Special Issue: The Basic Law at 60

The Basic Law at 60 – From 1949 to 2009: The Basic Law and Supranational Integration

By Juliane Kokott [*]

A. Introduction

Sixty years after the entry into force of the Basic Law the world is much more interdependent. The concepts of statehood and sovereignty have changed. The following contribution examines how the Basic Law, as amended and interpreted by the Federal Constitutional Court, deals with this development. As a foundational matter, the Basic Law contains a commitment towards integration, although sixty years ago integration largely was seen as a promise. Now, 60 years later, the Federal Constitutional Court is developing limits to integration and recently ruled out Germany's participation in a European Federal State and sees itself as the guardian of German sovereignty. A change of paradigms seems to have taken place. For the founding fathers and mothers, a united—possibly even federal—Europe was considered to be the solution to protect against war and relapse towards an undemocratic, terroristic regime. But now the Federal Constitutional Court feels compelled to protect democracy and the core values of the Basic Law against "too much" European integration.

The 60th birthday of the Basic Law thus invites us to consider Germany's constitutional law of supranational integration in context. The movement from an emphasis on integration towards protection of sovereignty is a reaction to the success and density of European integration, but also to Germany's growing importance within the broader world community of states. I will take the 60th birthday of the Basic Law as an opportunity to recall the open and integration-friendly spirit in which it was drafted and use that as a background for present approaches.

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B. Commitment Towards Integration and the Protection of Sovereignty Under the Basic Law

"[M]oved by the purpose to serve world peace as an equal part in a unified Europe, the German People have adopted, by virtue of their constituent power, this Constitution."[1]

With this preambular language the Basic Law calls for integration. From the Preamble, the whole constitutional text draws its actual judicial and political qualification. And following the promise of the Preamble, Germany now is comprehensively integrated in the international community and especially in Europe.

But the Federal Constitutional Court's *Lisbon Case* of 30 June 2009 has recently shown the limits of integration. Although, following the Court's ruling, Germany can go forward with its ratification of the Lisbon Treaty, the parliamentary Act Approving the Treaty of Lisbon will be seen as compatible with the Basic Law only if it takes into account the safeguards established by the Federal Constitutional Court. That is to say, the Act Approving the Treaty of Lisbon must be interpreted in conformity with the Constitution. Furthermore, the accompanying Act Extending and Strengthening the Rights of the *Bundestag* and the *Bundesrat* in European Union Matters was declared unconstitutional and has to be amended before the instrument of ratification of the Lisbon-Treaty can be deposited. The legislature must strengthen its own participation-rights in matters concerning the European Union. The Federal Constitutional Court thereby obliges the democratic legislature to channel and limit the effects of supranationalisation on the German people and the democratic process. Above all, the Federal Constitutional Court emphasises again that the peoples of the Member States, not the people of the European Union as a whole, are the legitimising basis for the enforcement of Community law. In Germany, Community law is only valid because of and insofar as it is approved by the German parliament.

However, according to the jurisprudence of the European Court of Justice (ECJ), the autonomy and primacy of Community law are cornerstones of European Integration. As early as 1964 the ECJ had ruled that "the laws stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question."[2]

Thus, there is conflict between the protection-of-sovereignty-approach of the Federal Constitutional Court and the integration-oriented-approach of the European Court of

[1] GRUNDGESETZ [GG] [Constitution] Preamble (F.R.G.).

[2] Case 6/64, Costa v. E.N.E.L., 1964 E.C.R. 585.

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Justice. Up until now, both Courts have been living with this conflict and it did not hinder the integration process.

The Federal Constitutional Court has deduced the protection-of-sovereignty-approach from the Basic Law. The following, however, shows that the Basic Law was drafted as an uttermost open and integration-committed Constitution, which the Constitutional Court in the *Lisbon Case* recognized more than in past-decisions. The Court declared that "[t]he constitutional mandate to realise a united Europe, which follows from Article 23.1 of the Basic Law and its Preamble means in particular for the German constitutional bodies that it is not left to their political discretion whether or not they participate in European integration."[3]

Tensions between the originally very open and integration-friendly approach of the Basic Law and the present worries about the erosion of the German nation-state's competences are dramatically demonstrated by comparing quotes from the time the Basic Law was drafted with the approach taken by the Federal Constitutional Court in the *Lisbon Case*.

To reawaken the spirit in which the Basic Law was drafted, allow me to quote Carlo Schmid, who played the leading role in the Herrenchiemsee Convention that had a strong influence on the workings of the Constitutional Convention (*Parlamentarischer Rat*). In the Constitutional Convention of 1948, he said that the provision pursuant to which

> the general rules of public international law are directly enforceable …, expresses very lively that the German People … are resolved to step out of the phase of the nation state and move beyond to a supranational phase. … We should … open the doors into a politically restructured supranational world order widely. … Our Basic Law forswears stabilising state sovereignty like a 'Rocher de bronze' (solid rock), on the contrary, it makes the surrender of sovereign powers to international organisations easier than any other constitution in the world.[4]

The Federal Constitutional Court emphasises, however, that the Basic Law only permits "a European Union which is designed as an association of sovereign national states

[3] Lisbon Case, BVerfG [Federal Constitutional Court], 2 BvE 2/08, of 30 June 2009; citations are to the legally not binding English translation of the Federal Constitutional Court *available at*: http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html, para. 225.

[4] *Deutscher Bundestag / Bundesarchiv* (eds.): *Der Parlamentarische Rat 1948-1949: Akten und Protokolle*, Vol. 9 Plenum, 443 (R. Oldenbourg 1996), (author's translation).

(*Staatenverbund*)."[5] The Court continues: "The concept of *Verbund* covers a close long-term association of *states which remain sovereign*, an association which exercises public authority *on the basis of a treaty*, whose fundamental order, however, is subject to the disposal of the Member States alone and in which the peoples of their Member States, i.e. the citizens of the states, remain the subjects of democratic legitimisation."[6]

Obviously, both *Zeitgeist* and the world order have changed in the sixty years between 1949 and 2009. In the beginning, Germany hoped to win back its international recognition and to be once again admitted to the international community, which was at the time only very little-integrated. Only the increasing density of European integration has given Germany—in the meantime fully readmitted to the international community—reason to consider the limits and conditions of international integration. Thus, two criteria, an objective one and a subjective one, play together. *Objectively*, one can see a need for action because of the intensity of integration. The Treaty of Lisbon particularly constitutes new competences for the European Union, broadens already existing competences with regard to content, and supranationalises matters that used to be subject to intergovernmental cooperation. This concerns such sensible policy fields as criminal law, family law as well as police and judicial cooperation in criminal matters. *Subjectively*, Germany has gradually stepped out of the shadows of its past and can now act with greater self-confidence in the international community.

The Federal Constitutional Court sees no contradiction between the commitment to integration found in the text of the Basic Law and the protection of national sovereignty it seeks to achieve in the *Lisbon Case*. According to Article 4 of the Lisbon Treaty, the Union indeed respects the "national identities [of the Member States], inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government."[7]

The point is finding the right balance. European integration cannot key itself to the interpretation and limits derived from the Basic Law by the Federal Constitutional Court. The German Constitution has no monopoly on the ideal protection of democracy, the rule of law, and fundamental rights. Certainly, supranationalisation may not lead to the oblivion of fundamental rights, the rule of law, or democracy. This would contradict fundamental principles of European and international integration every bit as much as German constitutional principles. The solution must lie in recalling the international and open spirit in which the Basic Law was drafted and adopted in 1949.

[5] Lisbon Case, BVerfG, 2 BvE 2/08, of 30 June 2009, para. 229.

[6] *Id.*

[7] Art. 4 TFEU (Treaty on the Functioning of the European Union).

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The Federal Constitutional Court properly takes this tradition into consideration in the *Lisbon Case*, but increasingly shows doubts about this part of the Basic Law's founding heritage. It does not forbid the Treaty's ratification but only manages to avoid disruptive conflict by insisting upon an interpretation of the instrument of ratification that is in conformity with its interpretation of the Basic Law. The Constitutional Court, thereby, also claims the competence to interpret the Treaty of Lisbon itself, which in the last instance must be the sole province of the European Court of Justice. Under Article 234 Paragraph 3 EC, for example, all national courts of last instance have to refer to the ECJ for a preliminary ruling, if questions of Community law arise.

Moreover, the Federal Constitution Court reviews in particular, "whether legal instruments of the European institutions and bodies, adhering to the principle of subsidiarity under Community and Union law, keep within the boundaries of the sovereign powers accorded to them by way of conferred power,"[8] as well as whether the inviolable core of constitutional identity is preserved. Yet, in my opinion, the special openness for integration is also part of the constitutional identity of the Basic Law.

Starting with the Preamble, the Basic Law makes Germany's *duty* towards European integration a national objective. European integration in that sense is not only to be seen as something economical or technical, but in a much broader sense—Europe as a promise for peace! In achieving this goal, modifications of state sovereignty are permitted.

It is important to recall the background of European Integration, in the words of Winston Churchill's Zurich speech of 1946:

> [B]ut over wide areas are a vast quivering mass of tormented, hungry, careworn, and bewildered human beings, who wait at the ruins of their cities and their homes and scan the dark horizons for the approach of some new form of tyranny or terror. … Yet all the while there is a remedy … It is to recreate the European fabric, or as much of it as we can, and to provide it with a structure under which it can dwell in peace, in safety, and in freedom. We must build a kind of *United States of Europe*. … The structure of the United States of Europe will be such as to make the material strength of a single State less important.[9]

[8] Lisbon Case, BVerfG, 2 BvE 2/08, of 30 June 2009, para. 240.

[9] Winston Churchill, speech at the University of Zurich (Switzerland) on 19 September 1946, *available at* http://www.coe.int/t/e/com/about_coe/discourschurchill.asp (last visited 13 January 2010).

C. The Preamble, Articles 23 and 24 of Germany's Basic Law

In June 1949, Carlo Schmid, father of the Basic Law, also wrote the following: "You have to want Europe as a federal state, if you want an effective Europe."[10] Whether the mothers and fathers of the Constitution had in mind the integration of Germany as a completely sovereign state in the midst of the European Community or a European Federal State, will not be discussed here. In any event, today the securing of the German national existence and sovereignty seems to be in the foreground. Without a doubt, new challenges arise when dealing with the preservation and organisation of democracy and parliamentary rights as well as the protection of fundamental rights in the environment of supra- and international systems. They require new answers, which, for example the Treaty of Lisbon is trying to give. New challenges and changing circumstances should not, however, lead us to forget that the founding fathers and mothers put great emphasis on the goals of European and international integration. According to Carlo Schmid, the Basic Law should leave to politics a wide margin of appreciation as to the modalities of the transition to "a politically newly structured supranational world order."[11]

Despite this foundational heritage the Constitutional Court has limited this margin of appreciation. The *Lisbon Case* further develops these limits.

Of course, these boundaries to integration also result from the present intensity of integration as compared with that which existed in 1948 and 1949. Article 24 of the Basic Law speaks of the transfer of sovereign powers onto "international" institutions. In this respect, the Herrenchiemsee Convention could have had in mind the League of Nations with its limited capability to act. It was of an "intergovernmental" nature, meaning it was founded on the voluntary cooperation between governments. The supranational European integration goes far beyond that.

European integration is supranational because the Community institutions have their own competences, which they can exert without the consent of the Member States. Furthermore, Community law is directly applicable in the Member States and claims primacy in application over national law. This form of integration can interfere profoundly with domestic structures. A famous example is the opening of the German Army (*Bundeswehr*) to women, which was achieved by a ruling of the ECJ and against an interpretation of the Basic Law that precluded the integration of women into the Army. At present, some maintain that the application of the European prohibition against age-

[10] Carlo Schmid, *Deutschland und der Europäische Rat*, SCHRIFTENREIHE DES DEUTSCHEN RATES DER EUROPÄISCHEN BEWEGUNG, Vol. 1 (1949) (author's translation).

[11] *Deutscher Bundestag / Bundesarchiv* (eds.): *Der Parlamentarische Rat 1948-1949: Akten und Protokolle*, Vol. 9 Plenum, 40 (R. Oldenbourg 1996) (author's translation).

discrimination, as a fundamental principle, with direct horizontal effect in the legal orders of the Member States constitutes an *ulta vires* act, violating national sovereignty.

Article 23, as amended, integrated the Constitutional Court's long-unfolding approach to European integration into the text of the Basic Law and sets forth conditions and limitations for further supranational integration. But bearing in mind both the text and the history of the Basic Law, a policy evidently hostile towards European integration would also be unconstitutional. Such efforts, too, could be challenged before the Constitutional Court.

The preceding remarks aim to show that the path between the Basic Law's historical commitment to integration and the limits on integration set forth by the Constitutional Court in the *Lisbon Case* is a narrow one.

D. Conditions for Integration

The following three topics will exemplify the tensions that arise between the openness for integration and the protection of sovereignty: I. Supranationalisation of Criminal Law; II. Democratic Legitimacy; and III. "Legal Instruments Transgressing the Limits" ("*Ausbrechende Rechtsakte*") / Ultra Vires Acts. Constitutional conditions for integration may result from these tensions.

I. Supranationalisation of Criminal Law, Rights of the Defendant

Criminal law interferes profoundly with the civil liberties and privacy of every individual. Because of a higher effectiveness, a supranationalised prosecution of criminal norms puts a strain on the offender, but also on suspects: national borders only serve conditionally as a protection from criminal prosecution. Because of its high intensity of encroachment, criminal law is a good testing ground for and a good example for the Basic Law's commitment to integration.

The creation of an area of freedom, security, and justice has been one of the explicit goals of the European Union since 1999. The Treaty of Lisbon aims to transfer cooperation in criminal matters into the supranational law and decision-making process of the Community. Evidently, integration now also includes criminal law, in which the thin line between civil liberties of the individual, on the one hand, and the collective security of the people of Europe, on the other hand, has to be traversed. But a certain supranationalisation of criminal law is simply the necessary corollary of the European fundamental freedoms. If a citizen can freely move his capital and resources across borders without any restrictions, this must not allow him to elude criminal responsibility. Money laundering, human trafficking, and international terrorism, but also significant cross-border environmental damages, need countermeasures on the European level and in some degree also on the international level of the United Nations.

Examples for this cooperative dynamic in criminal law in the European Union are the creation of EUROJUST,[12] the European arrest warrant,[13] but also the prohibition of "*ne bis in idem*" in different Member States.[14] Also worth mentioning are the Framework Decisions on combating organised crime,[15] in particular counterfeiting[16] and money laundering,[17] as well as fighting racism and xenophobia,[18] the interconnection of criminal records,[19] and the Prüm Convention on the stepping up of cross border cooperation, particularly in combating terrorism, cross-border crime, and illegal migration.[20]

Not only the European Union, but also the stronger integrated European Community may, within certain boundaries, enact provisions in the field of criminal law, as the European Court of Justice recognised in its decisions on the Community's competence for criminal sanctions against environmental pollution. Some of these decisions have been criticised strongly.

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[12] Council Decision 2002/187/JHA, 28 February 2002, setting up EUROJUST with a view to reinforcing the fight against serious crime, O.J. (L 63), 1-13.

[13] Council Framework Decision 2002/584/JHA, 13 June 2002, on the European arrest warrant and the surrender procedures between Member States, O.J. (L 190), 1-20.

[14] The Schengen acquis – Convention implementing the Schengen Agreement, 14 June 1985, between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders ("CISA"), O.J. (L 239), 19-62, Chapter III – Application of the ne bis in idem principle.

[15] Council Framework Decision 2008/841/JHA, 24 October 2008, on the fight against organised crime, O.J. L 300, 42-45 and Council Framework Decision 2002/629/JHA, 19 July 2002 on combating trafficking in human beings, O.J. (L 203), 1-4.

[16] Council framework Decision 2000/383/JHA, 29 May 2000, on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro, O.J. (L 140), 1-3.

[17] Council Framework Decision 2001/500/JHA, 26 June 2001, on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime, O.J. (L 182), 1-2.

[18] Council Framework Decision 2008/913/JHA, 28 November 2008, on combating certain forms and expressions of racism and xenophobia by means of criminal law, O.J. (L 328), 55-58.

[19] Council Framework Decision 2009/315/JHA, 26 February 2009, on the organisation and content of the exchange of information extracted from the criminal record between Member States, O.J. (L 93), 23-32. Article 11 in conjunction with Council Decision 2009/316/JHA, 6 April 2009, on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA, O.J. (L 93), 33-48.

[20] Council Decision 2008/615/JHA, 23 June 2008, on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime, O.J. (L 210), 1-11.

As to the concrete design of the necessary – limited – supranationalisation of criminal law, the political alternatives of either the principle of recognition or the limited harmonisation of material law arise. The principle of mutual recognition is friendlier in regard to the sovereignty of the Member States because it remains within their competence to define the elements of an offence. The European arrest warrant calls itself the first concrete measure of the principle of mutual recognition, to which the Member States have referred to as "the 'cornerstone' of judicial cooperation implementing the principle of mutual recognition."[21] The requested state has to detain and hand over the requested person without questioning the charges made by the requesting state if the offence is listed in the Framework Decision.

The principle of mutual recognition has proven itself particularly with respect to the free movement of goods, which is—with increasing integration—flanked by harmonized health and environmental standards. Due to reasons of the rule of law, a limited harmonization in criminal law is, however, necessary and some approaches have been made. Whether further steps of integration are legally possible and politically desired deserves further and deepened discussion. In any case, the Federal Constitutional Court demands restraint in harmonizing criminal law.

> [T]he decision on punishable behaviour, on the rank of legal interests and the sense and the measure of the threat of punishment, is to a particular extent left to the democratic decision-making process. In this context, which is of importance as regards fundamental rights, a transfer of sovereign powers beyond intergovernmental cooperation may only under restrictive preconditions lead to harmonization for certain cross-border circumstances; the Member States must, in principle, retain substantial space of action in this context.[22]

Problematic are the restrictions of rights in criminal proceedings. Not all Member States guarantee the same standards for criminal defendants. In parts, differences are due to the system—one needs only compare the German inquisitorial criminal proceedings with the Anglo-Saxon proceedings in front of a jury. Despite some minimum standards concerning human rights, drawn especially from the European Convention on Human Rights, differences remain. Furthermore, criminal defence abroad is *de facto* complicated by linguistic issues. It would be greatly beneficial if the initiative on procedural rights in criminal cases, which is strongly supported by Germany, would finally lead to common

[21] Council Framework Decision 2002/584/JHA, 13 June 2002, on the European arrest warrant and the surrender procedures between Member States, O.J. (L 190), 1-20, recital no. 6.

[22] Lisbon Case, BVerfG, 2 BvE 2/08, of 30 June 2009, para. 253.

European standards. That would be consistent with the duty of states to protect the citizen's constitutional rights also *vis-à-vis* other states.

On the topic of EU-criminal law, let me finally emphasise the fact that cross-border law enforcement is a necessary corollary to cross-border freedom of movement, just as supranationally guaranteed rights of the accused are a necessary corollary to supranational law enforcement.

II. Democratic Legitimacy

The principle of democracy proclaimed by the Basic Law is inviolable, but it cannot be realised in the same way on a European level as it can be on a national level. "The empowerment to embark on European integration permits a different shaping of political opinion-forming than the one that is determined by the Basic Law for the German constitutional order."[23] The Federal Constitutional Court allows this empowerment only:

> [U]nder the condition that the sovereign statehood of a constitutional state is maintained on the basis of an integration programme according to the principle of conferral and respecting the Member States' constitutional identity, and that at the same time the Member States do not lose their ability to politically and socially shape the living conditions on their own responsibility.[24]
> …
> The Basic Law does not grant the bodies acting on behalf of Germany powers to abandon the right to self-determination of the German people in the form of Germany's sovereignty under international law by joining a federal state. Due to the irrevocable transfer of sovereignty to a new subject of legitimisation that goes with it, this step is reserved to the directly declared will of the German people alone.[25]

The *Lisbon Case* emphasises once more the approach that underlies the *Maastricht Case* of 1993.[26] According to *Maastricht* the Member States are and need to remain the source of legitimacy for the exertion of European powers. The European Parliament can only add to

[23] *Id.* para. 219.

[24] *Id.* para. 226.

[25] *Id.* para. 228.

[26] Maastricht case, BVerfGE 89, 155.

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the legitimacy of European powers. The absence of a European "people" and a sufficient European-wide political opinion-forming process, the Court reasoned in *Maastricht*, means that a further strengthened European Parliament cannot serve as a substitute for the source of legitimacy provided by the nation state. This model assumes that nation states remain in control of the integration process. Once more, the strict adherence to the principle of conferral and therefore the sufficient determination of the integration programme of the European Union constitutes a prerequisite under this model. The Federal Constitutional Court correctly elaborates that "a tendency towards maintaining the *acquis communautaire* and to effectively interpreting competences along the lines of the … doctrine of implied powers"[27] must be tolerated within integration. However, "a tension that is constitutionally important [exists] towards the principle of conferral."[28]

Therefore, German constitutional law implies a duty, incumbent on all German state organs, to guard the respect of the principle of conferral. The Federal Constitutional Court concludes, as it already did in the *Maastricht Case*, that there is a constitutional obligation of all government bodies not to apply any European regulation not covered by the integration programme or not in compliance with the principle of conferral and therefore transgressing competence. From here arises, furthermore, the unconstitutionality of the Act Extending and Strengthening the Rights of the *Bundestag* and the *Bundesrat* in European Union Matters. This Act—in the version relevant to the Court's decision in the *Lisbon Case*—allowed limited amendments to the Treaty without the participation of the federal legislature. According to the Constitutional Court this would not satisfy the responsibilities the German legislature has when it comes to integration. Therefore, Germany amended this Act by strengthening parliamentary rights over integration.

The strengthening of parliamentary rights as well as the necessary participation of the national legislative bodies can serve to upgrade European questions in the national political debate. With respect to democracy and integration, this would be an appreciated outcome of the *Lisbon Case*.

III. "Legal Instruments Transgressing the Limits" / Ultra Vires Acts

The Federal Constitutional Court emphasises in the *Lisbon Case*—as it did already in the *Maastricht Case*—the constitutional duty of Germany's state organs not to apply legal instruments "transgressing the limits" of the integration programme laid down in the Treaty. These are the so-called "ultra vires" acts. This duty appears as a result of the principle of democracy, based on the Federal Constitutional Court's model of legitimation derived from the Nation State. It is based on the thesis that, because "instruments

[27] Lisbon Case, BVerfG, 2 BvE 2/08, of 30 June 2009, para. 237.

[28] *Id.* para. 238.

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transgressing the limits" are not covered by the Act approving the Lisbon-Treaty, Parliament takes no responsibility for them.

The "ultra vires" dogmatic is highly topical. The *Lisbon Case* of the Federal Constitutional Court was not even one week old when Professors Gerken / Rieble / Roth / Stein / Streinz published an opinion according to which the *Mangold Case* of the European Court of Justice transgressed the limits of European competences. The professors claim that the constitutional complaint of the company Honeywell Bremsbelag GmbH, against the decision of the Federal Labour Court (*Bundesarbeitsgericht*), should be successful. They maintain that the Federal Labour Court wrongfully assumed that it was bound by the ECJ's *Mangold Case*. But, according to their argumentation, the *Mangold Case* would be *ultra vires* and therefore not applicable in Germany. The ECJ supposedly invented a European prohibition of age discrimination.

The *Mangold Case* dealt with the following. Generally, under German labour law, employment contracts are of unlimited duration and termination by the employer is subject to specific conditions. In addition, fixed-term contracts are only allowed in exceptional circumstances. However, to promote employment, Germany made it possible for employers to hire employees older than fifty-two by means of a fixed-term employment contract without having to give any reason. This was meant as an affirmative action to integrate older unemployed persons into the job-market. Because of this, Mr. Mangold filed a complaint in front of the Munich Labour Court, which referred the matter to the ECJ for a preliminary ruling whether such discrimination based on age was compatible with European Law. At the time, the Anti-Discrimination-Directive,[29] which prohibits age-discrimination, was already in effect. But Germany had negotiated its own special deadline to transpose the Directive. Just during that time-period, which is meant to give the national legislature time to adapt national law to the specifications set forth in the Directive, Germany passed the contested legislation introducing the discrimination based on age. The ECJ relied on the Directive, which was already in effect, but for which the deadline to transpose had not yet passed, and read it in conjunction with the general principle of equal treatment, which also forbids arbitrary age-discrimination. The ECJ arrived at the conclusion that regulations like those implicated in the Munich Labour Court's referral could not be applied.

At this time a constitutional complaint by the company "Honeywell Bremsbelag GmbH"[30] is pending with the Federal Constitutional Court. The case concerns the application of the prohibition of age-discrimination as laid down in the *Mangold Case* by the Federal Labour Court. Honeywell claims that while trusting in the validity of the German regulation they

[29] Council Directive 2000/78/EC, 27 November 2000, establishing a general framework for equal treatment in employment and occupation, O.J. (L 303), 16-22.

[30] Federal Constitutional Court, 2 BvR 2661/06.

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had hired older employees as contract-personnel. They claim that the decision of the Federal Labour Court was based on an *ultra vires* legal instrument—the ECJ's *Mangold Case*—and infringed at least their constitutional right of general freedom of action.

The Decision of the Federal Constitutional Court in this case is expected soon, the outcome of which I do not want to anticipate. First of all, the argument that Community loyalty is violated by adopting a measure that is likely to seriously compromise the result prescribed by the directive even if the transposition period has not yet expired, supports the ECJ's conclusion in the *Mangold Case*. Secondly, the *Mangold Case* conforms with EJC-jurisprudence on affirmative action for women. According to that jurisprudence distinctions that are based strictly on gender violate the principle of non-discrimination. Affirmative action is in accordance with Community law only if it allows the consideration of the specific circumstances of the individual case. In the age-discrimination-case this consideration of the individual circumstances of the specific case was cut off from the beginning. It was completely insignificant whether the aggrieved party had ever been unemployed or for how long. Rather, the admissibility of employing contract-personnel was strictly bound to age. Thirdly, one could characterise a regulation trying to combat unemployment, which is bound to age instead of unemployment, as arbitrary. The general prohibition of arbitrary acts, seen as a fundamental legal principle, can also be enforced in the horizontal employer-employee relationship. In my opinion, these three reasons show that the *Mangold Case* does not constitute an *ultra vires* act.

In his opinion of 7 July 2009 in the *Kücükdeveci Case*,[31] which deals with youth-discrimination, my colleague, Advocate General Bot, acts on the assumption of a far-reaching third-party effect of constitutional rights and implicates that this could be true for all general principals of law, including the prohibition of age-discrimination as well as all fundamental rights. His approach is likely to cause further controversy.

An approach that would leave Member States greater latitude would be that the application of fundamental legal principles between private parties takes place in accordance with national law. In the German legal system basic rights may apply between private parties because they must be taken into account when interpreting the general clauses like, for example, "bona fide" of the ordinary law.

What is true for the fundamental rights of the Basic Law should also be true for fundamental rights which were developed as general principles of Community law and reaffirmed by the Charter of fundamental rights, a document that will become part of primary Community law with the ratification of the Lisbon Treaty. As with regard to the national rules of procedure when executing Community law, one would resort to the principles of equivalence and effectiveness, when it comes to the application of

[31] Opinion of Advocate General Bot, 7 July 2009, in C-555/07 Kücükdeveci, not yet published in the ECR.

Community fundamental rights between private parties, if the facts concerned fall within the scope of the EC-Treaty.

Admittedly, this approach would not ensure a uniform application of Community fundamental rights in the Member States because it depends on whether the respective domestic legal system allows such effects between private citizens. However, it would support the trust in the application of the written domestic law and thus legal certainty. Furthermore, such an approach notably permits a flexible handling of the specific constellations in the different fields. The application of fundamental rights might be needed more in Labour Law than in Civil Law because one can observe an imbalance in power between employer and employee that comes close to the relationship between the citizen and the state.

At least in one regard, Advocate General Bot certainly is correct. The ECJ will have to decide on the effects of Community fundamental rights between private citizens. Whichever path the Court chooses, it is important to find the right balance between ensuring the application of Community law, on the one hand, and respecting the legal traditions of the Member States, on the other hand. In any case, the application of fundamental rights between private citizens is a delicate topic because it gives great power to Constitutional Courts—in this case, also to the ECJ—and strengthens their influence on the ordinary law, which, in general, is the domain of the ordinary courts.

E. Outlook and Perspectives

From its evolutionary history, the Basic Law proves to be a Constitution remarkably ready for integration. It is based on the concept of an "open statehood," as Klaus Vogel once put it so well.[32] European and international integration are not only allowed by the Basic Law, they are obligatory.

But integration keeps interfering more and more with everybody's life. Reacting to the increasing intensity of supra- and international integration, the Federal Constitutional Court and the constitutional drafters and amending legislature set certain explicit restrictions and conditions concerning integration in conformity with the Basic Law, which can now be found above all in Article 23. Such judicial and political influences are possible without Europe having to be modelled upon Germany ("*am deutschen Wesen genesen*"), since the values of the Basic Law are also set forth in the European Convention on Human Rights, the Charter of Fundamental Rights of the European Union, and the Founding Treaties.

[32] KLAUS VOGEL, DIE VERFASSUNGSENTSCHEIDUNG DES GRUNDGESETZES FÜR EINE INTERNATIONALE ZUSAMMENARBEIT: EIN DISKUSSIONSBEITRAG ZU EINER FRAGE DER STAATSTHEORIE SOWIE DES GELTENDEN DEUTSCHEN STAATSRECHTS (1964).

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In the *Lisbon Case* the Federal Constitutional Court has continued to walk the fine line between the Basic Law's fundamental commitment to integration and the protection of sovereignty that the Court has deduced from the principle of democracy. To demand further participation rights for the German *Bundestag* and the *Bundesrat* for every amendment of the Treaties, through rectification of the Act Extending and Strengthening the Rights of the *Bundestag* and the *Bundesrat* in European Union Matters, may further a more lively debate on European affairs. Whether Germany's ability to act, which is in its own vital interest, may be inappropriately constrained, depends on the design and application of these participation rights.

Fortunately, the Federal Constitutional Court did not make a stand against the ratification of the Lisbon-Treaty. Nonetheless, the Court did not strictly concentrate the subject matter of the proceedings on the Lisbon Treaty, but set down terms for European integration in general. Therefore, the *Lisbon Case* may also serve as a basis for court proceedings against European integration as it developed up until now—without the Lisbon Treaty. The Constitutional Court developed a constitutional complaint against integration for Germans entitled to participate in the elections to the *Bundestag*, which is similar to an *actio popularis*. That the Lisbon Treaty is constitutional only with the safeguards specified in the *Lisbon Case* seems to be an invitation for further lawsuits concerning the judicial limits of integration. Several suitable cases, like the earlier mentioned Honeywell-Case or the case concerning telecommunications data retention are already in an advanced stage and will be decided in the near future.

The Federal Constitutional Court has a great responsibility—not least it may serve as an example for the Constitutional Courts of some other Member States.[33] May it find the right balance! After all, the approach of the Federal Constitutional Court questions the uniform application of Community law in all Member States.[34] Furthermore it neither serves the principles of legal certainty nor legal clarity. But the Federal Constitutional Court accepts these shortcomings in the name of the protection of sovereignty and democracy.

As you can see, we have moved a long way away from the enthusiasm on integration from the early years of the Federal Republic under the newly-minted Basic Law because of the changed general conditions that are a result of globalisation and supranationalisation. Nonetheless, the dictum of Carlo Schmid, arguing so vividly for the Basic Law's capacity for integration and openness towards international law is even more convincing today than 60 years ago:

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[33] *But see Ústavní soud České republiky* [Czech Constitutional Court], of 3 November 2009 (Lisbon Treaty II), Pl. ÚS 29/09, para. 110 et seq.

[34] *See* VASILIOS SKOURIS, DAS VERHÄLTNIS DES EUROPÄISCHEN GERICHTSHOFS ZU DEN NATIONALEN VERFASSUNGSGERICHTEN: FESTVORTRAG ANLÄSSLICH DES ÖSTERREICHISCHEN VERFASSUNGSTAGS (2009) (arguing that this would result in the introduction of a "theory of absolute relativity" for all legal acts of secondary Union law).

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> We do not want to fool ourselves: in this day and age, there is no problem which can be solved by national means alone. As much as the cause of all our hardships has a supranational base, we can only find the means to overcome these hardships on the supranational level.[35]

[35] *Deutscher Bundestag / Bundesarchiv* (eds.): *Der Parlamentarische Rat 1948-1949: Akten und Protokolle*, Vol. 9 Plenum, 41 (R. Oldenbourg 1996) (author's translation).

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