ARTICLES

National Constitutionalism, Openness to International Law and the Pragmatic Limits of European Integration – European Law in the German Constitutional Court from EEC to the PJCC

By Carl Lebeck[*]

A. Introduction

The issue of how democratic and constitutional nation states shall square international cooperation with their commitments to constitutionalism, democratic accountability and fundamental rights is a persistent problem that becomes ever more pressing with increasing international integration.[1] The German Federal Constitutional Court (FCC) is well-known for having developed a detailed case law on the extent and forms of delegation of powers from the German state to inter- and supranational organizations.

The basic principle for the FCC has been that international delegation of limited and revocable powers have been generally accepted as far as the organizations to which powers are delegated also have had an adequate protection of individual rights. The principle that delegation is to be functional was another way to create safe-guards concerning the extent to which powers were delegated. That principle has been applied consistently with regard to delegations to the European Community, although definition of powers that are limited and revocable been given an ever wider interpretation over time. When considering how the FCC has exercised constitutional control over delegations to international organizations, it seems also important to notice that in relation to the EC/EU, it has also controlled a process of constitutionalization at the level of European integration.[2] Here I will compare that with how FCC has conceptualized the national constitutional control

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[1] Daniel C Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 YALE LAW JOURNAL. 1490; 1495-1499 (2006).

[2] Thomas Giegerich, EUROPÄISCHE VERFASSUNG UND DEUTSCHE VERFASSUNG IM TRANSNATIONALEN KONSTITUTIONALISERIERUNGSPROZEβ: WECHSELSEITIGE REZEPTION, KONSTITUTIONELLE EVOLUTION UND FÖDERALE VERFLECHTUNG 46-91 (2003).

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of developments in the second and third pillars of European Union and more generally of European integration. In that context, I will also attempt to give a short background of how the FCC has treated problems of European integration as well as attempt to argue that the development of supranational integration also sheds new light on some central aspects of theories of judicial control of political decision-making.

B. Openness to International Law, Fundamental Rights and Democratic Accountability

The underlying approach that has directed the German Basic Law and the case law of the FCC in relation to international cooperation in general and European integration in particular has been the principle of "openness to international law".[3] The principle was incorporated into the Basic Law from the outset, and the relative openness towards international law can be seen as a way both to facilitate functional international cooperation and to facilitate cooperation in politically important areas that would embed Germany in the international community. In that sense, the role of public international law was another way to maintain liberal democracy within the German constitutional order.[4] That approach was however never exclusive since the fundamental principles of the Basic Law, the principle of democracy and the protection of fundamental rights, constrained the extent of delegation of decision-making powers as well as the powers over individuals that limited the forms and extent of delegation of powers to international cooperation. The principle of openness to international law has obvious historical origins, from the outset it was designed to enable Germany to reenter the international community as an equal member. The principle of openness to international law was however never intended to compromise the principle of democracy in the constitutional order, and it did not assume that international legal orders would be constitutionalized. In relation to the subsequent developments, it seems more correct to say that the limits on international integration were rather conceived as

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[3] Christian Tomuschat *Die Staatsrechtliche Entscheidung für die internationale Offenheit in* HANDBUCH DES STAATSRECHT vol. VII 483 (Josef Isensee and Paul Kirchhof eds., 1992); Hans Peter Ipsen, *Bundesrepublik Deutschland in den Europäische Gemeinschaften in* HANDBUCH DES STAATSRECHT vol. VII 767 (Josef Isensee and Paul Kirchhof eds., 1992); Paul Kirchof, *Der Deutsche Staat im Prozeβ der europäischen Integration, in* HANDBUCH DES STAATSRECHT vol. VII 855 (Josef Isensee and Paul Kirchhof eds., 1992); Christian Hillgruber, *Der Nationalstaat in übernationaler Verflechtung, in* HANDBUCH DES STAATSRECHTS vol. II 929 (Joseph Isensee and Paul Kirchhof eds., 2003).

[4] Ulrich Fastenrath *Die Internationaliseriung des deutschen Grundgesetzes – wie weit trägt die Entgrenzung der Verfassungsstaat in* INTERNATIONALISIERUNG VON STAAT UND VERFASSUNG IM SPIEGEL DES DEUTSCHEN UND JAPANISCHEN STAATS- UND VERWALTUNGSRECHT 37 (Rainer Pitschas and Shiego Kisa eds., 2002); STEFAN HOBE, DER OFFENE VERFASSUNGSSTAAT 142-163 (1998).

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limited to functions of constitutional law, rather than to the core-claims of inherent public powers and final decision-making.[5]

The principle of democracy in German constitutionalism has been interpreted as being strongly dependent on national political institutions where the people is sovereign by being able both to decide issues of policy and to decide on the structure constitutional order.[6] The basis for the sometimes slightly skeptical approach taken by the FCC to European integration seems to stem from the concern for maintaining a political order where accountability of decision-makers and changes of public policy of election are intertwined with the view of protection of fundamental rights as essential for legitimacy of a legal order.[7] The role of national democracy in the German constitutional doctrine has been less a matter of nationalism than a matter of ensuring democratic accountability and the role of the parliament. The protection of fundamental rights has in that respect served a similar purpose of ensuring certain social presuppositions a liberal political order.[8] The conflict between fundamental rights and international cooperation seems at least in principle easier to resolve since there is nothing that precludes international organizations to institute systems of judicial review, bills of rights etc that are equivalent to the highest standards of protection of fundamental rights. The difficulty is of course that whereas that is possible, it does not take into account differing standards of fundamental rights in different countries participating in international law-making. One could thus say that international cooperation has to accommodate political disagreement, without the majoritarian institutions for doing so that are part and parcel of domestic (democratic) political systems.

Acceptance of extensive effects of international law and the legalization and judicialisation of international relations have often been regarded as central aspects of liberal constitutionalism during the last decades, but there is a substantive conflict between extensive delegations of power to international organizations and democratic accountability. One could of course say that it is merely another variety of the problem of "countermajoritarian difficulty".[9] The reason for why it is

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[5] E.g. in relation to international economic law, ERNST-ULRICH PETERSMANN, CONSTITUTIONAL FUNCTIONS AND CONSTITUTIONAL PROBLEMS OF INTERNATIONAL ECONOMIC LAW 155-168; 205-210 (1991).

[6] Paul Kirchhof, *Die Parliament als Mitte der Demokratie in* DER STAAT DES GRUNDGESETZES – FS PETER BADURA 237 (Michael Brenner et al. eds., 2004).

[7] UDO DI FABIO, VERFASSUNGSSTAAT IN WELTGESELLSCHAFT 38-41; 87-88; 100-112 (2001); UDO DI FABIO, RECHT OFFENER STAATEN 43-48 (1998).

[8] KARL-HEINZ LADEUR, NEGATIVE FREIHEITSRECHTE UND DIE SELBSTORGANISERIUNG DES GESELLSCHAFTS (1999).

[9] ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH (1961).

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regarded as more problematic than separation of powers at the national level seems to be that changes and revisions to international organizations supposedly have higher thresholds than even to constitutional changes at the domestic level. That seems to lead to that international delegation is considered far less flexible, and generally more stable.[10]

There is an extensive debate in theory of international law on the effectiveness of international law in general and of treaty-based international organisations and international tribunals in particular. The debate has turned on the effectiveness of international law in relation to politically contentious issues, where proponents of the effectiveness of law usually points to the EU and the ECHR as the two main instances in which inter- and supranational law have worked effectively, whereas critics of that position usually points to the fate of acceptance of obligations under customary international law, and to the limited effectiveness of many other treaty-based organisations.

The argument of international law sceptics seems to be that public international law is inherently unstable since compliance with it would require governments to forego short-term benefits and as governments are generally unwilling to do so, and cannot be forced to do so by international institutions the influence of such international law would be marginal. In that respect, the international law sceptics also make a case wherefore there is little reason to believe that international law would be a problem in relation to democracy, since international law would be largely irrelevant to policy-decisions of political decision-makers. The ineffectiveness of international law according to those critics seems to be related to that it cannot force states to comply in the face of political costs. The response of various forms of functional integration has been to create schemes of cooperation limited to certain particular issues, where benefits are obvious (postal services, air traffic, telecommunications etc) and where limitations on political autonomy are very limited, whereas the other avenue for international law seems to consist in institutionalisation of reciprocity and equal treatment of governments. In that respect, the development of European integration which was developed on the basis of functional cooperation, shows some of the problems when functional competencies are bundled together in a common institutional structure, where the procedural limitations and institutional limits to development of political agendas are overturned through the ever-expanding competencies of the common institutions. The other aspect of that development seems to concern what has been

[10] *See* Anupam Chander, *Globalization and Distrust* 115 YALE LAW JOURNAL. 1193 (2005).

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described as the "disaggregation"[11] of unitary government into different institutional dispersed powers.

However, that kind of institutional dispersion of powers seems not to be a necessary connection to internationalisation, but rather a feature of contemporary constitutionalism. It even seems as if although international cooperation may lead to dispersion of powers, it also seems as if international cooperation everything equal strengthens the executive at the expense of other branches of government. I think therefore that it is fairer to say that there is a mix of concerns for accountability and dispersions of powers (usually in the interest of impartiality) in modern constitutional orders at the level of national law as well as on international law.

The conflicts can thus be said to be between accountability and impartiality, and a conflict between effectiveness based on relative operational independence of some branch of public authority (e.g. as in the case of judiciary) and the protection of long-term effectiveness and as a protection against abuses of powers (e.g. as in the case of politically accountable forms of public powers such as legislatures and executives). In that context, it is importance to notice that both accountability and independence of public institutions can be seen as way to counter abuses of public powers. That is important in order to understand the issues of legitimacy that in contexts of diminished political accountability, the role of accountability is double-edged. Accountability can work as a hurdle, a one kind of transactional cost on decision-making which can be removed in order to further some other goal (e.g. effectiveness or impartiality), but that it also can be seen as a protection against certain unwanted decisions. (That does of course not in turn preclude that accountability might be undesirable since certain decisions that are unpopular in the short term might be viewed as desirable in the long term, e.g. as in the context of judicial independence.)

The approach to international cooperation taken by the FCC in relation to that has been based on the principle that delegation of regulatory and technical powers to inter- and supranational organizations concerns particular functions and does not concern political decisions.[12] The basis for the idea of functional delegation is that such delegations only concern the issues that are related to relevant area of law,

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[11] Eric Posner, *Transnational Legal Process and the Supreme Court's 2003-2004: Some Sceptical Observations*, 12 TULSA JOURNAL OF COMPARATIVE AND INTERNATIONAL LAW 23 (2005).

[12] ULRICH EVERLING, *Vom Zweckverband zur Europäischen Union – überlegungen zur Struktur der Europäischen Gemeinschaft, in* DAS EUROPÄISCHE GEMEINSCHAFT IM SPANNUNGSFIEL VON POLITIK UND WIRTSCHAFT 32-51 (1985).

and that in such cases, the state, as long as it can withdraw from the treaty also retains ultimate decision-making power on the issue at stake. That underlying idea of the argument seems to be that the delegation of power is limited (which means that the political choice remains with the domestic institutions) and because of that foreseeable in its consequences (making it possible to assess costs and benefits of a delegation). The problem of the argument is that international organizations with functional jurisdictions tend to expand the scope of their powers in order to maintain uniformity and coherency in the policy-areas that are entrusted to them.[13] In that respect, there has been a long standing problem in relation to functional integration in the context of European law, where all institutions have shown a strong tendency to enhance their own roles.[14]

The limits to openness and the preservation of the principle of parliamentary democracy seem to lead to that from a German constitutional perspective there are also certain particular implications to how the legitimacy of international organizations is defined. The basis for such legitimacy is delegation to such organizations and that their ways of decision-making are seen as procedurally legitimate, that they include a minimum of accountability and subjected to sufficient constraints in terms of individual rights. That also means that conceptions of legitimacy that would be entirely based on efficacy[15] would hardly be possible to accept within that discourse, and in a similar way, delegation of fundamental decision-making powers that the constitutional level would be equally impossible.

[13] HJALTE RASMUSSEN, THE EUROPEAN COURT OF JUSTICE (1999).

[14] Joseph H. H. Weiler, *Eurocracy and Distrust Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights within the Legal Order of the European Communities*, 61 WASHINGTON UNIVERSITY LEGAL.QUARTERLY 1103 (1986); Alec Sweet Stone, GOVERNING WITH JUDGES (2000).

[15] Giandomenico Majone, *International Economic Integration, National Autonomy, Transnational Democracy: An Impossible Trinity?* (RSCAS Working Papers, EUI RSC 2002/48).

C. European Integration from the EEC to the European Arrest Warrant

The FCC has consistently imposed conditions of constitutionality based on the Basic Law on Germany's participation in European (and international) integration. The doctrine developed in the *So-Lange*[16] cases as well as the *Maastricht case*[17], the *EMU case*[18], the *Tobacco advertisement case*[19] and in the *Banana case*[20], as well as in relation to other treaties of human rights[21] means German membership in inter- and supranational organizations is conditional on the respect for the guarantees of democratic government and fundamental rights as laid down in the German Basic Law.[22] The reservations of the FCC in relation to the developments in European integration have been three-pronged, lack of political accountability of decision-makers at the European level, that the development of EC-law strengthens the indirectly elected national executive at the expense of directly elected representatives which in turn risks to upset the constitutional order and the lack of protection of fundamental rights.

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[16] HANS-PETER FOLZ, DEMOKRATIE UND INTEGRATION 28-31 (1999); Helmuth Steinberger, *Aspekte der Rechtsprechung des Bundesverfassungsgericht zum Verhältnis zwischen Europäischem Gemeinschaftsrecht und deutschem Recht*, *in* STAAT UND VÖLKERRECHTSORDNUNG – FS KARL DOEHRING 951 (Kay Hailbronner et al. eds., 1989); Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 37, 270; BVerfGE 73, 339.

[17] Helmuth Steinberger, *Die Europäische Union im Lichte der Entscheidung des Bundesverfasungsgericht vom. 12. Oktober 1993*, in RECHT ZWISCHEN UMBRUCH UND BEWAHRUNG – FS RUDOLF BERNHARDT 1313 (Ulrich Beyerlin et al. eds., 1995); BVerfGE 89, 155.

[18] BVerfGE 97, 350.

[19] BVerfGE 95, 370.

[20] Miriam Aziz, *Sovereignty Lost, Sovereignty Regained? Some Reflections on the Bundesverfassungsgericht's Bananas Judgment* 18-22 (RSC Working Papers 2001/31, Florence 2001), http://www.iue.it/RSCAS/WP-Texts/01_31.pdf; BVerfGE 102, 147.

[21] Rainer Hofmann, *The German Federal Constitutional Court and Public International Law: New Decisions, New Approaches*? 47 GERMAN YEARBOOK OF INTERNATIONAL LAW 9 (2004); Peer Zumbansen, *Globalization and the Law: Deciphering the Message of Transnational Human Rights Litigation*, 5 GERMAN LAW JOURNAL 1499 (2004); BVerfGE 111, 307.

[22] Juliane Kokott, *German Constitutional Jurisprudence and European Integration I*, 2 EUROPEAN PUBLIC LAW, 237 (1996); Juliane Kokott, *German Constitutional Jurisprudence and European Integration II*, 2 EUROPEAN PUBLIC LAW, 413 (1996).

I. The So-Lange Cases

FCC focused from the outset in the so called *So-Lange* cases on the protection of fundamental rights in the EC, whereas the focus in later years seems to have shifted towards issues of political accountability.

1. So-Lange I

In the first *So-Lange* case, *Internationale Handelsgesellschaft*, where a German company complained against a regulation of the EC on the basis that it infringed the rights of the company under German Basic Law. The FCC declared that the EC had not at the time (1972) attained the level of protection of fundamental rights necessary for it to be regarded as having a protection of rights equal to the German legal order.[23] However, the FCC also contended that in the particular case, the impairment of the fundamental right of the complainant was not sufficiently serious to be regarded as a violation of his constitutional rights. The FCC adapted the more general multi-tier model of constitutional control where economic rights and freedoms generally enjoy lower levels of judicial protection, than civil rights. (What seems distinctive about EC-law not that the ECJ has been relatively deferential towards the European Council of Ministers and the European Commission, but that it has been relatively activist in upholding the treaty-based individual rights of citizens in the member states. In relation to the traditional domain of regulatory law, it seems thus plausible to claim that the ECJ at least initially has increased the protection of rights. However, expansive functionalist approach where an increasing number of rights have been regarded as being relevant to the commerce between the member states, it is also clear that the ECJ has not reduced judicial deference to the political branches of the European Community. One could thus say that the ECJ has continued the tradition of enforcing a level protection of economic rights that is lower than for traditional civil rights and liberties, but unlike national constitutional systems, the ECJ has not developed a consistent case law on the higher protection level of civil rights, and indeed, given the functionalist character of delegation has had a very ambiguous line in recognizing such rights.[24]

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[23] RUDOLD STREINZ, BUNDESVERFASSUNGSGERICHTLICHER GRUNDRECHTSSCHUTZ UND EUROPÄISCHES GEMEINSCHAFTSRECHT 43-50 (1989).

[24] Jason Coppel & Aidan O'Neill, *The European Court of Justice Taking Rights Seriously?*, 29 COMMON MARKET LAW REVIEW 669 (1992).

In *So-Lange I* the FCC developed the principle that also a constitutional democracy where all public powers are ultimately traceable – from the legal point of view - to the Basic Law, accepts different ways of implementing the fundamental rights.[25] That form of pluralism of means to enforce rights seems also to mean that the court accepts some kind of supervisory jurisdiction, also in cases where it accepts that other parties enforce the basic rights at stake, but it assumes that the content of legal orders correspond.[26] The basis for the FCC to allow ECJ to enforce fundamental rights seems to be an acceptance of the view that since Germany has entered into a treaty setting up common institutions, the continuing interest in maintaining the European Community as well as the continuing interest that Germany will honor its obligations under international treaties compel the court to accept such delegations of power to interpret and maintain fundamental rights.[27] However, that does not change the fact that the FCC maintained the requirement that limitations on non-essential fundamental rights had to be proportional to their aim.

The dissenters pointed also to some further implications of the majority opinion in *So-Lange* case where the FCC conceded that the protection of fundamental rights would not be subjected to greater limitations than what would be the case in German law, but it noticed that the role of EC-law also meant that there was a strong tendency of deformalisation in relation to individual rights and in relation to requirements of statutory legislation in relation to EC-law.[28]

2. So-Lange II

The *So-Lange II* case concerned procedural and substantive issues of fundamental rights that are related to the freedom to pursue commercial activities.[29] The issues that arose were both related to the issue of whether ECJ provided sufficient protections for individual rights equivalent to the protected provided under art. 1 Basic Law and whether ECJ would be a legal court in the meaning of art. 101 (1)(2) Basic Law and whether it infringed on the individual right to be heard before a judge of law under art. 103 Basic Law.[30] The issue was thus partly whether the

[25] BVerfGE 37, 277-278.

[26] BVerfGE 37, 278.

[27] BVerfGE 37, 279-283.

[28] BVerfGE 37, 296-299.

[29] BVerfGE 73, 339.

[30] BVerfGE 73, 349-351.

judicial process of the ECJ provided sufficient safeguards for the individuals. The judicial process to which it was referred is the prejudicial decision-making of the ECJ that takes place after requests from national courts. The FCC rejected the view that the safeguards of the individual rights under procedures of ECJ were sufficient. The FCC also adopted a very broad understanding of the sources of law that would provide such guarantees extended beyond what is most commonly considered to be "constitutional" sources of EC-law, into the various memoranda and court-internal procedures.[31] The FCC did not state whether it, in the face of changes of such lower-level sources of procedural law would reconsider its position. The understanding of the constitutional protection of fundamental rights under EC-law presupposed a broad understanding of the extent to which EC-law could be said to be constitutional. The understanding of FCC in *So-Lange II* seems to include not just the treaties that have a constitutional status in EC-law, but also lower level procedural rules of the ECJ. The broad understanding of constitutional law in the context of EC seems in that sense to be adapted to view of the acceptance of the role of ECJ as a judge in its decisions on prejudicially referred questions. The FCC emphasized that the role of the ECJ was not dependent on that its decisions are prejudicial, but regarded ECJ as the actual decision-maker in cases where the national court had referred prejudicial questions to it. It seems problematic that the FCC has expanded the notion of which legal rules that can be understood as constitutional beyond normal, more formalistic understandings of what constitutes constitutional rules, is also the main difference between *So-Lange I* and *So-Lange II*. It can even be said that the extensive interpretation of what can be regarded as constitutional rules in the context of EC seems to mirror the much more restrictive interpretation of constitutional requirements of statutory changes under German Basic Law.

The basis for criticisms of fundamental rights in relation to EC-law has focused on the lack of any explicit constitutionalization of protection of fundamental rights. In order to reduce the tension between EC-law and German constitutional law, the FCC has lowered the standards for human rights protection in the fields of EC-law, which has facilitated integration. However, the ECJ has also used human rights standards, mainly drawn from the case law of the European Court of Human Rights to, at least to some extent, substitute national protection of fundamental rights with protection at the European level.[32] The approach of the ECJ has never been entirely consistent, and there has been a strong tendency for the ECJ to protect economic integration over fundamental rights, when those aims conflict. The

[31] BVerfGE 73, 366-367.

[32] PETRA FUNK-RÜFFERT, KOOPERATION VON EUROPÄISCHEM GERICHTSHOF UND BUNDESVERFASSUNGSGERICHT IM BEREICH DES GRUNDRECHTSSCHUTZES 25-29 (1999).

development of case law in the field of fundamental rights can thus be said to be both a matter of coordination between courts and a way to ensure legitimacy of the courts involved. For the FCC, that legitimacy seems to be enhanced through an acceptance of the political choice of German legislators to participate in European integration. For the ECJ, it seems to be a matter of enhancing protection of fundamental rights as a way to enhance political legitimacy. Part of that tendency can be seen in the FCC's deference to the legislature on issues of substance while articulating procedural requirements of constitutional law. It is many respects a problem the *So Lange* cases is that they presupposed legitimacy of supranational organizations as being more or less exclusively a matter of fundamental rights. In that respect, the changing approach of the *Maastricht* judgment seems to create a greater balance between concerns for protection of national political institutions and fundamental rights.

II. The Maastricht Judgment – Controlling Public Powers Without Democracy

The *Maastricht* judgment is the first in FCC's case law on European integration that concerns structural aspects of the constitutional order. The basis for constitutional delegation to inter- and supranational organizations under German public law post-*Maastricht* is that it has to be approved by the German legislature, and that such delegations may not infringe substantive and procedural requirements of the principle of democracy and fundamental rights, under the Basic Law.

The basis in German constitutional doctrine for the acceptance of EC-law is twofold. On one hand, it accepted the claim of precedence of European law, in "every day adjudication" with the premise that the EC exercised powers delegated to it the treaties which are authorized under the Basic Law.[33] However, it also clearly indicated that it regarded EC as an organization of limited and enumerated powers that could only exercise powers the member states had delegated to it. The German state had thus not delegated any sovereign powers to the EC, but there

[33]Rainer Arnold, *The Treaty on European Union and German Constitutional Law: The German Constitutional Court's Decision of October 12, 1993, on the Treaty of Maastricht*, 9 TULANE EUROPEAN AND CIVIL LAW FORUM 91 (1994); Karl M Meessen, *Hedging European Integration: The Maastricht Judgment of the Federal Constitutional Court of Germany*, 17 FORDHAM INTERNATIONAL LAW JOURNAL 511 (1993-1994); Manfred H. Wiegandt, *Germany's International Integration: The Rulings of the German Federal Constitutional Court on the Maastricht Treaty and the Out-of-Area Deployment of German Troops*, 10 AMERICAN UNIVERSITY JOURNAL OF INTERNATIONAL LAW & POLICY 889 (1994-1995); Joachim Wieland, *Germany in the European Union - The Maastricht Decision of the Bundesverfassungsgericht*, 5 EUROPEAN JOURNAL OF INTERNATIONAL LAW 259 (1994); Rudolf Streinz, *German Membership in Supranational and International Organizations After the Maastricht and AWACS/Somalia Decision of the Federal Constitutional Court* 89 AMERICAN SOCIETY OF INTERNATIONAL LAW PROCEDURE 259 (1995).

were particular competencies that the EC exercised on behalf of Germany.[34] The idea of attributed and limited competencies as distinguished from inherent public powers has been the basis for the concept of functional delegation of powers to the EC and has historically been the foundation for most forms of international cooperation.[35] One may thus say that the source of the doctrine of the FCC with regard to EC-law is that even if the competencies attributed to the EC are very extensive, they have been delegated to the EC, through a step-by-step process where each and every delegation have had limited effect.[36]. In addition, the FCC relies on the assumption that such delegations are revocable. Concerning revocability, it is also clear that there is a high degree of consensus between the ECJ and the FCC since neither court has claimed that the EC/EU have inherent powers of public authority.[37] (One can also question whether the criterion of "revocability" of delegated powers is feasible in any area where the FCC claims it to be so. It is hardly a political option for any country to reject rules from international organizations coordinating postal communications or telecommunications since that would virtually make any international contacts impossible. The reason for why such delegations, despite being in practice impossible to revoke are acceptable is of course that the restrictions on political choices that can be made within the domestic legal orders that emerge from them are negligible. The approach of the FCC thus seems to be mainly dependent on that the effect on political autonomy is limited and foreseeable, not that the powers actually are possible to revoke.) The problem that has faced the FCC consistently has been how to prevent those limited powers delegated to the EC from becoming self-controlling legal authority, i.e. sovereign legal powers.[38] It is important to not that the main target of FCC's of criticism of the FCC's case law has been the powers granted to the Council of Ministers as community legislator. For practical purposes it means that representatives of the executives of the member states get increased opportunities to act as legislators, without any effective parliamentary control. Effective parliamentary control was thought to be ensured by the three-pillar system of

[34] BVerfGE 89.

[35] One important issue seems to be that whereas the functional approach to international law-making has always been central, the EC/EU is unique because it amasses such a number of functional powers, since the normal form of delegation to such institutions has been to delegate to a great variety of mainly technical organizations with very limited goals, and generally without much direct political input. *See* Ingrid Detter, LAW MAKING OF INTERNATIONAL ORGANISATIONS (1965); *See also* Jan Klabbers, INTERNATIONAL INSTITUTIONAL LAW (2001).

[36] BVerfGE 89, 159-160.

[37] *Id*.

[38] FRANZ C MAYER, KOMPETENZÜBERSCHREITUNG UND LETZENTSCHEIDUNG 58-62 (1995).

EC/EU-law where a strict separation was at least in principle upheld between the intergovernmental and supranational pillars of European cooperation.[39]

What particularly concerned the FCC in the *Maastricht* decision was the grant of implicit powers to the EC, i.e. powers used in conjunction with the explicitly mentioned powers already granted but that are by definition impossible to define in advance. [40] The *Maastricht* decision concerned mainly the supranational first pillar of the EC/EU. Despite that difference it is also clear that the FCC had concerns as to accountability concerning EU-law, albeit to a lesser extent than with EC-law. The reason for why the Treaty of the European Union (TEU) and EC-law were acceptable to the FCC in the *Maastricht* decision was due to the separation between them where one is supranational and the other international. By using that distinction, functional powers could still be limited as in EU-law while issues belonging to the core of government still would be ultimately decided by the member states.

The model of functional integration seems to have become so important because the FCC has rejected most ways for establishing of direct electoral influence in the EC as being constitutionally illegitimate, excluding the possibility that institutions such as the European Parliament can remedy the democratic deficit in any important respect.[41] Where the EC suffers from a lack of accountability, there is also a lack of political and constitutional legitimacy for electoral accountability at the European level.[42] The FCC has articulated the problems as deriving from a lack of structures for public debate and democratic participation beyond the strictly institutionalized ones at the European level. The FCC further stated that the kind of deliberative community necessary for a democratic society had not emerged. The basis for the decision was twofold. The more controversial section stated that the EU lacked a public sphere and a self-organized civil society necessary for a democratic government. Less controversial was the statement that treaties at the time did not

[39] BVerfGE 89, 159.

[40] Steinberger, *supra* note 17, at 1331-1332. It also seems noticeable that the FCC has consistently regarded implicit or conventional constitutional changes in the EC/EU as changes in the German domestic constitutional order, insofar institutions that are competent to take measures binding on German authorities and citizens. In that sense, the FCC has continued with a relatively substantive conception of what the constitution includes. However, the extensive understanding of constitutions can create a problem in that too many norms are understood as constitutionalized, i.e. that they might be misinterpreted as more stable than they actually are.

[41] SVERKER GUSTAVSSON, *Preserve or abolish the democratic deficit?, in* NATIONAL PARLIAMENTS AS CORNER STONES OF EUROPEAN INTEGRATION 100 (Eivind Smith ed., 1994).

[42] CAROL HARLOW, ACCOUNTABILITY IN THE EUROPEAN UNION (2002).

include sufficient mechanisms for democratic accountability. The self-organizing civil society is also the foundation- for the constituent power which constitutes a constitutional and democratic order in the eyes of the FCC. The lack of a public sphere and a self-organizing civil society[43] at a European level also implies that the FCC regarded the possibility of coordinated action within the civil society to influence the government as a key part of democracy.[44] The view of the importance of the public sphere and the civil society was thus essentially connected to solving the problems of collective action as a pre-requisite for democracy. The democratic approach was also important in the sense that the FCC seems to have envisaged that continuous options for democratic choices was necessary also to retain the legitimacy of the EU itself, i.e. the only plausible legitimacy as the court would see it would stem from the acceptance of the people itself. That also meant that there were substantive limits to the extent to which competencies could be delegated to one unified legal and political institutional order.

Formally, the complaint against the legislation aimed at creating constitutional conformity between the Basic Law and the extended competencies of the EC/EU was founded on the basis of art. 38 Basic Law. That article guarantees the subjective (and fundamental) right to vote of every German citizen.[45] The subjective right of voting is defined by a particular content that requires it to concern elections to assemblies invested with certain public powers. One aspect that was partly overlooked in the subsequent debate on the decision was that the power to delegate can be seen as a democratic power, so one could say that the *Maastricht* judgment extended the indirect aspects of democracy at the expense of direct electoral control. Another noticeable in the *Maastricht* judgment is that it assumed a more or less perfect fit between popular opinion (formed within the framework of the nation states) and the representatives.[46] The issue of elections in Germany in the *Maastricht* case was based on that the right to vote is a right to influence political decision-makers with some power. The problem in that respect was essentially a matter of majority-decisions in the legislative institutions that would block the possibility of national vetoes for certain issues.

The other aspect of the *Maastricht* decision concerned protection of fundamental rights in relation to the EU. The FCC held that there were no powers of the EU that would affect the complainants' basic rights as the decisions would always be

[43] BVerfGE 89, 185-189.

[44] BVerfGE 89, 182-183.

[45] *Id*. at 171-72.

[46] *Id*. at 171-73.

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controlled by national parliaments. The FCC stated furthermore that there was a duty on parliament to review executive law-making when the executive represented Germany in the Council of Ministers.[47] In relation to the intergovernmental pillars, the FCC assumed that legislative control should be exercised through ordinary legislative procedures. The FCC however stated that in the case that the council would decide anything that would be enforced through EC-law in a way which diminished the "effective protection of fundamental rights", the ECJ would be obliged to strike that measure out and in the case that it would not do so the FCC would itself retain that power.[48] In that sense, it seems as if the FCC set a lowest standard for protection of fundamental rights within the EC, whereas it avoided in the *Maastricht* case to speak clearly about the standard of rights-protection it would follow in cases of other ways to implement EU-policies. However, that lowest standard (and the guarantees under art. 79 Basic Law) is also according to the FCC the outer limit to the cooperative relation with the ECJ.

III. The EMU Judgment

The case on German participation in the European Monetary Union (EMU) is another of the landmark cases decided by the FCC. It should of course be clear that the EMU case concerned equally, as much as the *Maastricht case* the issue of integration within the European Community, something which the FCC as generally accepted.[49] The FCC accepted the principle of further cooperation since it regarded the EMU as a continuation of the cooperation in the economic area that had existed for several decades, and which had already been accepted through the *Maastricht* judgment.

The argument of the complainant in the EMU case was based on the view that the transfer of powers to the ECB and the European Commission would make an informed political choice impossible, and thus also political accountability impossible concerning central aspects of economic policy. It was also argued that this action infringed upon substantive aspects of the right to free elections.[50] The FCC rejected that argument and regarded it as a matter of a pre-legal basis for democracy, something which also meant that the role of the court in protecting these requirements was far more limited. The consequence of that seems to a

[47] *Id*. at 173-74.

[48] *Id*. at 178.

[49] BVerfGE 97, 350.

[50] *Id*. at 368-69.

certain extent to be that the FCC retracted from the more radical approach of protecting the democratic public sphere avoiding the kind of substantive arguments that it had employed in the *Maastricht* case, referring to rely on the more formal parts of it.[51]

The other aspect of the FCC's decisions was that the EMU was alleged to be a vehicle for further political integration, which would make the political choice insufficiently transparent in that the EMU would have far wider implications than what was actually stated in the decisions transferring powers of German public authorities. However, the EMU case is particularly relevant because it seems to set out the limits to the approach of the *Maastricht* case where the FCC assumed that limited and revocable powers could be controlled and foreseen, and thus legitimized. In the EMU case, the argument of the FCC centered on that every step that was envisaged had already been foreseen in the *Maastricht* treaty and thus there had been (and still were) opportunities for parliamentary control. The FCC in the EMU case seems to have provided for a less radical interpretation of the presuppositions for democracy than in some other contexts. It stated that the requirements for democratic control, i.e. a self-organizing civil society, and a sphere of public debate, that unlike formalized fundamental rights have a lower level of protection. In that sense, it seems as if the FCC's EMU decision lessened the substantive requirements for democratic self-government and instead accepted a greater degree of formalized delegation as a way to maintain democratic legitimacy. The FCC thus accepted that requirements for democratic participation were already ensured by the role of the national parliament. Despite that the FCC did not authorize any incremental development towards a political union, and it stated explicitly that if a political union should develop, new constitutional amendments would be necessary. The approach taken was to a great extent a matter of retaining the formal requirements for democratic participation set out in the *Maastricht* judgment, but reducing the informal requirements.[52]

IV. The Tobacco Directive case – No Negative Freedom of Commercial Speech

The statute implementing the Tobacco advertisement directive was challenged in the FCC[53] on the grounds that the requirement that packages of tobacco products have warning labels was a way for the government to force private firms to express particular opinions on a contentious issue and that it was therefore in breach of

[51] *Id*. at 368-70.

[52] I will not discuss in this paper constitutional issues emerging from the accession to the EMU, suffice to say that they seem of limited relevance to this study.

[53] BVerfGE 95, 370 (370-371).

guarantees of freedom of expression. In a fashion not dissimilar to its approach in the *So-Lange* cases, the FCC held that since it concerned expression relating to a commercial enterprise, the expression sought also to regulate the enterprise.

That meant according to the FCC that there was no reason to accept the view that the obligation to warn about the dangers to health of tobacco was an issue of freedom of expression. That again can be said to confirm how the EC/EU and the national courts have relied on a distinction between different kinds of rights which means that the categorization of rights has became extremely important for courts assessing the limitations on such freedoms.[54] The use of such categorizations has also been a way to both show judicial deference in the field of international cooperation as well as in the field of economic policy.

V. The Banana cases – No Right to External Trade in Bananas

The other cases related to secondary EC law are the so called *Banana* cases which concerned whether a decision of the ECJ deciding the traditional preference for bananas produced in certain countries under German law and the GATT-agreement to be contrary to EC law. [55] In the cases that were involved, lower German courts refused to implement the decisions of EC-institutions pending decisions of the ECJ and the FCC.[56] The problem consisted in that an exception that had existed for German importers since the beginnings of the EEC with regard to import-quotas on bananas had been overturned, and the issue was whether the limitation infringed on the right of occupational freedom of German citizens (and freedom of trade of companies). The legal issue was thus similar to that of *So-Lange I* and *So-Lange II*, where the FCC in both cases rejected the claims.

In the decisions on regulation of bananas, the FCC decided in a way similar to the *So-Lange II* and the *Maastricht* that since the general protection of human rights

[54] One of the interesting aspects of that seems also to be that since the FCC has largely relied on that kind of categorizations is of course also that it has simultaneously used such categorizations as a way to assess the proportionality of limitations of rights, which if nothing else shows that the protection of fundamental rights in general has a tendency to mix various forms of categorizations and more discretionary forms of judicial reasoning.

[55] Ulrich Everling, *Will Europe Slip on Bananas? The Bananas Judgement of the Court of Justice and National Court*, 33 COMMON MARKET LAW REVIEW 401 (1996); Martin Nettesheim, *Grundrechtliche Prüfdichte durch den EuGH*, EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 106 (1995).

[56] Frank Hoffmeister, *German Bundesverfassungsgericht: Alcan Decision of 17 February 2000; Constitutional review of EC Regulation on Bananas, Decision of 7 June 2000,* 39 COMMON MARKET LAW REVIEW 791 (2001); Uta Elbers & Nikolaus Urban, *The Order of the German Federal Constitutional Court of 7 June 2000 and the Kompetenz-Kompetenz in the European Judicial System,* 7 EUROPEAN PUBLIC LAW 21 (2001).

under EC law did not fall below the minimum level of protection required.[57] However the FCC furthermore stated that a secondary legislative rule instituted by a legal act of the European Community itself would constitute a legislative norm. However, that did not per se change the fact that such norms are subject to constitutional scrutiny concerning their protection of fundamental rights. In the *Banana* case, the FCC stated that in order for the protection of fundamental rights to fall below the minimum standard, such violations of basic rights had to be general, to violate essential aspects of a particular fundamental right and to be dependent on structural deficiencies in the constitutional order to the EC.[58] In relation to such criteria, it obviously becomes close to impossible for the EC to fall below any standards for protection of fundamental rights, and although the FCC reserved the right to review such measures, it is of limited practical importance. Secondly the FCC also stated that constitutional complaints related to secondary norms of EC law were *prima facie* inadmissible. That is also a procedural restriction which means that the FCC sets not just a substantive but procedural limit to its power to review, except in the case that the ECJ has abandoned its role as guardian of fundamental rights, and done so in a general way.[59]

The clarifications that the FCC made, both concerning the status of the procedure of prejudicial questions of reference to the ECJ and the procedural and substantive requirements on the commitment of the European Community to protect fundamental rights limited the effects of the *Maastricht* judgment. The *EMU*, *Banana* and *Tobacco advertising* judgments can thus be said to have in common that they have strongly delimited the effects of the FCC's competency to review EC law. Some authors have argued that the *Bananas* judgment can be seen as a way to confirm *So-Lange II*.[60] That view seems not entirely unjustified, but the *Banana* judgment should rather be understood as a way to solidify some of the practical consequences of the *So-Lange* cases within the framework of the *Maastricht* judgment which is based on the *ultra vires* principle.

[57] BVerfGE 102, 147.

[58] *Id*. at 156.

[59] *Id*. at 161.

[60] Elbers & Urban, *supra note* 56, at 32.

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VI. The European Arrest Warrant Decision – Maintaining the National Constitutional Structure

The FCC decided in July 2005 that the German statute passed in order to fulfill German obligations under the Treaty of European Union concerning the framework decision on the European Arrest Warrant (EAW) violated the German Basic Law. The court declared the statute, in its entirety, as null and void. The judgment to declaring the statute implementing the EAW void was delivered by the FCC's Second Senate[61]. Of the participating judges, five joined the majority opinion, which declared the statute implementing the EAW to be unconstitutional due to how the statute was drafted, not that the EAW, as such violated the Basic Law. One judge concurred in the decision to void the statute, but on the ground that the statute was unconstitutional because the EAW, by any reasonable interpretation, would violate the German Basic Law. The two remaining judges dissented and wanted to uphold the statute implementing the EAW.

In 2002 the Council of Ministers decided to adopt the framework decision, the EAW to be implemented by the national legislatures.[62] The EAW is aimed at drastically reducing the legal hurdles for extraditing persons suspected for certain crimes between the member states of the European Union. The basis for the decision is that the member states mutually recognize each others' judicial decisions in matters of criminal jurisdiction and comply with requests of extradition from other member states in situations set out in the EAW. Under the EAW, extradition of criminal suspects in the EU becomes an exclusively judicial issue, unlike the previous regime where extradition has been either entirely prohibited or a matter for national executives to decide. The underlying assumption of the EAW is that the member states have a high degree of confidence in each others' legal systems, so much so that it requires states to extradite also their own citizens. Although the EAW introduced certain safeguards such as the *ne bis idem* principle, it is not

[61]Bundesverfassungsgerict (BVerfG – Federal Constitutional Court), 2 BvR 2236/04, para. 1-201, (July 18, 2005), http:// www.bverfg.de/entscheidungen/rs20050718_2bvr223604.html; Klaus Michael Böhm, *Das Europäische Haftbefehlsgesetz und seine rechtsstatlichen Mängel*, 58 NEUE JURISTISCHE WOCHENSCHRIFT 2588, 2588-90 (2005); Simone Mölders, *The European Arrest Warrant in the German Constitutional Court* 7 GERMAN LAW JOURNAL 45-58 (2006) (www.germanlawjournal.com/pdf/Vol07No01/PDF_Vol_07_No_1_45-58_Developments_Moelders.pdf, visited May 22, 2006); Alicia Hinarejos Parga, *Bundesverfassungsgericht (German Constitutional Court), Decision of 18 July 2005 (2 BvR 2236/04) on the German Arrest Warrant Law*, 43 COMMON MARKET LAW REVIEW 583 (2006); Nicola Vennemann, *The European Arrest Warrant and Its Human Rights Implications* 63 HEIDELBERG JOURNAL OF INTERNATIONAL LAW 103 (2003); Joachim Vogel, *Europäischer Haftbefehl und deutsches Verfassungsrecht* 60 JURISTENZEITUNG 801 (2005).

[62] Council Framework Decision, 2002/584/JHA, 2002 O.J. (L 190) 1.

possible for a State to refuse extradition on the basis that a legal system does not fulfill the standards of art. 6 ECHR. Nor is it necessary that a State requesting extradition does not fulfill constitutional standards of the extraditing State. Whereas the purpose of the EAW has been to judicialise the process of extradition thereby injecting certain procedural rights into it, it has also eradicated the scrutiny of the legal systems of States making requests for extraditions.

The EAW was passed as a framework decision passed within the third pillar (Police and Judicial Cooperation in Criminal Matters) of the EU, rather than in the EC-law. The legal basis for decision-making of the EU in matters related to the PJCC is laid down in Title VI of the TEU arts. 29-53. The specific basis in the TEU for the framework decision on the EAW is art. 31(b) which states that the parties to the framework decision are obliged to facilitate extradition of their own citizens to other member states. The article also states that such decisions are to have the form of framework decisions which are to be implemented in the member states through ordinary legislative processes. An important aspect of that process is to safeguard the influence of national parliaments in the process of legislation, and thus also to avoid constitutional conflicts between the commitments of the countries as members of the European Union and the constitutional orders of the countries themselves. The decision of the FCC in the case on the statute concerning the implementation of the EAW is the last, but hardly final, decision in the FCC's longstanding work on defining the extent of delegation of powers to international organizations.

D. Constitutional Issues – Rights, Delegation, Accountability and the Role of the FCC

I. Distinguishing Community and Union Law – Preserving National Constitutional Control

The German constitutional doctrine on delegation of powers to the EC/EU distinguishes sharply between EC–law, which is presumed to take precedence over national law, and EU-law where no such presumption exists.[63] The FCC reaffirms in the present decision that the basis for the constitutional legitimacy of European integration in German law relies on that distinction.[64] The German constitutional doctrine does so despite attempts by the ECJ to merge certain aspects of the first

[63] Bundesverfassungsgericht (BVerfG – Federal Constitutional Court), 2 BvR 2236/04, para. 74, (July 18, 2005), http:// www.bverfg.de/entscheidungen/rs20050718_2bvr223604.html.

[64] *Id*. at para. 82.

and the third pillars of European law.[65] It seems important to note that whereas there is no distinction between a country's duty to fulfill international obligations based on the character of the treaties, the treaties stipulate different forms of implementation. These differences are central to how different forms of law-making in the EU are treated, and in which circumstances which forms of legislation are required. Another important limitation that the FCC mentioned in *So-Lange I*, but which has not been discussed much (but neither contradicted) is that the EC is seen as a legal regime which is constrained by general rules of customary international law.[66] In that sense, the FCC also sought to reconcile the potential conflicts between openness of a constitutional order to customary international law, and openness to European integration. The requirement to reconcile these aspects is not particularly controversial, but it also shows that the FCC has developed what seems to be a constitutional hierarchy of international norms, where *jus cogens* norms followed by customary international law is at the pinnacle of hierarchy, followed by EC–law and below EC-law ordinary treaties such as the TEU are placed.

The EAW-statute case is the first where there is any possibility for the FCC to distinguish between legal norms stemming from EC-law and EU-law. In that sense, the case is of greater importance. From the judgment of the FCC in the EAW-statute case, it seems clear that it renounced the view that framework decisions can be equated with directives in having an "indirect" direct effect.[67] In that respect, the FCC implicitly rejected the view of the ECJ by stressing the discretion of national legislatures. However, the majority of the FCC stressed that it considered the requirements for national legislative discretion to be fulfilled in the EAW, but not in the German statute implementing the EAW. However, that interpretation of the

[65] In the *Maria Pupino* case, the ECJ held that a framework decision on the standing of victims of crime in the criminal procedure was directly applicable also in states that had not incorporated the provisions of the framework decision in their national legislation. The reason for that was partly the ECJ regards framework decisions to be structurally similar to directives and that they might thus be interpreted as having a similar "indirect direct effect". Framework decisions are structurally to directives in the way they are drafted and in the way the legal basis for them in the TEU is framed similarly to the legal basis of directives in EC-law, i.e. they are to be effective with respect to their objective but the Member states are free to pursue that objective however they see fit. A more reasonable interpretation of the structural difference between EC-law and EU-law in the second and third pillar would be to see the latter as a response by the Member states to the ECJ's tendency to make all legislative instruments of the EC directly effective. If the Member states had wished to make framework decisions directly effective, they could have been incorporated in EC-law, rather than being created within a different institutional structure. In relation to that, the decision of the ECJ seems very problematic as it is a quite radical attempt to "supranationalize" the intergovernmental parts of the EU. Case C-105/03, Criminal Proceedings against Maria Pupino, 2005 E.C.R. I-5285.

[66] BVerfGE 37, 270 (278-79).

[67] 2 BvR 2236/04 para. 81-82

EAW was contrary to the one the ECJ had reached. The restriction on the discretion of national legislatures that the FCC has accepted in relation to regulations and directives that concern the common market were unacceptable when it came to framework decisions that concern criminal procedure where a stricter standard of constitutional control applies and where the national legislature is obliged to retain the power to alter its decisions.[68] In a similar way, the legislature is obliged under the Basic Law to act if the confidence in the legal system of the other states is shaken. The FCC founded that claim on the fact that framework decisions are not a form of action based on the supranational character of EC and that the legislature cannot relinquish its discretion by referring to legal rules decided on the basis of TEU. There is a certain degree of formalism in the approach to distinguish EC- and EU-law in the sense that the FCC thereby rejects the idea of "an ever closer union" as something which the member states have already accepted, and instead it continues the one-step-at-a-time approach of previous decisions. To a certain extent, that is consistent with the view of the *Maastricht* judgment which assumes that the legitimacy of the German accession to the EU can only be regarded as an effect of that the Basic Law was amended in order to make way for that. The need to amend the constitution before great and unforeseeable changes could therefore be said to be fulfilled in the *Maastricht* case but it could not be said to have been fulfilled in the case of the EAW-statute. That meant also that the FCC set out procedural limits to legislative discretion, which in the end became another effect of the very broad notion of constitution that the FCC employs. However the broad notion of a constitution that it favors is, as discussed above, not necessarily a basis for aggressive judicial enforcement of a constitution, as shown by the *So-Lange* cases.

The FCC has consistently required of EC-law that in order to conform to the Basic Law, it should provide a protection of fundamental rights which, as a whole, is equivalent to the protection of fundamental rights in national law. It has also required that all powers delegated to the EC should at least in principle be revocable by the national legislator. [69] The test of "overall level of rights-protection" creates a kind of constitutional control where the FCC has to ask whether the particular rule to be decided so dilutes the rights-protection in EC-law as a whole as to make protection fall below the standard of the Basic Law. By the very nature of such a criterion, the test is more or less only possible to apply before every expansion of community powers through a new treaty, or in the wake of some dramatic legal or political change within the community. That is sinceit is

[68] *Id.* para. 79-81

[69] Kokott, *supra* note 22, at 243-246.

otherwise hard to claim that a specific piece of legislation or a particular judicial ruling would change the overall level of rights-protection in the EC.

In respect to the issue of extradition, the FCC did not change that view but stated that the review of proportionality of legislation on extradition of German citizens was still a duty of the legislature, but that the FCC has competency to review whether the legislature has assessed the proportionality of legislative measures correctly.[70] The FCC's solution in relation to European law was to distinguish between EC-law where a low level of constitutional scrutiny is applied and EU-law where a normal level of scrutiny is applied. Since the legal basis of the EAW is in the TEU, the declaration that the German statute implementing it was void was thus not an affront to the principle of supremacy of EC-law. The judgment instead implies that the level of constitutional scrutiny that applies in relation to the third and second pillars of the EU is considerably higher than in relation to the first pillar. The FCC accepted in the judgment implicitly the previous decisions of the court which assumed that EC-law has a special status under German law.

When it comes to obligations under the TEU, it is however clear that the FCC does not accept such a special status of the EU. In that respect, it seems as if the "international" – as opposed to "supranational" – character of the EU also means that the FCC regards the obligations to other member states, in relation to EU–law, as ordinary obligations under international law that ought to be scrutinized under ordinary standards of constitutional control.[71] The preservation of the distinction is however also a way to protect the constitutional legitimacy of the European Community in German law. The majority of the court stated that since there could be no possibility to relax the protection of human rights because of obligations of public international law based on international treaties, German obligations under public international law were irrelevant in deciding the constitutionality of the statute implementing the EAW.[72] In doing so, it referred to the judgments of *Waites v. Germany* [73]and *Matthews v. UK*[74] of the European Court of Human Rights where

[70] Bundesverfassungsgericht (BVerfG – Federal Constitutional Court), 2 BvR 2236/04, para. 79, (July 18, 2005), http:// www.bverfg.de/entscheidungen/rs20050718_2bvr223604.html..

[71] 2 BvR 2236/04 para. 73-74

[72] From that it is also clear that the FCC distinguishes between obligations under public international law, and obligations under EC-law, which is also the approach taken by art. 23 Basic Law. The FCC does thus implicitly also reject the "internationalist" view of the EC as an international organisation created under treaty-law of customary international law.

[73] Waite v. Germany, 30 Eur. Ct. H.R. 261 (2000).

[74] Matthews v. UK, 28 Eur. Ct. H.R. 361 (1999).

the EctHR rejected arguments that the ECHR would be inapplicable in the states that are parties to ECHR in cases where the states were bound by other international obligations.[75] That seems also to imply that the FCC gives special weight to obligations under international law that concerns protection of human rights in relation to other international obligations.[76] The special status of international obligations to protect human rights seems however limited to other international obligations since the FCC, in a judgment in 2004 stated that the supreme basis for constitutional review in German law is the Basic Law which also supersedes any human rights obligations under international law.[77] The court furthermore insisted on the role of the Basic Law, as being the highest source of German law and an expression of popular sovereignty, could not be compromised by any form of international human rights protection or any other international obligations that would conflict with the Basic Law.[78] In relation to the EAW-judgment, it seems also as if the FCC has accepted the functional differentiation between economic law and civil rights protection. It is important to note that the review of the statute implementing the EAW concerns the third pillar, where the political decision-makers of the member states have agreed to further integration in fields that are understood as non-economic. In that sense, the FCC has shown a high degree of fidelity to the intentions and structural differentiation of different kinds and areas of decision-making.

II. Legislative Discretion and Political Accountability

The second structural constitutional aspect concerns whether the German legislature had fully exercised its legislative discretion in order to avoid conflicts between constitutional protection of rights and Germany's obligations under European law. The centrality of parliamentarianism in contemporary German constitutionalism is also another reason for the position of the FCC. Since parliamentarianism requires not only that the parliament holds legislative powers, but also necessitates that it to exercise them in a way which reflects political choices and exercise of political power on behalf of the citizens. It could be said that the FCC rejects the idea of a supine parliament, which although not disempowered, does not exert its power within the constitutional order.

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[75] Bundesverfassungsgerict (BVerfG – Federal Constitutional Court), 2 BvR 2236/04, para. 119, (July 18, 2005), http:// www.bverfg.de/entscheidungen/rs20050718_2bvr223604.html..

[76] It seems hard given the case law of the FCC to sketch a very detailed understanding of the constitutional hierarchy of international obligations, but it seems possible to assume that EC-law has a special status, as has also human rights obligations and then "ordinary" bi- and multilateral treaties.

[77] BVerfGE 111, 307 (317-19).

[78] *Id*. at 318-319; Hofmann, *supra* note 21, 18-23.

In the EAW-statute case, the court rejected the way in which the statute implementing the EAW was drafted as it did not comply with the constitutional rules for limiting the protection against extradition and the national legislature did not utilize all the discretion accorded to national legislatures in the EAW.[79] The German legislature, the FCC decided, had interpreted the EAW in terms broader than necessary and, therefore, the statute implementing the EAW also rejected the possibility for any independent judicial review, as well as any review of the proportionality of the measure of extradition in cases where such weighing would have been appropriate.[80] The importance in retaining legislative discretion as well as the demand that legislation is not unduly broad has also caused the court to defend the effectiveness of such political choices within the German constitutional order. In relation to the EAW, the dilemma as pointed out above was that the legal effects of the delegation would not be consistent in all countries and that they would also be set in twenty-four mutually independent systems of criminal justice.[81] That means that there was a considerable difference between traditional forms of delegation to one body, (the European Community), whereas the delegation of powers under the EAW was, in effect, a relinquishment of powers, allowing other independent states to set standards of criminal procedure. In order to avoid that it would in effect amount to relinquishing of powers; the majority ordered the legislature to continually monitor the legal and political developments in the other member states. The FCC thereby used a judicial order to a legislature to continuously deliberate over certain issues.[82] While it can be seen as a method to maintain active parliamentary control of certain aspects of international cooperation, but it is also a measure for which the FCC maintains some control over the activities and deliberations of the legislature. The argumentation of the FCC can, in that sense, be said to resemble in this context, the reasoning in the *Maastricht* case, where the implied legislative powers of the council under art. 308 of the EC-treaty were considered as dangerous, namely a mix of lack of accountability and lack of control of the effects and extent of delegation. The problem was thus that it was a relinquishment of national authority rather than a matter of that delegation of powers, and in that sense there court seems to have reasoned in a similar way in the EAW-statute case.

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[79] Bundesverfassungsgerict (BVerfG – Federal Constitutional Court), 2 BvR 2236/04, para. 77-78; 93-94, (July 18, 2005), http:// www.bverfg.de/entscheidungen/rs20050718_2bvr223604.html.

[80] *Id*. at para. 96-97.

[81] *Id*. at para. 76.

[82] *Id*. at para. 78-79; Stefan Huster, *Die Beobachtungspflicht der Gesetzgeber*, 25 ZEITSCHRIFT FÜR RECHTSSOZIOLOGIE 3, 11-14; 15-17 (2003).

The view that the German Basic Law demands that the directly elected legislators retain actual should discretion over certain decisions is coherent with the earlier stated view of the FCC that European integration is essentially a matter of delegation of limited functions of public law where the German legislature would retain powers to make discretionary political choices.[83] For that to be meaningful, it also requires the legislature to actually exercise such discretion, and for it to be constitutional, to exercise discretion in a way that is in conformity with human rights. In the EAW-statute case, the FCC concluded that the legislature had adopted a form of implementation of an EU-measure that was far too broad and disproportionately restricting human rights.[84] Thus FCC protected the possibility of continuing political accountability within the German political system at the expense of the immediate powers of the German legislature to further its own conception of the constitutionally recognized objective of European integration. The use of proportionality as the method for judicial review in the EAW-statute case means that the distinction between delimited delegation of public powers and public powers combined with a requirement for a sufficiently high general protection of civil rights is relevant to EC-law whereas in relation to the EU, a higher and more continuous level of scrutiny will be used.

The dilemma that however stems from the approach of the FCC is of course that the court becomes not just a way to ensure procedural correctness in the constitutional system, but becomes a kind of substitute for political accountability more generally. Alternatively, there seems to be a case for it in the sense that the process of democratic representation through voting bundles a lot of issues together as well as retrospective and prospective concerns. The role of the constitutional court in such a context may then become to "unbundle" certain issues in order to force legislatures to take active stands on important issues. The doctrine that the FCC uses to enforce that is a mix of application of principles of proportionality and reviews that are concerned with principles of overbreadth of legislation. That can thus be seen as a way to guard the parliament against its own tendency to devolve powers. It is a view that can be questioned in the sense that there might not be any strong case for assuming that parliaments do not necessarily abandon its competencies. However, since it seems as if there might also be strong political interests in devolving competencies of parliaments, partly for reasons of effectiveness and courts may play a role to constrain political discretion. It is also clear that whereas a parliament might make trade-offs between short-term political

[83] BVerfGE 89, 155 (186-187); Peter L Lindseth, *Democratic Legitimacy and the Administrative Character of Supranationalism: the Example of the European Community*, 99 COLUMBIA LAW REVIEW 628 (1999).

[84] KIRCHHOF, *supra* note 6, 257-262.

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gains and long-term political autonomy, it seems also clear that for courts such trade-offs are not accessible, since courts have less short-term political gains to make from such delegations, and thus everything equal a stronger interest in maintaining their institutional powers.

III. The Role of the FCC – Guardian of the Constitution or Maintaining Constitutional Conformity through Interpretation?

The role of the FCC is another central part of the problem of European integration. The FCC has traditionally played a role which is more extensive than what is accorded to courts in traditional accounts of separation of powers. It has instead been regarded as and regarded itself as a guardian of the free and democratic constitutional order. In relation to that, it has both been working as a kind of quasi-legislative institution through so called "abstract-concrete" review (a role which has been particularly important in the case law on European integration) as well as a guardian of fundamental rights. The views of the proper role of FCC and constitutional courts in general have varied in constitutional theory, and below I seek to outline some of the more central theories.[85]

1. Division and Separation of Powers as justifications of constitutional adjudication[86]

Constitutional courts have often been justified through the need for separation of powers within a given political order. The idea of separation of powers, has to a great extent, been based on the need for constraining certain branches of government but the purpose was additionally to make each branch carry out its tasks more effectively. Another instance of separation of powers has been the understanding of separation of powers as based on pre-commitments, where various actors seek to bind either themselves or each others or to simultaneously bind one's future selves as well as one's present (and future) political opponents.[87] The way to do so has usually been to separate what kind of things that the different branches of government can do, partly by legal rules, and partly by institutional constraints based on organizational, bureaucratic and hierarchical constraints.

The protection of separation of powers however has two sides one is that the court sometimes must protect gridlocked legislation against executive encroachment the

[85] ULRICH R HALTERN, VERFASSUNGSGERICHTBARKEIT, DEMOKRATIE UND MIβTRAUEN 211-37 (1997); GÜNTER FRANKENBERG, VERFASSUNG DER REPUBLIK 281-87, (1996).

[86] *Id*. at 211-212.

[87] Stephen Holmes, *Precommitment and the Paradox of Democracy*, *in* CONSTITUTIONALISM AND DEMOCRACY 195 (Jon Elster and Rune Slagstad eds., 1987).

other is that the courts sometime must protect states, particularly in states with where minorities nationally constitute local majorities. One basic understanding of the role of the FCC has been the issue of separation of powers, where the FCC has been regarded as maintaining the constitutional structure of vertical separation of powers. In that respect, the view is not different from other a number of other theories of the role of courts in relation to constitutional law.

Separation of powers in Germany is a constitutional principle[88] that the FCC has enforced, however separation of powers in the German context borders on what in other contexts is described as "division of powers". That has also to some extent been an object of criticism in the sense that the role of the FCC has transformed democracy and structures of accountability into a "jurisdictional state".[89] That view has been criticized mainly because its attendant legalism has been seen as a problematic constraint on democratic accountability, and it has also been criticized for all too easily judicialising and legalizing different aspects of political decision-making in general and the rules regulating the process of political decision-making in particular.[90] The role of the court has also been criticized since the basic structure of the German federal government is based on parliamentarianism, a fact that also makes the traditional arguments for impartial arbiters of separated political powers weaker. On the other hand is the federal character of the legislature is an argument in favor of such a more expansive role of the FCC.

In such a system the role of the constitutional court in controlling the executive power in order to protect the legislature becomes more limited, at least when the government has clear support of the majority in the legislature. In a parliamentary system with two houses and a form of continuous change in the upper house consisting of representatives from the states, the court gets a larger role since the changes may create a kind of divided government. In a similar respect, the distinction between different procedural rules for different kinds of decisions and

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[88] Udo di Fabio, *Gewaltenteilung*, *in* 2 HANDBUCH DES STAATSRECHTS 613 (Paul Kirchhof and Joseph Isensee eds., 2nd ed. 2003).

[89] Wolfgang Knies, *Auf dem Weg in den "verfassungsgerichtlichen Jurisdiktionsstaat," in* VERFASSUNGSSTAATLICHKEIT – FS KLAUS STERN 1155 (Joachim Burmeister ed., 1997).

[90] Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 HARVARD LAW REVIEW 29, 35-40 (2004). Pildes points to the problems that emerge in the constitutionalization of political procedures which requires courts to consider ever more substantive issues. This, in turn, either leads to the legal system resolving issues which it is unable to do competently and effectively, undermining legitimacy or leading to too extensive judicialisation. The extensive judicialisation of procedural issues (or of what purport to be procedural issues) was present in the Maastricht and EMU cases where the problem concerned the dilution of the right to vote, but where the procedural issues were intertwined with problems of substantive policy issues.

the enforcement of supermajority requirements provide a constitutional court with a strong role in relation to separation of powers problem. By maintaining claims for separation of powers, the FCC tends to protect the federal structure, i.e. the competencies of the *Länder* (states) and the powers of the parliament and courts against the executive.

The role of the FCC with regards to European integration has, to some extent, been to safeguard the powers of the states, and to a lesser extent of the, parliament against itself. However, the kind of consensual democracy that Germany has been in many respects also by definition diminishes the role of separation of powers, since concerns of separation of powers become at their most important in gridlocked governmental systems; which seems to presuppose a considerable degree of party-conflict.[91] However, in relation to European integration, it seems as if the role of the FCC in enforcing procedural limits to delegation of powers has been a way to maintain separation of powers and protect interests of the states *(Länder),* at least to some extent, in relation to a project on which there has been considerable political consensus. In such contexts, it also seems as if separation of powers arguments begets a more formalistic approach of the judiciary.

2. Functionality of Law

The idea of functionality of law as a basis for the decision-making of a constitutional court[92] is another aspect of what could be described as a pragmatic approach to law. The idea that law will be made more functional through the adaptation of a constitutional court with powers to review statutes and other legal norms with a view to their constitutionality, assumes either that the constitution will provide a functional framework for government and that the court can remedy problems in the political branches, or that the constitutional order as such may be dysfunctional at certain times and that a pragmatic court might provide a basis for informal amendments to the constitution. Both of these possibilities assume a high degree of confidence in the ability of courts to make such assessments, but it is an assumption that in order to be evaluated also has to be compared to the options available for political branches to resolve such issues themselves. The functionalist approach has to some extent been emphasized by that the FCC, unlike the US Supreme Court has not sought to limits its own jurisdiction by employing political questions doctrines. (However, as can be seen from the FCC's interpretations of the constitutional significance of the practical effects of the continuing integration in

[91] *See* Daryl Levinson and Richard H. Pildes, *Separation of Parties, not Powers*, 119 HARVARD LAW REVIEW 2311 (2006).

[92] HALTERN, *supra* note 85, at 177-180; 180-186.

the EU, it might accomplish something similar by a more restrictive interpretation of facts.)

The view of making the legal system more functional the perceived needs of society has been and seems to remain an important part of the justification of the need for jurisdictional control. The idea of constitutional judicial review as justified by that increases functionality of law thus presupposes an understanding of political legitimacy of law that seems to be dependent on a substantive, informal and non-procedural view of what legitimates public authority, linked to a factual assumption that an insulated constitutional court is more suited to provide such functionality than other branches of government. The problem of such understandings of functionality seems however to be that whereas functionality as an approach may resolve low-level conflicts in a political system, it is left without effective tools to manage more deep-seated forms of political conflicts, since the functionality-based justifications seem to be unable to provide any justification of other legal and political choices.

3. Integrationist Role in a Pluralist Democracy[93]

Another very common view of constitutional judicial review is that the judges work to lower the stakes of politics[94] and that by that increase the possibilities for the political order to integrate society, and to "make things work". That kind of integration is supposedly more important in pluralist societies where differences in opinion may create gridlocks and generally stifle political decision-making. The integrationist approach relies thus to some extent on the assumption that democratic procedures are less effective than other institutional designs to resolve gridlocks, which also requires courts to step into to solve the problems. The integrationist and functionalist approaches have much in common, although they seem to explain the need for judicial intervention in politics in slightly different terms, either in relation to the general complexities of modern societies, or more specifically in relation to the pluralism of opinions (and attendant distrust) in such societies.

It is a view which, in relation to European integration and the FCC, is an insufficient description of its role. In relation to EU, the court may have retained its jurisdiction in terms of reviewing exercises of political power in the EC/EU however, the practical character of the judgment has usually been of the kind that

[93] *Id*. at 230-241.

[94] William N. Eskridge, *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE LAW JOURNAL 1279 (2005).

has led to higher rather than lower stakes, since the court has adopted an all-or-nothing approach to protection of rights. In that sense, the judgment in the case of the EAW-statute is a clear difference in the sense that it actually uses proportionality as a way to delimit the exercise of powers of parliament through EC-law. The integrationist aspect in the case of the decisions on the European integration seems to be found – if to be found at all – in the approach of the FCC in making changes limited and foreseeable, whereas it has also increased the predictability in the workings of the judicial system by clarifying procedural rules, while still maintaining a model of the relationship between EC law and German constitutional law that generates ambiguity at the level of structure.

4. Guardian of the Constitution

The idea of the "guardian of the constitution" depends on the idea of the essential instability of normal democratic politics, and that the only institution able to stabilize it in the long run is a judicial, rather than political institution.[95] It should be noted that the FCC is viewed almost universally as an institution on the border between law and politics, as the very reason for construction when the Basic Law was framed was the unavoidably political character of the legal issues that it would have to decide.[96] In that sense, there is a strong difference between the FCC and general high courts that only include a political dimension. Therefore, political discretion on the part of the judges does not challenge the legitimacy of the FCC as sometimes is the case with other courts. The view of the FCC as a guardian of the constitution also means that the FCC is legitimized less by any pragmatic approach to law than by fidelity to the constitutional order. In practice, however, it seems as if the FCC has come to accept a more pragmatic approach by setting constitutional hurdles for the freedom of the political branches to pursue international cooperation and integration It has rarely precluded entirely political choices for which stable and large political majority can be mustered.

[95] The notion of the court as the "guardian of the constitution" is important as it seems to refer to a wider understanding of the jurisdiction of the highest court or the constitutional court than what is visible if one understood it in conventional terms of jurisdiction. The notion of "guardian of the constitution" also points to the fact that the court has a clearly political role, and that it is a role that might be exercised in conflict with the political branches of government. It also seems to lead to a rejection of ideas of constitutional "departmentalism" or doctrines of "political questions" where courts, on the basis of considerations of constitutional structure, avoid making decisions on certain politically contentious issues. For a theoretical background *see* Carl Schmitt, *Legalität und Legitimität, in* VERFASSUNGSRECHTLICHE AUFSÄTZE 293-335 (1932/1958); Hans Kelsen, *Wer Soll der Hüter der Verfassung Sein? in* DIE WIENER RECHTSTHEORETISCHE SCHULE 1873 (Hans Klecatsky ed., 1968).

[96] Hans-Jürgen Papier, *Der Bundesverfassungsgericht als "Hüter der Grundrechte," in* DER STAAT DES GRUNDGESETZES – FS PETER BADURA 411 (Michael Brenner et al. eds., 2004).

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5. Some Reflections on the FCC and the Role of Constitutional Judge in European Integration.

The practice of the FCC has been characterized by a mix of pragmatism and formalism in how it has approached the constitutional implications of European integration. The FCC has generally accepted the effectiveness of European law, and it has done so by balancing values of formality, legality and clarity of domestic law, with the value of international cooperation in general and of European integration in particular, as well as to avoid disturbing what in many respects has been a successful process of supranational constitutionalization. The way in which the court maintained that was by setting constitutional limits for what could be accepted in international integration in principle, while retaining a considerable flexibility in practice, a flexibility which was used in a way to facilitate European integration into German law, while proceduralising the transfers of power to European law (thereby also avoiding a certain aspect of deformalisation).

In the most recent case on the EAW-statute case, judges Gerharts[97] and Lübbe-Wolf[98] in their respective dissents in the case of the EAW-statute rejected the total nullification of the German act implementing the framework decision on the basis that it would infringe on Germany's obligation to other members of the EU. In effect it seems as if they proposed a more limited standard of review which should have resulted in partial rather than total nullification.[99] Their argument was based on that Germany, and the various branches and agencies of the German government have an obligation to interpret the Basic Law as far as possible as not to conflict with the TEU. That approach is problematic as it implies that, there is at least an argument to be made of judicial deference, not just to EC-law, but to obligations arising from the TEU. That also illustrates the problems for national constitutional courts in the context of extensive European cooperation when it comes to the provisions of the EU. On one hand, the FCC recognizes the special character of the EU on the basis that the Basic Law speaks on integration in the European Union, referring to EC as well as to EU; on the other hand it maintains a clear distinction between legal acts under EC-law and under the TEU in order to protect national legislative control. The view that there is a special case for avoiding a clash between national constitutional obligations on one hand and obligations underlying German participation in the EU can be supported on the basis of the

[97] Bundesverfassungsgerict (BVerfG – Federal Constitutional Court), 2 BvR 2236/04, para. 185-201, (July 18, 2005), http:// www.bverfg.de/entscheidungen/rs20050718_2bvr223604.html.

[98] *Id*. at para. 155-184.

[99] *Id*. at para. 184; 201.

text of art. 23 Basic Law that explicitly mentions the EU, comprising both the intergovernmental and supranational parts of the EU. However, the majority decided to keep the distinction between these parts of the European cooperation clear in order to protect the effectiveness of democratic representation.[100] In that sense however, the majority seems to have stated more clearly than before that if there is a choice between international obligations and democratic representation, democratic representation takes precedence.

The dissenting judges seemed on the other hand to point to another role of the FCC, namely one which can be seen as a mediator and facilitator within the political system, breaking rather than creating gridlocks. In that respect, there is a genuine conflict in relation to the role of the FCC. In relation to earlier case-law it seems relatively obvious that the FCC has worked as to facilitate a number of constitutionally recognized goals, such as European integration by harmonizing constitutional standards, in particular in regard to constitutional rights concerning economic activities. However, it has been an approach that whereas being facilitative also has been related to actual cases arising after the adoption of certain provisions, whereas the court has been more restrictive, pressing for constitutional changes in order to avoid tensions, before the adoption of new obligations under the treaties. In that sense, the approach of the dissenting judges in the EAW-statute case can be said to hold to a previous tradition, namely that the FCC seeks to accommodate European law-making in the national constitutional order after treaties have been accepted. However, as pointed out the majority-opinion in the EAW-statute case avoided discussing the per se validity of the framework, just stressing the importance of holding strictly to its formal character requiring parliamentary authorization, an authorization that in Germany can be reviewed by the FCC. In that sense the majority-opinion staked out a new way for constitutional control act in relation to European integration. But the dissenters in the EAW-statute case also showed the tension in the judicial role of the FCC, as being either a facilitator of the workings of the political systems, or a guardian of the constitution. The facilitative model, while being more modest and causing less tension with the political system also has a downside in a certain deformalisation of the political system, a deformalisation that also diminished accountability. The tension between accountability and formal correctness on one hand, and on the other hand a less formalist and more effective, but less accountable reflects a more general conflict between possibilities for public decision-making and on the other hand control (at least in the short run) of political decisions.

[100] *Id*. at para. 84.

The facilitative and guardianship based models are however not entirely different in the sense that they both presuppose that an impartial power is necessary in order to make the political system run effectively. In that sense, it seems clear that the facilitative model has not been the most important one in the cases on European integration, where the court instead has sought to preserve the ability of the German electorate to act. On the other hand, the court by requiring constitutional law to European integration, has also worked in democracy-forcing way. In that sense, it seems as if there is less conflict between the "guardianship" and "democracy-forcing" models of constitutional courts than what sometime meet the eyes. It has also been argued that the FCC by the decision in the EAW-statute case increased legal uncertainty and ambiguity in relation between German law and European law.[101] Whereas it partly seems to be incorrect, the uncertainty pertains only in relation to EU-law in the third pillar (since most acts by the political decision-makers in the third pillar probably would be deemed non-justiciable) it seems also to be a logical consequence of that Germany has chosen to define the constitutional role of the EU in an ambiguous way. There are several reasons for that kind of constitutional choices, and one important is probably – as is often the case with constitutional issues[102] – to get an issue, namely the constitutional significance of European integration "off the table". Already in *So-Lange I*[103] the FCC also recognized that European integration has the character of a process which seems to be continuing, and from the perspective of the FCC it seems as if it in subsequent cases has sought to harness that process in order to make it democratically accountable by creating constraints and procedures when it comes to further integration, beyond what was already accepted..

One could thus say that the constitutionalizing of an ambiguous relation between national and European law may work both as a way to avoid issues, but it might over a longer period of time, lead to a view where the role of the court becomes democracy-forcing, rather than decision-avoiding.[104] The piecemeal approach of the

[101] Martin Wasmeier, *Der Europäische Haftbefehl vor dem Bundesverfassungsgericht – Zur Verzahnung des nationalen und europäsichen Strafrechts,* 23 ZEITSCHRIFT FÜR EUROPARECHTLICHE STUDIEN 1 (2006).

[102] Cass R. Sunstein, *Constitutionalism and Secession*, 58 UNIVERSITY OF CHICAGO LAW REVIEW 633, 636-643 (1991).

[103] BVerfGE 37, 281

[104] On the other hand, that has, of course, a cost in terms of the legal certainty of individuals, since it is, at least at the level of principle, not clear when a court reserves the right to review measures under EC law. One could also more generally say that the piecemeal approach of "one case at a time" has certain advantages in terms of democratic accountability since it provides plenty of opportunities for political responses to judicial decisions, but it also seems clear that it as an approach that undermines the extent and role of precedence, and thereby also weakens certainty and clarity of law.

FCC in relation to European integration seems also to be a response to the kind of ambiguity which is associated with the German constitutional regulation. In relation to that seems the clearly facilitative approach of the dissenters in the case to be more different from the approaches previously taken than the approach taken by the majority that emphasized the limited, "one case at a time" based approach to judicial review of European integration.

E. Conclusions: Protecting Political Accountability and Constitutional Rights

The FCC has claimed final and supreme power to interpret the Basic Law as well as the German constitution thus also – in principle – power to review the constitutionality of legal rules stemming from the European institutions for a long time. In that respect, the judgment on the EAW-statute discussed here relies on well-established precedents. The major difference is that the FCC for the first time actually rejected a statute implementing a legal rule that came from the EU. That seems to reflect the fact that EU, concerns issues that go to the very heart of the tasks of the state and the protection of civil liberties, warranting more intense constitutional scrutiny in national courts.

The FCC's traditional approach to the protection of civil liberties and constitutional structure in relation to the EC has since the *Maastricht* judgment relied on the overall revocability of delegated competencies and overall equivalence of protection of rights; reflecting that EC-law traditionally concerned areas of law where governments have considerable regulatory powers.[105] The more limited protection of economic rights in contemporary constitutionalism implies that there are fewer constitutional obstacles to supranational integration in economic matters than to international integration in the field of criminal procedure since the latter area supposedly requires greater constitutional scrutiny. The reason for that is that criminal procedure, unlike economic regulation, concerns the very core of protection of human rights.[106] The court seems to argue that the adoption and implementation of international obligations affecting such a central aspect of the relations between the government and the citizens as extradition requires a higher degree of constitutional scrutiny and political accountability than EC-law. The

[105] George A. Bermann, *Regulatory Federalism*, 263 RECUEIL DES COURS 13, 64-73 (1997).

[106] The blurring of the distinction between protection of civil rights and economic rights has been a recent problem in EC law. *See* Case T-306/01, Kadi and Al-Yusuf v. Council and Commission, (decided 21 September 2005 not yet reported, under appeal); Case T-253/02 Ayadi-Hassan v. Council (decided 12 July 2006, not yet reported). The problem that arises is that what is understood as a matter of economic regulation also has severe repercussions on the civil rights of the parties concerned, whereas the judicial control of such regulation, despite that, still is limited to the lower level scrutiny which the court uses in relation to economic rights.

demand for the German federal legislature to retain and exercise legislative discretion seems to imply both a demand for continuing political accountability as well as a protection of the option to change the unwanted political decisions.[107] That constrains the powers of the legislature at the present time, but seems to be aimed at protecting the legislature's freedom to act over time and furthermore the ability of the German electorate to keep the legislators accountable. Since the legal effect of a judgment of the FCC can be changed only through a constitutional amendment, one may say that the court also raised the bar for delegations of certain constitutionally sensitive powers to international organizations.

The case law of the FCC with regard to European integration has, at several occasions, prompted constitutional amendments, and it seems possible to argue that the sometimes quite restrictive case law of the FCC has worked as an incentive for "dialogues" between European and national courts as well as between the FCC and the German legislature.[108] In relation to European integration at least, constitutional judicial review has therefore had a role that has enhanced rather than diminished political accountability. Regarding the relation between the FCC and the ECJ, as well as the relation with European Court of Human Rights, a common view has been that the FCC has created a kind of "cooperative constitutionalism" that is characterized by a high degree of coordination among the courts, particularly when it comes to rights-protection.[109] That cooperative account seems prescient in the sense that the FCC as well as the ECJ have adapted to each others' positions, seemingly in order to avoid direct clashes between different accounts of legitimacy of European law. However, it seems also clear that the FCC, as pointed out by Funk-Rüffert, has assumed a cooperative relationship, it has also maintained that it will still have these ultimate prerogatives, though it presupposes that the FCC does not use them save in exceptional circumstances. There are also considerable limits to that kind of cooperative constitutionalism, namely that it unlike "ordinary" constitutionalism seems to make accommodation of political disagreement, within the political system harder. While it seems possible to claim that the FCC has had a facilitating and integrating role within the German constitutional order, a role which has presupposed a certain degree of judicial activism, the dilemma seems to be that cooperative constitutionalism at a European level requires far more of such activism. It might not be a qualitative difference, but it is still an important quantitative one. The idea of cooperative constitutionalism

[107] For application in the context of US Constitutional Law, *see* BRUCE ACKERMAN, RECONSTRUCTING AMERICAN LAW (1984).

[108] Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARVARD INTERNATIONAL LAW JOURNAL 191 (2003).

[109] FUNK-RÜFFERT, *supra* note 32, at 40-55; 89-103; 121-126.

seems, problematic when it comes to include courts, since courts are supposed to be less prone to adapt to changed political circumstances. For example, cooperative constitutionalism managed through courts seems to assume a relatively high degree of stability. Cooperative constitutionalism, as understood in the context of EU, has included a high degree of flexibility when it comes to certain aspects of European law, but it has also continuously set out limits for such cooperation. The limits to cooperation with the ECJ have also had the effect of forcing political accountability on the national institutions. In the EMU case, the FCC relied on a more problematic understanding, namely that ever closer integration would not diminish the role of national systems or aggrandize the role of supranational EC-law, but that it would lead to closer interaction between them and therefore also be a basis for further integration that would still retain the most vital powers of national law.

The latest of these decisions, the EAW-statute judgment was also criticized for failing to develop new principles of constitutional legitimacy concerning European integration.[110] While it is true that the FCC did not present any such new principle, it is an omission that seems appropriate given that the FCC, in relation to international integration has tended to protect the procedural and (albeit to a lesser extent) substantive aspects of political autonomy within the German constitutional system. In doing so, the court essentially used the requirements for supermajorities and for continuous support during the process of constitutional amendment as a way to enforce a higher standard of political accountability than normal in the political process. The FCC seems to rely on an understanding of the legitimacy of constitutional judicial review much like the one espoused in process-based constitutional theories.[111] It can also be said to reflect a distrustful view of the role of legislatures within the German constitutional order, and a will to protect the political agency of the people, two tendencies that seem to be united in several constitutional orders.[112]

How should the role of the FCC – and perhaps the potential role of constitutional courts in general – to European (and international) integration be assessed

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[110] Christian Tomuschat, *Ungereimt es. Zum Urteil des Bundesverfassungsgerichts vom 18. Juli 2005 über den Europäischen Haftbefehl*, 32 EUROPAEISCHE GRUNDRECHTE-ZEITSCHRIFT 453 (2005).

[111] JOHN HART ELY, DEMOCRACY AND DISTRUST (1982); Ulrich R. Haltern, *High Time for a Check-Up – Progressivism, Populism and Constitutional Review in Germany* (Jean Monnet Working Paper, 5/1996), *available at* http://www.jeanmonnetprogram.org/papers/96/9605ind.html; HALTERN, *supra* note 85, at 423-428.

[112] Mark Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE LAW JOURNAL 1037 (1979-1980).

generally? As I have sought to discuss above, the functional character of delegation has meant that the court has essentially balanced the interest in international cooperation with the principle of proportionality as an essential part of the protection of fundamental rights and the principle of democracy. The proportionality review has however, because of the focus "overall protection" of rights, developed into a kind of proceduralised review of constitutional changes. The difference between the approach of the FCC in relation to EC-law and EU-law thus seems to mean that the role of constitutional control is changed from providing a review based on overall character of the legal order to one based on decisions in particular cases. The tendency of proceduralisation in the case law on European integration seems in certain respects to have delimited the role of the FCC, and the decision in the EAW-statute case seems to restore a more active role of the FCC.

In relation to FCC's case law on European integration, it also seems as if the accountability-forcing and procedure-protecting aspects of constitutional adjudication may work relatively well together, but it also shows a conflict between accountability-forcing and what could be described as facilitative and pragmatic approaches of constitutional adjudication. However, if the consideration for accountability is the central aspect, it seems also clear that the need for effective decision-making is another important aspect. So the approaches of constitutional justice seem either to be proceduralist – accountability-forcing and (to a great extent) formalist or on the other hand orientated towards substantive outcomes, facilitating decisions and being largely pragmatic. While one approach seems to rely on the formalization of politics having a largely proceduralist understanding of legitimacy, the other seem to lead to deformalization having a largely substantive understanding of political legitimacy. In that regard it also seems as if the understandings of "cooperative constitutionalism" and "network constitutionalism" implies a problem when it comes to control of legality, accountability and the articulation of political disagreement. Thus "cooperative constitutionalism" seems to be in tension with some of the formal tenets of liberal constitutional orders[113]. In many ways, the decisions over time can be seen as attempts to bridge the gaps between formalism and pragmatism in constitutional interpretation in this particular field.

It thus seems thus fair to say that constitutional judicial review, at least in the context of international integration, is able to protect popular sovereignty,

[113] The kind of cooperation between judicial institutions that cooperative constitutionalism implies in this respect (as well as in respect to political cooperation) can be more or less extensive, but it seems to be conceptually rooted in public international law, where cooperation is a part of the general principles of *pacta sunt servanda* and comity.

constitutional legality and individual rights at the same time. In the case of the FCC it has done so through presenting limited constraints on integration, forcing reconsiderations and sometimes also forcing (by anticipation) constitutional amendment. Thereby it seems as if constitutional judicial review of international cooperation has smaller problems of democratic legitimacy than many other forms of constitutional judicial review, and constitutional judicial review seems also to be able to promote legitimacy of international cooperation on the context of municipal law. On the other hand, constitutional judicial review is probably unable to find any legitimacy beyond the domestic legal order which it is supposed to protect (and shape), and in that respect, there will always be limits to the extent to which domestic courts can internalize and legitimize (from a constitutional perspective) international law.