary relationship between the Federal Constitutional Court and the European Court of Justice under the guiding concept of the Basic Law's openness towards European law. This recent line of argumentation was developed by the Federal Constitutional Court in its *Lisbon* decision.[49] The structure of this concept may be different from that of openness towards international law, but both principles are comparable in terms of their content and their functions. As is shown in its Preamble and in its Article 23, the Basic Law is a constitution which is open towards European law and which requires participation in European integration and in the international peaceful or-

[46] BVerfGE 111, 307; cf. on this, cited instead of many other sources: E. Klein, 'Zur Bindungswirkung staatlicher Organe an Entscheidungen des Europäischen Gerichtshofs für Menschenrechte', *Juristenzeitung* (2004), p. 1176 et seq.; J. Meyer-Ladewig/H. Petzold, 'Die Bindung deutscher Gerichte an Urteile des EGMR', *Neue Juristische Wochenschrift* (2005), p. 15 et seq.

[47] At the same time confirming the established case-law according to which the ECHR does not constitute a direct standard of review in constitutional complaint proceedings, cf. BVerfGE, *supra* n. 44 at 317; from the earlier case-law BVerfGE 10, 271 at 274; 34, 284 at 395; 40, 126 at 149; 74, 102 at 128; 82, 106 at 120; 83, 119 at 128.

[48] BVerfGE, *supra* n. 46, at 328-329.

[49] BVerfG, *supra* n. 4, marginal no. 225.

der. All constitutional bodies, including the Federal Constitutional Court, are in the service of this participation.

It is difficult to predict just how heavily the postulate of openness towards European law will weigh in future cases. In the light of the principle of federal comity (*Bundestreue*),[50] which has been developed by the Federal Constitutional Court, and the principle of *effet utile*[51] on the European level, which has been created by the Court of Justice, its potential should not be underestimated. At any rate, it knocks the bottom out of all statements that describe, often in martial terms and style, the relationship between the Federal Constitutional Court and the Court of Justice as allegedly being extremely tense and intricate. There is not, nor has there been, a question of a struggle for power or of a rivalry between the Federal Constitutional Court and the Court of Justice. Those who talk all the same about 'imminent judicial conflicts',[52] a 'war of the judges'[53] or 'complete supervision by Karlsruhe'[54] basically fail to see that the relationship between the Court of Justice and the Federal Constitutional Court is not about superiority or subordination but about appropriately sharing and assigning responsibilities in a complex multilevel system.[55]

Ensuring this is not an easy task, not least due to the different jurisdictional mandates of the two courts. While the Federal Constitutional Court approaches the process of European integration from the perspective of German constitutional law, the Court of Justice performs its review solely against the standard of Union law, without answering any questions regarding the interpretation of national law. With a view to these different competences and standards of review, the theoretical basic assumptions of the two courts as regards the interlocking of the national and the European legal systems are not identical, even today.[56] I would like to subsequently show the prudent *Verbund* strategies with which the two European constitutional courts reach convincing solutions all the same.

[50] In greater detail H. Bauer, *Die Bundestreue* (1992).

[51] Cf. on this S. Seyr, *Der "effet utile" in der Rechtsprechung des EuGH* (Berlin, Duncker & Humblot 2008); M. Potacs, 'Effet utile als Auslegungsgrundsatz', *Europarecht* (2009), p. 465 et seq.

[52] 'Denkschrift, Das Lissabon-Urteil des Bundesverfassungsgerichts: Auswege aus dem drohenden Justizkonflikt', *Der Spiegel* of 10 Aug. 2009.

[53] U. Karpenstein, Deutschlandradio of 10 Aug. 2009.

[54] C. Calliess, 'Unter Karlsruher Totalaufsicht', *Frankfurter Allgemeine Zeitung* of 27 Aug. 2009.

[55] F. Kirchhof, 'Die Kooperation zwischen Bundesverfassungsgericht und Europäischem Gerichtshof', in M. Herdegen, H.H. Klein, H.-J. Papier, R. Scholz & R. Herzog (eds.), *Staatsrecht und Politik: Festschrift für Roman Herzog zum 75. Geburtstag* (München, Beck 2009), p. 155 et seq.

[56] Overview at R. Streinz, *Europarecht: [mit Lissabonner Reformvertrag]* (Heidelberg, Müller 2008), marginal nos. 190 et seq.

The primacy of European law

The starting point of our reflections is the peculiarity of the European Union's high degree of integration, which is still aptly described with the term 'supranationalism'.[57] The autonomy and direct effect of Union law are two of its main characteristics.[58] In view of the direct effect of Union law, it is in the nature of things that collisions between Union law and domestic law cannot be ruled out. Notwithstanding different dogmatic approaches, there is agreement in European and national case-law as regards the fundamental question of the relation between the two levels: Union law has primacy over national law, as has been confirmed in Declaration No. 17 annexed to the Treaty of Lisbon.[59]

Since its landmark decision in the *Costa* v. *E.N.E.L* case, the Court of Justice has been establishing the primacy of (now) Union law over any national legal provision by virtue of its autonomy.[60] Besides the autonomous character of the legal system of the Community, another argument that is advanced in favour of absolute primacy of Community law is the necessity of the uniform application of Union law in the member states to ensure the functioning of the legal system of the Community. Guaranteeing legal unity is the task of the Court of Justice, which has the competence to pass final judgments in this matter.[61] The uniform application of Community/Union law is ensured by the extremely successful *Verbund* instrument of a dialogue between courts based on Article 267 of the Treaty on the Functioning of the European Union. This article gives national courts rights and obligations to refer cases for a preliminary ruling.[62]

The Federal Constitutional Court has recognised the primacy of Union law from the perspective of national constitutional law.[63] From the German perspec-

[57] Cf. Streinz, *supra* n. 56, marginal nos. 126 et seq. with further references; in an early decision, the Federal Constitutional Court already speaks of the 'supranational' public authority of the then European Economic Community, cf. BVerfGE 22, 293 at 295 et seq.

[58] Fundamental statements on this are contained in ECJ, Case 26/62, *van Gend en Loos* v. *Administratie der Belastingen*, *ECR* 1963, 1.

[59] Cf. BVerfG, *supra* n. 4, marginal no. 331.

[60] Fundamental statements in ECJ, Case 6/64, *Costa* v. *E.N.E.L.*, *ECR* 1964, 1251; cf. furthermore ECJ, Case 11/70, *Internationale Handelsgesellschaft* v. *Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, *ECR* 1970, 1125, marginal no. 3; ECJ, Case 106/77, *Amministrazione delle Finanze dello Stato* v. *Simmenthal*, *ECR* 1978, 629, marginal nos. 13 et seq.

[61] Cf. V. Skouris, 'Stellung und Bedeutung des Vorabentscheidungsverfahrens im europäischen Rechtsschutzsystem', *Europäische Grundrechte-Zeitschrift* 2008, p. 343 et seq.

[62] An overview of the cases referred by the national constitutional courts can be found at: Advocate-General J. Kokott, opinion delivered on 2 July 2009 in case C-169/08, *Presidente del Consiglio dei Ministri* v. *Regione autonoma della Sardegna*; the referral by the Italian Corte Costituzionale is acknowledged there as a component of a 'relationship of active cooperation'.

[63] A fundamental contribution on this is R. Streinz, *Bundesverfassungsgerichtlicher Grundrechtsschutz und Europäisches Gemeinschaftsrecht* (Baden-Baden, Nomos-Verl.-Ges. 1989).

tive, however, as well as from that of other member states,[64] such primacy is neither absolute nor based on Union law, but anchored in national constitutional law, and therefore also limited by it. According to the Federal Constitutional Court's case-law, which has recently been confirmed in the *Lisbon* judgment,[65] the primacy of application of Union law applies by virtue of an authorisation by constitutional law, i.e. by virtue of the bridging function of the German Acts Approving the European Treaties.[66]

What cooperation and coordination strategies are employed by the Federal Constitutional Court to ensure an adequate fundamental rights protection in the European Union and to protect Germany from Union institutions overstepping the boundaries of their powers and German constitutional identity? Apart from the '*Solange* technique' of refraining from exercising the right of review which the Federal Constitutional Court developed for fundamental rights protection, we will look in greater detail at the *ultra vires* and the identity review that the Federal Constitutional Court has developed as limits to the transfer of sovereign powers.

Adequate fundamental rights protection in the European Union

From the very beginning, the Federal Constitutional Court has stood up for the guarantee of an adequate fundamental rights protection in the European Community. In its *Solange I* decision of 1974,[67] the Federal Constitutional Court reserved itself the right to measure Community law against the precepts of the Basic Law as long as (*Solange*) the European Community did not have a catalogue of fundamental rights comparable to the one contained in the Basic Law. The Court of Justice has taken on this challenge. Since the beginning of the 1970s, it has consistently extended the Community's fundamental rights protection.[68] It

[64] Cf. on this R. Streinz, 'Verfassungsvorbehalte gegenüber Gemeinschaftsrecht – eine deutsche Besonderheit? Die Schranken der Integrationsermächtigung und ihre Realisierung in den Verfassungen der Mitgliedstaaten', in H.-J. Cremer & H. Steinberger (eds.), *Tradition und Weltoffenheit des Rechts: Festschrift für Helmut Steinberger* (Berlin [u.a.], Springer 2002), p. 1437 at p. 1456 et seq.; cf. also P.M. Huber, *Offene Staatlichkeit: Vergleich*, in A. von Bogdandy & P.M. Huber (eds.), *Handbuch Ius Publicum Europaeum* (Heidelberg, Müller 2007), Vol. II, § 26, marginal nos. 34 et seq.; P. Kirchhof, 'Das Grundgesetz – ein oft verkannter Glücksfall', *Deutsches Verwaltungsblatt* (2009), p. 541 at p. 543-544.; an overview to the reationship between Community law and national law from the side of the member states can be found at T.C. Hartley, *The foundations of European Community law: an introduction to the constitutional and administrative law of the European Community* (Oxford [u.a.], Oxford Univ. Press 2007), p. 239 et seq.

[65] BVerfG, *supra* n. 4, marginal nos. 332, 339.

[66] Cf. on this in particular BVerfGE 73, 339 at 374-375 – *Solange II*.

[67] BVerfGE 37, 271 – *Solange I*.

[68] Fundamental statements in ECJ, Case 29/69, *Stauder* v. *Ulm*, *ECR* 1969, 419, marginal no. 7; ECJ, Case 11/70, *Internationale Handelsgesellschaft* v. *Einfuhr- und Vorratsstelle für Getreide und Futtermittel*,

found these fundamental rights particularly in the ECHR and the constitutional traditions common to the member states, as has meanwhile been explicitly provided by Article 6(3) TEU, and lends them the character of general principles of Community law.

Impressed by this fundamental rights jurisprudence, the Federal Constitutional Court, in its *Solange II* decision from 1986, regarded its former requirement from the *Solange I* decision as factually having been met. It is true that it has not in principle abandoned the claim to review acts of Union law for their conformity with the fundamental rights. However, it does not exercise its jurisdiction any longer because *and* as long as a fundamental rights protection is guaranteed in the sovereign sphere of the European Union that is essentially comparable to the standard of the Basic Law.[69] This case-law, developed in its *Maastricht* judgment from 1993,[70] has been confirmed in its *Banana Market* decision of 2000,[71] and most recently in its decision on the Lisbon Treaty.[72]

What this means for judicial practice becomes apparent in particular in the procedural solution of the *Banana Market* decision. According to this decision, constitutional complaints and submissions by courts are inadmissible from the outset if their grounds do not state that the evolution of Community/Union law generally has declined below the unconditionally required standard of fundamental rights. The European Union's fundamental rights commitment pursuant to Article 6(3) TEU and the continuing endeavours to extend European fundamental rights protection make it unlikely that this admissibility threshold may ever be passed. Against this background, the reserve competence that theoretically[73] is still due to the Federal Constitutional Court cannot be understood as a threat to the Court of Justice. Instead, it underlines the recognition, common to modern democratic constitutions, of all public authority being bound by fundamental

ECR 1970, 1125, marginal no. 4, and ECJ, Case 4/73, *Nold* v. *Commission*, *ECR* 1974, 491, marginal no. 13; cf. J. Schwarze, 'Der Schutz der Grundrechte durch den EuGH', *Neue Juristische Wochenschrift* (2005), p. 3459 et seq.

[69] BVerfGE 73, 339 at 376, 387 – *Solange II*; from the immense array of literature on the '*Solange*' decisions and their consequences cf. by way of example, C. Tomuschat, 'Aller guten Dinge sind III? Zur Diskussion um die Solange-Rechtsprechung des BVerfG', *Europarecht* (1990), p. 340 et seq.

[70] BVerfGE 89, 155 – *Maastricht* at 174-175.

[71] BVerfGE 102, 147 at 167 – *Banana market organisation*; on this for instance C.D. Classen, 'Anmerkung zum Beschluss des BVerfG zur Bananenmarktordnung', *Juristenzeitung* 2000, p. 1157 et seq.; F.C. Mayer, 'Grundrechtsschutz gegen europäische Rechtsakte durch das BVerfG: Zur Verfassungsmäßigkeit der Bananenmarktordnung', *Europäische Zeitschrift für Wirtschaftsrecht* (2000), p. 685 et seq.

[72] BVerfG, *supra* n. 4, marginal no. 337.

[73] On this most recently P.M. Huber, 'Das europäisierte Grundgesetz', *Deutsches Verwaltungsblatt* (2009), p. 574 at p. 578 with further references.

rights.[74] This is expressed not least in the Charter of Fundamental Rights of the European Union that has been anchored in primary law according to the Lisbon Treaty.

The guarantee of national constitutional identity
(Die integrationsfeste mitgliedstaatliche Verfassungsidentität)

With European fundamental rights protection thus being set on the right track, the question remains to be clarified of where the limits of constitutional empowerment for integration are to be located. A convincing answer to this question must take as a starting point two principles which are two sides of the same coin: on the one hand, the need to ensure the functioning of the European Union and of its legal system, a cause which is championed by the Basic Law itself in its Article 23, and on the other hand, the European Union's obligation to respect the member states' national identities, including their constitutional structures in Article 4(2) Lisbon TEU.[75] To give the boundaries of integration that thereby have been traced a more concrete shape, the Federal Constitutional Court has first of all created the concept of the *ausbrechender Rechtsakt* – a legal act that transgresses the boundaries of the sovereign powers accorded to the European institutions and bodies by way of conferral. To this concept was added the criterion of the inviolable constitutional identity in the *Lisbon* judgment.[76]

Taking up the line of argument from its *Kloppenburg* decision,[77] the Federal Constitutional Court in its *Maastricht* judgment reserved to itself the review of whether legal acts of the European institutions and bodies remain within the boundaries of the sovereign powers accorded to them.[78] On closer inspection, this statement, which has sometimes been understood as a warning directed at the Court of Justice, has lost much of its threat. First of all, the standard that the Federal Constitutional Court applies when reviewing of acts of German authorities in the sphere of Community law has become more flexible by virtue of the qualifica-

[74] Aptly observed by J. Limbach, 'Die Kooperation der Gerichte in der zukünftigen europäischen Grundrechtsarchitektur', *Europäische Grundrechte-Zeitschrift* (2000), p. 417 at p. 420.

[75] A. Voßkuhle, in C. Starck, H. v. Mangoldt & F. Klein (eds.), *Kommentar zum Grundgesetz: [in drei Bänden]* (München, Vahlen 2005), Art. 93, marginal no. 85.

[76] Cf. on this H. Sauer, 'Kompetenz- und Identitätskontrolle von Europarecht nach dem Lissabon-Urteil – Ein neues Verfahren vor dem Bundesverfassungsgericht?', *Zeitschrift für Rechtspolitik* (2009), p. 195 et seq.; with a critical view V. Skouris, *Das Verhältnis des Europäischen Gerichtshofs zu den nationalen Verfassungsgerichten, Festvortrag anlässlich des österreichischen Verfassungstags 2009*, manuscript, p. 13 et seq.

[77] BVerfGE, *supra* n. 22, at 240 et seq.

[78] BVerfGE, *supra* n. 70, at 209-210; cf. also BVerfG, order of the First Chamber of the Second Senate of 17 February 2000 – 2 BvR 1210/98 –, *Neue Juristische Wochenschrift* (2000), p. 2015 at p. 2016 – *Alcan*; by way of example from among the numerous critical voices in the literature M. Zuleeg, 'Die Rolle der rechtsprechenden Gewalt in der Europäischen Integration', *Juristenzeitung* (1994), p. 1 at p. 3 et seq.

tions provided by Article 23(1) of the Basic Law. Furthermore, as an element of the Basic Law's openness towards European Union law, the court's review of the applicability of secondary Community legislation is performed in a 'relation of cooperation' with the Court of Justice.[79] And finally, the exercise of the Federal Constitutional Court's reserve competence may only exceptionally be exercised, i.e., if legal protection cannot be obtained at Union level.[80]

There has been a broad, ongoing discussion in the legal literature about the question of when acts of the Union might give rise to an *ultra vires* review. Theoretically, this review concerns all legal acts of all Union bodies, i.e., not only legislative acts such as, e.g., the EU directive on data retention[81] but also decisions of the Court of Justice. The latter's case-law justifying new Union competences or extending existing ones, which has been criticised in terms of its methodology, has time and again been the focus of attention,[82] with the 2005 *Mangold* judgment on age discrimination having been the object of particularly fierce criticism.[83] It must, however, be noted that in the seventeen years that have passed since the pronouncement of the *Maastricht* judgment, the two Senates of the Federal Constitutional Court have never seen themselves compelled to establish that a legal act transgressed the boundaries of the sovereign powers accorded to the European institutions and bodies by way of conferral. All actors involved have made their contribution to achieving this harmony. The German legislative bodies have promptly and duly implemented the rulings of the court in Luxembourg – for instance in connection with the access of women to service involving the use of arms in the Federal Armed Forces[84] – with the Federal Constitutional Court not-

[79] BVerfGE, *supra* n. 70 at 175.

[80] BVerfG, *supra* n. 4, marginal no. 340.

[81] Cf. ECJ, Case C-201/06, *Ireland* v. *European Parliament*, *Neue Juristische Wochenschrift* (2009), p. 1801 et seq.; on this S. Simitis, 'Der EuGH und die Vorratsdatenspeicherung oder die verfehlte Kehrtwende bei der Kompetenzregelung', *Neue Juristische Wochenschrift* (2009), p. 1782 et seq.

[82] In a pointed manner for instance R. Herzog/L. Gerken, 'Stoppt den Europäischen Gerichtshof', *Frankfurter Allgemeine Zeitung* of 8 Sept. 2008, p. 8; J. Wieland, 'Der EuGH im Spannungsverhältnis zwischen Rechtsanwendung und Rechtsgestaltung', *Neue Juristische Wochenschrift* (2009), p. 1841 et seq.

[83] ECJ, Case C-144/04, *Mangold* v. *Helm*, *ECR* 2005, I-9981, marginal nos. 55 et seq. The Grand Chamber of the European Court of Justice established that the period prescribed for the transposition into German law of the relevant EU directive had not yet expired but regarded this as immaterial because the ban on discrimination on grounds of age had to be regarded as a general principle of Community law rooted in the general principle of equal treatment. From among the large number of statements concerning the *Mangold* case cf. by way of example, T. Gas, 'Mangold und die Folgen', *Europäische Zeitschrift für Wirtschaftsrecht* (2007), p. 713 et seq.; R. Streinz/C. Herrmann, 'Der Fall Mangold – Eine „kopernikanische Wende im Europarecht"?', *Recht der Arbeit* (2007), p. 165 et seq. [*See* now BVerfG, judgment of the Second Senate of 6 July 2010 – 2 BvR 2661/06 – <www.bundesverfassungsgericht.de> – *Honeywell* decision; cf. addendum to editorial, *supra* p. 174 – *EuConst*.]

[84] New version of Art. 12a para. 4 sentence 2 GG amended by the Law Amending the Basic Law (Art. 12a) (*Gesetz zur Änderung des Grundgesetzes (Art. 12a)*) of 19 Dec. 2000, Federal Law Gazette (*Bundesgesetzblatt* – BGBl.) 2000 I, p. 1755.

ing that the latitude for incorporation of Union law into German law should be used in a manner considerate with the fundamental rights.[85] The Court of Justice, for its part, has contributed to constructive co-existence by showing the first signs of a change in the image that it has of itself. This change sometimes becomes apparent in a more restrictive interpretation of Union competences[86] and more fundamentally in the area of direct and indirect taxation,[87] where the court's approach is more cautious than in earlier case-law.[88] The same applies to the realisation of the fundamental freedoms in the subject areas that are the competence of the member states, such as health policy.[89] Finally, the Court of Justice has on several occasions shown consideration for the member states' identities, their particular traditions and important structural principles of their legal systems. By way of example, I would like to mention the recognition of member states' decisions restricting fundamental Union freedoms by giving priority to the protection of human dignity,[90] concerns of freedom of assembly and of opinion,[91] the protection of national culture[92] or the combating of crime related to games of chance.[93]

'Emergency brake mechanisms' are most effective if they do not have to be applied. Precisely because of their existence – and not despite their existence – it has never 'come to the crunch'. This has made it possible for the Federal Constitutional Court to complement the *ultra vires* review with the identity review in its *Lisbon* judgment without having to fear that it would more frequently get into

[85] Cf. BVerfGE 113, 273 – European Arrest Warrant Act on police and judicial cooperation in the context of the 'Third Pillar' of the European Union.

[86] For instance ECJ, Case C-376/98, *Germany* v. *European Parliament and Council of the European Union* ('Tobacco Advertising Directive I'), *ECR* 2000, I-8419, marginal nos. 76 et seq.; differently, however, ECJ, Case C-380/03, *Germany* v. *European Parliament and Council of the European Union* ('Tobacco Advertising Directive II'), *ECR* 2006, I-11573, marginal nos. 36 et seq.; a critical view on this is taken for instance by J.F. Lindner, *Bayerische Verwaltungsblätter* (2007), p. 304 et seq.; T. Stein, 'Zur Tabakwerberichtlinie', *Europäische Zeitschrift für Wirtschaftsrecht* (2007), p. 54 et seq.

[87] Cf. e.g., ECJ, Case C-376/03, *D* v. *Inspecteur van de Belastingdienst*, *ECR* 2005, I-5821; ECJ, Case C-513/04, *Kerckhaert and Morres* v. *Belgium*, *ECR* 2006, I-10967; ECJ, Case C-184/05, *Twoh International BV*, *ECR* 2007, I-7897; ECJ, Case C-284/06, *Burda*, *ECR* 2008, I-4571.

[88] Cf. on this and on the following also T. v. Danwitz, 'Zur Kooperation der Gerichtsbarkeiten in Europa', manuscript of a paper presented on 22 Oct. 2009, p. 17-18.

[89] ECJ, Case C-171/07, *Doc Morris*, Europäisches Wirtschafts- und Steuerrecht (2009), p. 226 et seq. (Provisions restricting the right to operate a pharmacy to pharmacists alone); ECJ, Case C-141/07, *Commission* v. *Germany*, *Neue Juristische Wochenschrift* (2008), p. 3693 et seq.

[90] ECJ, Case C-36/02, *Omega* v. *Bonn*, *ECR* 2004, I-9609 (*Laserdrome*); cf. on this V. Skouris, 'Vorrang des Europarechts: Verfassungsrechtliche und verfassungsgerichtliche Aspekte', in W. Kluth (ed.), *Europäische Integration und nationales Verfassungsrecht* (Baden-Baden, Nomos 2007) at p. 37 et seq.

[91] ECJ, Case C-112/00, Schmidberger, *ECR* 2003, I-5659 (*Brenner motorway closure*).

[92] ECJ, Case C-260/89, *ERT* v. *DEP*, *ECR* 1991, I-2925.

[93] ECJ, Case C-42/07, *Liga Portuguesa de Futebol Profissional*, *Europäische Zeitschrift für Wirtschaftsrecht* (2009), p. 689 et seq.

conflict with the Court of Justice. Identity review is based on the recognition that the Basic Law's empowerment to transfer sovereign powers to the European Union finds its limits in the Constitution's substantive core of identity, which is protected by Article 79(3) of the Basic Law – in other words, what the Constitution-amending legislature is unamenable to must also remain off-limits to integration. Just as only the Federal Constitutional Court can exercise the concrete review of statutes according to Article 100 of the Basic Law, which protects the parliamentary legislature, so too is it solely for the Federal Constitutional Court to review whether the inviolable core content of the constitutional identity of the Basic Law pursuant to Article 23(1) third sentence in conjunction with Article 79(3) of the Basic Law is respected.[94] This review power, which is rooted in German constitutional law, is at the same time corroborated by European Union law, as it goes 'hand in hand'[95] with the protection of national constitutional identity and the principle of sincere cooperation in accordance with the European Union Treaty in its Lisbon version. Thus, the 'bridge' between Union law and German national law continues to be secured by the railing of continuing German constitutional empowerment. However, the Federal Constitutional Court, when exercising this review, will continue to observe the principle of the Basic Law's openness towards European integration, thereby continually taking into account the responsibility for integration which is due by the court as it is by all other German constitutional bodies.

The future of multilevel cooperation of the European constitutional courts

It is difficult to take stock of the *Verbund* of the three European constitutional courts, if only because the image that the institutions have of themselves sometimes seems to leave a more important mark than their relationship in the *Verbund*. As long as the cognitive dissonance keeps within reasonable bounds, occasional divergences between an institution's perception of itself and the way in which it is perceived from the outside do have, however, a certain inspirational potential. The three courts each have their own prisms reflecting different (legal) views of the world while at the same time making these views possible. However, as we have seen, the Federal Constitutional Court, the European Court of Justice and the European Court of Human Rights administer justice not by shielding themselves from each other, but by engaging in the mutual exchange of ideas and prac-

[94] BVerfG, *supra* n. 4, marginal no. 240; cf. already BVerfGE 113, 273 at 296 – *European Arrest Warrant Act*.

[95] BVerfG, *supra* n. 4, Headnote 4 and marginal no. 240.

tice.[96] In doing so, diverging decisions have only seldom been passed, with occasional notes of discord always resulting in productive power for new developments.

Some may regret that the Federal Constitutional Court no longer has a unique position as regards German constitutional law, because due to progressing internationalisation and Europeanisation, it no longer has the exclusive right of review of the law that is applicable in Germany. Precisely for the Federal Constitutional Court, however, an important possibility of compensation presents itself: the possibility of contributing, in the European multilevel system, towards the establishment of a binding common European constitutional order with fundamental rights standards that are applicable Europe-wide, and of expertly accompanying, in doing so, the process of coherence in the multilevel cooperation system of the Court of Justice and the European Court of Human Rights.[97] Understood in this manner, the sharing of responsibilities between the courts does not result in a reduction but in a tripling of the fundamental rights protection in the *Verbund* of the constitutional jurisdictions in Karlsruhe, Strasbourg and Luxembourg.

Actually, the multilevel cooperation of the European constitutional courts involves more actors than the three who have been the focus of my observations. In particular, the constitutional courts of the other European states and the exchange of ideas and experiences that flourishes among them may not go unmentioned. After 1945, an expansion of constitutional jurisdiction took place in Western Europe,[98] and more recently the constitutional courts of the states of Central and Eastern Europe also entered the stage of constitutional and European law.[99] Besides, the constitutional courts of the member states cooperate not only with the Court of Justice and the European Court of Human Rights in the multilevel constitutional jurisdiction, but also with each other, for instance in the personal interaction of their judges[100] and particularly by means of the mutual reception of

[96] Cf. Hoffmann-Riem, *supra* n. 41, at p. 474.

[97] Cf. on this M. Breuer, 'Offene Fragen im Verhältnis von EGMR und EuGH', *Europäische Grundrechte-Zeitschrift* (2005), p. 229 et seq.; A. Haratsch, 'Die Solange-Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 66 (2006), p. 927 et seq.; N. Lavranos, 'Das So-Lange-Prinzip im Verhältnis von EGMR und EuGH', *Europarecht* (2006), p. 79 et seq.; S. Schmahl, 'Grundrechtsschutz im Dreieck von EU, EMRK und nationalem Verfassungsrecht', *Europarecht – Supplement 1* (2008), p. 7 et seq.

[98] Cf. C. Starck (ed.), *Verfassungsgerichtsbarkeit in Westeuropa* (Baden-Baden, Nomos 2007), part I: Berichte, 2nd edn.

[99] Cf. O. Luchterhandt, C. Starck & A. Weber (eds.), *Verfassungsgerichtsbarkeit in Mittel- und Osteuropa* (Baden-Baden, Nomos-Verl.-Ges. 2007), part I: Berichte.

[100] Cf. in this direction J. Limbach, 'Globalization of Constitutional Law through Interactions of Judges', *Verfassung und Recht in Übersee* (2008), p. 51 at p. 52 et seq.; cf. on the personal and institutional interconnections also Skouris, *supra* n. 76, p. 2-3.

their case-law.[101] Thus, the case-law of the constitutional courts that form part of the *Verbund* proves to be a discursive struggle for the 'best solution', which makes the multilevel cooperation between the European constitutional courts ultimately a multilevel instance for learning (*Lernverbund*).[102] The mutually inspiring further development of the European constitutional culture,[103] which has only been touched upon here, is extremely promising as regards European integration by constitutional law and constitutional jurisdiction.

[101] Cf. from the Federal Constitutional Court's recent case-law for instance the reference to the Conseil d'État in BVerfGE 118, 79 at 96.

[102] Cf. F. Merli, *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 66 (2007), p. 418 et seq.; Hoffmann-Riem, *supra* n. 41, at p. 26.

[103] Fundamental statements on this in Häberle (2009), *supra* n. 3, p. 6 et seq., p. 460 et seq.; cf. also F.C. Mayer, 'Europa als Rechtsgemeinschaft', in G.F. Schuppert, M. Bach & H. Schuppert Pernice (eds.), *Europawissenschaft* (Baden-Baden, Nomos-Verl.-Ges. 2005), p. 429 et seq.