# International Law, Law of the European Union and National Constitutional Law

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## 1 Introduction: Hierarchy of Norms and Competence

There is no relation in the shape of a strict hierarchy of norms between the three legal orders which are mentioned in the heading. For international law and national constitutional law, this is a matter of common knowledge. The hierarchy or grading of norms regularly arises from an allocation of competences. Internally, this is given by constitutional law. As an example I refer to Art. 31 BL [Basic Law for the Federal Republic of Germany], which reads as follows: "Federal law shall take precedence over Land law." At first view this Article seems to establish a strict hierarchy of federal law over Land law. But by looking at the regulations of competence for legislative powers in the Basic Law, it becomes clear, that there is Land law which cannot be overridden by federal law, because the Federation lacks the legislative powers. If the Federation regulated in the field of Land legislative powers, then its laws would be void in default of legislative powers. Therefore, no federal law would exist that could override Land law. Only in the field of concurrent legislative powers (Art. 72.1/2, 74 BL) – newly besides some exceptions (Art. 72.3 BL) – the sentence "Federal law shall take precedence over Land law" applies. Within the legal order of the Federation or a state a strict hierarchy between the constitution and the laws and those and legal regulations is valid.

Legal hierarchies in a constitutional democracy are based on the primacy of the constitution *and* on the democratic derivation of state authority. The directly democratically legitimised parliament enacts the laws in the scope of which government bodies can, due to empowerment (Art. 80.1 BL), issue regulations. In the relation of the legislation of the Federation and states democratic relations of derivability of equal value exist, which are updated in accordance with the division of competence under federal constitutional law.[1] The constitution-amending federal legislator can, within certain limits (Art. 79.3 BL), dispose of the division of competence between

[1] German Federal Constitutional Court, 2 BvN 1/69 (Order of 29 January 1974) – *Landesgrundrechte* (in BVerfGE 36, 342 [361 et seq.]); to the relationship of federal constitutional law to state constitutions cf. Badura 1995, p. 112 et seq.



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federal state and states by amending the Basic Law (Art. 79.1/2 BL). The federal state is hierarchically superior to the states to the extent of its competence. Therefore, competence determines upon hierarchy. This is likewise an expression of federalism in which the Federation has got the "Kompetenz-Kompetenz" [the power to change the division of competence between the Federation and the Länder] which expresses its internal sovereignty.

Now to my topic "International Law, Law of the European Union and National Constitutional Law". I start – still introductory – with a few clarifications to the three legal categories.

**1.1** ***International Law*** is the law of the international community, which consists in treaties and customs which have strengthened in law; added to that are "the basic principles of law recognised by civilized nations".[2] This law, which applies between the states – inter nationes –, is based on the agreement of states through treaties, through action and through mutual conviction. Instances which uphold the law are the organs of the United Nations, which can, however, rarely enforce the law, and, with a better self-assertion, the regional institutions under international law, such as the Council of Europe with the European Court of Human Rights.

**1.2** ***Law of the European Union*** represents international treaties of the Member States of the European Union (primary European Law) and the law which is set based on these treaties by the organs of the European Union (secondary European Law). Between the treaty law and the law set by the organs of the European Union an evident hierarchy exists – as the grading in primary and secondary European Law already indicates. The secondary Union Law has to remain within the limits of the treaties, internally comparable to the relationship between constitutional law and ordinary law. The Court of Justice of the European Union is assigned to preserve the law through the interpretation and application of the treaties (Art. 19.1 sentence 2 TEU).

**1.3** ***National constitutional law*** as the highest internal source of law (precedence of the constitution!) is essential for the exercise of public authority inwards and outwards. Therefore, it regulates the conclusion of international treaties (Art. 59 BL), which, also when in the shape of contract law regarding the European Union, have to stay within the limits of the constitution.[3] Usually, international treaties have force of law below the constitution. This means that the rule *lex posterior derogat legi priori* applies, meaning that the new law displaces the old treaties. Taking this rule into account, the legislator has to make sure that new laws comply with international treaties, which have been concluded previously, or has to try to adapt the treaty to the planned new legislation through negotiations between the government

[2] Cf. Art. 38.1 of the Statute of the ICJ.

[3] Kempen, in von Mangoldt et al. (2010), Art. 59, para 98 et seq.; Rauschning, in Kahl et al. (2009), Art. 59, para 103 et seq.

and the contracting party, so that internal law and obligations of international law remain in harmony.[4]

Art. 25 BL declares the general rules of international law to be an integral part of federal law, which take precedence over all acts. Only the general principles of international law and international customary law, to the extent that it contains general rules, take part in this hierarchy of international law over non-exclusive federal law.[5]

For the development of the European Union, Art. 24.1 BL and the special regulation of Art. 23.1 BL, which was incorporated into the BL in 1992, allow to transfer sovereign powers. So far as the Basic Law is thereby alerted in content, the proceeding of the amendment of the Basic Law applies. Furthermore, Art. 23.1 BL contains limitations in terms of content for the acts of delegation, and therefore binds the legislator at the conclusion of corresponding international treaties. The protection of constitutional law rests on the Federal Constitutional Court.[6]

After these introductory considerations to the hierarchy of norms and to competence, I would like to go into detail in the following. First, I will discuss the relationship between international treaties and national constitutional law, mainly using the example of the European Convention on Human Rights (Sect. 2). Thereafter, I take a look at supranationality, which is created through international treaties of sovereign States, whereby the sovereignty of the Member States in the European Union requires special attention (Sect. 3). The strict hierarchy of norms within the law of the European Union conduces to secure the sovereignty of the Member States (Sect. 4). In the last section, I deal with the relationship between national fundamental rights and fundamental rights of the European Union (Sect. 5).

## 2 International Treaties and National Constitutional Law Using the Example of the ECHR

International law is an important instrument of the states enabling cooperation between them. Normally, treaties are concluded for that purpose. In the Vienna Convention on the Law of Treaties[7] reference is made to the principles of the United Nations (Preamble, Art. 1, 2 UN Charter), including the sovereign equality and independence of states, non-intervention in internal affairs of states, the prohibition of the use of force as well as the universal respect for and protection of human rights and fundamental freedoms for all.

In German constitutional law international treaties, which regulate the political relationship of the Federation or refer to objects of federal legislation, require the

[4] On this problem see the example of a current case of tax law cf. Krumm 2013, p. 364 et seq.
[5] Koenig, in von Mangoldt et al. (2010), Art. 25, para 20 et seq.; Cremer 2013a, para 10–18; Geiger 2002, p. 164 et seq.
[6] See, for instance, German Federal Constitutional Court, 2 BvE 2/08 et al. (Judgment of 30 June 2009) – *Lissabon-Vertrag* (in BVerfGE 123, 267 et seqq.).
[7] Of 23 May 1969, in force by 27 January 1980 (BGBl. 1985 II, p. 926).

approval or participation of the body responsible for the federal legislation in the given situation in the form of federal law (Art. 59.2 BL). The treaty which creates international law is an expression of sovereignty and equality of the states. Internally, according to German constitutional law the directly democratically legitimised parliament is responsible for concluding the act of sovereignty, which then is executed outwards by the Federal President (Art. 59.1 sentence 2 BL). Just as a private person enters a contract with one or several other private persons and thereby creates law, states conclude treaties with one another as a legal basis for collaboration of any kind and create international law.

The protection of human rights that is guaranteed in regional international law through the European Convention on Human Rights (ECHR) raises a problem of hierarchy. The Convention as international treaty law stands below the fundamental rights of the BL. But the Federal Republic has obligated itself to recognise the jurisdiction of the European Court of Human Rights (ECtHR) (Art. 46 ECHR). Individuals can apply to the ECtHR for review of German legal acts, which have already been examined on the benchmark of the German fundamental rights, on the measure of the ECHR.

Recently, the situation where the ECtHR judged a decision of the Federal Constitutional Court to be a violation of human rights, emerged in a legal dispute between *Princess Caroline of Hanover* (née of Monaco) and the Federal Republic of Germany, which passed as a legislation between the princess and a publishing house through all court instances. It concerned balancing the freedom of the press with personality rights; the ECtHR interpreted this differently to the Federal Constitutional Court with regard to the concept of a "person of contemporary history", the information value to the press organisation, and determination of exactly what is a private sphere.[8] The level of hierarchy between the Basic Law and the ECHR as an international treaty has in fact been reversed. This is why Germany – a country in which the ECHR has the rank of ordinary law – comprehensively ensures that no law or judgment infringes the human rights of the ECHR as interpreted by the ECtHR.

The Federal Constitutional Court has, without explicitly responding to the problem of ranks, stated in reference to previous decisions[9]: "[T]he guarantees of the Convention influence the interpretation of the fundamental rights and constitutional principles of the Basic Law. The text of the Convention and the jurisdiction of the European Court of Human Rights serve, on the level of constitutional law, as guides to interpretation in determining the content and scope of fundamental rights and constitutional principles of the Basic Law, provided that this does not lead to a restriction or reduction of protection of the individual's fundamental rights under the Basic Law – and this the Convention itself does not desire (Art. 53 ECHR)."

[8] See, extensively, Starck 2006a, p. 76 et seqq. = Starck 2006b, p. 85 et seqq.

[9] German Federal Constitutional Court, 2 BvR 1481/04 (Order of 14 October 2004) – *Görgülü* (in BVerfGE 111, 307 [317]), with reference to 2 BvR 589/79, 2 BvR 740/81, 2 BvR 284/85 (Order of 26 March 1987) – *presumption of innocence* (in BVerfGE 74, 358 [370]); German Federal Constitutional Court, 2 BvR 1462/87 (Order of 14 November 1990) – *condition of probation* (in BVerfGE 83, 119 [128]).

The fundamental rights of the Basic Law can – without difficulties – be interpreted in order that they comply with the ECHR.[10]

Another example comes from family law. In 2003, the Federal Constitutional Court considered § 1626a of the German Civil Code, which makes mutual parental care for an illegitimate child solely conditional on the mother's will, as not infringing Art. 6.2 BL.[11] The ECtHR decided differently in a German case[12] in 2009, based on Art. 8 and 14 ECHR, which say nothing about parental rights, but on the legal development in other European states.[13] A margin of discretion would exist for the national legislator when regulating parental care, but it narrows, if a general European standard can be found. In 2010, subsequent to this decision, the Federal Constitutional Court declared § 1626 (1) Civil Code as incompatible with Art. 6.2 BL and thus unconstitutional.[14] The Federal Constitutional Court moves in line with the European Court of Human Rights in a new, very extensively reasoned interpretative approach.[15]

In this case the result may be convincing. But generally you have to ask, how does the ECtHR determine a common European standard? How can one reason that this achieves a normative status? Let us take another example: Since 1959 the Federal Constitutional Court has steadily decided that marriage in the sense of the Basic Law is a union of a man and a woman in a generally inextricable long-term relationship[16], a structural principle which is withheld from the legislator's power of disposition.[17] Should this become different, if the ECtHR finds that the stage of development in other European states also acknowledges same-sex union as marriage? The example shows that there are limits to the adaptation to actual European standards.

[10] Frowein 1992, para 7, 24 et seq.

[11] German Federal Constitutional Court, 1 BvL 20/99, 1 BvR 933/01 (Judgment of 29 January 2003) – *right of custody* (in BVerfGE 107, 150 [169 et seq.]).

[12] Appl. No. 22028/04 *Zaunegger v. Germany* (ECtHR 3 December 2009).

[13] See the list in German Federal Constitutional Court, 1 BvR 420/09 (Order of 21 July 2010) – *joint custody* (in BVerfGE 127, 132 [139 et seq.]).

[14] German Federal Constitutional Court, 1 BvR 420/09 (Order of 21 July 2010) – *joint custody* (in BVerfGE 127, 132 [145 et seq.]).

[15] German Federal Constitutional Court, 1 BvR 420/09 (Order of 21 July 2010) – *joint custody* (in BVerfGE 127, 132 [146–162]).

[16] German Federal Constitutional Court, 1 BvR 205/58 (Judgment of 29 July 1959) (in BVerfGE 10, 59 [66]); 1 BvR 636/68 (Decision of 4 May 1971) – *Spanier-Entscheidung* (in BVerfGE 31, 58 [82]); 1 BvR 16/72 (Order of 11 October 1978) – *Transsexueller* (in BVerfGE 49, 286 [300]); 1 BvL 136/78, 1 BvR 890/77, 1 BvR 1300/78, 1 BvR 1440/78, 1 BvR 32/79 (Judgment of 28 February 1980) – *Ehescheidung* (in BVerfGE 53, 224 [245]); 2 BvL 27/81 (Order of 8 March 1983) (in BVerfGE 63, 323 [330]); 1 BvF 1/01, 1 BvF 2/01 (Judgment of 17 July 2002) – *gleichgeschlechtliche Lebenspartnerschaft* (in BVerfGE 105, 313 [345]); 2 BvR 1397/09 (Order of 19 June 2012) – *Lebenspartnerschaft Beamter* (in BVerfGE 131, 239 [259]); 2 BvR 909/06 (Order of 7 May 2013) para 86 – *Ehegattensplitting* (in BVerfGE 133, 377 et seqq.).

[17] German Federal Constitutional Court, 2 BvL 27/81 (Order of 8 March 1983) (in BVerfGE 63, 323 [330]).

Art. 10.2 of the Spanish Constitution of 1978 explicitly demands:[18] "Provisions relating to the fundamental rights and liberties recognised by the Constitution shall be construed in conformity with the Universal Declaration of Human Rights and international treaties and agreements thereon ratified by Spain." Similarly reads Art. 16.2 of the Portuguese Constitution of 1976. In these countries the constitution itself regulates the precedence of international human rights declarations to which the country has acceded. But the cited constitutional provisions may indeed only concern the normative substance of the declarations and not the stage of development of the states which have acceded to the Convention on Human Rights.

Besides that, it can come to a legally secured primacy of application of the liberties of the ECHR, if the European Court of Justice (ECJ) reviews the application of community law by national authorities and adduces Art. 6.2 and 6.3 TEU[19] as a fundamental legal principle.[20] An accession of the European Union to the European Convention on Human Rights is planned. The draft of a respective agreement is present,[21] but in Opinion 2/13 the CJEU has declared this agreement not compatible with Article 6.2 TEU or with Protocol (No 8) relating to Article 6.2.[22]

## 3 Supranationality and Sovereignty

The cooperation between states can be so close, that international institutions are established. Already in the initial version of the Basic Law from 1949 it was intended in Art. 24.1 that the Federation can assign sovereign powers to international institutions by law.[23] Thereby the path was paved from cooperation to integration, from internationality to supranationality. Supranationality means that the state transfers sovereign powers and that the supranational public authority can issue sovereign acts, which are directly effective in the contracting states, i. e. also in Germany. The concession of sovereign powers to supranational institutions entails that their exercise in particular is no longer always dependent on the will of the Member State.

Sovereign rights are transferred by law. This organisational reservation of statutory powers requires that the content and extent of the assigned sovereign rights are

[18] Las normas relativas a los derechos fundamentales y a las libertadas que la Constitución reconoce se interpretarán de conformidad con la Declaración Universal de Derechos Humanos y los tradados y acuerdos internationales sobre las mismas materias ratificados por España.
[19] They read as follows: (2) "The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties." (3) "Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.".
[20] Cremer 2013b, para 135 et seq.
[21] See Polakiewicz 2013, p. 472 et seq.
[22] Opinion 2/13, *Accession to the ECHR* (CJEU 18 December 2014).
[23] Vogel 1964.

definite.[24] Since the act of transfer of sovereignty creates a new hierarchy, which withdraws competence from the parliament and obliges the *Bundestag* to executive legislation, when directives are issued by institutions of the European Union (Art. 288.3 TFEU), a sufficient certainty of the transfer of sovereignty is necessary. This is especially apparent in cases where legal acts are issued by majority decisions in the Union's institutions.[25]

Art. 23 BL is a special provision for European integration, which was already well advanced on the basis of Art. 24 BL (the Federation may by law transfer sovereign powers to international organisations). The aim of Art. 23.1 sentence 1 BL is the realisation of a united Europe. Already in the initial version of the Preamble of the Basic Law it reads: "... inspired by the determination to promote world peace as an equal partner in a united Europe".[26] In order to achieve this goal, "the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law" (Art. 23.1 sentence 1 BL). To meet the objective of integration the Federation can transfer sovereign powers by a law with the consent of the *Bundesrat* (Federal Council of Germany).

The basis of the European Union is international treaties. The Member States of the European Union maintain their sovereignty, which is an expression of self-determination of the respective constitutive people. The Member States remain "masters of the treaties", as the Federal Constitutional Court never gets tired of pointing out.[27] This is strongly expressed in the Lisbon-Judgment of the Federal Constitutional Court[28] and summarised in the guiding principles:[29] The European Union is an association of sovereign states [Staaten(ver)bund], which "remain sovereign", that is established on a lasting basis, a "treaty union of sovereign states", which are still responsible for "the political formation of economical, cultural and social circumstances", for the living conditions of their citizens, especially for the range of self-responsibility and the personal and social security, which is protected by

[24] German Federal Constitutional Court, 2 BvR 2134, 2159/92 (Judgment of 12 October 1993) – *Maastricht* (in BVerfGE 89, 155 [183–188]); 2 BvE 2/08 et al. (Judgment of 30 June 2009) – *Lissabon-Vertrag* (in BVerfGE 123, 267 [355]); 2 BvE 13/13 et al. (Order of 14 January 2014) para 48 (in BVerfGE 134, 366).

[25] Classen, in von Mangoldt et al. (2010), Art. 24, para 9 et seq.

[26] See Starck, in von Mangoldt et al. (2010), preamble, para 40 et seq.

[27] German Federal Constitutional Court, 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09 (Judgment of 30 June 2009) – *Lissabon-Vertrag* (in BVerfGE 123, 267 [349]); in settled case-law see German Federal Constitutional Court, 2 BvR 687/85 (Order of 8 April 1987) – *Kloppenburg* (in BVerfGE 75, 223 [242]); 2 BvR 2134, 2159/92 (Judgment of 12 October 1993) – *Maastricht* (in BVerfGE 89, 155 [200]) (supported by the will of the Member States). See also Badura 1995, p. 116.

[28] German Federal Constitutional Court, 2 BvE 2/08 et al. (Judgment of 30 June 2009) – *Lissabon-Vertrag* (in BVerfGE 123, 267 [339 et seq.]).

[29] German Federal Constitutional Court, 2 BvE 2/08 et al. (Judgment of 30 June 2009) – *Lissabon-Vertrag* (in BVerfGE 123, 267).

fundamental rights. Further, the court names such like political decisions, which are in particular dependent on cultural, historical and linguistic understanding. This should also include the mentality of the population, of whose inclusion at the issuing of law the theory of legislation provides information to us.

The transfer of sovereign powers to the European Union (Art. 23.1 sentence 2 BL) has led to some confusion in the German and foreign legal literature and case-law: The Czech constitutional court speaks of a division of sovereignty, of the "concept of shared – 'pooled' – sovereignty [...] which is difficult to classify in political science categories".[30] A few think that sovereignty as a term of constitutional and international law has become obsolete,[31] others plead in favour of a federative sovereignty of the Union.[32] It is likewise inadequate to assume an abeyance of sovereignty.[33] The Federal Constitutional Court has opposed this by repeatedly describing the Member States as masters of the treaties.[34]

You have to free yourself from the idea that the transfer of sovereign powers to a supranational union withdraws sovereignty in whole or in part from the state that carries out the transfer through an international treaty, meaning that the state, which is the actor, gives up its sovereignty. The conclusion of an international treaty, which binds the state legally, is an act of sovereignty. Just as I do not give up my liberty when joining an association or a trading company and agree to the thereby underlying obligations, the state does not give up its sovereignty when transferring sovereign powers, or better competences[35] or authorisations[36] to a supranational union for collective exercise, even if it is many and important sovereign powers.

The European Union is still based on the democratically legitimised will of the Member States. Their persisting sovereignty[37] also shows up in the right to leave the European Union (cf. Art. 50 TEU). How could a state after giving up its sovereignty still be able to leave the European Union! If sovereignty was divided or in a state of abeyance, then sovereign states, which were able to conclude international treaties on the transfer of further sovereign powers, on new tailoring of already transferred sovereign powers or on revocation of individual sovereign powers[38], would not exist

[30] Cited from Ley 2000, p. 165.
[31] Ipsen 1972, p. 101; Ipsen 1992, para 19; Denninger 2000, p. 1125; Kokott 2002, p. 21 et seq.
[32] Dreier 1988, Col. 1208; Everling 1993, p. 942 et seq.
[33] Ipsen 1992, para 19; Schönberger 2004, p. 104, et seq. on the basis of the theory of federation by Schmitt 1928 p. 363, 372 et seq., who presumes a "substantial equality" and an "ontological conformity" of the Member States (p. 376); Schmitt has, in the course of his remarks, the German Reich, a federal state, in mind, which was founded in 1871; further particulars on references in Starck 2005, p. 722 et seq. (footnotes 36–38).
[34] German Federal Constitutional Court, 2 BvE 2/08 et al. (Judgment of 30 June 2009) – *Lissabon-Vertrag* (in BVerfGE 123, 267 [349 et seq.]); Classen, in von Mangoldt et al. (2010), Art. 23, para 3; differently Pernice, in Dreier (2006), Art. 23 para 36 (with further annotations).
[35] See Art. 88-1 of the French Constitution.
[36] Rights of decision-making, Chapter X § 5 Swedish Constitution.
[37] Steinberger 1991, p. 16 et seq.; Schmitz 2001b, p. 237 et seq.; Hillgruber 2002, p. 1077 et seq.; Hillgruber 2004, para 61–74; Randelzhofer 2004, para 33 et seq.
[38] German Federal Constitutional Court, 2 BvE 2/08 et al. (Judgment of 30 June 2009) – *Lissabon-Vertrag* (in BVerfGE 123, 267 [350]): The steps of integration have to be limited in subject through the pact of tranfer and in principle revocable.

anymore. At the same time, this would mean the discharge of international law as a basis for European integration and the transition into a dynamic European law, which should lead to a European federal state law.

Against this the Federal Constitutional Court has rightly said in 2009 in the Lisbon-judgment on the understanding of sovereignty of the Basic Law:[39] Sovereign statehood is freedom which is organised by international law and committed to it. Sovereign statehood stands for a pacified area and the order guaranteed therein on the basis of individual freedom and collective self-determination. The Federal Constitutional Court points out that the Basic Law seeks European integration and an international order of peace. The text says: "It is true that the Basic Law grants the legislature powers to engage in a far-reaching transfer of sovereign powers to the European Union. However, the powers are granted under the condition that the sovereign statehood of a constitutional state is maintained on the basis of an integration programme according to the *principle of particular limited authorisation* and respecting the Member States' *constitutional identity*, and that at the same time the Member States do not lose their ability to politically and socially shape living conditions on their own responsibility."[40]

In practice this is secured through cooperation between the Federal Constitutional Court and the European Court of Justice, as the Federal Constitutional Court has underlined several times. In its request for a preliminary ruling of 14 January 2014 to the European Court of Justice,[41] concerning the European Central Bank, this relationship of cooperation is outlined as follows: "In their cooperative relationship, it is for the Court of Justice to interpret the act. On the other hand, it is for the Federal Constitutional Court to determine the inviolable core content of the constitutional identity, and to review whether the act (in the interpretation determined by the Court of Justice) interferes with this core." Therewith, the Federal Constitutional Court has the last word concerning the validity of legal acts of the institutions of the European Union with regard to Germany. In the concrete case the European Court of Justice will have to closely review the measures of the European Central Bank on its compatibility with the bank's competences. The measures will, in the interpretation of the Court, then be reviewed by the Federal Constitutional Court by the mentioned standards of the Basic Law.

The Federal Constitutional Court says on the limits of authorisation of Art. 23.1 sentence 1 BL: "The Basic Law does not grant powers to bodies acting on behalf of Germany to abandon the right to self-determination of the German people in the form of Germany's sovereignty under international law by joining a federal state. Due to the irrevocable transfer of sovereignty to a new subject of legitimation that goes with it, this step is reserved to the directly declared will of the German people alone." The Federal Constitutional Court points out that single sovereign

[39] German Federal Constitutional Court, 2 BvE 2/08 et al. (Judgment of 30 June 2009) – *Lissabon-Vertrag* (in BVerfGE 123, 267 [346]).

[40] Emphasis added. German Federal Constitutional Court, 2 BvE 2/08 et al. (Judgment of 30 June 2009) – *Lissabon-Vertrag* (in BVerfGE 123, 267 [347]), also to the following.

[41] German Federal Constitutional Court, 2 BvE 13/13 et al. (Order of 14 January 2014) para 27 (in BVerfGE 134, 366).

rights may only be transferred when defined. A transfer in such a way that further authority of the European Union can be derived from it, is unconstitutional. In particular, the transfer or utilisation of a "Kompetenz-Kompetenz"[42] is forbidden. These principles are established in the treaties as a mirror image: conferred competences (Art. 5.1 TEU) and the European Union's obligation to preserve the national identity of its Member States (Art. 4.3 TEU).

## 4 Hierarchy within the Law of the European Union

With that we have arrived at the precedence of primary Union law (international law) over secondary Union law. The institutions of the European Union, i. e. the European Parliament, the European Council, the Council, the Commission, the Court of Justice (Art. 13 et seq. TEU) owe their existence to the international treaties, which founded the European Union, and are bound in their actions to the stipulated assignments and authorisations. From this, a strict hierarchy follows. Nonetheless, the institutions of the Union, including the Court of Justice, perform an expansion of competence through development of the law referring to the implied powers doctrine and the rule of *effet utile* of international treaty law. The Federal Constitutional Court takes note of this,[43] but warns against a gradual transition of responsibility for integration to institutions of the European Union, especially through the European Court of Justice, which was previously regarded as the engine of integration.[44]

The integration cannot develop its dynamic from the inside, but is reliant on integrative steps of the Member States, the "masters of the treaties". "Implied powers" has to be within the scope of the limited conferred competence. Everything else is an assumption of competence. The same applies for *effet utile*, which is no clause to optimise competence. *Effet utile* can only claim validity of the interpretation of a limited conferred competence insofar as otherwise the interpretation of the authorisation would make it practically meaningless.[45] Hereto I cite a statement of *K. F. Gärditz* and *Ch. Hillgruber*[46]: "An expanding interpretation of a (limited) competence of the Union, which is solely justified by the useful integrating effect *('effet utile'),* allegedly connected therewith, gives virtually reasons [...] to the supposition of an obvious transgression of competence."

[42] To this a chain of judgments: German Federal Constitutional Court, 2 BvR 1107/77, 2 BvR 1124/77, 2 BvR 195/79 (Order of 23 June 1981) – *Eurocontrol I* (in BVerfGE 58, 1 [37]); 2 BvR 2134, 2159/92 (Judgment of 12 October 1993) – *Maastricht* (in BVerfGE 89, 155 [187, 192, 199]); 2 BvE 6/99 (Judgment of 22 November 2001) – *NATO Strategy* (in BVerfGE 104, 151 [210]); 2 BvE 2/08 et al. (Judgment of 30 June 2009) – *Lissabon-Vertrag* (in BVerfGE 123, 267 [349]); 2 BvE 6/12 et al. (Judgment of 12 September 2012) – *ESM, fiscal compact* (in BVerfGE 132, 195 [238 et seq.]).

[43] German Federal Constitutional Court, 2 BvE 2/08 et al. (Judgment of 30 June 2009) – *Lissabon-Vertrag* (in BVerfGE 123, 267 [351]).

[44] See with further particulars Walter 2009, p. 258 et seq.; Streinz 2008, para 164, 566.

[45] Potacs 2009, p. 474 et seq.

[46] Gärditz & Hillgruber 2009, p. 877.

In the context of implied powers and *effet utile* stands Art. 352 TFEU, which contains a supplementary clause on competence, that covers, compared to the predecessor norm of Art. 308 EC, which was limited to a treaty-immanent development of the achievement of targets within the common market,[47] all policy areas of the treaties (exception: foreign and security policy, Art. 352.4 TFEU). Therein, the Federal Constitutional Court sees a blanket empowerment, which would allow a substantial alteration of the treaty without the approval of parliaments of the Member States and concludes: the German representative in the Council may not declare formal approval on behalf of the Federal Republic of Germany of a corresponding legislative proposal of the Commission as long as the German *Bundestag* and *Bundesrat* have not ratified it according to Art. 23.1 sentences 2 and 3 BL.[48]

Here, the question regarding hierarchy and competence arises so clearly, that the Federal Constitutional Court, with reference to previous own decisions, speaks of a "transgression of limits when utilising the authorities of the European Union" and consistently arrogates *ultra vires* review to itself:[49] "In the case that legal protection cannot be obtained at Union level, the Federal Constitutional Court examines, if legal acts of the European institutions and establishments, while ensuring the principle of subsidiarity under the law of the Community and the Union (Art. 5.1 sentence 3 and Art. 5.3 TEU), keep within bounds of their powers, which have been conferred through limited competence."

For the question concerning hierarchy and competence this means, that the primacy of Union law only applies by and within the scope of the continuing constitutional authorisation. Therefore, a relative primacy is present, which only applies within the scope of transferred competence. The legal act of transfer, which is constitutionally authorised, stands hierarchically above the law which is created by the institutions of the European Union, because the European Union is no federal state, which is equipped with "Kompetenz-Kompetenz".

The international treaties, which constitute competence, are measures for the decisions of the European Court of Justice, which has been created and given competence through the treaties itself. Through the EEC treaty judicial power was not assigned to the Community for a boundless extension of competence, as the Federal Constitutional Court already said in 1987.[50] The Court of Justice could and would have to determine "legal instruments transgressing the limits" of the Commission or the Parliament in a proceeding before it and declare them illegal. If it does not do so,

[47] German Federal Constitutional Court, 2 BvE 2/08 et al. (Judgment of 30 June 2009) – *Lissabon-Vertrag* (in BVerfGE 123, 267 [394]), subsequent to Oppermann 2005, para 68.
[48] German Federal Constitutional Court, 2 BvE 2/08 et al. (Judgment of 30 June 2009) – *Lissabon-Vertrag* (in BVerfGE 123, 267 [395]).
[49] German Federal Constitutional Court, 2 BvR 1107/77, 2 BvR 1124/77, 2 BvR 195/79 (Order of 23 June 1981) – *Eurocontrol I* (in BVerfGE 58, 1 [30 et seq.]); 2 BvR 687/85 (Order of 8 April 1987) – *Kloppenburg* (in BVerfGE 75, 223 [235, 242]); 2 BvR 2134, 2159/92 (Judgment of 12 October 1993) – *Maastricht* (in BVerfGE 89, 155 [188]) ("ausbrechender Rechtsakt" [legal instrument transgressing the limits]).
[50] German Federal Constitutional Court, 2 BvR 687/85 (Order of 8 April 1987) – *Kloppenburg* (in BVerfGE 75, 223 [242]).

it has to accept that the Federal Constitutional Court does it with the consequence that corresponding acts of the European Union are not applicable in Germany. This competence to review, which is constitutionally reasoned and is not contrary to the principle of openness towards European Law [*Europarechtsfreundlichkeit*] of the Basic Law and the principle of loyal cooperation (Art. 4.3 TEU), is necessary to safeguard the "fundamental political and constitutional structures of sovereign statehood of the members at progressing integration"[51] and to protect the Member States from gradually easing into a European federal state.

In 2010, the Federal Constitutional Court found once again that Union law remains dependent on a contractual transfer and authorisation.[52] Therefore the Union's institutions including the ECJ remain, for an extension of their powers, reliant on alterations to the treaty, which the Member States make and take the responsibility for in the scope of their authorisations. Indeed, the Federal Constitutional Court sees the risk, that *ultra vires* review of national constitutional courts could endanger the Union law's primacy, but also the risk of an extension of competence contrary to the treaty. A pro-European *ultra vires* review would ask for the assessment of an action of the European Union which is obviously contrary to the competence, and being of great importance, whereto several German Professors on public law can be cited. The Federal Constitutional Court appropriately limits the competence on the development of law of the ECJ to the completion of programmes as provided for in the treaty, the closure of gaps and the solution of contradictions in values. New basic political decisions and a structural transfer of competence are forbidden.[53]

The Federal Constitutional Court refers to the different procedures in which it can exercise its scrutiny role.[54] Interesting is the Court's suggestion to create a new procedure, which is especially tailored to *ultra vires* review and an identity check. The introduction of such a new procedure would send an important signal towards the Union's institutions and in particular to the ECJ, already the respective considerations of the Federal Constitutional Court are a clear warning.

[51] German Federal Constitutional Court, 2 BvE 2/08 et al. (Judgment of 30 June 2009) – *Lissabon-Vertrag* (in BVerfGE 123, 267 [354]), with reference to 2 BvR 2236/04 (Judgment of 18 July 2005) – *European arrest warrant* (in BVerfGE 113, 273 [296]); also for significant and stark transgressions of competence Kokott 1994, p. 233; Isensee 1997, p. 1255 et seq.; different view Schmitz 2001b, p. 285 et. seq., according to which the constitutional law of the Member States is subjected to the decisions of the European Court of Justice without limitations.

[52] German Federal Constitutional Court, 2 BvR 2661/06 (Order of 6 July 2010) – *Honeywell* (in BVerfGE 126, 286 [302 et seqq.]), also to the following.

[53] German Federal Constitutional Court, 2 BvR 2661/06 (Order of 6 July 2010) – *Honeywell* (in BVerfGE 126, 286 [306]).

[54] German Federal Constitutional Court, 2 BvE 2/08 et al. (Judgment of 30 June 2009) – *Lissabon-Vertrag* (in BVerfGE 123, 267 [354 et. seq.]).

## 5 National Fundamental Rights and Fundamental Rights of the European Union

The fundamental freedoms of Union law are included in the following guarantees: free movement of goods (Art. 28 et seq. TFEU), free movement of workers (Art. 45 et. seq. TFEU), freedom of establishment (Art. 49 et. seq. TFEU), freedom to provide services (Art. 56 et. seq. TFEU) and free movements of capital and payments (Art. 63 et. seq. TFEU). At first, these fundamental freedoms are rights of equality in the sense that at the presence of cross-border matters nationals of the Member States of the European Union have to be treated as equal to own nationals of the concerned Member State.

Furthermore, by now the fundamental freedoms of the Union law act as real rights to freedom, to which they have gradually developed through the jurisdiction of the European Court of Justice.[55] This implies an influence of Union law on German law, as regulations, which are without distinction applicable to nationals and foreigners, are reviewed for their compatibility with the Union law's principle of proportionality. The argumentation of the European Court of Justice is not only oriented on rights of equality, as in accordance to the treaty, but also on rights of freedom, as a citation from the *Gebhard* decision proves: It follows from the Court's jurisdiction that "national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner (1), they must be justified by imperative requirements in the general interest (2), they must be suitable for securing the attainment of the objective which they pursue (3), and they must not go beyond what is necessary in order to attain it (4)."[56]

This statement means that internal proportionality examinations can, in cross-border cases, be reviewed independently by the European Court of Justice and the conclusions of the examinations can interfere with the outcome under national law.[57] For example, beer that does not meet the German purity standard legally laid down may be imported into Germany from another Member State[58] and someone with a qualification certificate of another Member State may practise his profession in Germany. The fundamental freedoms can thereby lead to a disadvantage for Germans.

When reviewing the proportionality of restrictions, the European Court of Justice has to take the underlying policies of the concerned state into consideration, for example health policy, which is within the responsibility of the Member States and where the Union may only take additional measures. A harmonisation is explicitly precluded in Art. 168.5 TFEU. It is, again, a problem of competences.

[55] Case 8/74, *Dassonville* (ECJ 11 July 1974); Case 107/83, *Klopp* (ECJ 12 July 1984); Case C-55/94, *Gebhard* (ECJ 30 November 1995).
[56] Case C-55/94, *Gebhard* (ECJ 30 November 1995) para 37.
[57] Examples in Starck 2007, p. 17 et seq., 40 et seq.
[58] Case 178/84, *Reinheitsgebot* (ECJ 12 March 1987).

The European Union exercises public powers, which have been assigned to it by the Member States. Under German constitutional law, public power is only allowed to be transferred, if a level of protection of basic rights essentially comparable to that afforded by the Basic Law is guaranteed (see Art. 23.1 sentence 1).[59] Regarded as fundamental rights under Community law were, based on the case-law of the European Court of Justice[60], human dignity, human integrity, the right to respect for private and family life, the inviolability of the home, the protection of the confidentiality of correspondence with the lawyer, of medical secrecy and of personal data, the freedom of religion and the freedom of movement. Further: the basic right of communication, the freedom to choose and practise an occupation, the freedom of association, the basic right of ownership, rights of equality and basic procedural rights.

The Charter of Fundamental Rights of the European Union (EUCFR), which was proclaimed in the year 2000 in Nice and became valid law in 2009, pools the Member States' common concepts of fundamental rights.[61] It applies with equal ranking to the international treaties on the European Union (Art. 6.1 [1] TEU). The competences of the Union as defined in the treaties are in no way extended through the provisions of the Charter (Art. 6.1 sentence 2 TEU, Art. 51.1 EUCFR). The fundamental rights of the Charter are only binding to the institutions of the European Union and to the Member States when implementing Union law (Art. 51.1 EUCFR). The competences of the Member States may not be touched in the application of the Union's fundamental rights.

* * *

I have tried to make clear,

- that you can only agree on a hierarchy of norms on the basis of an order of competences,
- that integration goes a substantial step further than cooperation,
- but that integration does not yet establish a new statehood.

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[59] German Federal Constitutional Court, 2 BvL 52/71 (Order of 29 May 1974) – *Solange I* (in BVerfGE 37, 271 [280 et seq.]); 2 BvR 1107/77, 2 BvR 1124/77, 2 BvR 195/79 (Order of 23 June 1981) – *Eurocontrol I* (in BVerfGE 58, 1 [30 et seq.]); 2 BvR 197/83 (Order of 22 October 1986) – *Solange II* (in BVerfGE 73, 339 [376]); 2 BvR 2134, 2159/92 (Judgment of 12 October 1993) – *Maastricht* (in BVerfGE 89, 155 [174 et seq.]).

[60] Cf. Rengeling 1993.

[61] Schmitz 2001a, p. 833 et seq.

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