

# FCC vs. ECJ?

## Europeanisation/German Politics

Intro  
The Lisbon ruling  
Summary

## Outline

Intro

Recap

Intro

The Lisbon ruling

FCJ case law on Europe

The Lisbon ruling

Summary

Summary

Your turn



## Last week: Federalism and Europeanisation

- ▶ Federalism: divided sovereignty
- ▶ Specific features of German federalism
  - ▶ Dominance of executive institutions
  - ▶ Interlocking/overlapping responsibilities
- ▶ Joint decision trap: players can veto change of decision rules
- ▶ *Very similar structure within EU*
- ▶ German states affected by Europeanisation
  - ▶ Play veto/co-decision game at European level
  - ▶ German bargaining position fragmented

## The European Court of Justice (ECJ)

- ▶ Created by treaty of Paris (1951) to ensure that treaties are observed and interpretation is uniform
- ▶ Two important principles established by *court*
  - ▶ Direct effect
  - ▶ Supremacy of EC/EU law
- ▶ Akin to constitutional court for EU, plays other roles as well
- ▶ 'Direct Action'
  - ▶ Member state infringements on their obligations
  - ▶ Unlawful acts by Council/Commission/EP
  - ▶ Failure of institutions to act
- ▶ Preliminary rulings
  - ▶ Disputes between individuals/companies and EU
  - ▶ Judgement in dispute between two parties
  - ▶ De facto last court of appeal

## Germany and rule of law

- ▶ 'Rechtsstaat' idea in Germany older than democracy
  - ▶ Kant, Robert von Mohl (1832)
  - ▶ Administrative Courts existed from 1860s on
- ▶ After 1945, rule of law core principle of West German state
  - ▶ Human rights incorporated into constitution
  - ▶ Constitution limits majority rule
  - ▶ Core principles protected from constitutional amendments
- ▶ Rule of law in practice
  - ▶ No administrative prerogatives. Every action/decision by state:
    - ▶ requires a legal base ('Vorbehalt des Gesetzes')
    - ▶ can be challenged in court ('Vorrang des Gesetzes')
  - ▶ Laws can be declared unconstitutional ('Vorrang der Verfassung')
  - ▶ Federal Constitutional Court acts as guardian
- ▶ Legal/constitutional limits to Europeanisation?

## Europeanisation and the rule of law

- ▶ Europe a 'regulative state' (Majone)
- ▶ German courts apply European laws
- ▶ Federal parliament/council *have* to transpose European directives into national law
- ▶ Is this compatible with constitutional safeguards for democracy/rule of law?

## Solange I + II

- ▶ “Solange I” ruling (1974):
  - ▶ FCC accepts supremacy of EU law only insofar as it does not conflict with constitutional rights
  - ▶ Application of EU law by German authorities subject to review by FCC (after preliminary ruling by ECJ)
  - ▶ While (“solange”) EC treaties do not include comparable bill of rights
- ▶ “Solange II” ruling (1986):
  - ▶ FCC will not exercise its right to constitutional review
  - ▶ While (“solange”) ECJ guarantees protection of fundamental rights that is comparable to German constitutional standards
  - ▶ (Constitutional review still possible in exceptional circumstances)

## Maastricht

- ▶ Maastricht ratification bill and amendments (new article 23 of Fed Constitution) challenged in FCC by groups of MPs
  - ▶ Insufficient protection of fundamental rights
  - ▶ Transfer of sovereignty and diminished role of Bundestag undermine democracy
- ▶ FCC:
  - ▶ Maastricht & art 23 ok
  - ▶ ‘Cooperation’ between ECJ and FCC protects fundamental rights (reserve powers)
  - ▶ Legitimacy of EU laws is derived from voluntarily and reversible transfer of sovereignty (mandate)
  - ▶ EU/institutions *must not extend scope of their authority*, MS remain masters of the treaties

## Beyond Maastricht

- ▶ ‘Banana market’ (2000): FCC did not exercise reserve powers
- ▶ ‘European Arrest Warrant’ (2005):
  - ▶ *Implementation* of EAW directive unconstitutional, therefore void
  - ▶ Because legislature did not ‘exhaust the margins afforded to it’
  - ▶ Extradition must be subject to judicial review → no trust in rule of law in other MS?
- ▶ By and large, cautious and pro-integrationist rulings

## What, and why (2009)?

- ▶ Lisbon treaty tried to save substance of failed Constitutional Treaty
- ▶ Again, MPs challenged ratification bill, and supplementary bills and changes to constitution in FCC
- ▶ FCC ruled that the treaty was constitutional in principle
- ▶ But requested additional participation rights for Bundestag and Federal Council/Länder
- ▶ Widely seen as rather eurosceptic
- ▶ Focus no longer on fundamental rights
  1. Responsibility for integration – scope and limits
  2. Supremacy of German constitution, no ‘Kompetenz-Kompetenz’ for EU institutions
  3. Sovereignty and democratic deficit

## Constitutional responsibility for integration

- ▶ FCC sees EU as a derivative legal system, a reversible union of sovereign states
- ▶ Contradicts ECJ jurisdiction
- ▶ Germany 'responsible for integration', but integration is limited
  - ▶ Continuing political will
  - ▶ Limited by constitutional commitment to democracy
  - ▶ More generally by inviolable core of constitution and constitutional identity
  - ▶ Sovereignty and German people's right to self-determination
- ▶ Giving EU 'Kompetenz-Kompetenz' would be unconstitutional
- ▶ All this subject to constitutional review

## Integration, parliament, and red lines

- ▶ FCC focuses on parliament
  - ▶ Further integration requires parliamentary approval
  - ▶ Parliament must not give blanket authorisations, should not trust 'Europe'
- ▶ Two 'red lines'
  1. Amendment of primary law without ratification requires an additional act of parliament
  2. Any ratification act must safeguard principles of federal and constitutional identity
- ▶ Lisbon treaty has tricky provisions that could be read as 'Kompetenz-Kompetenz', but is basically ok
  - ▶ CoR, early warning system, new rights for nat parliaments
  - ▶ Unanimous decision by EC and passerelle clauses to change internal policies and to upgrade procedures akin to ratification
  - ▶ Not totally consistent
- ▶ FCC does not trust government, not satisfied with ratification act, wants additional safeguards

## Supremacy of the German constitution

- ▶ In line with Maastricht ruling, 'ultra vires' ('beyond powers') review if no legal protection within EU
- ▶ *Plus* 'identity' review – does EU infringe on core of German constitution?
- ▶ Very broad and potentially problematic phrasing
- ▶ Authority of EU/ECJ seen as derived
- ▶ FCC can declare EU law inapplicable if
  1. It falls behind German standards for fundamental rights
  2. It is lacking mandate for application in Germany ('ultra vires')
  3. It violates constitutional identity
- ▶ More forward than Solange II, Maastricht

## Sovereignty and democratic deficit

- ▶ Sovereignty remains a core principle of constitution
  - ▶ Bundestag must retain meaningful sphere of influence
  - ▶ Fed Government must be able to influence EU policy making process → intergovernmentalism
- ▶ Lisbon ruling has long list of national parliamentary powers, including police, military, tax and spending, criminal law, education, regulation of media . . .
- ▶ An EU regulation requires cross-border component
- ▶ FCC recognises democratic deficit, ignores improvements
- ▶ FCC ok with current democratic deficit as long as EU does not become federation

## Latest developments:

- ▶ 'Mangold' ruling
  - ▶ ECJ declared a clause of German labour law inapplicable because it violated primary EU law
  - ▶ FCC confirmed decision by top German labour tribunal to follow ECJ, rejected bid to review case
  - ▶ A softening stance?
- ▶ Euro
  - ▶ In September 2011, the FCC ruled on Germany's participation in the Greek bailout and the European Financial Stability Facility (EFSF) + 2012/14 rulings on ESM
  - ▶ These decision did not breach parliamentary rights
  - ▶ But future decisions need to be made in a way that guarantees sustainable parliamentary control over the budget
  - ▶ Very cautious
- ▶ 2014: FCC seeks preliminary ruling from ECJ ...  
<https://www.bundesverfassungsgericht.de/urn:nbn:de:bsv:1-14-000-1.html>

## So what?

- ▶ Massive Europeanisation of German legal system (SEM)
- ▶ Uneasy relationship between FCC and ECJ
- ▶ Lisbon ruling deviates from Solange II + Maastricht rulings
- ▶ FCC has drawn 'red lines' for further integration – has it?
- ▶ Doukas is *very* sceptical

## Class questions

- ▶ Work in pairs: What exactly are Doukas' points of criticism?
- ▶ In teams of five students:
  - ▶ Do you think Doukas' concept of legal pluralism is convincing?
  - ▶ How do you see the future of FCC/ECJ relations?