Chapter I

The Dilemma of the Presumptuous Watchdog: Constitutional Identity in the Jurisprudence of the German Federal Constitutional Court

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Abstract

This article deals with the jurisprudence of the German Federal Constitutional Court relating to European integration. It provides a condensed account of this jurisprudence, from its beginnings half a century ago, to the present; it also sets out the doctrinal standards as developed by the court, and explains their interaction with both their textual bases in the German Basic Law and the procedural law of constitutional review. The main analytical ambition of the article is to make sense of this development, and it tries to do so by reference to the court's – changing and presumably fading – role as a central actor in shaping European integration.

Keywords: German Federal Constitutional Court, European integration, democracy, rule of law, judicial governance

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1. Of courts and watchdogs

It is quite common to analogise constitutional courts with watchdogs[1] – for obvious reasons: they both guard something and fend off intrusions; they signal to potential intruders ('bark') what they consider to be the limits, and they may eventually defend these limits ('bite') when they are disregarded. Thus far, the imagery is quite straightforward. It is unclear, however, whether it can be carried any further.

When does it make sense to bark, when to bite, and how does this calculation change over time? We do not typically speculate about any such strategies, neither in dogs, because we deem it impossible, nor in courts, because we deem it improper for them to be strategic. Maybe, however, these premises are wrong, or at least obstructive when it comes to understanding the aforementioned watchdogs' predicament.

2. What to expect

In the context of the present book, the German situation is similar to that of France and Italy. Germany has been a member of the European integration project from day one, and in fact the issue of preserving the national constitutional identity against encroachments on the part of the central level, be they seeming or real, arose long before the accession to the European Union (EU) by those other, more recent Member States whose law is covered in this volume. The German Federal Constitutional Court has thus been in a position to 'accompany' the development of the law of the EU and its predecessor organisations in this regard.

In light of this sequentiality and the co-evolution of German and European law, it will come as no surprise that the German Federal Constitutional Court has developed (what has come to be known today as) its 'identity jurisprudence' with reference to the German Grundgesetz (Basic Law) rather than to any of the pertinent bases in the primary law of the EU. I shall therefore elaborate briefly, in the next section, on the textual bases for this in the Basic Law and on their development over time.

We shall also see that the German Federal Constitutional Court has, on the one hand, sought to play a formative role in the said co-evolutionary process, and that it has repeatedly sent rather assertive signals to its European interlocutors. On the other hand, it has almost persistently steered clear of any outright conflict with the

1 The imagery has been employed at uncountable instances; for a recent use in a related context, see, for example, Weiler, 2021, p. 182.

European institutions, be they its main interlocutor in Luxembourg, or the others in Brussels or Strasbourg. Remarkably, the German Federal Constitutional Court has shaped the relevant procedural law accordingly, i.e. in a way which renders it more likely that relevant cases are brought before it, but which also allows the court to avoid a ruling relatively easily.

As to its substantive position, the German Federal Constitutional Court has seemed to be concerned not so much with protecting German characteristics against pan-European homogenisation, but rather with determining the pace of European integration and, more specifically, with ensuring that, on its way, the standards of democracy and the rule of law are maintained. To be sure, there has been some oscillation in its line of cases, but the German Federal Constitutional Court has, in this regard, been astonishingly consistent over time. The aforementioned does not mean, however, that it has managed to retain its strong influence up to this day. Its messages have certainly been no less pronounced in the last decade than any time before, but its strength may be fading, and there are now more voices in the EU.

3. Core features of the German constitutional order

After the Second World War and the defeat of Nazi Germany, the Federal Republic of Germany was established as one of two German states. Its constitutional order was laid down in the Basic Law. Some 40 years later, after the fall of the Iron Curtain, the unification of the two German states was performed by way of accession of the eastern to the western part. The Basic Law was not replaced on this occasion, but rather just extended in its territorial reach and amended in only some minor respects. Indeed, this constitutional document has remained in force continuously since 1949.

The Basic Law was, at its inception, an ambitious constitution, intended to keep and guide (West-)Germany on its way towards a liberal democracy. In what has commonly been interpreted as a response to the lessons of the Nazi past, the organisational set-up was designed so as to stabilise the government in case of any future populist swing. This is reflected in both the electoral system and in how government comes into office, as well as how it can be removed from it. This design is also a reason why the Basic Law is rather difficult to change. More specifically, there is not only a procedural side to this entrenchment, in that only a qualified majority in both chambers of the legislature can enact amendments to the Basic Law,

but also a substantive one – the so-called 'eternity clause' – which declares certain core elements of the constitutional order as 'unamendable'.[2]

Moreover, there is a strong judicial guardian of the constitutional order, namely the German Federal Constitutional Court. Seated in the provincial town of Karlsruhe, the court nonetheless occupies a central position in the German system. As the final interpreter of the constitution, it has, i. a., the power to scrutinise ordinary legislation and declare it invalid. Moreover, based on the eternity clause, it can even hold that constitutional amendments are unconstitutional and void. The proceedings before the German Federal Constitutional Court can be initiated not only by various institutional actors, but also by individuals who claim that their fundamental rights have been violated. Such constitutional complaints make up, by far, the largest share of cases brought before the court. Overall, this strong design of constitutional review may, too, be viewed as a marked – and counter-majoritarian – reaction to the trauma of the Nazi period.

The Basic Law has initially been rather silent regarding the interaction between domestic and international law. Hence, it has mostly been for the German Federal Constitutional Court to create and fine-tune this interface, and it has consistently followed an approach of (increasingly) moderate(d) dualism: international law – generally – requires national implementation in Germany before it can take effect in the domestic system, and it – generally – does so on the level which the implementing legislative act occupies in the normative hierarchy. That is to say: it is inferior to constitutional norms and their interpretation by the German Federal Constitutional Court, and even the lex posterior rule will typically apply when there are conflicting provisions of the same rank.

Whilst thus far focus has been on the dualism part, it is now pertinent to discuss the exceptions to these general rules, the elements of moderation, or of the Basic Law's 'friendliness towards international law' ('Völkerrechtsfreundlichkeit'), as the German Federal Constitutional Court likes to label it:[3] firstly, as far as international law is concerned, the court operates on the assumption that all domestic public power should – and indeed does – seek to comply with the obligations that Germany has incurred under international law. For this reason, all state actions, including legislation and even

2 The official translation of Art. 79 of the Basic Law reads as follows:
'*(1) This Basic Law may be amended only by a law expressly amending or supplementing its text. In the case of an inter- national treaty regarding a peace settlement, the preparation of a peace settlement or the phasing out of an occupation regime or designed to promote the defence of the Federal Republic, it shall be sufficient, for the purpose of making clear that the provisions of this Basic Law do not preclude the conclusion and entry into force of the treaty, to add language to the Basic Law that merely makes this clarification.(2) Any such law shall be carried by two thirds of the Members of the Bundestag and two thirds of the votes of the Bundes- rat. (3) Amendments to this Basic Law affecting the division of the Federation into Länder, their participation in principle in the legislative process, or the principles laid down in Art. 1 and 20 shall be inadmissible*'.

3 On this principle of 'friendliness towards international law', see Herdegen, 2022, Mn. 6-8. For a relatively recent and thorough treatment of this principle, its bases and limits, by the German Federal Constitutional Court itself, see BVerfGE 141, 1 – Völkerrechtsdurchbrechung.

constitutional norms, have to be interpreted in a way that maintains such compliance, and the point of reference is not just the written text of international agreements, but the interpretation they have received by the competent adjudicative body.[4]

Obviously this approach is bound to fail when it comes to instances of outright contradiction, but in most cases interpretation can do the job. It is not entirely clear, however, whether this approach is to be applied with equal strictness to all kinds of international norms. The European Convention on Human Rights has occupied a prominent position in the German Federal Constitutional Court's case law in this regard, but similar standards may apply for other commitments in the field of human rights, if possibly with lesser force.

Secondly, the German Federal Constitutional Court has always afforded special treatment to the law of the EU and its predecessor organisations. In principle, it has gone along with all the pertinent rulings of the European Court of Justice,[5] allowing for the direct effect and supremacy of European law, both primary as well as secondary, including even the European Court of Justice's partial extension of these principles to directives. In short, German law has acknowledged the peculiarity of 'supranational law', as opposed to 'international law', with regard to its interaction with domestic law, and it has done so from the beginning, in the 1960s, onwards.

In fact, with regard to European integration, it was the Basic Law that essentially followed the jurisprudence of the German Federal Constitutional Court, not vice versa. European integration had not been specifically addressed in the Basic Law – but for a brief reference in the preamble – until an amendment in the year 1992. The emerging supranational order had been dealt with under the same – sparse – provision, namely Article 24, which allows for the transfer of sovereign rights to international organisations in general.[6] Subsequently, in 1992, an extensive provision was inserted in Article 23,[7] which, most importantly, confirmed the German Federal

4 Cf. the seminal decision of the German Federal Constitutional Court, BVerfGE 111, 307 – EGMR-Entscheidungen (aka Görgülü); reconfirmed and further elaborated upon in BVerfGE 128, 326 – EGMR Sicherungsverwahrung.

5 Most prominently, of course, with the decisions in C-26/62 – *Van Gend en Loos v. Administratie der Belastingen*, and C-6/64 *Costa v. ENEL*.

6 The official translation of Art. 24 of the Basic Law reads as follows (part in italics added in 1992): '(1) The Federation may, by a law, transfer sovereign powers to international organisations. *(1a) Insofar as the Länder are competent to exercise state powers and to perform state functions, they may, with the consent of the Federal Government, transfer sovereign powers to transfrontier institutions in neighbouring regions.* (2) With a view to maintaining peace, the Federation may enter into a system of mutual collective security; in doing so it shall consent to such limitations upon its sovereign powers as will bring about and secure a lasting peace in Europe and among the nations of the world. (3) For the settlement of disputes between states, the Federation shall accede to agreements providing for general, comprehensive and compulsory international arbitration'.

7 Art. 23 had initially addressed another matter and then been repealed, meaning that the number was 'free' when the provision on the EU was inserted. The following is the official translation of the current version of Art. 23 of the Basic Law. Most of it is still the Maastricht version, except for some minor changes not indicated here, and the part in italics which was added in 2009: '(1) With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development

Constitutional Court's view that the eternity clause in the Basic Law operates as a limit also on European integration, and which additionally spelled out the guidelines for the interaction between domestic and supranational institutions in the post-Maastricht world, i.e. the newly-created EU.

4. Barking dogs seldom bite: The jurisprudence of the German Federal Constitutional Court

From the early 1970s onwards, the German Federal Constitutional Court has developed a line of jurisprudence dealing, from different angles, with the question

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. To this end the Federation may transfer sovereign powers by a law with the consent of the Bundesrat. The establishment of the European Union, as well as changes in its treaty foundations and comparable regulations that amend or supplement this Basic Law or make such amendments or supplements possible, shall be subject to paragraphs (2) and (3) of Art. 79.*(1a) The Bundestag and the Bundesrat shall have the right to bring an action before the Court of Justice of the European Union to challenge a legislative act of the European Union for infringing the principle of subsidiarity. The Bundestag is obliged to initiate such an action at the request of one fourth of its Members. By a statute requiring the consent of the Bundesrat, exceptions to the first sentence of para. (2) of Art. 42 and the first sentence of para. (3) of Art. 52 may be authorised for the exercise of the rights granted to the Bundestag and the Bundesrat under the contractual foundations of the European Union.* (2) The Bundestag and, through the Bundesrat, the Länder shall participate in matters concerning the European Union. The Federal Government shall notify the Bundestag of such matters comprehensively and as early as possible. (3) Before participating in legislative acts of the European Union, the Federal Government shall provide the Bundestag with an opportunity to state its position. The Federal Government shall take the position of the Bundestag into account during the negotiations. Details shall be regulated by a law. (4) The Bundesrat shall participate in the decision-making process of the Federation insofar as it would have been competent to do so in a comparable domestic matter or insofar as the subject falls within the domestic competence of the Länder. (5) Insofar as, in an area within the exclusive competence of the Federation, interests of the Länder are affected and in other matters, insofar as the Federation has legislative power, the Federal Government shall take the position of the Bundesrat into account. To the extent that the legislative powers of the Länder, the structure of Land authorities, or Land administrative procedures are primarily affected, the position of the Bundesrat shall receive prime consideration in the formation of the political will of the Federation; this process shall be consistent with the responsibility of the Federation for the nation as a whole. In matters that may result in increased expenditures or reduced revenues for the Federation, the consent of the Federal Government shall be required.(6) When legislative powers exclusive to the Länder concerning matters of school education, culture or broadcasting are primarily affected, the exercise of the rights belonging to the Federal Republic of Germany as a member state of the European Union shall be delegated by the Federation to a representative of the Länder designated by the Bundesrat. These rights shall be exercised with the participation of, and in coordination with, the Federal Government; their exercise shall be consistent with the responsibility of the Federation for the nation as a whole. (7) Details regarding paragraphs (4) to (6) of this Art. shall be regulated by a law requiring the consent of the Bundesrat'.

of whether there are any limits, under German law, on the supremacy of an evolving law of the EU and its predecessor organisations. As we shall see in this part, the court has consistently emphasised that there were such limits and that it was itself the competent institution to enforce them. However, the German Federal Constitutional Court had never actually done this until a few years ago: there was certainly one such judgement in 2020, but perhaps also an earlier one in 2015 that could be counted as such enforcement. After the 2020 decision, which triggered intense reactions within and beyond Germany, the German Federal Constitutional Court appears most lately to have returned to its previous – and more restrained – approach.

4.1. The early years: 'The Solanges'

The first landmark case[8] in this line is commonly referred to as 'Solange 1': the name derives from the formula of the ruling which entails the German expression for 'as long as' – 'solange'. The German Federal Constitutional Court (modified, but) used that formula again in another decision at a later point, which is why the two cases have been given numbers.

In the first 'Solange' case, a national court had to apply a supranational norm in the case before it. It thought that the application of this norm of secondary European law – a regulation – would amount to a violation of a fundamental right granted in the Basic Law. Hence, it asked the German Federal Constitutional Court to assess the validity of that norm.

The Basic Law provides a special procedure for such referrals:[9] all courts can stay a proceeding before them, if they think that a rule of law upon which their decision turns is unconstitutional, and they can refer that rule for review to the German Federal Constitutional Court. The key question in 'Solange 1' was whether the German Federal Constitutional Court would consider itself competent for such a review also in this special case.

To appreciate the aforementioned situation, it is important to note that 'Solange 1' was decided in 1974, i.e. a decade after the European Court of Justice's judgement in Costa,[10] which had introduced the doctrine of supremacy. According to this doctrine, any conflict between norms of supranational and national law would have to

8 BVerfGE 37, 271 – Solange I. There had been an earlier decision on a related matter in which the German Federal Constitutional Court declared it inadmissible to challenge acts of secondary European law directly by way of constitutional complaint, but left open whether it would be willing to review such compatibility with the Basic Law in other procedural settings (cf. BVerfGE 22, 293 – EWG-Verordnungen, in para. 21).

9 The official translation of Art. 100(1) of the Basic Law reads as follows: '*If a court concludes that a law on whose validity its decision depends is unconstitutional, the proceedings shall be stayed, and a decision shall be obtained from the Land court with jurisdiction over constitutional disputes where the constitution of a Land is held to be violated or from the Federal Constitutional Court where this Basic Law is held to be violated. This provision shall also apply where the Basic Law is held to be violated by Land law and where a Land law is held to be incompatible with a federal law.*'

10 Art. 24 of the Basic Law.

be resolved in favour of the former, regardless of their respective rank in the internal hierarchy of the two normative systems. Hence, from a perspective of supranational law – as framed by the European Court of Justice – there would not have been any point in the German Federal Constitutional Court assessing whether the European norm at hand was compatible with the fundamental rights guarantees of the Basic Law, because the regulation would, in any event, prevail.

However, the German Federal Constitutional Court disagreed with that view. Whilst it would not refute the principle of supremacy as such, the court emphasised that there are limits to its operation in German constitutional law. Today's specific provision on European integration (Article 23[11]) had not yet been included in the Basic Law at that time. Thus, there was only the short clause allowing for the transfer of sovereign powers to international organisations (Article 24[12]). The German Federal Constitutional Court interpreted this clause restrictively, emphasising that any such transfer of power could not amount to a change of the identity of the constitution. The court took the view that the Basic Law's section on fundamental rights formed part of this identity, meaning that limiting these guarantees could not without more be allowed.

The German Federal Constitutional Court went on to elaborate that European integration was still in flux and incomplete with regard to, i. a., the development of a codified catalogue of fundamental rights, and whilst the court acknowledged the pertinent jurisprudence of the European Court of Justice, it concluded that, as long as (sic!) there was in European Law no such catalogue that afforded a measure of protection at the level of the Basic Law, the German Federal Constitutional Court would continue to review norms of European law with regard to their compatibility with the fundamental rights guarantees of the Basic Law. It clarified that, in case it was to find an incompatibility, it would declare the European norm only inapplicable to that extent in Germany, and that such a ruling would not affect the validity of the norm as such.

Sure enough, however, the German Federal Constitutional Court did not actually find any violation of a fundamental right. Thus, 'Solange 1' was but a well-calibrated warning – an incidence of barking, if you will. In substance, there was no conflict with the European Court of Justice or the way it interpreted European law, especially with regard to its supremacy.

Twelve years later, that is in 1986, the German Federal Constitutional Court modified this jurisprudence in its 'Solange 2' decision.[13] In substance, the situation was similar to the first in that, again, a norm of secondary European law was challenged as violating a fundamental right guaranteed in the Basic Law. Procedurally, however, it was different, because this time none of the ordinary courts dealing with the case saw such a violation. Thus, there was no referral, and the case was brought

11 BVerfGE 37, 271 – Solange I.
12 Art. 23 of the Basic Law.
13 BVerfGE 73, 339 – Solange II.

to the German Federal Constitutional Court by way of a constitutional complaint[14] after all regular remedies had been exhausted.

The German Federal Constitutional Court reaffirmed its starting point that the Basic Law does not authorise any transfer of sovereign powers, not even within the process of European integration, that may cause a conflict with the identity of the German constitution. The court went on to state, however, that European integration had made sufficient progress in the time since 'Solange 1' to ensure that the protection of fundamental rights in European law had now reached a level which was essentially equal to that afforded by the Basic Law. Thus, as long as (sic!) this continued to be generally the case, any individual challenges before the German Federal Constitutional Court against norms of secondary European law would be considered inadmissible.

Again, the court did not find any violation in the case at hand. Consequently, as in 'Solange 1', the relevance of the ruling rests entirely in the signal that the court sent out for future cases, and to European institutions. Remarkably, the German Federal Constitutional Court did not quite keep up the threshold it had formulated in 'Solange 1', because the codified fundamental rights catalogue, which it had viewed necessary then, was still far out of sight in 'Solange 2'. In fact, the Charter of Fundamental Rights would only come into force more than two decades later in 2009.

Procedurally, 'Solange 2' brought about an important change. By declaring future challenges of that kind inadmissible, the German Federal Constitutional Court made it easier for itself to dispose of such cases in the future, because it would no longer have to enter into a review on the merits. At the same time, the Court kept a foot in the door, as it could always step in again if it found that the above condition ('as long as') was no longer met.

The framing of that condition was, however, quite remarkable in that it referred to the 'general' level of fundamental rights protection in Europe. As a consequence, an individual case would, strictly speaking, remain inadmissible even if there had been a human rights violation which, however, was not indicative of a decrease of the general level of protection in Europe. For a court whose mission it is to safeguard individual rights, this would be an astonishing approach. It has never been tested, however, whether the court would maintain the aforementioned view if a decision actually turned on this.

In part, this may be attributed to another remarkable feature of the reasoning in both Solange decisions – one that relates to the court's understanding of the concept of constitutional identity. This concept was not much elaborated on in either of these decisions. In particular, they made no explicit reference to the eternity clause, even

14 The relevant provision of the Basic Law is Art. 93. The official translation of the relevant part reads as follows: '*(1) The Federal Constitutional Court shall rule: (…) 4a. on constitutional complaints, which may be filed by any person alleging that one of his basic rights or one of his rights under para (4) of Art. 20 or under Art. 33, 38, 101, 103 or 104 has been infringed by public authority.*'

though one might have expected the court to mention this clause if dealing with potentially unchangeable content of the Constitution.

However, in 'Solange 1', the German Federal Constitutional Court did not equate constitutional identity with an immutable core in the first place. It did, to be sure, refer to the fundamental rights – which are part of the Basic Law – as an indispensable essential element[15] of the constitution. However, it also stated that qualifications were possible, and it actually went on to discuss whether the conditions for such qualifications were met. Evidently, this is not the kind of immutability that an eternity clause provides.

In 'Solange 2', the German Federal Constitutional Court was still explicitly concerned with immutable elements of the Constitution, but changed a nuance in that it no longer referred to the whole fundamental rights part in this regard. Rather, it spoke of '*the legal principles that form the basis of the Basic Law's fundamental rights part*'.[16] It thus moved closer to the wording of the eternity clause, which also referred to 'principles', albeit not those underlying the entire fundamental rights part, but rather those laid down, i. a., in Article 1, i.e. the dignity clause.[17] This could be viewed as synonymous, however, based on the widely shared assumption[18] that Article 1 is an overarching general principle which has been spelled out in the specific fundamental rights provisions that ensue in the rest of the Basic Law's section on fundamental rights.

Such increased proximity notwithstanding, the German Federal Constitutional Court did not, at that time, base its concept of constitutional identity upon the eternity clause. Consequently, qualifications of German constitutional identity through European law were not viewed as forbidden per se. And indeed, in both cases the court did not find a substantive violation of national law. Constitutional identity, hence, was considered to encompass more than the immutable core that is protected in the eternity clause, and the Court did not openly contemplate whether there was anything that was more sacrosanct because it might come under the protection of the eternity clause.

This may help explain why the court, in 'Solange 2' thought it acceptable to no longer review cases on an individual basis, even if they involved an actual violation of a human right. The court was dealing with cases that were still outside any immutable core of the Basic Law. What is confusing, however, is that the court did not

15 Solange 1, para. (44): 'unaufgebbares Essentiale'.

16 Solange 2, para (104): 'Rechtsprinzipien, die dem Grundrechtsteil des Grundgesetzes zugrundeliegen'.

17 The official translation of Art. 1 of the Basic Law reads as follows: '*(1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority. (2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world. (3) The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law.*'

18 On this notion that there is a 'kernel of dignity' (Menschenwürdekern) contained in other fundamental rights guarantees, see Herdegen, 2020, Art. 1(1), Mn. 26 seq.

address the question of such stricter limits. As this had plainly been on the table, it is plausible to assume that the German Federal Constitutional Court deliberately avoided any such explicit warning. 'Solange 2' was an incident, thus, of judicial growling rather than of outright barking.

4.2. Forging the Union: From Maastricht to Lisbon

After the fall of the Iron Curtain, the post-Second-World-War projects of regional integration in (Western) Europe not only extended their geographical reach eastwards, but also became more intense. In 1992, the Treaty of Maastricht transformed the European Economic Communities into (one pillar of) what would henceforth be called the EU. The new paradigm went explicitly beyond economic integration, introducing European citizenship as a strong symbol for the move from market to polity. The substantive changes that this step entailed were certainly not as groundbreaking as the accompanying rhetoric suggested. However, the transformation was far-reaching enough to warrant a renewed debate regarding the finalité of European integration – and regarding its limits. The latter was at the core of another of the German Federal Constitutional Court's landmark decisions: the Maastricht judgement of 1993.[19]

The Basic Law had meanwhile been changed alongside the developments at the supranational level. Now, there was Article 23 in (mostly) its present shape, explicitly authorising, in the first sentence of its first subsection, that Germany participates

> in the development of the European Union that is committed to democratic, social and federal[20] 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.

It does not take much to recognise the Solange legacy in this wording, except that the framers had chosen to phrase this clause not as a condition, but as a description of the EU. One might take this as a pro-integrationist gesture. The remaining sentences of subsection 1, however, and indeed all the ensuing subsections, do stipulate conditions for the participation of domestic institutions in the activities at the supranational level.

Most of these stipulations are procedural, but there is a strong substantive limitation in the third sentence of the first subsection:

19 BVerfGE 89, 155 – Maastricht.

20 It may be important to note that the original text, when speaking of federal principles, uses 'föderative' instead of 'föderale'. The translation 'federal' is correct, but it applies to both and does not catch the intended nuance. It was the explicit intention to avoid 'föderal', as this might imply a narrow understanding that equated the multilevel structure of the European Union with the specific federal structure of the Federal Republic of Germany. 'Föderativ' in this sense may hence be read as multilevel. For an extensive treatment of this issue cf. Scholz, 2022, Art. 23 Mn. 95-98.

> The establishment of the European Union, as well as changes in its treaty foundations and comparable regulations that amend or supplement this Basic Law or make such amendments or supplements possible, shall be subject to paragraphs (2) and (3) of Article 79.

Thus, here is the explicit mentioning of the eternity clause which had not found its way into the Solange decisions.

This constitutional affirmation formed the background – and basis – for the German Federal Constitutional Court's continuation of its earlier jurisprudence. However, whilst its approach would remain rather stable, the topics changed. Solange-style cases hardly ever came up anymore, and unsurprisingly so in light of the procedural threshold which the German Federal Constitutional Court had introduced in 'Solange 2' (and which it would later reinforce in a decision of 2000).[21] Instead of fundamental rights, democracy became the central theme for the next two decades, beginning with the Maastricht judgement.

The proceeding was concerned with (the German contributions to concluding) the Treaty of Maastricht. The complaints argued was that this was a violation of the Basic Law which could not even be authorised by the newly-inserted Article 23. Accordingly, the argument had to be grounded on the eternity clause. The main claim was that democracy, as guaranteed by the Basic Law, stood in the way of this most recent step of further European integration. This was consistent in that democracy is indeed one '*of the principles laid down in Articles 1 and 20*', thus the wording of the eternity clause. It is in the first two subsections of Article 20[22] that we find the guarantee of, i. a., a democratic order for Germany.

A procedural problem seemed to be, however, that Article 20 is not understood as conferring in and of itself any subjective rights. To be sure, violations could nonetheless be reviewed by the German Federal Constitutional Court, but not upon a constitutional complaint. However, there were, at the time, only some constitutional complaints in that matter, and no eligible applicants who would bring a challenge along any of the other procedural lines available. The German Federal Constitutional Court would therefore have had to reject the case as inadmissible, unless it found some subjective right that could be vindicated by way of a constitutional complaint. And such a rejection would have meant that the German Federal Constitutional Court could not deal with the merits of these complaints.

Apparently, this was not the outcome that the court sought to achieve. Instead, it came up with a rather creative construction: it based its decision on Article 38[23]

21 BVerfGE 102, 147 – Bananenmarktordnung.

22 The official translation of Art. 20(1-2) of the Basic Law reads as follows: '*(1) The Federal Republic of Germany is a democratic and social federal state. (2) All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive and judicial bodies.*'

23 The official translation of Art. 38(1-2) of the Basic Law reads as follows: '*(1) Members of the German Bundestag shall be elected in general, direct, free, equal and secret elections. They shall be representatives*

of the Basic Law, which deals with the elections of the members of the Bundestag, i.e. the German Parliament. At first sight, this may seem quite self-suggesting, since, indisputably, this provision contains the right to vote, which is a subjective constitutional entitlement that can be enforced through a constitutional complaint. Creativity, however, was needed to explain how this right could potentially be violated by an international treaty that deepened European integration but did not seem to affect German voters in their constitutionally-guaranteed right to participate in national elections.

However, according to the German Federal Constitutional Court's new construction, the right to vote, in order to be meaningful, provides a safeguard against the hollowing-out of national democracy through an excessive conferral of powers to (inter- or in this case:) supranational institutions. Article 38, so the argument runs, entails not only the right on the part of the voters to elect the members of the Bundestag, but also a right – still on the part of the voters – for the Bundestag to retain a sufficiently-strong political position.

Democracy, which used to be (viewed as being) guaranteed in only an objective fashion under the Basic Law, was thus 'subjectivized'. As a consequence, every German voter would henceforth be in a position to initiate a constitutional review of any further steps of European integration. This is a remarkable move, especially for a court that has notoriously been struggling with docket control, and even more so if one recalls that the same court had just a few years earlier erected an almost insurmountable procedural threshold for Solange-style cases.

Moreover, this generosity towards future plaintiffs was not a price that the German Federal Constitutional Court paid for the chance to actually strike down any of the challenged measures, because, of course, it did not stop (Germany from participating in) any of the reforms that the Maastricht Treaty brought. Rather, the German Federal Constitutional Court needed its creative construction of Article 38 just so it could address the merits of a case that it would eventually dismiss – or, if you will: just so its barking would be heard.

What, then, were the signals that the German Federal Constitutional Court had been so eager to send? Its core mission was to attach strings to any future steps of European integration, and the eternity clause now served explicitly as its leverage to accomplish this goal: Germany, so the argument ran, could only be part of an EU that conformed to the Basic Law's unamendable core.

Hence, the court insisted that the newly-created EU, just like its predecessor organisations, continue to be limited by the principle of conferral, i.e. that it had no 'Kompetenz-Kompetenz', to use a prominent Germanicism of the time.[24] Consequently,

of the whole people, not bound by orders or instructions and responsible only to their conscience. (2) Any person who has attained the age of eighteen shall be entitled to vote; any person who has attained the age of majority may be elected.'

24 The term was used 13 times in the Maastricht decision alone, cf. paras. (37), (64), (116), and (122) subseq.

the court asserted the right also to exercise an *ultra vires* control for any legal acts by the EU. Additionally, it made explicit that it understood the Treaty on European Union (TEU) to contain neither an authority of taxation on the part of the Union, nor an authorisation yet for the creation of a currency union.

Perhaps more importantly still, the German Federal Constitutional Court presented an unusually elaborate exposition of its democratic vision as applied to the supranational setting. First, the court coined a new term – 'compound of states' (Staatenverbund) – to describe the EU as an entity sui generis: a close community of states, but short of a federation. The court went on, secondly, to stipulate that, in such a compound of states, national parliaments remained the main source of democratic legitimation, whilst the institutions and procedures of democratic participation at the European level served a supplementary function in this regard, and further European integration had to go hand in hand with an extension of such democratic structures. The court emphasised, thirdly, that there were sociological preconditions to the proper functioning of democracy, and that these were yet to develop at the European level.[25]

Constitutional identity is not a term that the decision used, although it occasionally mentioned that the Treaty of Maastricht made provision for national identity to be preserved. Implicitly, however, the whole decision rested on the eternity clause and the unamendable core it defined.

In this regard, and unlike the Solanges, the Maastricht decision was centred on the principle of democracy. However, like those decisions, the court wanted to keep its foot in the door and retain the ability to monitor the future development of European integration. Thus, whilst it did consider the present state of affairs acceptable, as in 'Solange 2', it did not install any procedural filter for future challenges, but kept the door wide open, as in 'Solange 1'. So, the Maastricht decision featured a watchdog barking at full volume – and the German Federal Constitutional Court at the height of its influence, probably.

25 The pertinent passage (para. (98) subseq.) reads as follows (references omitted, italics added, based on the translation from https://iow.eui.eu/wp-content/uploads/sites/18/2013/04/06-Von-Bogdandy-German-Federal-Constitutional-Court.pdf): 'If democracy is not to remain a formal principle of accountability, it is *dependent upon the existence of specific privileged conditions*, such as ongoing free interaction of social forces, interests, and ideas, in the course of which political objectives are also clarified and modified (…), and as a result of which public opinion moulds political policy. For this to be achieved, it is essential that both the decision-making process amongst those institutions which implement sovereign power and the political objectives in each case should be clear and comprehensible to all, and also that the enfranchised citizen should be able to use its own language in communicating with the sovereign power to which it is subject. *In cases where they do not already exist, actual conditions of this kind may be developed, in the course of time, within the institutional framework of the European Union.* A development of this kind is dependent not least upon the nations concerned being kept informed of the objectives of the Community institutions and of the decisions made by those institutions. Political parties, trade associations, the press, and broadcasting stations are both a medium and a factor in this process of information, in the course of which a European public opinion should develop'.

It took quite a while for the German Federal Constitutional Court to again hand down a major decision on European integration.[26] In part, this is certainly to be ascribed to the delayed revision of the EU's bases in primary law. The Constitutional Treaty had been underway since the early 2000s, and, if it had not failed, the German Federal Constitutional Court would most likely have been called upon earlier to review such further evolution of the Union. However, it had to wait until 2008, when the Treaty of Lisbon was awaiting ratification and a number of challenges against it were brought before the court. In a nutshell, their argument was, again, very similar to the Maastricht proceeding, i.e. that this next step of deepened European integration hollowed out their right to democratic participation at the national level.

The court's judgement,[27] pronounced in mid-2009, was monumental in its length, spanning some 170 pages, and remarkable in its content, building upon the Maastricht decision and developing a differentiated yardstick to be applied in future cases. The court started by confirming its Maastricht approach, classifying the EU as a 'compound of states' whose constituent parts, the Member States, retain their sovereignty and determine the legal foundations of the EU. Their peoples remain the primary source of democratic legitimation.

The court reiterated that the EU could not assume a Kompetenz-Kompetenz, but had to respect the principle of conferral. It did not identify '*a pre-determined number of certain types of sovereign rights*' that had to '*remain in the hands of the state*',[28] but emphasised that European integration had to leave sufficient space to the '*Member States for the political formation of economic, cultural and social living conditions*'.[29] This requirement was remarkable as it went beyond the Maastricht reasoning in that it no longer had any inbuilt provisionality. In Maastricht, the limits against a conferral of excessive competencies had been set only for the time being[30] – the EU was not there yet, but might one day, at least in theory, arrive at a point when these restrictions would no longer apply. In Lisbon, by contrast, the German Federal Constitutional Court drove in some stakes that were meant to last.

The court went on to specify that the protection against excessive integration applied

> in particular to areas which shape the citizens' living conditions, in particular the private sphere of their own responsibility and of political and social security, protected by fundamental rights, as well as to political decisions that rely especially on

26 Leaving aside the relatively unspectacular decision in Bananamarket briefly mentioned above, and some failed constitutional complaints against the Treaty of Amsterdam with regard to the conditions under which Germany could join the currency union; BVerfGE 97, 350 – Euro.

27 BVerfGE 123, 267 – Lissabon.

28 Ibid. at para. (248). This quote and the following ones are from the official translation offered on the website of the German Federal Constitutional Court, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2009/06/es20090630_2bve000208en.html.

29 Headnote 4 of the decision.

30 Maastricht, paras. (98)-(101).

> cultural, historical and linguistic perceptions and which develop within public discourse in the party political and parliamentary sphere of public politics'.[31]

Whilst this definition fails to provide a workable criterion for identifying any potential integrationist excess in the future, the court enumerated such areas that it considered

> (p)articularly sensitive for the ability of a constitutional state to democratically shape itself: decisions on substantive and formal criminal law (1), on the disposition of the monopoly on the use of force by the police within the state and by the military towards the exterior (2), fundamental fiscal decisions on public revenue and public expenditure, the latter being particularly motivated, inter alia , by social policy considerations (3), decisions on the shaping of living conditions in a social state (4) and decisions of particular cultural importance, for example on family law, the school and education system and on dealing with religious communities (5).[32]

The stunning level of detail in this enumeration is to be explained by the fact that the court had been presented, inter alia, with challenges against provisions of the Lisbon Treaty that supposedly went too far in encroaching upon these areas. Accordingly, the court listed here the ones it considered sensitive, and it took up those challenges later in its judgement when dealing with the respective treaty provisions. Additionally, despite the increased sensitivity of those matters, the court did not find any clause that could not be constructed in a way that it deemed compatible with the Basic Law's requirements. Thus, again, no biting, just barking.

The determination, however, with which the German Federal Constitutional Court stipulated unconditional limits on future integration, was astonishing, because the restriction still seemed to rest upon the court's 'thick concept' of democracy, implying sociological preconditions for true and meaningful participation to be possible:

> Democracy not only means respecting formal principles of organisation (…) and not just a cooperative involvement of interest groups. Democracy first and foremost lives on, and in, a viable public opinion that concentrates on central acts of determination of political direction and the periodic allocation of highest-ranking political offices in the competition of government and opposition. Only this public opinion shows the alternatives for elections and other votes and continually calls them to mind also in decisions relating to individual issues in order that they may remain continuously present and effective in the political opinion-formation of the people via the parties, which are open to participation for all citizens, and in the public information area.[33]

31 Lissabon, headnote 4.
32 Ibid. in para. (252). All enumerated areas are then dealt with in more detail in the subsequent passages.
33 Ibid. in para. (250) (internal reference omitted).

There is no indication as to why the optimism, which seemed to prevail in this regard in the court's Maastricht reasoning, had meanwhile faded. This is all the more enigmatic as, in its Lisbon decision, the court conceded explicitly that '*due to the great successes of European integration, a common European polity that engages in issue-related cooperation in the relevant areas of their respective states is visibly growing*'.[34] Had the court still been animated by its spirit of Maastricht, this observation would certainly have led it to adopt a more welcoming stance on future integration.

One can only speculate why it did not: it is, possibly, a reflection of the growth of the EU. Membership had, meanwhile, more than doubled. It could be the case that integrationist visions had become more remote in 2009 than they had been in the early 90s. In any event, the watchdog proved to be more territorial in Lisbon than on any of the other occasions reviewed here, although its bite inhibition was still operating at that time.

As mentioned above, the court also used the Lisbon decision to explicate its yardstick for future cases. For one, it announced that it was going to perform an *ultra vires* control, i.e. examine '*whether legal instruments of the European institutions and bodies keep within the boundaries of the sovereign powers accorded to them by way of conferral (…), whilst adhering to the principle of subsidiarity under Community and Union law*'.[35]

In addition, the court coined the term 'identity review' for safeguarding against potential infringements of the '*inviolable core content of the constitutional identity of the Basic Law pursuant to Article 23.1 third sentence in conjunction with Article 79.3 of the Basic Law*'.[36] In elaborating on this latter type of review, the court established an explicit link between its own jurisprudence rooted in the eternity clause and the respect due under EU law towards the national constitutional identities of the Member States.[37] Thus, different from the Maastricht decision, identity is the key term in Lisbon when referring to the Basic Law's inviolable core.

After the Lisbon decision, one might have thought that it was just a matter of – presumably rather little – time until the German Federal Constitutional Court would be called upon to apply the pronounced standards of review and that it would indeed find some violation sooner rather than later. However, the parameters changed when, just slightly more than a year after the Lisbon decision, the court took the opportunity to mitigate its threat significantly.

In Honeywell,[38] a relatively brief decision dismissing a constitutional complaint, the court raised the threshold for its *ultra vires* review considerably, stating that it would only be applied

34 Ibid. in para. (251).
35 Ibid., headnote 5.
36 Ibid.
37 Ibid.: '… *the guarantee of national constitutional identity under constitutional and under Union law go hand in hand in the European legal area*'.
38 BVerfGE 126, 286 – Ultra-vires-Kontrolle / Honeywell (in English texts, the case is often referred to as 'Mangold').

> if a breach of competences on the part of the European bodies is sufficiently qualified. This is contingent on the act of the authority of the European Union being manifestly in breach of competences and the impugned act leading to a structurally significant shift to the detriment of the Member States in the structure of competences.[39]

In addition, the court also declared that, before it would engage in such a review,

> the Court of Justice of the European Union is to be afforded the opportunity to interpret the Treaties, as well as to rule on the validity and interpretation of the acts in question, in the context of preliminary ruling proceedings according to Article 267 TFEU, insofar as it has not yet clarified the questions which have arisen.[40]

The German Federal Constitutional Court had thus created a procedural loop that would allow for an exchange between itself and the European Court of Justice before any further escalation would take place. Combined with the watering down of the substantive standard, this did seem like an effective safeguard against the kind of 'judicial clashes' that many had anticipated after the Lisbon judgement. It was difficult to foresee, at the time, that the relaxation of the standard would actually backfire in the future.

4.3. Losing balance: PSPP & Co.

The tension between the national and the supranational legal order has persisted also in the post-Lisbon era. This decision did not succeed, despite its monumentality, in pacifying the aforementioned inherent conflict. Quite to the contrary, this period brought about a considerable escalation – more cases, an increasingly open conflict between the courts in Karlsruhe and Luxembourg, and even some outright conflict: eventually, the German Federal Constitutional Court would indeed go 'nuclear', as two commentators put it quite drastically.[41] But let us trace the development step by step.

The substantive focus of the proceedings before the court shifted once again in this third period. Had the Solanges been, on their face, about fundamental rights, and had the big treaty reviews focused on democracy, there would be a new theme now that was to move centre stage: budgetary sovereignty. All but one of the decisions to be covered in this section were in this field.

The one 'outlier' was a proceeding against the execution of a European arrest warrant, decided in 2015.[42] A US citizen had been sentenced in absentia by an Italian

39 Ibid., headnote 1a. this quote and the following one are from the official translation offered on the website of the German Federal Constitutional Court, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2010/07/rs20100706_2bvr266106en.html.

40 Ibid., headnote 1b.

41 Cf. the commentary of 22 May, 2020, by Sarmiento and Utrilla, on Euronews.

42 BVerfGE 140, 317. The decision goes by different names. Most call it Europäischer Haftbefehl II, but some also refer to it as Identitätskontrolle or even Solange III.

court to 30 years of imprisonment. When arrested in Germany, he objected to his extradition and, after having exhausted all regular remedies, filed a constitutional complaint. The main argument was that the dignity clause of the Basic Law[43] entailed a prohibition against criminal convictions without having properly established the individual responsibility of the accused ('Schuldgrundsatz' – principle of guilt). A sentence in absentia would generally not meet this requirement, and the extradition by German authorities would thus violate their obligation under Article 1(1) of the Basic Law.

German law was fairly clear on that matter. The problem was that the provisions of EU law pertaining to the arrest warrant did not allow for any substantive check to be performed on the part of the extraditing Member State. Thus, there was a potential conflict between these rules and German fundamental rights guarantees. Moreover, the court had explicitly stated, in its Lisbon decision, that the principle of guilt was an element of constitutional identity as protected by the Basic Law.[44]

So, would this case trigger the identity review as framed in Lisbon? And would it lead to the eventual collision between the two judicial heavyweights that had so long been anticipated? Certainly, this was no easy call for the observers at the time, and the German Federal Constitutional Court indeed managed to surprise everyone.

A potential way out for the court might have been to resort to the procedural filter it had installed in 'Solange 2'. If it could have viewed the problem at hand as an individual rather than a general one, then the complaint might have passed as inadmissible. But would this make sense – explicitly stating that a violation touches upon the immutable core of the Basic Law and at the same time considering the problem 'not general enough' for review? The paradox of the 'Solange 2' filter had to become obvious now that Lisbon had brought conceptual clarity to the identity jurisprudence. The court did not really resolve the issue; it emphasised, rather cryptically,[45] that there were some heightened admissibility standards for constitutional complaints seeking an identity review, but decided that the complaint before it was admissible.

Next, one could have expected the court to follow its Honeywell ruling and, before deciding itself, refer the case to the European Court of Justice for a preliminary ruling on the exact meaning of the relevant provisions of EU law. There had been doubts whether this Honeywell loop was to be applied not just in *ultra vires* cases, or also before an identity review could take place.[46] However, although the German Federal Constitutional Court confirmed that the Honeywell principles applied equally to both situations,[47] it did not choose this avenue. To understand this contortion, one needs to know that the earlier case law of the European Court of Justice[48] in that matter made

43 Art. 1 of the Basic Law.
44 BVerfGE 123, 267 – Lissabon, at para. (346).
45 For a detailed analysis of this aspect, see Burchardt, 2016, pp. 533-535.
46 Ibid., on p. 535.
47 BVerfGE 126, 286 – Ultra-vires-Kontrolle / Honeywell, at para. (46).
48 Cf. C-399/11 – *Melloni*.

it unlikely that this court would be able to solve the conflict by softening the rigidity of the rules on the European arrest warrant.

Thus, the German Federal Constitutional Court added a qualification to its decision in Honeywell, stating that a referral was only to be made 'if necessary',[49] and it then came to the conclusion that it was not necessary here because EU law was clear on the matter. Interestingly, however, this 'clarity' was not derived from the jurisprudence of the European Court of Justice, but, quite to the contrary, based on the German Federal Constitutional Court's own – and diverging – view of how EU law should be understood: pointing to the dignity clause in the Charter of Fundamental Rights, the German court stated that European law had to be interpreted in a manner so that it did not prescribe obedience to an arrest warrant in such a case.

So, as a result, the German Federal Constitutional Court had, for the first time, pinpointed a norm of EU law that failed the German identity review, but it steered clear of an outright collision with the European Court of Justice by taking the liberty to align European law with German law in that matter – quite a bold move, and possibly not to the amusement of the court in Luxembourg. This could hardly be called barking anymore, but rather amounted to a mock bite.

Thus far, the thematic outlier has been examined, and focus can now switch to the line of decisions on budgetary sovereignty.[50] The starting point is the respective passage from the Lisbon decision where the German Federal Constitutional Court began to stipulate the conditions under which budgetary restrictions could amount to a violation of the principle of democracy and – as a reflex – of the corresponding individual right as framed in Maastricht. This would, in the court's own words, be the case '*if the determination of the type and amount of the levies imposed on the citizen were supranationalised to a considerable extent*', and the same applied '*correspondingly to essential state expenditure*'. The court went on to concede that '*(n)ot every European or international obligation that has an effect on the budget endangers the viability of the Bundestag as the legislature responsible for approving the budget*'. However, it insisted that it was '*decisive (…) that the overall responsibility, with sufficient political discretion regarding revenue and expenditure, can still rest with the German Bundestag*'.[51]

These criteria are not particularly specific. However, quite in line with the overall spirit of the Lisbon decision, they sound rather assertive of national sovereignty, in this case with regard to fiscal autonomy. It should be noted, though, that the court

49 BVerfGE 126, 286 – Ultra-vires-Kontrolle / Honeywell, at para. (46).

50 BVerfGE 129,124 – EFS; BVerfGE 132,195 – Europäischer Stabilitätsmechanismus; BVerfGE 134, 366 – OMT-Beschluss; BVerfGE 135, 137- ESM-Vertrag; BVerfGE 142,123 – OMT-Programm; BVerfGE 146, 216 – PSPP-Vorlagebeschluss; BVerfGE 151, 202 – Europäische Bankenunion; BVerfGE 154,17 – PSPP-Programm; the most recent decision of 6 December, 2022 – 2 BvR 547/21, has not yet been published in the official collection. It is referred to as 'Eigenmittelbeschluss' or 'Next Generation Europe', and can be retrieved from http://www.bverfg.de/e/rs20221206_2bvr054721.html.

51 BVerfGE 123, 267 – Lissabon, at para. (256).

wrote this on the eve of the Greek debt crisis. With hindsight, it would perhaps have framed these lines somewhat more cautiously.

In any event, with the lively times that were to come in European fiscal policy, the court would be faced with an unexpectedly high number of such cases in the post-Lisbon era. Germany was involved, obviously, in a number of stability mechanisms at the EU level, and this involvement was regularly challenged and labelled as too far-reaching a compromise on budgetary sovereignty. Without going into detail on each of these decisions, it can be stated that the court's responses initially exhibited a familiar pattern: it would reaffirm its jurisdiction and the applicable doctrines, send out signals as to where the limits of its tolerance might be, and at times require some qualifications of the measures under review, but essentially let them pass.

Moreover, the court would elaborate further in this jurisprudence on the core doctrines of the *ultra vires* and the identity review as well as on how they relate to each other. In particular, its 2016 decision on the Outright Monetary Transactions (OMT) Program offers an extensive treatment of these matters. As for the identity review, the court specified that this was about examining "whether the principles declared by Article 79 sec. 3 (of the Basic Law) to be inviolable are affected by transfers by the German legislature of sovereign powers or by acts of institutions, bodies, offices, and agencies of the European Union', and that it concerned 'the safeguarding of the core of human dignity in fundamental rights (…) as well as the fundamental principles upon which the principles of democracy, the rule of law, of the social state, and of the federal state of Article 20 (of the Basic Law) are based'.[52] Under the ultra vires review, by contrast, the court 'examines whether acts of institutions, bodies, offices, and agencies of the European Union exceed the European integration agenda in a sufficiently qualified way and therefore lack democratic legitimation in Germany'."[53]

Regarding the relationship between the two, the court explained that both types of review were independent of one another. However, '(s)ince the exceeding of competences in a sufficiently qualified manner also affects the constitutional identity (…), the *ultra vires* review constitutes a particular case (…) of the application of the general protection of the constitutional identity by the Federal Constitutional Court.[54]

Further, as such cases would, in part, typically turn on the interpretation of supranational norms, the German Federal Constitutional Court emphasised that it was primarily for the European Court of Justice to determine the meaning of EU law.

52 BVerfGE 126, 286 – Ultra-vires-Kontrolle / Honeywell, at para. (138). The decision on the OMT Program may, in the present context, be remarkable also for its comparative compilation of similar case law across the EU (in para. (142)). Here, and in the rest of the present para, the verbatim quotes are again taken from the official translation on the court's official website, retrievable from https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2016/06/rs20160621_2bvr272813en.html.

53 In para. (143).

54 In para. (153).

Even if the Court of Justice were to adopt '*a view against which weighty arguments could be made*', the German Federal Constitutional Court would go along with this. However, the court added that this was to be the case only '*as long as the Court of Justice applies recognised methodological principles (… and did not …) act in a way that is objectively arbitrary*'.[55]

This last part of the German court's exposition of its review standards could, on its face, be read as a delineation of the spheres of competence of the two courts – perhaps even as an affirmation of respect for the European Court of Justice. But was it? Why did the German Federal Constitutional Court even deem it necessary to be explicit about this minimum threshold? Was it warranted to tell its colleagues not to decide arbitrarily? Again, there is some likelihood that this message was received in Luxembourg with mixed feelings, to say the least, especially as this was just one year after the 'mock bite' in the arrest warrant case.

Admittedly, this is pure speculation, and, worse even, relates to a matter that might be flatly irrelevant, for what is the point in trying to sense the emotional vibes in judicial prose? This is rather uncommon, for sure. On the other hand, however, the ensuing course of events after the OMT decision may otherwise be difficult to explain, and quite a few commentators have eventually resorted to subtextual explanations.

The next proceeding to arise was the notorious PSPP case, with the abbreviation referring to the European Central Bank's Public Sector (Asset) Purchase Program. The challenges against (German participation in) this programme (and related measures) were brought before the German Federal Constitutional Court by way of multiple constitutional complaints. The key contention was that the underlying decisions of the European Central Bank were *ultra vires*, as they were in breach of the prohibition of monetary financing and the principle of conferral in EU law. Additionally, the claim was that the resulting limitations on the budgetary autonomy of the German Bundestag amounted to a violation of the constitutional identity as protected in the Basic Law. In a thoroughly reasoned decision, the German Federal Constitutional asked the European Court of Justice for a preliminary ruling on how the pertinent provisions of EU law were to be understood, especially with regard to the relevant decisions of the European Central Bank. This was in 2017.[56]

The European Court of Justice responded to these questions a year later in a decision referred to as "Weiss".[57] It found no violation of EU law by the European

55 In para. (161).

56 Cf. BVerfGE 146, 216 – PSPP-Vorlagebeschluss. An English translation is available at https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2017/07/rs20170718_2bvr085915en.html.

57 C-493/17. At times the non-German literature uses the same shorthand also for the related decisions of the German Federal Constitutional Court. An extensive excerpt of the decision in Weiss has been incorporated into the reasons of the subsequent decision by the German Federal Constitutional Court on the PSPP Program.

Central Bank. Thus, the case arrived back in Karlsruhe and was decided in May 2020, that is, another one and a half years later.[58]

Based on the interpretation by its colleagues from Luxembourg, the German Federal Constitutional Court was satisfied that the challenged programmes posed no threat to German budgetary autonomy which was large enough so as to fail the identity review.[59] The result of the *ultra vires* review, however, was different. The court found, indeed, that the European Central Bank had exceeded its competence in taking the challenged decisions, as had the European Court of Justice in not reviewing them adequately.[60]

The underlying legal issue was whether these decisions would come under the EU's – and, more specifically, the European Central Bank's – exclusive competence for monetary policy. Alternatively, they would have to be classified as measures of economic policy for which there is only a supporting competence, meaning that they would probably not be covered. This question, in turn, depended on whether, and to what extent, the economic effects, which these measures could undisputedly have, were to be taken into account. Leaving them aside and focusing exclusively on the monetary purposes of those decisions would lead to a result whereby they were within the mandate of the bank.

The view of the German Federal Constitutional Court was that, first, these economic effects were relevant – and indeed weighty –, that, second, a justification would have been required as to why taking measures at the European level constituted no undue encroachment upon the realm of Member State competence, and that, third, any grounds for such a justification would have had to pass a proportionality test. The court found, however, that the European Central Bank had '*neither assessed nor substantiated that the measures provided for in (its) decisions satisfy the principle of proportionality*'.[61]

However, the German Federal Constitutional Court was dissatisfied not only with the decisions of the bank – to this it dedicated but a few lines – but also – and mainly – with their review by the European Court of Justice. It thus went on to explain, meticulously,[62] why it thought that the European court had failed to scrutinise the proportionality of those measures of the bank with the required degree of precision. More specifically, the German Federal Constitutional Court stated that this review of proportionality was rendered 'meaningless' because, in the assessment by the European Court of Justice, the economic policy effects of the PSPP were 'disregarded

58 Cf. BVerfGE 154,17 – PSPP-Programm. In the following, the verbatim quotes are again taken from the official translation on the court's official website, retrievable from https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/05/rs20200505_2bvr085915en.html.

59 Ibid. in para. (116).

60 Ibid.

61 Ibid.

62 Ibid. in paras. (116)-(153).

completely', so that 'no balancing of conflicting interests' could take place – which, however, was supposed to be the 'key element' of such a review.[63]

The European Court of Justice had thus, in the eyes of its German counterpart, '*manifestly exceeded (its) judicial mandate*', which, in turn, resulted '*in a structurally significant shift in the order of competences to the detriment of the Member States*'.[64] Therefore, the judgement of the European Court of Justice was labelled, in this regard, as '*simply not comprehensible so that, to this extent, (it) was rendered ultra vires*'.[65]

So, there it was, eventually – the bite: announced with long notice, applied with professional skill, dosed with thorough deliberation – and yet, unanticipated by most. The reactions showed widespread irritation. The repercussions in academia were enormous[66] and mostly negative, ranging from flat rejection[67] to apologetic reconstructions of how the escalation had evolved.[68] There were quite a few, to be sure, who did not deem such biting illegitimate per se, but even amongst them the view prevailed that the specific occasion had not warranted this reaction.[69] Additionally, the harshness of the language was picked up in many comments.[70] 'Simply not comprehensible' is a tough verdict. However, given the lenience of the standard as it had been framed before, the court could not have chosen any relevantly milder tone to justify this result. If the court had anticipated that it was ever going to bite, it probably would have been more cautious about the formulation of the threshold.

Politics had to respond, too, of course, and there were at least two distinct epilogues that deserve mentioning. First, the German Federal Constitutional Court had required the Central Bank of the Federal Republic of Germany (aka German Bundesbank) to stop participating in the PSPP after a transitional period of three months, unless the criteria of its PSPP judgment be met by that time.[71] So, this required immediate action, but it also proved manageable without major perturbation.

63 All quotes ibid. in para. (138).
64 Both quotes ibid. in para. (154).
65 Ibid. in para. (116).
66 By way of illustration, different pertinent fora hosted extensive discussion of that decision: for the German Law Journal's 'Special Collection on European Constitutional Pluralism and the PSPP Judgment' of August 31, 2020, cf. https://germanlawjournal.com/german-law-journal-special-collection-on-european-constitutional-pluralism-and-the-pspp-judgment/; for the special issue of the International Journal of Constitutional Law, published on 12 May, 2021, documenting the Symposium: The PSPP Judgment of the Bundesverfassungsgericht, cf. https://academic.oup.com/icon/search-results?f_TocHeadingTitle=Symposium%3a+The+PSPP+Judgment+of+the+Bundesverfassungsgericht; for the debate on Verfassungsblog (in the week of the decision) cf. the editorial overview 'Wir Super-Europäer', of 8 May, 2020, by Maximilian Steinbeis, at https://verfassungsblog.de/wir-super-europaeer/.
67 An illustrative example is the commentary co-authored or endorsed by 25 scholars, cf. Basedow et al., 2021, pp. 188-207.
68 Cf. for a prominent example Grimm, 2020, pp. 944-949.
69 Cf. for a particularly pointed example see Weiler, 2021, p. 182
70 Cf. for example Marzal, 2020.
71 Cf. BVerfGE 154,17 – PSPP-Programm, in para (235).

After all, the court had only objected to the absence of sufficient considerations pertaining to the proportionality of the decisions of the European Central Bank. The bank was free, thus, to just provide additional reasons, and it did. Within less than two months, the Bundesbank had requested, and the European Central Bank had delivered, both new considerations on that matter and documentation of earlier ones which had not been disclosed before. This material was then shared with the German Ministry of Finance, which in turn disclosed it to the Bundestag, and it was concluded that the requirements that the German Federal Constitutional Court had framed in PSPP were now met.[72]

So far, so easy. All institutional actors involved were determined, as it seems, to dispose of the matter as smoothly as possible. This was not true, to be sure, for the complainants of the initial PSPP proceeding. Since not all of the relevant documents had been made public, they requested such disclosure in the German Federal Constitutional Court. This was framed as an application for an order of execution of the PSPP decision. However, the court dismissed the application approximately a year after its PSPP judgement, on formal grounds, holding that it went beyond what can be pursued in this procedure in that it related to measures taken after that judgement.[73]

The second epilogue unfolded, soon after the first had ended, between the European Commission and the German Government. Slightly more than a year after the PSPP judgement, the Commission initiated infringement proceedings against Germany. As the first steps of such proceedings are not public, there is only summary information available regarding the content of the respective communications. Apparently, the Commission's argument was that the decision of the German Federal Constitutional Court had denied legal effect to the preliminary ruling of the European Court of Justice in Weiss, and that it had thus violated the principle of supremacy.[74] The German Government is reported to have responded[75] that it acknowledged, i. a., the supremacy of EU law, that it in its view, the legality of acts of institutions of the EU did not depend on their assessment by the German judiciary within proceedings of constitutional complaints, and that it was committed to using all means at its disposal in order to avoid any *ultra vires* decisions in the future. Upon this declaration, the Commission decided not to pursue the infringement proceeding

72 A thorough exposition of this course of events can be found in the subsequent decision of the German Federal Constitutional Court.

73 Cf. BVerfG, Order of the Second Senate of 29 April 2021 – 2 BvR 1651/15 -, paras. (1)-(111). The decision has not been published in the official collection. The English translation (and a link to the German original) can be found at http://www.bverfg.de/e/rs20210429_2bvr165115en.html.

74 Cf. the brief report which at the time was published on the webpages of Christian Calliess, Europarecht Aktuell: EU Kommission leitet Vertragsverletzungsverfahren gegen Deutschland ein; News of 10 June, 2021, https://www.jura.fu-berlin.de/fachbereich/einrichtungen/oeffentliches-recht/lehrende/calliessc/Aktuelles/20210610_Vertragsverletzung.html.

75 Cf. Ruffert, 2021 on Verfassungsblog, which, i. a., contains a summary of the statement by the German Government.

any further.[76] This was in late 2021. It was the last of the formal repercussions of the PSPP decision, and perhaps also the end of what might eventually emerge as an era characterised by that decision and its run-up. In any event, there has been yet another decision since.

4.4. Beginning of a new era: The judgement on the 'Own Resources Decision'

In December 2022, the German Federal Constitutional Court pronounced its judgement[77] regarding (the German ratification of) the 'Own Resources Decision' taken by the Council of the European Union in December 2020. This decision was based on a programme of the EU entitled 'Next Generation EU', which, in turn, is intended to mitigate the economic and social consequences of the pandemic. The 'Own Resources Decision' authorised the European Commission to borrow up to 750 billion euro until the year 2026.

This sum is outside the regular budget, but almost of the same size.[78] There had long been debates related to increasing the EU budget by way of borrowing, but the predominant view has been that this would require a new mandate in the primary law of the EU. The challenges were, first, that the 'Own Resources Decision' went beyond the competencies of the EU and, second, that (taken together with the previous occasions) the (aggregated) potential liabilities that Germany had incurred amounted to an undue limitation of the budgetary autonomy of the German Bundestag. Whilst the latter argument had to be tested under the identity review, the former would primarily come under the *ultra vires* test, but a violation could, according to the logic set out in the decision, also affect the constitutional identity.

The German Federal Constitutional Court found no violation on either count. From a political perspective, this result was, perhaps, expectable. After all, the proceeding was about the COVID-19 crisis and its economic repercussions – difficult to imagine, hence, that the German Federal Constitutional Court would put the brakes on the European recovery measures. This was all the more true as the court had already denied injunctive relief in that matter approximately one and a half years earlier.[79]

From a legal perspective, however, the decision was quite remarkable. Doctrinally, the court would reaffirm its approach in yet another thorough exposition of

76 Cf. the respective news release on the website of the European Commission on 2 December, 2021. https://ec.europa.eu/commission/presscorner/detail/en/inf_21_6201.

77 Cf. BVerfG, Judgment of the Second Senate of 6 December 2022 – 2 BvR 547/21 ('Eigenmittelbeschluss'). The decision has not been published in the official collection yet. The English translation, which does not cover the entire judgement, though, and a link to the German original can be found at http://www.bverfg.de/e/rs20221206_2bvr054721en.html.

78 For an overview of the long-term EU budget see https://www.consilium.europa.eu/en/policies/the-eu-budget/long-term-eu-budget-2021-2027/.

79 BVerfG, Order of the Second Senate of 15 April 2021 – 2 BvR 547/21; the decision has not been published in the official collection. The English translation (and a link to the German original) can be found at http://www.bverfg.de/e/rs20210415_2bvr054721en.html.

the standard of review as it had evolved since its Lisbon decision. So, no surprises here. But wasn't the case at hand much more sensitive with regard to a potential erosion of Member State competencies than the one in PSPP?

It is not so much the budgetary autonomy issue. The court had been wise enough in its earlier decisions not to quantify a red line in this regard.[80] Thus, it has retained the flexibility to extend the limits of its tolerance as the situation requires (albeit maybe not to reduce them again). And certainly, this pandemic-driven 'Own Resources Decision' was not an ideal moment to invoke these limits.

What was more remarkable, however, was the German Federal Constitutional Court's self-restraint with regard to the competence matter, as the case bore the potential to push open the gate for a permanent expansion of the EU's budget, and the issue was squarely on the table. Indeed, the reasons even include a verbatim quote by Olaf Scholz, German Minister of Finance at the time, stating, in the German Bundestag, that this was '*the path toward the fiscal union*', and that this was '*a good path for the future of Europe*'.[81] The court's ruling did address this matter, to be sure, seeking to contain this inherent tendency by underscoring the exceptional nature of the case at hand. More specifically, it emphasised that the

> 2020 EU Own Resources Decision only authorises borrowing on the part of the European Union itself; ensures that the borrowed funds be used exclusively for tasks for which the European Union has competence in accordance with the principle of conferral; subjects the borrowing to limits as to both the duration and the amount of the commitments assumed; and requires that the amount of 'other revenue' not exceed the total amount of own resources.[82]

However, all these conditions notwithstanding, it was clear that, still, a rather generous construction of the relevant provisions of primary law had to be adopted for that 'Own Resources Decision' to pass. Again, the German Federal Constitutional Court was frank about this. Indeed, it would discuss all objections at length, but only to conclude for each relevant provision that it was not entirely impossible to interpret them broadly enough to cover that decision. It is this very move, and the language used to perform it,[83] that are the most remarkable features of the decision. Whilst the criteria remained ostensibly unchanged, their application has been loosened

80 In the present decision, it went even further in explicitly leaving open '*whether such a justiciable strict outer limit exists*'; cf. BVerfG 'Eigenmittelbeschluss', in para. (219).

81 Cf. BVerfG 'Eigenmittelbeschluss', in para. (14), (117) (neither passage is available in the English translation).

82 Ibid. headnote 2.

83 Ibid. in para. (162) (interpretation 'not manifestly untenable' for Art. 122 of the TFEU, and 'not clearly ruled out' for Art. 311 of the TFEU); para. (171) (cannot be said to 'manifestly exceed the competence' for Art. 122 of the TFEU, and not a 'manifest violation' of Art. 311 of the TFEU); para. (186) (again does not 'manifestly exceed the competence' for Art. 122 of the TFEU); para. (193) ('possible exceeding of competences is not manifestly apparent' for Art. 311 of the TFEU); para. (203) ('circumvention (… is not …) manifestly evident' for Art. 125 of the TFEU).

considerably[84] – to an extent, arguably, that amounts almost to a complete abdication on the part of the court.[85]

Moreover, the German Federal Constitutional Court would not even request a preliminary ruling from the European Court of Justice, because it deemed this unnecessary. This was plausible in so far as the German court reached an affirmative ruling anyway. However, it is noteworthy nonetheless, because there had been a relevant ruling by the European Court of Justice only on one of the relevant provisions.[86] For the other two, there were many open questions, which the court had itself laid open and discussed at length. But still, the German Federal Constitutional Court saw '*no reason to assume that the Court of Justice of the European Union would interpret the competences (…) more narrowly than*' it had done itself.[87]

Mind, though, that the German court had voiced multiple objections to that broad interpretation, and that it had concluded just that this broad interpretation was not 'manifestly untenable'. Was the German Federal Constitutional Court thus insinuating that the European Court of Justice would in any case have gone to the outer limits of interpretation so as to support the legality of the Council's 'Own Resources Decision'? And if so, would this be a statement about an inevasive practical necessity in the case at hand, or about an alleged tendency of the European Court of Justice in general?

Once again, it is not easy to decipher the subtextual messaging that may be going on here between Karlsruhe and Luxembourg. Such speculation appears to be of declining importance, though, as there is ample reason to assume that this most recent decision of the German Federal Constitutional Court marks the beginning of a new era in which it will follow a much more restrained approach and perhaps also play a less pronounced role. The watchdog may not have fully resigned, but it has certainly retracted.

5. Reading the law from the court's lips

There has been a strong focus, in most of this contribution, on the jurisprudence of the German Federal Constitutional Court. But does this make sense? Is there anything in this which helps us understand the past and maybe even predict the future?

84 For a similar diagnosis ('a downright tangible relaxation of the standard of review'), see, for example, Ruffert, *2022*.

85 On this issue, see, for example, the very outspoken assessment by the dissenting Judge Müller, for whom the court's decision 'signals a retreat from the substance of *ultra vires* review'; cf. the Dissenting Opinion published at the end of the decision, cf. BVerfG, Eigenmittelbeschluss, para. (1).

86 I. e. Art. 125 of the TFEU, for the interpretation of which the German Federal Constitutional Court had relied upon the European Court of Justice's decision in C-370/12 – *Pringle*.

87 Ibid. in para. (236).

Adopting this perspective seemed plausible at least insofar as it is certainly this jurisprudence, rather than the sheer text of the Basic Law, that displays what the law is in the matter at hand. This statement is more, in this context, than just a confession to the Holmesian creed.[88] As we have seen, the Basic Law used to be almost entirely silent on the relevant questions for decades – that is: the formative years for the interaction of national and supranational law. And even when the Basic Law was given an extensive clause on this issue later, this was largely to confirm the path that the German Federal Constitutional Court had already defined at that point, and which the court then pursued further thereafter.

Today, we have a long and nuanced line of decisions. We have doctrines telling us both how to understand the substantive provisions of the Basic Law in this matter and what kinds of challenges the German Federal Constitutional Court is likely to face when reviewing a case. Additionally, we have criteria that the court will apply to these cases. So, the court has set the scene for the resolution of pertinent conflicts in the future, and it has done so quite thoroughly.

This does not mean, however, that the law as it has emerged from this jurisprudence allowed us, neither now nor in the past, to predict the outcome of future cases with any relevant degree of certainty. And indeed, it would not seem particularly functional if it did. European integration has always been a dynamic process. It might not be moving all that fast, and it has halted more than once, but in contrast with other polities, nation states in particular, the potential for dynamism has been inscribed in the institutional set-up of the EU and its predecessor organisations from the outset. Stand-still has always equalled crisis in European integration. It would seem most appropriate, hence, for its Member States not to overemphasise stability in the legal regimes governing the interface with their supranational interlocutor.

6. Understanding the watchdog and its predicament

But if it is not primarily the law that helps us understand what has been going on, what else can we draw from the above exposition of the German Federal Constitutional Court's jurisprudence? At this point, we may shift our focus again to where the present contribution started, that is, to the role of the German Federal Constitutional Court. Perhaps it is by looking at the court as an institutional actor that we can best make sense of this.

88 Cf. the famous quote by Oliver Wendell Holmes, Jr.: '*The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law*'; Holmes, 1897, pp. 460–461.

6.1. Starting point: Self-interested integrationism?

In order to do this, we may need first to have a look at the general set-up within which the German Federal Constitutional Court has operated. Taking part in European integration can be assumed to pay off, on balance, for all current Member States. At least, the fact that they have joined and remained on board may be taken as a strong indication of this. However, Member States are not monolithic, and EU membership has been faced with opposition in all of them, albeit to varying degrees across time. Additionally, the balance sheet is different for each individual Member State.

As for Germany, pro-integrationist positions have always been predominant by far. Germany's peculiar history has most likely played a decisive role in this, especially in the post-war era, but similarly around 1990 when German unification became possible. Moreover, the fact that Germany is the largest economy and amongst the most influential Member States may explain its consistently pro-European stance. And obviously, there is no need here to further ponder upon whether it is geopolitics, or the economy, that has determined the course of history.

In any event, it is not all that surprising, against this backdrop, that the German Federal Constitutional Court has not so much been concerned with protecting any features of German national identity against potential encroachments of the central power. This, one may assume, could be achieved by political actors representing national interests in Brussels or Strasbourg. Moreover, it is quite intuitive that the largest Member State's constitutional court would then use its leverage instead so as to impact on the trajectory of European integration and its institutional development.

6.2. Presumptuousness I: Benevolent hegemonialism?

To be sure, one may view this attitude as hegemonial – the illegitimate presumption of a role that a single national court cannot have any mandate to play in the development of a supranational polity. There would be much to be said about this claim, for and against it. Indeed, a sizeable part of the echo that the German Federal Constitutional Court's jurisprudence has received, both nationally and internationally, speaks to this question.[89] But even if one found the court guilty of the charge of presumptuousness in this regard, one should maybe not judge it on this sole ground, since, at least, it does not seem to have been particularistic interests that the German Federal Constitutional Court has pursued. Rather, as we have seen, the concerns it has voiced pertain to democracy and the rule of law, commonly shared values, that is, and to specific aspects of these principles, moreover, which seemed so basic that such insistence would hardly be considered divisive amongst the Member States.

89 For a widely cited review cf. Weiler, 1995.

The assessment would hence turn on whether the substantive desirability of the pursued goals could offset the formal objections against the actor's competence in pursuing them. It is difficult to pass judgement on this matter, but it may be recalled that this question has come up more than once in the history of European integration. The European Court of Justice's decision in Van Gend[90] may feature as the original sin in this regard. It was an incidence of institutional overstretch, for sure. But would there have been, without it, any plausible trajectory for a supranational community to emerge, starting from a Westphalian order governed by the principle of sovereign equality?

This is neither to express any firm position on the legitimacy of the role that the German Federal Constitutional Court assumed, nor to suggest that this assessment had necessarily to be parallel to that of the European Court of Justice. But it may, at least, illustrate that forging a viable supranational polity might be attainable realistically only at the expense of sacrifices in terms of procedural legitimacy. So, it may all depend – and, more specifically, the assessments of the German Federal Constitutional Court's presumptuousness may depend – on whether one considers the output to be legitimate, and the output legitimacy to be weighty enough to justify those sacrifices.

6.3. Presumptuousness II: Escalating overstatement?

The German Federal Constitutional Court may, however, have been presumptuous in yet another sense – not only in that it might have exceeded its proper mandate, but in that it may have overestimated its own force.

There is some indication, to be sure, that the German Federal Constitutional Court was indeed an influential player, especially in the earlier stages of European integration. The echo of its pertinent decisions reached far beyond the confines of its home country and German(-speaking) scholarship, and it still does.[91] There seemed to be a widespread perception that the German Federal Constitutional Court's rulings had to be taken seriously, and determinative of some outer limits that had to be observed when moving further on the integration path.

But how much does that tell us about the court's actual force at the time? Assessing this force is particularly difficult as the court has rarely applied it, but mostly just threatened to do so. What would have happened if the watchdog had remained silent? As with all preventive measures, their effectiveness is difficult to gauge, and we have no counter-factuals here to refer to. Thus, there is no hard proof. We can only speculate.

90 C-26/62 – *Van Gend en Loos v. Administratie der Belastingen*.

91 Especially the PSPP decision triggered many – and predominantly critical – reactions. The International Journal of Constitutional Law dedicated an entire symposium to this judgement, published in Volume 19, Issue 1, 2021, p. 179 subseq. Of the many other reactions to PSPP, see, for a particularly outspoken critique, Cassese, 2020; for a somewhat more moderately framed, but equally critical account see Eleftheriadis, *2020*; for a mixed assessment see Bobic and Dawson, 2020, pp. 1953-1998.

This applies, all the more, to the other alternative: we cannot know what the course of events would have been had the court bitten earlier[92] and maybe also more often then. Nor could the court itself predict this, of course, in any instance when it decided just to bark rather than to bite. This approach, however, may still have been a wise strategy. Uncertainty can increase the threat. As long as one only barks, weakness does not show, but it might once one bites.

This may indeed be what happened in the court's decision in PSPP and its aftermath. It did cause a scandal, for sure. But when the turmoil settled, it seemed as if the court and its position had not gained any significant force. And indeed, the next decision showed a very cautious, perhaps even resignant, court. We shall see what the future brings, but at this point, it seems unlikely that the German Federal Constitutional Court will ever return to its old level of assertiveness again.[93]

This is not to say that it was unwise for it to bite. Threats may wear down over time. At some point, one may have to act upon them, if one wants to retain credibility. When the German Federal Constitutional Court had to decide in PSPP, it seemed indeed to have reached a point at which it had become hard for it to bark effectfully.[94] Perhaps the court could have steered clear of that situation in its earlier decisions, or it could have waited for a more plausible opportunity[95] to bite. In either case, it might still be in a stronger position today – perhaps.

However, it is conceivable also that its (perceived) strength had already begun to fade long before and, indeed, independently of, its own decisions. The EU has grown. The German Federal Constitutional Court may still be the largest Member State's most important court, but there are many Member States now, and some courts with a voice that is audible too. In such a changing environment, the German Federal Constitutional Court's strategies, if any, may not have made too much of a difference.

92 And few commentators contemplate this – admittedly hypothetical – course of events. Weiler, is an exception in this regard. In his view, the Lisbon judgement would have been an appropriate opportunity, but the court '*shied away from going the full length by saying Nein to Lisbon in the name of democracy (…) Had they done a 'PSPP' in the Lisbon case, it would have provoked the much-needed serious soul searching which is so overdue in our Union*'. Weiler, 2021, p. 182.

93 In the eyes of Weiler, ibid., there was a '*toppling, through self-immolation no less, of the FCC from its pedestal as the primus inter pares of Member State constitutional courts*' (p. 180), and, as a consequence '*the prestige of the FCC suffered a serious blow*' (p. 182).

94 For an elaborate analysis of the court's situation when deciding in PSPP, see Grimm; very pointedly, he describes the situation of the 'German Federal Constitutional Court' as being '*caught in a trap that it set itself with the best, pro-European intentions*' Grimm, 2020, p. 948.

95 Thus, the main thrust of Weiler's Art., entitled 'Why Weiss?', cf. in particular, p. 186 seq.

7. Stronger as a pack?

Here is yet another dilemma, and a more general one. European integration is in need of effective checks, maybe more than ever. Not that it had moved forward all too speedily in recent years – not across the board at least, but in some respects maybe. Much depends on perspective here, but this is at the heart of the problem: there will always be cases in which some Member State feels that insufficient regard has been paid to one of its vital interests, be it in matters of constitutional identity, or be it a more generic concern about the EU's conformity to essential requirements related to the rule of law, democracy, or Member State autonomy.

But who is to carry out such checks? The European Court of Justice does not seem to be an optimal candidate for this task. For too many, this institution's past will be too strongly associated with the decisive contributions it has made to European integration. These contributions may be praiseworthy to this day, and groundbreaking in retrospect, but they were integrationist, and regardless of how its future jurisprudence developed, it is hard to imagine that the European Court of Justice could, anytime soon, shake off the suspicion of being driven – deep inside – by some integrationist bias. The problem would not (necessarily) be the content of the decisions, but the legitimacy of the institution.

So, who else could perform that task? It no longer seems realistic that institutions at the top of the Member States' judiciary could play that role. Being particularistic agents by definition, their legitimacy in that realm has always been shaky, and their decreased relative weight within the EU is unlikely much longer to sustain any such performance, even if they were to manage it more cautiously than the German Federal Constitutional Court. And who says that caution and benevolence in the above sense would prevail in all future times? In fact, the prospect of a bunch of weakened, but unleashed watchdogs going wild is amongst the more plausible trajectories of a refragmentation of Europe.

The time may thus have come for a new institution: a European court that could be invoked when Member States see a violation of interests of the kind described above; a court that would be composed of Member State judges delegated to that institution only on the occasion of such disputes, and of some judges, in addition, of the European Court of Justice; an institution, hence, which would not just avoid any suspicion of an integrationist bias, but also be able to transcend the particularistic national views.

This short sketch of the idea may suffice – the suggestion is neither new nor mine, and it has been elaborated upon elsewhere.[96] Such a new court, to be sure, would neither be the solution to all problems, nor even the end to all disputes. One should not expect it to become the procedural capstone, providing Kelsian closure to

96 The suggestion would make this new adjudicative body a part of the European Court of Justice; for the initial suggestion, see Weiler and Sarmiento, 2020a; the same authors have also published a reply to (some early) critique of their proposal, Weiler and Sarmiento, 2020b.

the cupola of EU law. This is not how supranationalism has worked so far, and it is doubtful whether it should, or even could, be transformed this way.

Instead, such a court would likely be too weak to take the reins, and would thus be compelled to remain cautious with any formal finality of its decisions. It would, ideally, be reconciliatory in its attitude and Solange-style in its rulings. It could play a role similar, maybe, to that of the German Federal Constitutional Court in its better days, or of other Member State courts, for that matter. It would be a response to the decrease of these institutions' relative weight, and in some cases also to the erosion of their authority.

The dilemma, in a nutshell, may hence be this: with national watchdogs losing stature, there is a growing need to recalibrate the power balance for a formative judicial dialogue on the future trajectory of European supranationalism. And the solution may rest on the hope that a pack of watchdogs might be able to achieve what a single watchdog is no longer able to.

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