

## The German Constitutional Court versus the EU: self assertion in theory and submission in practice – Euro Aid and Financial Guarantees. Part 1.

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*On the day that Parliament's sovereigntist Eurosceptics have got together to hold a debate on Britain's future in Europe and contemplate the UK leaving the EU. Dr. Gunnar Beck outlines the history of the German Constitutional Court's complicated relationship with the EU in a series of posts.*

In his post entitled 'The People's Court' (a presumably unconscious allusion to the *Volksgeschicht* under [Roland Freisler](#)) Dr. Oliver Gerstenberg provides an admirably clear overview of the recent 'Greek bailout' judgment of the German Federal Constitutional Court (the "FCC"). Dr. Gerstenberg expresses apprehension at the growing self-assertion and alleged populism of the FCC. I beg to differ. To call the kernel of German identity 'its openness to Europe' confuses a debatable *ought* with a simple *is*. It is also unclear why the FCC should not be the appropriate forum for considering the course of EU integration if the political establishment has over fifty years coherently favoured views either not shared or only reluctantly acquiesced in by the German electorate. Dr Gerstenberg is not concerned with political debate – the German political system has never allowed for genuine debate of anything to do with EU integration. Unfortunately however – and here I agree with Dr. Gerstenberg – the FCC is indeed not the appropriate forum for articulating political debate about EU integration. The reasons for this are historical and institutional. The FCC has been self-assertive for four decades, but merely in theory. In practice it

submits to the political establishment, at least in matters involving the EU.

The judgments of the FCC together with the extra-judicial writings of some of its judges, provide what is perhaps the most comprehensive analysis of the issues of primacy, legal pluralism and the problem of *Kompetenz-Kompetenz* in the relationship between national and EC law. The FCC developed its analysis in a series of seminal judgments which go back to the 1970s.

In the *Solange I* case, the FCC ruled in 1974 that, in the hypothetical case of a conflict between Community law and the guarantee of fundamental rights under the German Constitution, German constitutional rights prevailed over any conflicting norm of EC law. The FCC thus impliedly rejected the position of the doctrine of the primacy of Community law, which had first been laid down by the ECJ in the 1964 decision *Costa v ENEL* and then extended by it in 1970 in the *Internationale Handelsgesellschaft* case to cover even the fundamental constitutional norms of the Member States. However, on the facts of the case the FCC held that the rules of Community law in issue did not represent a violation of the fundamental rights under the German Constitution

The FCC later moderated its stance in the light of the ECJ's development of a doctrine of protection for fundamental rights. In *Solange II* the FCC ruled in 1983 that, in view of this development and for as long as the Community generally ensured an effective protection of fundamental rights as against the sovereign powers of its institutions and that protection was regarded as substantially similar to the protection of fundamental rights required unconditionally by the German Basic Law (*Grundgesetz* – GG) – Germany's Constitution in all but name – the FCC would no longer exercise its jurisdiction to decide on the application of secondary Community legislation. However, the FCC neither said that it no longer had such jurisdiction nor did it rule out that it might not resume exercising its jurisdiction should the conditions for its suspension no longer be in place. *Solange II* therefore did not affect the substance of the FCC's judgment in *Solange I*, namely, that the power of the national government to transfer sovereign rights extends only so far and no further than is compatible with the protection of fundamental constitutional rights and with safeguarding the basic structure of the Basic Law. In the light of its more restrained theoretical stance, the FCC unsurprisingly again found there had been no breach of the complainant's procedural or substantive rights under the Basic Law.

The FCC very significantly widened its analysis in *Brunner v. Treaty on European Union*, its *Maastricht Judgment* of 12 October 1993. In that judgment, the FCC embedded its earlier human rights focus in a more comprehensive analysis of the relationship between EU law and German constitutional law and an historically and socially enlightened theory of democratic legitimacy. In its long and politically charged judgment the FCC made clear that Germany's acceptance of the supremacy of Community law was limited by at least four factors:

- 1) the need for democratic legitimation by means of parliamentary assent (argument one),
- 2) the presence of a *demos* as the expression of the “spiritual, social and political” homogeneity of a people which understands itself as ‘one’ as a necessary source of political allegiance (argument two),
- 3) the constitutional guarantee of fundamental rights (argument three) and

4) the basic principles of the legal certainty and predictability as one of the constituents of the rule of law which underlie the principle of the specific transfer of limited competences (*begrenzte Einzelermächtigung*) to the EU (argument four).

The unifying principle central to the four strands of argument, the FCC opined, is the principle of conferral which prevents the EU from acquiring autochthonous law-making powers and ensures that the requirements of the German constitution act as a side-constraint on any future transfer of further powers to the EU. Through the act of conferral of sovereign rights and powers by parliamentary assent to the founding treaties of the European Union, the Union acquires the democratic legitimacy it would otherwise lack. At the same time the principle limits the powers of the European Union by reference to the overriding requirements imposed by the liberal-democratic basic order guaranteed by the German constitution. The principle of conferral thus safeguards the democratic-majoritarian foundation of the German constitution through the need for German parliamentary assent as a precondition for every additional step in the process towards European integration, and it protects the German Constitution's liberal basis with its twin demands for the protection of fundamental rights and of the rule of law by reserving to the FCC Court the jurisdiction to strike down any unconstitutional legislation irrespective of whether it has been adopted by the organs of the European Union or by the German parliament.

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Mark Gillis

on **March 30, 2016 at 3:18 pm** said:

Solange II was decided on 22 October 1986.