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Informal constitutional change: constitutional change without formal constitutional amendment in comparative perspective

Passchier, R.; Passchier R.

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Author: Passchier, Reijer
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5 The German Basic Law and the evolution of European integration

> 'The incremental evolution of European integration in quantitative and qualitative terms has raised the problem of "silent constitutional revision"'.
>
> Jens Woelk[1]

5.1 INTRODUCTION

In Germany, one of the most significant and hotly debated constitutional developments over the past decades has been what is commonly called the 'Europeanization' of the Basic Law (*Grundgesetz*); that is, the overlapping, limitation, displacement and supplementation of national constitutional law by European Union[2] (EU) law.[3]

Some traces of Europeanization actually show on the face of the Basic Law. Since 1992, the Basic Law has been amended a number of times in connection with the evolution of European integration.[4] Article 23 was adopted in connection with the ratification of the Treaty of Maastricht in 1992. This Article provides, among other things, special constitutional authorization for Germany's participation in the development of the EU and codifies some of the limits of this authorization that had been developed earlier by the German Constitutional Court. Since 2009, Article 45 has provided that the Bundestag 'shall appoint a Committee on the Affairs of the European Union'. Article 50, which was added to the Basic Law in 1992, says that the *Länder* 'shall participate through the Bundesrat in the legislation and administration of the Federation and in matters concerning the European Union'. Since 1992, Article 88 has provided a constitutional basis for the transfer of powers of the Federal

1 Woelk (2011), 161.
2 In this chapter, I use the term 'European Union' to refer to the current Union as well as the various Communities that have preceded this organization. This approach is consistent with Article 1(3) of the Treaty of the European Union, which states that 'The Union shall replace and succeed the European EU.' See also Schütze (2016), lxvi.
3 Maurer (2007), 127.
4 Streinz (2011), 137.

Bank to the European Central bank.[5] In 2000, the German constitutional legislator adapted the Basic Law to European developments in the field of equal treatment for men and women by removing a sentence from Article 12a(1) of the Basic Law that stipulated that '[women] may on no account render service involving the use of arms.'[6] Further formal amendment amendments that have been prompted by European integration concern the right to asylum (Article 16a BL), which was amended in 1993, and the ban on extradition of German citizens (Article 16 BL), which had to be (partly) lifted in 2000 to allow the German legislator to implement the European Arrest Warrant.[7]

However, it appears that the contemporary text of the Basic Law gives an incomplete account of the constitutional implications the evolution of European integration has had in the German constitutional order. In the first place, it may be noted that some of the constitutional amendments being associated with Europeanization have arguably been brought about (long) after the actual constitutional development had taken place. For example, consider Article 23 of the Basic Law (1992), which is probably the most prominent amendment to the Basic Law brought about in connection with Europeanization. Among other things, it provides limits to this process. However, for the large part, these limits were not new. Most of them had already been established by the German Constitutional Court prior to the moment this amendment was being engineered.[8]

Moreover, even after several formal amendments to the Basic Law have been brought about, the contemporary text of the Basic Law does not seem to reflect all – and perhaps not even the most important – constitutional implications of almost seven decades of European integration. Indeed, it has been widely recognized in German constitutionalism that the evolution of European integration has effected substantial 'material' modifications of the contents of the German Basic Law; that is, constitutional changes outside of the Article 79(2) amendment procedure of the Basic Law.[9]

This chapter starts by providing a few examples of informal constitutional developments that have taken place in connection with the evolution of European integration. All of these examples are derived from German constitutional literature and are recognized by authoritative authors in this field. My aim is to gain a sense of what kind of mechanisms of change, apart from the Basic Law's formal amendment procedure, have Europeanized the Basic Law.

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5 Kämmerer (2003), 453.

6 In 2000, the CJEU ruled that Council Directive 76/207 precludes the application of national legislation that imposes a general exclusion of women from the armed forces. See: Case C-285/98 Tanja *Kreil v. Bundesrepublik Deutschland* [2000] I-69.

7 Streinz (2011), 139.

8 See e.g. BVerfG 37, 271 – *Solange I*.

9 Cf. BVerfG 58, 1, 36 – *Eurocontrol*, Pernice (1998), 42. Maurer (2007), 128. Woelk (2011), 161. Hufeld (2011), 29 et seq.

The second section of the chapter will explore why some important constitutional implications of the evolution of European integration have not shown on the face of the Basic Law. This question is especially interesting because Germany is known for its commitment to bringing about constitutional change through formal constitutional amendment and for its lively amendment culture.[10] So why is it that some of the most notable constitutional changes induced by European integration have come about solely through alternative routes of constitutional change?

Lastly, this chapter will ask whether and to what extent alternative mechanisms of constitutional change have been able to substitute some of the most important functions that are being attributed to the formal constitutional amendment procedure of the Basic Law. Have alternative mechanisms of change produced amounts of support for change equivalent to those a formal constitutional amendment procedure would presumably have generated? Have such mechanisms been effective means of constitutional change? And what implications has informal constitutional change had for the relevancy of the Basic Law's text, which the Article 79(2) formal amendment procedure aims to protect?

The case study conducted in this chapter is interesting in its own right. The process of Europeanization has taken place in all the 28 EU Member States and the German debate about this process provides insights that might be helpful for understanding Europeanization in other Member States as well. Furthermore, studying the Europeanization of the Basic Law can teach us a great deal about the more general theme of informal constitutional development, including the mechanisms by which informal constitutional change comes about, the significance of formal constitutional norms, and the consequences that informal constitutional change can have for a constitutional democracy that lives under a written constitution.

5.2 EUROPEANIZATION AS INFORMAL CONSTITUTIONAL CHANGE

In this section, I will explore the mechanisms, apart from formal constitutional amendment, by which the Basic Law has Europeanized. To that end, I will search for concrete examples of where, due to the evolution of EU law, the meaning of one or more constitutional provisions has changed substantially without (foregoing) explicit change of the constitutional text. As I will suggest, these examples indicate that the Basic Law has been Europeanized significantly through such mechanisms as treaty-making and judicial interpretation, both by the CJEU and the German Constitutional Court.

10 See e.g. Benz (2011), 35. Murphy (2007), 487.

5.2.1 The relationship between EU law and domestic law

Probably the most important example of informal constitutional change being effected by the evolution of European integration concerns the relationship between EU law and German domestic law.

When the EU was founded, the formal legal quality of EU law was not fundamentally different than the quality of other international rules; from the EU law perspective, it only formally bound states and did not directly create rights and duties at the national level.[11] Each Member States could decide what position EU law would have in its national jurisdiction and in what way it would comply with EU obligations.[12] In Germany, the relationship between EU and domestic law was regulated by Article 25 of the Basic Law, which provides that:

> 'The general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory.'

Hence, as with international law, the general rules of EU law were considered an integral part of federal law (albeit not independently, but on the basis of Article 25 of the Basic Law). Moreover, pursuant to Article 25 they enjoyed primacy over domestic ordinary legislation, but not over national constitutional law.[13]

In the early 1960s, however, the Court of Justice of the European Union (CJEU) ruled that EU law takes precedence over national law – including national constitutional law – and that it directly creates rights and duties for citizens of the Member States, independent of the Member States' legal arrangements. In the 1963 *Van Gend & Loos* case, the CJEU considered that the EEC Treaty is more than just an agreement that creates mutual obligation between the contracting parties.[14] Instead, according to the CJEU,

> '… the Community [EU] constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law

11 Although it should be noted that the case law of the CJEU works backward, the arguments used in Costa v. E.N.E.L. mean that, as far as EU legal doctrine is concerned, EU law was always supreme, even if the Member States or even other EU actors did not realize it.

12 Streinz (2011), 135.

13 According to German legal doctrine, general rules of 'ordinary' international law have a higher status in law than ordinary statutes, but they are subordinate to the provisions of the Basic Law. Zippelius and Würtenberger (2005), 509. See also Pernice (1998), 59 and Rojahn (2003), 269.

14 Case C-26/62 *Algemene Transport- en Expeditie Onderneming van Gend & Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.

> therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage.'[15]

In the 1964 *Costa/ENEL* case, the CJEU clarified that, according the doctrine of direct effect, natural and legal persons can invoke EU law before the national courts of the Member States.[16] It also stated that:

> 'By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply.'[17]

Furthermore, in the *Costa/ENEL* case the CJEU considered that the doctrine of direct effect established in *Van Gend & Loos* would be 'quite meaningless' if a Member State could unilaterally nullify its effects by means of a legislative measure that could prevail over EU law.[18] Therefore, the Court found that:

> '[t]he transfer by the States from their domestic legal system to the EU legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the EU cannot prevail.'[19]

In subsequent case-law, the Court vigorously maintained and further developed these doctrines of direct effect and supremacy of EU law. It confirmed, among other important things, that EU law takes precedence over national constitutional law,[20] including fundamental rights provisions.[21] It also specified that both primary and secondary EU law have direct effect and enjoy primacy over national law.[22] The Court also ruled that the doctrine of supremacy of EU Law precludes the valid adoption of new national legislative measures 'to the extent to which they would be incompatible with EU provisions.'[23] Although the doctrines of direct effect were never crystalized in the Treaties – and may therefore themselves perhaps be regarded as examples of informal constitu-

15 Ibid.
16 Case C-6/64 *Flaminio Costa v E.N.E.L.* [1964] ECR 585.
17 Ibid.
18 In the words of the court: 'law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as EU law and without the legal basis of the EU itself being called into question'. See: Ibid.
19 Ibid.
20 Case 106/77 *Amministrazione delle Finanze v Simmenthal SpA* [1978] ECR 629.
21 Case 11/70 Internationale *Handelsgesellschaft mbh v Einfuhr und Vorratstelle für Getreide und Futtermittel* [1970] ECR 1125.
22 Case 106/77 *Amministrazione delle Finanze v Simmenthal SpA* [1978] ECR 629.
23 Ibid.

tional change, albeit at a European level[24] –, they have become an integral and undisputed part of EU law.[25]

The doctrines of direct effect and supremacy of EU law, as introduced and maintained by the CJEU, were at odds with the original constitutional plan for the relationship between EU Law and German domestic law. In particular, the claim that EU law takes precedence over national constitutional law implied a striking deviation from the original constitutional plan as embodied by Article 25 of the Basic Law. Nevertheless, German constitutional actors would – with some reserves – largely stomach the consequences, even though the Basic Law was not being amended. In 1967, the German Constitutional Court accepted that the EU is a Union 'of its own kind' to which the Member States transferred certain sovereign rights:

> 'Thereby a new public authority has come into being, which is autonomous and independent from the authorities of the Member States; its acts therefore neither need to be confirmed ('ratified') nor can they be repealed by them.'[26]

In 1971, the German Constitutional Court accepted that, by ratifying the EEC Treaty, the Member States had created an autonomous legal order that has direct effect in the domestic legal order and can be invoked in the German courts.[27] Furthermore, in subsequent case law, the German Constitutional Court in principle also accepted the supremacy of EU law, albeit in a modified and non-absolute form.[28] In short, referring to the German Basic Law, the Constitutional Court has acknowledged that EU law enjoys primacy over national constitutional law in so far as the German constitutional 'identity' as embodied by Articles 1, 20 and 79(3) of the Basic Law is not violated.[29]

24 Voermans (2009), 98.

25 Craig and De Búrca (2008), 256 et seq.

26 '[Die Gemeinschaft] ... ist eine im Prozeß fortschreitender Integration stehende Gemeinschaft eigener Art, eine "zwischenstaatliche Einrichtung" im Sinne des Art. 24 Abs. 1 GG, auf die die Bundesrepublik Deutschland – wie die übrigen Mitgliedstaaten – bestimmte Hoheitsrechte "übertragen" hat. Damit ist eine neue öffentliche Gewalt entstanden, die gegenüber der Staatsgewalt der einzelnen Mitgliedstaaten selbständig und unabhängig ist; ihre Akte brauchen daher von den Mitgliedstaaten weder bestätigt ("ratifiziert") zu werden noch können sie von ihnen aufgehoben werden.' See: BverfGE 22, 293, 296 – *EG-Verordnung*.

27 '….durch die Ratifizierung des EWG-Vertrages (vgl. Art. 1 des Gesetzes vom 27. Juli 1957 – BGBl. II S. 753 -) ist in Übereinstimmung mit Art. 24 Abs. 1 GG eine eigenständige Rechtsordnung der Europäischen Wirtschaftsgemeinschaft entstanden, die in die innerstaatliche Rechtsordnung hineinwirkt und von den deutschen Gerichten anzuwenden ist.' BVerfGE 31, 145, 173 – *Milchpulver*.

28 Streinz (2011), 135. Heun (2011), 186. Zippelius and Würtenberger (2005), 542. Pernice (1998), 60.

29 Streinz (2011), 136.

Moreover, since 1974,[30] the Constitutional Court, has reserved for itself the authority to review whether EU law developments are (still) in conformity with the core identity of the German constitution.[31] The German legislator has not univocally accepted the doctrines of direct effect and supremacy of EU law either, though the Treaty of Lisbon – which the German legislator ratified – includes a nonbinding declaration (Declaration NR. 17), which states that:

> 'in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law'.

Contemporary German constitutional handbooks generally adopt the view of the German Constitutional Court, recognizing the doctrines of direct effect and supremacy of EU law within the limits that have been developed by the Constitutional Court since 1974. As these limits are broad and quite abstract, this means that an average German handbook may explain that, as a consequence of the doctrine of supremacy of EU law, provisions of German law are not applicable if they conflict with EU law; that, in case of doubt, German law must be interpreted in light of EU law; that the competences of German public authorities in the field of legislation are limited or modified by the competences of EU and EU authorities; and that the compatibility of national law with EU or EU law can be reviewed by the Court of Justice of the European Union (CJEU).[32]

To date, neither the doctrines of direct effect and supremacy of EU law as they have been developed by the CJEU, nor these doctrines as they have been recognized by German constitutional actors, have shown on the face of the German Basic Law. Nevertheless, from a historical institutionalistic perspective, they have profoundly changed the material meaning of Article 25 BL law in particular and the entire Basic Law in general. Before the doctrines of direct effect and supremacy were introduced, the Basic Law operated as the highest law within the German legal order. After this introduction, however, the Basic Law largely lost this status and function. With the exception of the Basic Law's fundamental core, as embodied by Article 1, 20 and 79(3)), the document has become subordinate to EU rules, both as a practical matter and largely as a legal matter. As we have seen, despite their constitutional significance, these

30 In the 1974 *Solange* judgment, for example, the German Constitutional Court reserved for itself the competence to declare a rule of Community law inapplicable in Germany if it would consider such a rule incompatible with one or more fundamental rights provided by the German Basic Law, 'as long as' the Community itself would not provide an equivalent protection of fundamental rights. BVerfGE 37, 271, 279 *et seq* – Solange 1.

31 73 BVerfGE 339, 387 – *Solange II*, BVerfGE 89, 155 – *Maastricht* – 1993, 2 BVerGE 2/08 – *Lisbon* – 2009, 2 BVerfGE 2728/13 – OMT – 2014.

32 Maurer (2007), 128.

changes have not been effected by a formal constitutional amendment, but instead by alternative means of change such as judicial decisions (both at an EU and national level) and ordinary legislation ratifying EU Treaties.

5.2.2 The powers of individual state institutions

Moreover, European integration has had substantial implications for all German authorities constituted by the Basic Law, even when the concerned provisions have not been subject to formal constitutional amendment. Especially since the introduction of the doctrines of direct effect and supremacy of EU law, these authorities have been placed under the conditions of EU law, whether their powers are transferred to the European level or whether they have retained their powers in modified form.[33]

For example, European integration has had substantial consequences for the powers of the German Constitutional Court. Under Article 100(1) of the Basic Law, the Constitutional Court originally had the sole authority on determining the validity of domestic legislation.[34] This so-called *Verwerfungs monopol,* as originally interpreted, provided that the Constitutional Court has the exclusive power to reject acts and norms; no ordinary court or administrative agency is entitled to refuse the application of domestic legislation on the grounds that it is constitutionally doubtful.[35] The drafters of the Basic Law had included the *Verwerfungsmonopol* for the Constitutional Court to exclude the possibility of different institutions having different opinions about the validity of the same legislation.[36] It is also believed that the power to determine the validity of domestic law was monopolized and concentrated in order to protect the parliamentary legislator: these measures aimed to prevent every single court from ignoring the will of the legislator and refusing the application of a law because it would be unconstitutional and void.[37] Moreover, the *Verwerfungsmonopol* was included to promote uniformity of constitutional jurisprudence.[38] However, as we have seen, in *Costa/ENEL* and subsequent case law, the CJEU has made it mandatory for national courts to review whether domestic acts and laws are compatible with EU law and, in case of conflict,

33 Maurer (2007), 128.

34 Article 100(1) of the Basic Law provides that: '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.'

35 Grimm (2012), 45. Meyer (2003), 704.

36 Grimm (2012), 107.

37 Maurer (2007), 667. Meyer (2003), 705.

38 Meyer (2003), 705.

to disregard national legislation.[39] Especially in *Simmenthal*, the CJEU was very clear about the duty of national courts:

> '…every national court must, in a case within its jurisdiction, apply EU law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the EU rule.'[40]

Again, since as early as 1971, also the Constitutional Court itself recognized that the primacy of EU law can, in principle, be invoked in the German courts.[41] Although there is no jurisprudence, German constitutional actors have also held that the administration has the competence to reject the application of national legislation that is not compatible with EU law.[42] As Grimm argued, since these developments the *Verwerfungsmonopol* of Article 100(1) of the Basic Law no longer holds true:

> 'every judge, even every civil servant can disregard a law enacted by the democratically elected national parliament if she deems it incompatible with EU law'.[43]

A related example concerns the function and tasks of the judiciary in general (Article 92-104 BL). The classic task of the German judiciary is to interpret and apply German law[44] and 'general rules' of international law pursuant to Article 25 of the Basic Law. However, in the process of European integration, national courts have effectively become increasingly EU courts as well, even though the Basic Law has not been amended to this end.[45] As we have already seen, since *Costa/ENEL*, national courts are 'bound to apply' EU law.[46] Furthermore, since the founding of the European Communities, national courts have had an institutionalized dialogue with the European courts. According to the contemporary TFEU, national courts have the power to request the CJEU to give a preliminary ruling on issues concerning the interpretation of the EU Treaties.[47] Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal is obliged to bring the matter

39 Case C-6/64 *Flaminio Costa v E.N.E.L.* [1964] ECR 585. Case C-26/62 *Algemene Transporten Expeditie Onderneming van Gend & Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.
40 Case 106/77 *Amministrazione delle Finanze v Simmenthal SpA* [1978] ECR 629.
41 BVerfGE 31, 145, 173 – Lütticke.
42 Pernice (1998), 62.
43 Grimm (2012), 45. See also Streinz (2007), 46.
44 See in particular Art 93(1) BL.
45 Streinz (2011), 148.
46 Case C-6/64 *Flaminio Costa v E.N.E.L.* [1964] ECR 585.
47 Now Article 267 TFEU.

before the European Courts.[48] On the one hand, it should be noted that the German Constitutional Court has referred explicitly to the CJEU only once, namely in the OMT case.[49] Moreover, it clearly still considers itself the sole and ultimate guarantor of the German Constitution. On the other hand, at the same time, the 'interdependence of the judiciary within the multilevel system,'[50] as Streinz aptly labeled the new situation that has emerged in the course of European integration, has been recognized by the judiciary itself: the Constitutional Court has acknowledged that the CJEU is a 'legal judge' in the sense of Article 101(1) of the Basic Law, that the CJEU has been admitted to the German legal protection system,[51] and that the German Constitutional Court exercises its jurisdiction regarding the applicability of derivative EU law in Germany in a 'co-operative relationship'[52] with the CJEU.[53]

The evolution of European integration has also – without formal constitutional amendment – significantly changed the powers and role of the German parliament (the *Bundestag*), compared to the way parliament was originally established by the Basic Law (Article 38-48).[54] Most importantly, the processes of European integration increasingly reduced the ability of the national parliament to make legislation unilaterally. The wider the scope of EU law would become, the less room there would remain for the national parliament to take its decisions regarding legislation independently.[55] This effect has been particularly visible in the economic area, but also more recently in other areas such as the area of security and justice, the area of foreign affairs and, since the start of the implementation of the Economic and Monetary Union in the early 1990s, also the monetary and financial area. In recent years, even the budget debate – which has traditionally been considered a key activity of parliament[56] – has significantly been circumscribed by among other regulations the European Growth and Stability Pact.[57] Recent developments in the

48 Now Article 267(2) TFEU.
49 2 BVerfGE 2728/13 – OMT – 2014.
50 Streinz (2011), 148.
51 BVerfGE 75, 223, 240f – *Kloppenburg-Beschluss*.
52 BVerfGE 89, 155, 7 – *Maastricht*.
53 Streinz (2007), 46.
54 Grimm (2012), 107. See also Nettesheim (2002), 81 et seq.
55 Grimm (2012), 117.
56 See also Article 110 Basic Law.
57 Indeed, these developments have substantially changed the meaning of the Basic Law provisions with regard to finance (Article 104a-115 BL). These provisions fix the distribution of tax income within the Federal Republic and attribute equal financial autonomy to the Federal Government and the *Länder*. However, this autonomy has been substantially limited at both levels by the evolution of the European Monetary Union; this is because, since the ratification of the Treaty of Maastricht, the Commission has had the power to monitor the development of the budgetary situation and of the stock of government debt in the Member States (Now Article 126 TFEU). Moreover, Article 104a BL, which provides that 'the Federation and the Länder shall separately finance the expenditures resulting from the discharge

area of budgetary control associated with the 'European Semester' go much further still.[58] Today, approximately 20 percent of the federal legislation is in fact a transformation of EU Law.[59] A much larger percentage of legislation is influenced by EU obligations, depending on the level of integration in the area concerned.[60] Federal ministries spend roughly 30 percent of their time transposing EU regulations. According to Heun, these developments have

> 'reduced the autonomy of the Bundestag [the German Parliament] as a legislator including the fact that some substantial matters are regulated by European law and have a major impact on national legislation, even displacing national law completely in some areas'.[61]

Pernice even argued that, as far as the transposition of EU directives is concerned, it is has become the role of the parliament to be 'rubber-stamping the ideas from Brussels and acting as an administrative agency rather than a political body'.[62]

A classic example of an EU law development that has significantly circumscribed the powers of national legislators is the 1978 decision of the CJEU in *Cassis de Dijon.*[63] In this case, the CJEU significantly expanded the freedom of goods, ruling that measures applying to both imported and domestic goods that have an effect equivalent to a quantitative restriction on imports are prohibited under the ECC Treaty. In other words, if a product has been lawfully produced and marketed in one Member State of the Union, the sale of this product may not be subject to restriction in another Member State. After *Cassis de Dijon* Member States may still impose their own standards, but they must justify them. Hence, it has become much harder for Member States' legislatures to decide upon their own standards of protection.[64] Meanwhile, the function of the national parliament changed as a consequence of European integration. Over the years, large parts of the national parliament's traditional legislative functions have been taken over by the Council of Ministers and the European Parliament, which have increasingly acted as European legislators.[65] Instead of making legislation, it has become the national parliaments' task to control

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of their respective responsibilities', is arguably losing its grip on reality at a time when more and more decisions are made at a European level. See: Pernice (1998), 59.

58 Hinarejos (2015).

59 Töller cited by Heun (2011), 117.

60 Ibid.

61 Ibid.

62 Pernice (1998), 59.

63 Case 120/78 Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein.[1978] ECR 649.

64 Grimm (2012), 107.

65 Pernice (2009), 373.

the ministers in the Council (or the Head of Government in the European Council).[66]

5.2.3 The principle of federalism

The evolution of European integration has effected substantial transformations outside the formal amendment procedure of the Basic Law with respect to the federal system in general (Articles 20(1) and 79(3) BL) and the distribution of legislative and executive powers between the federal and the state level in particular (Articles 70-75, 87f BL). German legal theory has traditionally defined federalism as a system in which the state as whole, as well as the *Länder*, have sovereignty.[67] In this understanding, independent sovereignty implies, among other things, that the *Länder* have a constitutional autonomy, a certain core of competences and minimum financial means that cannot be taken away, as well as a fundamental right to participate in the federal legislative process (which is protected, even against formal constitutional amendment, by Article 79(3) of the Basic Law).[68] However, European integration has actually triggered substantial shifts of power from the *Länder* to the federal state, and from the federal state to EU institutions.[69] As Heun explained, European integration has affected the position of the *Länder* in particular, because the European Union perceives the individual Member States as single identities.[70] Moreover, while EU law is often implemented at the level of the *Länder*, the *Länder* have only had a limited capacity to influence the European decision-making process.[71] Before Article 23 BL was introduced in 1992, the Federal legislator could, pursuant to Article 24(1) BL, transfer sovereign powers to the European level just by simple law, without involving the Federal Council (*Bundesrat*).[72] As foreign affairs, including European affairs, was a matter under exclusive power of the federation, the *Länder* could not use its legislative powers to block the transfer of sovereignty by the federal legislator.[73]

In 1986, new rights of participation in the decision-making processes regarding European matters were attributed to the *Länder* in an attempt to compensate for their increasing losses of competences due to European integration.[74] In 1992 and 1993, the most important of these rights were codified in Article 23 of the Basic Law and in a statute regarding the cooperation of

66 Pernice (2009), 373.
67 Heun (2011), 50.
68 Ibid, 54.
69 Streinz (2012), 141. Hufeld (1997), 148 et seq. Nettesheim (2002), 91 et seq.
70 Heun (2011), 81.
71 Ibid.
72 Ibid.
73 See: Article 70 BL and Article 73(1) BL.
74 Heun (2011), 81.

the Federation and Lander in matters regarding the EU.[75] Article 23(1) of the Basic Law, for instance, explicitly provides that the Federation may only transfer sovereign powers to the EU through a law with the consent of the Federal Council. Moreover, Article 23(2) states that, through the Federal Council, the *Länder* 'shall participate in matters concerning the European Union' and that the Federal Government has the obligation to keep the Federal Council 'informed, comprehensively and at the earliest possible time'. This means, among other things, that before it participates in the legislative process of the EU, the Federal Government must provide the Federal Council with an opportunity to state its position (Article 23(3)). It also means that, insofar as the legislative powers of the *Länder*, the structure of the Land authorities, or *Land* administrative procedures are primarily affected, the position of the Federal Council must 'be given the greatest possible respect in determining the Federation's position' (Article 23(5)). However, the constitutional amendments did not restore the division of powers between the federal state and the *Länder* as it was originally 'eternalized' by Article 79(3) of the Basic Law, among other provisions. As Heun pointed out, the amendments 'will only slightly delay, and not hinder, the competences from migrating to the federal government and the European Union'.[76]

5.2.4 The content of fundamental rights

Other important examples of informal constitutional change that has been effected by the evolution of European integration can be found in the field of human rights. In the first place, European integration has had implications for the scope of human rights. In particular, the interpretation of Articles 8(1), 9(1), and 12(1) of the Basic Law – the so-called 'German fundamental rights' – has changed in the process of European integration.[77] These three articles grant 'all Germans' the freedom of assembly, the freedom of association, and occupational freedom, respectively. However, since the introduction of EU Citizenship by the Treaty of Maastricht, German jurisprudence has held that these articles also apply to non-German citizens on German soil.[78] Also, Article 19(3) of the Basic Law, which provides that the fundamental rights of the Basic Law also apply to 'domestic artificial persons', has been extended to apply to non-German artificial persons from inside the EU as well.[79] In the course of European integration, EU law should also be counted among the

75 Article 2 Gesetz zur Einheitlichen Europäischen Akte Vom 28 Februar 1986 BGB1 II 1102.
76 Heun (2011), 82.
77 Maurer (2007), 128.
78 Ibid.
79 Streinz (2011), 141.

system of legal protection guaranteed by Article 19(4) of the Basic Law.[80] Moreover, European integration has had consequences for the interpretation of Article 2(1) of the Basic Law, which provides that

> '[e]very person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law'.

Since EU law has been considered part of the German constitutional order since 1971,[81] EU law also co-determines the limits of this general right to freedom.[82] These developments substantially and persistently change the meaning of the Basic Law provisions concerned, but they have not (yet) crystalized in the text of the Basic Law.

European integration has also changed the meaning of Basic Law fundamental rights provisions on a more abstract level. Article 1(3) of the Basic Law stipulates that the fundamental rights listed in Article 2-19 of the Basic Law bind the legislature, the executive, and the judiciary as directly applicable law. However, in *Internationale Handelsgesellschaft* the CJEU ruled that

> 'the validity of a EU measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure.'[83]

This means that wherever German authorities implement EU acts, they must respect EU fundamental rights as developed by the CJEU and codified by the 2009 Charter of Human Rights: they cannot set aside EU rules simply because their application would violate a fundamental right of the German Basic Law.[84] Consequently, the rule of Article 1(3) that all German authorities are

80 Maurer (2007), 128.
81 See: BVerfGE 31, 145, 173.
82 Maurer (2007), 128. Pernice (1998), 56.
83 Case 11/70 Internationale *Handelsgesellschaft mbh v Einfuhr und Vorratstelle für Getreide und Futtermittel* [1970] ECR 1125, par. 3.
84 Pernice (1998), 55. This effect is also recognized by the German constitutional Court. In the 1981 *Eurocontrol* judgment, it stated that:
'Acts of the particular public power of a supranational organization which is separate from the State power of the Member States may also affect those persons protected by fundamental rights in Germany. Such acts therefore affect the guarantees provided under the Basic Law and the duties of the Federal Constitutional Court, which include the protection of fundamental rights in Germany, and not only in respect of German governmental institutions (notwithstanding BVerfGE 58, 1).'
However, the court added that it will continue to assert the right to review EU Acts in case they evidently depart from the from the inalienable standards of protection provided by the Basic Law in order to be able to guarantee the mandatory standard of fundamental rights under the Basic Law. See: BVerfG 89, 155 – *Maastricht*.

bound by the fundamental rights stipulated by the German Basic Law does not apply to an increasing number of actions that result from EU obligations. As Pernice explained,

> 'German authorities are, insofar, under European "command", they act as European authorities and are with regard to the German legislation and constitution almost *de legibus soluti* [released from the law].'[85]

Grimm noted that these developments have had substantial implications for the interpretation of fundamental rights in Germany because, in interpreting fundamental rights, Germany and the EU have not entirely been guided by the same principles and values.[86] Article 1 of the Basic Law regards human dignity as an inviolable right and in German jurisprudence, personal communicative, and cultural rights traditionally prevail over economic interests. In general, the German constitution grants the federal legislature much leeway in regulating the economy in such a way that non-economic values are also respected.[87] For the EU, however, the four economic freedoms of the internal market have enjoyed the highest priority. It is true that the German Constitutional Court has held since *Solange II* that German rights still apply, but that EU law protects them as long as the level of protection is sufficient, that is, comparable to that of the Basic Law was achieved.[88] Yet, as Grimm reports, the CJEU may require that human dignity be balanced against entrepreneurial freedom:

> '[s]ince there is hardly any legal matter that does not have an economic aspect, the EU has a tool to extend its powers into fields that, according to national constitutional law, should not be guided by economic rationality.'[89]

5.2.5 Résumé

This section has listed some examples of constitutional norms, principles, and institutions whose material meaning has changed substantially and persistently – without formal constitutional amendment – as a consequence of European integration. This list is certainly far from comprehensive, as the evolution of European integration has presumably changed the material content of every single Basic Law provision in some important or less important way. As Pernice put it,

85 Pernice (1998), 55.
86 Grimm (2010), 46.
87 Ibid, 45.
88 73 BVerfGE 339, 387 – *Solange II*.
89 Ibid.

> 'whenever the Treaties on the European Union are changed, national constitutions undergo significant changes as well. Both constitutional levels are in permanent interdependency. Nearly all parts of the national legal orders – from constitutional law to private and criminal law – are affected by the Treaties and EU secondary law and are thereby Europeanized.'[90]

In addition, it should be considered that the progress of European integration is still ongoing and effects new constitutional developments virtually every day.[91] Therefore, it is probably impossible to give a comprehensive and perfectly systematic account of how the Basic Law has been Europeanized, but the list of examples presented above at least gives a sense of what kind of mechanisms have effected some of the most important informal constitutional changes in connection with European integration. Indeed, the Europeanization of the Basic Law has not only come about through formal constitutional amendments, but also through such mechanisms as treaty-making, court decisions – both at a European and at a national level – and by the national executive and legislature implementing EU policies.

5.3 Explanations for informal constitutional change

The fact that such important implications of the evolution of European integration for the material content of the Basic Law have not been subject to formal constitutional amendment may well be considered surprising. Post-WWII German constitutionalism is known for its 'positivism' – that is, its attachment to formal constitutional amendment – and its lively amendment culture.[92] Article 79(1) of the Basic Law[93] is commonly understood as a 'textual change commandment' (*Gebot der Textänderung*): 'no constitutional change without textual change'.[94] According to the mainstream view,[95] this does not mean either that the Basic Law categorically prohibits taking place outside the formal amendment procedure[96] or that the limits of informal constitutional change

90 Pernice (2009), 373.
91 Maurer (2007), 126.
92 Fusaro and Oliver (2011), 421. Murphy (2007), 487. Woelk (2011), 145.
93 The first sentence of Article 79(1) of the Basic Law provides that '[t]his Basic Law may be amended only by a law expressly amending or supplementing its text.'
94 Bryde (2003), 205.
95 See for the mainstream view: Bryde (2003), 205. Nettesheim seems to disagree, arguing that, pursuant to Article 79(1), the Basic Law does not allow its provisions to change implicitly. See: Nettesheim (2002), 79.
96 As Voâkuhle explained, when a new concretization is no longer compatible with the normative contend of a certain constitutional provision, the Basic Law must be amended in order to prevent violating Article 79(1). Voâkuhle (2008), 209.

be determined with precision.[97] However, Article 79(1) does demand a certain degree of fidelity to the words of the Basic Law and it reserves the right to bring about constitutional changes from a certain point for the constitutional legislator. In any case, Article 79(1) of the Basic Law does not allow for 'breaches of the constitution' (*Verfassungsdurchbrechungen)* by an ordinary statute without explicitly changing the text of the constitution, even if this statute is supported by a three-thirds majority.[98] As a more general matter, Article 79(1) reflects the aspiration of the Basic Law to render constitutional change and textual change fully analogous.[99]

The textual change commandment of Article 79(1) of the Basic Law seems to have had some influence on how constitutional change has taken place in German practice. Unlike the US and Japan, for example, German constitutional actors have occasionally used the constitutional amendment procedure to bring about or codify constitutional change. Major reforms associated with re-armament, emergency regulations, budgetary and financial policy reorganizations, reunification, and European integration were indeed accompanied by formal constitutional amendments.[100] More generally, the Basic Law has quite a high amendment rate relative to other national constitutions. Using a method that allows for comparison, Busch counted 193 amendments in the period between 1947 and 2007.[101] This makes the Basic Law the fifth most flexible constitution out of the constitutions of 20 OECD countries.[102] Benz indicated that, in Germany, informal constitutional change is relatively unconventional and that if certain constitutional transformation take place without foregoing formal amendment, the constitutional actors involved tend to adapt the constitutional text as soon as possible after the actual transformations have taken place.[103] Also, Kommers suggested that formal amendment rather than

97 As Badura explained, the limits of informal constitutional change are flexible. Badura (1992), 63.

98 This rule is a direct rejection of the Weimar practice. Under the Weimar constitution (1919-1945), the use of alternative means of change was not exceptional. For instance, it was acceptable for the legislator to deviate from the constitutional text – without explicitly amending it – by way of an ordinary statute if this statute was adopted by a qualified majority required to amend the constitution. However, the Weimar constitution's 'informal turnover' prompted the framers of the post-war Basic Law to take precautionary measures. It was mainly considered that, in a constitutional democracy that operates according to the rule of law, a more strict distinction had to be drawn between the *pouvoir constitutuant* and the ordinary legislator. See: Bryde (2003), 205 and Kotzur (2013), 126-127.

99 Bryde (2003), 206.

100 Heun (2011), 22.

101 Busch (2007). Most commentators count between 50-63 amendments, but the 'national' count does not allow for comparison as every country has its own methods of counting textual additions.

102 Ibid.

103 Benz (2011), 35.

alternative methods of constitutional change have been foremost in modern Germany.[104]

This raises the question of why, in apparent sharp contrast to the experience of constitutional change in other fields, so many important constitutional changes associated with Europeanization have taken place outside the Basic Law amendment procedure of Article 79(2). I present three possible answers below.

5.3.1 The German 'amendment culture' is a myth

One explanation for the fact that the Basic Law has Europeanized for a significant part without formal amendment is that, contrary to what some authors have indicated, Germany does not actually have such a thing as an 'amendment culture'. German constitutional actors certainly seem to prefer constitutional change to take the front door of the Basic Law's formal amendment procedure. However, although the German Basic Law has been amended many times, the extent to which these amendments truly reflect substantial constitutional change may be questioned. As Heun pointed out, the Basic Law has been amended many times (Heun counted more than 50 amendments), but only about five of these amendments have gained major importance.[105]

Furthermore, the extent to which the Article 79(2) formal amendment procedure of the Basic Law has actually rendered (material) constitutional change and (formal) textual change analogous may also be questioned. German constitutional actors, including the Constitutional Court,[106] have acknowledged that the meaning of constitutional provisions has sometimes changed outside the Basic Law's formal amendment procedure.[107] For example, the decisions of the Constitutional Court are being acknowledged as an important source of informal constitutional change.[108] It is noted that the ordinary legislature has modified the meaning of certain constitutional provisions, especially as it concretizes and implements formal constitutional provisions.[109] Also, constitutional authors have considered evolving unwritten constitutional norms,

104 Kommers cited in Murhpy (2007), 487.

105 Heun mentioned amendments concerning rearmament, emergency regulations, budgetary and financial policy reorganizations, reunification, and European integration. See Heun (2011), 22.

106 BVerfGE 34,269, 288 – *Soraya*. ‚[Eine] Norm steht ständig im Kontext der sozialen Verhältnisse und der gesellschaftlich-politischen Anschauungen, auf die sie wirken soll; ihr Inhalt kann und muss sich unter Umständen mit ihnen wandeln'. Cited by Zippelius & Würtenberg (2005), 67.

107 Heun (2011), 21. Bryde (2003), 206-207.

108 Petersohn and Schultze (2011), 47. Kneip (2011), 228 *et seq*. Zippelius and Würtenberger (2005), 64. Kotzur (2013), 140.

109 Zippelius and Würtenberger (2005), 65. Schulze-Fielitz (2008), 222.

conventions, and practices in order to effect implicit constitutional transformations.[110]

A 'perfect example', as Heun put it, of informal constitutional change is the transformation of Article 68 BL.[111] This article provides the federal chancellor with the power to ask for a 'confidence vote' in times of political crisis. If the vote is not supported by a majority of the parliament, the federal president may dissolve the parliament. The framers of the Basic Law included this article with the intention of providing stability and avoiding elections before the regular end of the legislative term. However, Chancellors Helmut Kohl and Gerhard Schröder have both used this instrument (in 1982 and 2005, respectively) while they enjoyed the support of a majority. They actually purported to lose the vote, thereby triggering the dissolution of the parliament and consequent election. In both cases, the Constitutional Court deferred the question about the constitutionality of the actions to the political actors involved. Legal scholars now distinguish a 'true' vote of confidence from a 'non-authentic' one.[112]

In sum, the high amendment rate of the Basic Law should not obscure the fact that the German constitution also changed many times outside the formal amendment procedure of Article 79(2) and, therefore, that the phenomenon of informal constitutional change is not so exceptional in Germany as some might expect.

5.3.2 Formal amendment is too difficult or impossible

Another factor that might explain why important constitutional developments associated with Europeanization do not show on the face of the Basic Law is the difficulty of formal constitutional amendment. Article 79(2) stipulates that amending the Basic Law requires the support of two-thirds of the Members of the *Bundestag* and the *Bundesrat*. For Woelk, the high amendment rate of the Basic Law is an indicator that the Basic Law's procedural requirement of amendability is 'definitely not an obstacle for change.'[113] As noted above, however, most amendments to the Basic Law appear to be relatively minor. The two-thirds majority may still prove to be impermeable if an amendment proposal would bring about change with regard to truly fundamental matters, such as the role and powers of one of the institutions that are necessary for amending the constitution.[114]

110 Zippelius and Würtenberger (2005), 65. Badura (1992), 64.
111 Heun (2011), 103. See also Woelk (2011), 146.
112 Ibid.
113 Woelk (2011), 145.
114 Grimm (2010), 40.

As in the US and Japan, a certain degree of cultural persistence against formal amendment seems to exist in Germany. This fact, combined with the qualified procedural requirements of Article 79(2), constitutes an important source of amendment difficulty. For example, in the 1970s the *Bundestag* established a commission to work out recommendations for a total revision of the Basic Law. However, when this commission presented its suggestions six years later, the Basic Law was already deeply venerated in West German society and the need for total revision was no longer felt.[115] Also, when East and West Germany reunified, the West was unwilling to draft a new constitution, although Article 146 had originally promised a new constitutional document for this historic event.[116]

Moreover, many informal constitutional changes that have been effected by European integration concern issues that are addressed by the eternity clauses of the Basic Law. These include fundamental rights, the allocation of powers in the federal system, and the way the principle of democracy is implemented in the organization of public powers. Article 79(3) of the Basic Law prohibits the textual alteration of certain Basic Law provisions and designates a few 'core' norms that are untouchable by formal constitutional amendment. It provides that

> 'Amendments to this Basic Law affecting the division of the Federation into *Länder*, their participation on principle in the legislative process, or the principles laid down in Articles 1 [human dignity] and 20 [basic institutional principles] shall be inadmissible.'

Article 1 declares that 'Human dignity shall be inviolable' and that '[t]he German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world'. Moreover, Article 20(1) states that '[t]he Federal Republic of Germany is a democratic and social federal state'. According to German legal doctrine, constitutional amendments that would appear to contravene Article 79(3) could be tested, and in cases where an amendment is seen to violate the eternity clause, it could be ruled impermissible.[117] Consequently, the provisions and subjects addresses by the Basic Law's eternity clauses can only change implicitly.

5.3.3 Formal amendment has been considered unnecessary

Another important reason why a significant part of the constitutional changes effected by European integration took place without formal constitutional

115 Grimm (2010), 36.
116 Ibid.
117 Maurer (2007), 745.

amendment is the fact that, with regard to these changes, formal amendments have often been considered legally unnecessary. While Article 79(1) of the Basic Law embodies relatively strict doctrinal limits for informal constitutional change as a general matter, these limits do not apply to informal constitutional changes that have been effected by the evolution of international and European law.[118] Since the enactment of the Basic Law in 1949, the Preamble[119] and Article 24 of the Basic Law have embodied the concept of 'international openness', allowing for the transfer of sovereign powers by legislative act. Pursuant to Article 24, Ratification Acts (Article 59(2) BL) may 'breach the constitution' in case German authorities have to renounce (some of) their powers. According to German legal doctrine, such acts are exempted from the textual change commandment of Article 79(1) and are only circumscribed by the much broader limits of Article 73(3), which in any case provide the lower limits of informal constitutional change.[120] Moreover, Article 25 of the Basic Law has made 'general rules' of international law an integral part of federal law. Therefore, their development has been able to effect implicit constitutional changes in cases were German constitutional actors have recognized that certain international rules have constitutional or supra-constitutional status.[121]

Indeed, German legal doctrine has especially been permissive to informal constitutional changes that have occurred in connection with European integration.[122] German constitutional actors, including the Constitutional Court,[123] have explicitly recognized, almost from the beginning, that the evolution of European integration may imply substantial 'material' modifications to the content of Basic Law provisions, on the grounds that Article 24 allows for the transfer of sovereign powers to international organizations by an ordinary law and also based on general acknowledgement of the supremacy of EU law, even over the Basic Law.[124] In addition, since 1992, Article 23(1) of the Basic

118 Bryde (2003), 203.

119 The first sentence of the Preamble of the Basic Law provides that: 'Conscious of their responsibility before God and man, Inspired by the determination to promote world peace as an equal partner in a united Europe, the German people, in the exercise of their constituent power, have adopted this Basic Law'.

120 The 'window in sovereignty' provided by Article 24 of the Basic Law is ultimately circumscribed by the core identity of the Basic Law (Article 73(3) BL), which provides, according to most authors, in any case the lower limit of informal constitutional change. Bryde (2003), 208. Woelk (2011), 163. Taking an historical institutional approach (chapter 2), we may add of course that also the 'core identity' of the Basic Law, though formally unamendable, has itself an interdependent relationship with the legal and socio-political context in which it is embedded.

121 Bryde (2003), 208.

122 Bryde (2003), 208. See also Kokott (2010), Pernice (1998) and Hufeld (1997), 132 *et seq*.

123 BVerfG 58, 1, 36 – *Eurocontrol*. 'Die Übertragung von Hoheitsrechten bewirkt einen Eingriff in und eine Veränderung der verfassungsrechtlich festgelegten Zuständigkeitsordnung und damit materiell eine Verfassungsänderung'. And: '[…] eine förmliche Verfassungsänderung nach Art. 79 GG [ist] nicht gefordert […]'.

124 Pernice (1998), 43. Hufeld (2011), 30.

Law has provided a special constitutional basis[125] for Germany's participation in the European Union: it explicitly provides that Germany shall participate in the development of the European Union and that, to this end, sovereign powers may be transferred by a legislative act.

In addition to being permissive, German legal doctrine has also provided limits to informal constitutional change connected with European integration. The most important of these limits have been embodied by Article 23(1) of the Basic Law since 1992. However, Article 23(1) seems to hardly (if at all) provide stricter limits to informal constitutional change by European integration compared to those that were already in place: the restriction and conditions set by Article 23(1) largely follow the formulation of the fundamental principles laid down in Articles 1, 20, 28 and 79(3) of the Basic Law, and therefore largely resemble the limits that had already been read, by most authors, into Article 24.[126] Moreover, Article 23(1) confirms that the Basic Law allows for the transfer of sovereign power by way of an ordinary statute: it subjects such a statute to the requirements stipulated by Article 79(2) (two-thirds majority) and Article 79(3) (fundamental core), but not to the textual change commandment of Article 79(1).

Only in the past two decades, the room for European integration to effect informal constitutional change seems to have been narrowed down somewhat by the German Constitutional Court.[127] This court has increasingly emphasized the protection of sovereignty – which the court has deduced from the principle of democracy – at the expanse of the principle open statehood.[128] It has also developed the procedure of 'identity review', which has made it, in the words of the Constitutional Court itself,

> 'possible to examine whether due to the action of European institutions, the principles under Article 1 and Article 20 of the Basic Law, declared inviolable in Article 79.3 of the Basic Law, have been violated'.[129]

However, at the same time, the Constitutional Court has continued to emphasize that the Basic Law lays down 'a binding structure for Germany's participation in the development of the European Union' and that, pursuant to Article 23(1) 'the Basic Law can be adapted to the development of the European Union.'[130] Moreover, the limits to informal constitutional change effected by European integration, as provided by the Basic Law and clarified and developed by the Constitutional Court, remain mostly of theoretical significance, because the Constitutional Court has never actually found a violation

125 Rojahn (2003), 125 et seq.
126 Bryde (2003), 208. Woelk (2011), 162.
127 See especially BVerfGE 89, 155 – *Maastricht* – 1993, 2 BVerGE 2/08 – *Lisbon* – 2009.
128 Kokott (2010).
129 2 BVerGE 2/08 – *Lisbon* – 2009, par. 240. See also 2 BVerfGE 2728/13 – OMT.
130 Lisbon case par. 230.

of these limits and has never really stood in the way of further European integration or made it legally necessary to amendment the constitution before European integration could move on. It is true that the review powers asserted by the German Constitutional Court have forced the CJEU to take the German constitutional reservations seriously.[131] However, so far the Constitutional Court has continued to live up to its reputation as the 'Dog that Barks but does not Bite', as Weiler once noted.[132] Indeed, in *Honeywell*, the *Bundesverfassungsgericht* ruled that it would consider a violation of the EU Treaties to be *ultra vires*, only if this violation would be 'manifest' and of 'structural significance'.[133] And in the follow-up judgement to the OMT case it seems to have accepted the ruling of the CJ[134]EU that a program such as the Outright Monetary Transactions program would not be *ultra vires*, that is, would not 'manifestly' exceed the competences attributed to the European Central Bank and, hence, would not present a constitutionally relevant threat to the German Bundestag's right to decide on the budget.[135]

So why is it that some constitutional changes induced by European integration have been brought about or codified by using the formal amendment procedure of Article 79(2), while other changes have only taken alternative routes? Nettesheim argued that formal amendment such as Article 23 (which, as already noted, confirms the participation of Germany in the EU and provides limits to European integration), Article 28(1) (which confirms the right for EU citizens to vote in country and municipal elections), and Article 88(2) (which provides for the possibility to transfer powers and responsibilities of the Federal Bank to the European Central Bank) have not been brought about on legal-doctrinal grounds, but on grounds of 'constitutional aesthetics' ('*Verfassungsästhetik*'), which recommend bringing the provision of the Basic Law in line with EU law.[136] As Nettesheim pointed out, in case the text of the Basic

131 See: Heun (2011), 188.

132 Weiler (2009), 505 (caps in original).

133 2 BVerfGE 2728/13 – Honeywell.

134 Case C-62/14, *Peter Gauweiler and others v. Deutscher Bundestag*, Judgement of the Court (Grand Chamber) of June 16 2015.

135 2 BvR 2728/13.

136 Nettesheim (2002), 78. At least with regard to the amendment of Article 88 and Article 28(1) BL, Pernice agreed that there was no legal need for constitutional amendment. Regarding Article 88, he argued that '[t]he fact that the federal government establishes a federal bank acting as bank of issue does not exclude that this Bank is integrated into a European System of Central Banks – in contrary: the system is based on its existence as much as on the existence of an (independent) Central bank in each other Member State.' Regarding the adaption of Article 28(1), Pernice argued that a modified construction of the word 'people' (*Volk)* would 'easily have allowed to accommodate voting rights for foreigners with the text of Article 28(1) GG, without an explicit amendment'. See: Pernice (1998), 54. Against this last point, one could argue that in the case of Article 28(1) BL, amendment was perhaps not strictly necessary, but was made because the Constitutional Court had declared any attempt to give foreign citizens a right to vote for municipal elections unconstitutional (see: BVerfGE 83, 37). When this right was introduced at a European level, this jurisprudence

Law is amended in connection to EU developments, such 'retrospective' constitutional amendments merely confirm that the German constitutional legislator has accepted these developments.[137] Similarly, Streinz pointed out that although it has not been necessary to facilitate European integration from a constitutional or European law perspective, some of these amendments were nevertheless helpful in view of constitutional politics.[138] In fact, a textual modification of the Basic Law is only legally necessary, as Pernice explained, in all cases where individual rights granted by EU law provisions are not fully clear and effective without formal amendment of the Basic Law. Pernice wrote:

> 'in other area fields, the normative unity of the European constitutional order may suffice to produce adequate results, and it is rather a question of clarity and simplicity for each [national] constitution to adapt its text from time to time to the changes it has undergone as a consequence of the development of the Treaties constituting the European Union.'[139]

5.4 Alternative mechanisms as perfect substitutes?

In German constitutionalism, the formal constitutional amendment procedure of the Basic Law (Article 79(2)) is considered to be of great importance for at least three reasons. First, the textual change commandment of Article 79(1) reflects the idea that the formal constitutional amendment procedure is a particular legitimate route for constitutional change. Article 79(1) aims to safeguard the content of the Basic Law and precludes it from changing by accident, unconsciously, or secretly.[140] Therefore, it demands a certain degree of fidelity to the constitutional text and it limits the possibility of legitimate informal constitutional change. At the same time, it embodies the rule that if constitutional change has taken place by alternative processes, such dynamics may later require a textual clarification.[141] Second, because of the textual change commandment of Article 79(1) of the Basic Law, the Article 79(2) formal amendment procedure is seen as one of the most effective, if not the only truly effective, means of constitutional change. Although Article 79(1) does not categorically prohibit informal constitutional change, it embodies the idea that the text of the Basic Law is to remain the basis, guideline, and limit of constitu-

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may have been overridden as a strictly doctrinal matter, but it is at least understandable that the constitutional legislator wanted to make it clear that constitutional rules with regard to the participation of European citizens in municipal elections had changed.

137 Nettesheim (2002), 78.
138 Streinz (2006), 39.
139 Pernice (1998), 59.
140 Bryde (2003), 208.
141 Kotzur (2013), 136.

tional evolution.[142] This means that certain reforms would indeed require the form of a formal constitutional amendment in order to be valid.[143] Third, formal constitutional amendment has sometimes been regarded the preferable route of constitutional change (e.g. Article 79(1)), because German constitutionalism values the continuing relevancy of the Basic law's *text*. By at least promoting that informal constitutional change and formal constitutional change remain aligned with one another, German constitutionalism seeks to guarantee that the Basic Law remains a comprehensive charter (*'Urkunde'*) of German constitutional law.[144]

However, as we have seen, the Europeanization of the German Basic Law has taken place for an important part outside of the Basic Law's formal constitutional procedure. This raises the question about the extent to which alternative mechanisms of change have been able to functionally substitute the Article 79(2) formal amendment procedure of the German Basic Law. This section aims to explore the following questions: To what extent have informal constitutional changes effected by the evolution of European integration been considered legitimate? To what extent have alternative processes of change that have Europeanized the Basic Law been effective in adapting the Basic Law to new circumstances and demands? And, in the view of constitutional actors, to what extent have alternative processes of change been able to preserve the relevancy of the Basic Law's text?

5.4.1 Legitimacy

In the early years of European integration, the legitimacy of informal constitutional change that occurred in connection with European integration seems to have hardly been questioned by German constitutional actors. On the contrary, the Herrenchiemsee Convention, which had a strong influence on the workings of the Constitutional Convention that drafted the Basic Law, embraced a very open and integration friendly interpretation of the Basic Law.[145] During the Herrenchiemsee Convention of 1948, Carlo Schmid, one of the most prominent founding fathers of the German Basic Law, said that the provision pursuant to which:

> 'the general rules of public international law are directly enforceable …, expresses very lively that the German People … are resolved to step out of the phase of the nation state and move beyond to a supranational phase. … We should … open the doors into a politically restructured supranational world

142 Badura (1992), 64.
143 Bryde (2003), 205.
144 Bryde (2003), 206. Hufeld (1997), 98.
145 Kokott (2010), 101.

> order widely. … Our Basic Law forswears stabilising state sovereignty like a "Rocher de bronze" (solid rock), on the contrary, it makes the surrender of sovereign powers to international organisations easier than any other constitution in the world.'[146]

Carlo Schmid also wrote that '[y]ou have to want Europe as a federal state, if you want an effective Europe'.[147] Schmid also believed that the Basic Law should leave to politics a wide margin of appreciation as to the modalities of the transition to 'a politically newly structured supranational world order'.[148]

During the first few decades of European integration, constitutional implications of the evolution of European integration appear to have been accepted virtually without reservations. In the common understanding, the Basic Law was based on the concept of 'open statehood', as Vogel put it.[149] Constitutional actors recognized that the evolution of European integration would go hand in hand with substantial material modifications, even when the text of the constitution was not explicitly changed.[150] As Pernice explained, this was considered the implication of Article 24 of the Basic Law and the fact that constitutional actors, including the Constitutional Court,[151] had recognized the autonomy and supremacy of EU Law even over constitutional law.[152]

However, the increasing intensity of European integration – both in qualitative and quantitative terms – raised what has been referred to as the problem of 'silent constitution revision'.[153] As Kokott explained, when the Herrenchiemsee Convention drafted Article 24, it presumably had in mind intergovernmental organizations with a limited capability to act, but the supra-

146 *Deutscher Bundestag / Bundesarchiv* (eds.): *Der Parlamentarische Rat 1948-1949: Akten und Protokolle*, Vol. 9 Plenum, 443 (R. Oldenbourg 1996), translated and quoted by Kokott (2010), 101.

147 Carlo Schmid, *Deutschland und der Europäische Rat, Shriftenreihe des Deutschen Rates der Europäischen Bewegung*, Vol. 1 (1949), translated and quoted by Kokott (2010), 104.

148 *Deutscher Bundestag / Bundesarchiv* (eds.): *Der Parlamentarische Rat 1948-1949: Akten und Protokolle*, Vol. 9 Plenum, 40 (R. Oldenbourg 1996), translated and quoted by Kokott (2010), 104.

149 Vogel (1964), cited by Kokott (2010), 112.

150 In 1972, Hans Peter Ipsen labeled the phenomenon of informal constitutional change by European integration 'constitutional mutation'. See: Ipsen (1966) cited by Pernice (1998), 42.

151 As we have seen, in 1967 the Constitutional Court had said that, with the ratification of the Treaty of Rome, a new public authority had come into being that is autonomous and independent from the authorities of the Member States; and that this public authorities' acts neither need to be confirmed nor confirmed and that they cannot be repealed by the Member States. See: BverfGE 22, 293, 296 – *EG-Verordnung*. In 1971, the Constitutional Court confirmed this judgment and more or less accepted the supremacy of EU law by saying that if national law and EU law conflict, the national courts should not apply national law, and thus give priority to EU Law. BVerfGE 31, 145, 173 – *Milchpulver*.

152 Pernice (1998), 42.

153 Woelk (2011), 161.

national European integration soon went much further: it became apparent that it could profoundly interfere with domestic constitutional structures.[154] Meanwhile, the *Zeitgeist* and the world order had also arguably changed. Immediately after WWII, Germany was eager to win back its international recognition and membership of the international community. In this context, there was no room for reservations. However, once Germany was fully readmitted to the international community and had won back (part of) its self-confidence, German constitutional actors also started to consider the limits and conditions of international integration.[155]

In 1974, the German Constitutional Court broke with the clear conception of the supremacy of EU Law that had prevailed until then in German constitutionalism.[156] The Constitutional Court started to gradually develop 'counter-limits' to European integration, instruments to defend German sovereignty and the core identity of the constitution, such as substantive equivalence of fundamental rights, the rule of law and democratic participation.[157] The (ominous) legitimacy deficit of European integration by 'silent constitutional revision' was subsequently addressed by the constitutional legislator at the time of the ratification of the 1992 Treaty of Maastricht. In connection with this Treaty, the German constitutional legislator inserted a new Article 23 into the Basic Law, also known as the 'European Clause', which provides a specific legal basis for EU integration and codifies the limits and conditions to European integration that had earlier been developed by the German Constitutional Court.[158] In addition, Article 23 emphasizes the protection of the federal principle. Paragraphs 2-6 seek to provide compensation for the loss of *Länder* and Federal Council competences as a consequence of European integration, by strengthening their participation in the European decision making process.[159] Also, in order to safeguard the participation of the *Länder* further, Article 23(1) subjects the establishment of the European Union, as well as changes in its Treaty foundations and comparable regulations that amendment or supplement the Basic Law (that is, those that produce informal constitutional change), to the procedural and substantive requirements of Article 79(2) and 79(3) that also apply to formal constitutional amendment. The only thing that Article 23(1) does not require still is a textual amendment to the Basic Law, because the 'textual change commandment' embodied by Article 79(1) is not included.[160]

In the years after the adoption of Article 23, the Constitutional Court has further articulated the doctrinal limits of (informal) Europeanization of the

154 Kokott (2010), 104.
155 Ibid, 102.
156 BVerfG 37, 271 – Solange I.
157 Woelk (2011), 161.
158 38th amendment to the Basic Law, 21 December 1992 (*BGBL*, I, 2086).
159 Heun (2011), 81.
160 Woelk (2011), 163.

Basic Law. In both in the 2009 *Lisbon* judgment, the Court stressed that acts ratifying new EU Treaties must remain within the boundaries of the core identity of the Basic Law and that German state organs may not apply EU legal instruments that transgress the limits of the integration program laid down in the Treaties (so-called *ultra-vires* exercises) as ratified by the German legislature.[161] The main rationale for the latter instrument was the protection of democratic participation and legitimacy, which according to the Court could only be realized and guaranteed through the national parliaments of the Member States.[162] The Constitutional Court explains its nation-state-based model of legitimation as follows:

> 'Article 23.1 of the Basic Law like Article 24.1 of the Basic Law underlines that the Federal Republic of Germany takes part in the development of a European Union designed as an association of sovereign states (*Staatenverbund*) to which sovereign powers are transferred. The concept of *Verbund* covers a close long-term association of states which remain sovereign, a treaty-based association which exercises public authority, but whose fundamental order is subject to the decision-making power of the Member States and in which the peoples, i.e. the citizens, of the Member States, remain the subjects of democratic legitimation.'[163]

Thus, the Court famously found that the Member States must remain the 'masters of the Treaties'.[164]

The German Constitutional Court's views regarding the relationship between EU law and German constitutional law and the limits of legitimate informal constitutional change by European integration have been criticized. In the first place, it has been argued that the Constitutional Court has misinterpreted the Basic Law, over-emphasizing the defense of national sovereignty at the expense of Germany's constitutional commitment towards European integration.[165] Another line of attack has focused on the Constitutional Court's model of legitimacy, which, as we have seen, is based on the thesis that the European integration process derives its legitimacy mainly from the national parliament and that the European parliament cannot provide more legitimacy than it already does. Pernice, for example, argued that the EU is not (anymore) a 'compound of states', as the Constitutional Court holds, but a 'compound of constitutions' (*Verfassungsverbund*).[166] This means that rules of EU primary law and national constitutional law have each become elements of a

161 2 BVerGE 2/08 – *Lisbon* – 2009.
162 Woelk (2011), 165.
163 2 BVerGE 2/08 – *Lisbon* – 2009, par. 229.
164 Ibid, par. 231.
165 Kokott (2010), 103.
166 Pernice (1998), 43.

> 'single constitutional system, obtaining their respective legitimacy from the same (European) citizens and giving the authority for legislation and public action applicable to the same people.'[167]

Despite this criticism, and partly as a result of the German Constitutional Court's rulings and the amendment (Article 23(1) BL) that has been brought about by the German constitutional legislator, Germany has a more or less universal legal doctrine that seems to have guided the choice of constitutional actors as to whether particular consequences of the evolution of Europeanization are acceptable. Insofar as the evolution of European integration – in whatever form – has been covered by a Ratification Act and has remained within the boundaries of the core identity of the Basic Law, its consequences for the Basic Law have commonly been accepted by the German Community of constitutional actors. But to the extent that the evolution of European integration has (supposedly) transgressed these limits, it has raised difficult constitutional questions.[168] Hence, within the boundaries of the German doctrine of (informal) Europeanization, alternative means of constitutional change have been able to substitute the legitimation function of the Basic Law's constitutional amendment procedure. Outside of this doctrine, they have not been able to prevent the rise of controversialities that would presumably not have arisen if the text of the Basic Law and the evolution of European integration had remained perfectly aligned with one another.

At the same time, it should be noted that the Constitutional Court has never actually deemed concrete constitutional implications of European integration illegitimate. Nor has it actually made the ratification of a European Treaty impossible or even difficult.[169] Only in the OMT case it actually reviewed

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167 Ibid.

168 The *Mangold* case of the CJEU (Case C-144/04, *Mangold* [2005] ECR I-9981), for instance, was criticized by a group of German law professors because it supposedly invented a European prohibition against age discrimination (See: Kokkott (2010), 110). Ultimately, however, the German Constitutional Court did not agree – arguably easing its ultra vires test somewhat. E.g. Woelk (2011), 165. The Constitutional Court ruled that: 'Ultra vires review by the Federal Constitutional Court can only be considered 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.' See: 2 BVerfG 2661/06.

169 In the Lisbon case, the Court also specified that the national legislative bodies have a special 'responsibility for integration' (par. 236), which means that the national parliament must have sufficient means to participate in the EU decision-making process. The Court declared the Act Extending and Strengthening the Rights of the Bundestag and the Bundesrat in (*Bundestag* printed paper 16/8489) unconstitutional because it did not reserve sufficient participatory rights for the national Parliaments. The ratification of the 2009 Lisbon Treaty therefore required a new constitutional amendment, Article 23(1a), which guarantees the right of the Parliament and the Federal Council 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.

whether concrete EU acts transgressed the integration plan of the Treaties, but, as noted, it accepted the decision of the CJEU[170] that a program such as the Outright Monetary Transactions program would not be ultra vires.[171] Thus far, the Constitutional Court has indeed more or less accepted 'de-facto monism', as Woelk puts it, with regard to the relation between German and EU legal system.[172] Of course, it is possible that the Constitutional Court will consider the evolution of European integration to transgress the limits it has formulated together with the German constitutional legislator; for example, if the EU transforms into a (fully-fledged) federal state.[173] Also the ECB's policy of Quantitative Easing may prove to be a transgression of these limits.[174] Only after these developments have come to a conclusion may it become apparent whether and to what extent alternative mechanisms of constitutional change can function as the equivalents the formal constitutional amendment procedure outside of the limits of Europeanization set out by German legal doctrine.

5.4.2 Effectivity

Although the Europeanization of the Basic Law has been facilitated by a formal constitutional amendment (e.g., Art. 23(1) BL), this process has largely taken place through alternative processes of constitutional change, such as Ratification Acts, treaty-making, and judicial decisions. Have these processes been able to bring about rules and structures for government that are clear, stable and enduring? Or have alternative mechanisms of change instead produced ambiguities, uncertainties, or an unstable constitutional regime?

Looking back, it may be observed that alternative processes of change have been very effective at Europeanizing the German constitutional law.[175] Article 24 of the Basic Law and the permissive interpretations of the Constitutional

170 Case C-62/14, *Peter Gauweiler and others v. Deutscher Bundestag*, Judgement of the Court (Grand Chamber) of June 16 2015.

171 2 BvR 2728/13.

172 Woelk (2011), 165.

173 In the Lisbon judgment, the Constitutional Court ruled that: 'The Basic Law does not grant powers to bodies acting on behalf of Germany to abandon the right to self-determination of the German people in the form of Germany's sovereignty under international law by joining a federal state. Due to the irrevocable transfer of sovereignty to a new subject of legitimation that goes with it, this step is reserved to the directly declared will of the German people alone.' See: 2 BVerGE 2/08 – *Lisbon* – 2009, par. 228. Thus, in the view of the Constitutional Court, Germany cannot legitimately become part of a European Federation through alternative processes of constitutional change (or even formal constitutional amendment). Making this step is only possible through the constitution-making route of Article 146 of the Basic Law. See: Schorkopf (2010), 1237.

174 2 BverfG 859/15.

175 E.g. Streinz (2007), 55 et seq.

Court – particularly its general acceptance of the supremacy and autonomy of European law – would probably have remained a sufficiently stable basis for European integration, independent from any of the 'Europe friendly' formal amendments to the Basic Law.[176] However, Article 23(1) seems to have raised Germany's constitutional commitment to the development of European Union beyond all doubt: while it provides limits to European integration, it also makes it clear that policies hostile to European integration would be unconstitutional.[177] Moreover, with reference to the text and history of the Basic Law, the constitutional implications of European integration have commonly been recognized by constitutional actors. In particular, most actors would seem to agree that EU law has become an integral part of German constitutional law.[178]

However, it is not at all certain whether the scheme for Europeanization (de jure dualism, de facto monism) that has been followed so far will remain an effective scheme for constitutional change in the future. The main question appears to be whether the German Constitutional Court will continue to be able to find a workable balance between 'Europe friendliness' and the protection of national sovereignty. In the past two decades, the court has continued to underline the Basic Law's fundamental commitment to European integration. On the other hand, as we have seen, it has increasingly emphasized the defense of national sovereignty and democracy.[179] To date, ambiguity may have been a way to influence the behavior of European institutions[180] and avoid a frontal clash with the integration-oriented CJEU.[181] However, by questioning the doctrines of supremacy and autonomy of EU law, the German Constitutional Court has made the future of European integration more unpredictable: it has neither served 'the principles of legal certainty nor legal clarity', as Kokott put it.[182] Both with regard to the exercise of competences by EU institutions, as well as possible future Ratification acts, it is not at all clear what kind of constitutional implications of further European integration the German Constitutional Court will recognize and what kind of developments it will deem incompatible with the core identity of the Basic Law. How far can the progress of European integration go, as far as Germany is con-

176 Nettesheim (2002), 78.
177 Kokott (2010), 105.
178 Pernice (1998), 42.
179 'It is true that the Basic Law grants the legislature powers to engage in a far-reaching transfer of sovereign powers to the European Union. However, the powers are granted under the condition that the sovereign statehood of a constitutional state is maintained on the basis of an integration programme according to the principle of conferral and respecting the Member States' constitutional identity, and that at the same time the Member States do not lose their ability to politically and socially shape living conditions on their own responsibility.' Lisbon case, par. 226.
180 Cf. Heun (2011), 188.
181 Cf. Woelk (2011), 165.
182 Cf. Kokott (2010), 113.

cerned? Even the Constitutional Court's explicit ban on federalization of the EU under the present Basic Law[183] does not provide particularly clear guidance. At what point exactly will the EU become a federation? When the Treaties say so? Or does the court have a 'material' concept of 'federation' in mind? And how will it define this concept? Many questions remain.

In addition to these ambiguities and uncertainties, it is also still the question whether the German Constitutional Court will have the last say in matters of European integration. In German jurisprudence, the Constitutional Court is very authoritative and although its claim to supremacy of its interpretations is subject to debate, it commonly has a very dominant role in constitutional matters.[184] At the same time, some constitutional actors, including the Constitutional Court itself,[185] have acknowledged the exclusive competence of the CJEU to give a final view on the validity of Union acts (pursuant to Article 267 of the TFEU).[186]

5.4.3 The relevance of the constitutional text

Formal constitutional amendment procedures are often seen as instruments by which constitutional text can be adapted to new circumstances and demands. It has been hypothesized that alternative processes of change cannot perfectly substitute this function. If (too many and too far-reaching) constitutional developments take place outside of the formal constitutional amendment procedure, the importance of the constitutional text may be diminished or specific constitutional provisions may even lose their shaping force – and practical relevance.[187]

In analyzing the American and Japanese case, we have observed that this hypothesis hardly holds true. These cases reveal that if the meaning of certain constitutional provisions has changed through mechanisms that have a lower status in law than the formal amendment procedure of the constitution (such as judicial decisions or ordinary status) or social–political developments, tension may mount between the original or textual meaning of the constitutional provision and the new circumstances in which it has to operate. The original or textual meaning may then preserve at least some of its normative

183 In the words of the Court, 'due to the irrevocable transfer of sovereignty to a new subject of legitimation that goes with it, this step is reserved to the directly declared will of the German people alone.' 2 BVerGE 2/08 – *Lisbon* – 2009, par. 228.

184 Heun (2011), 178-179.

185 BVerfGE 75, 223, 234 – *Kloppenburg-Beschluss*. 'Art. 177 EWGV spricht dem Gerichtshof im Verhältnis zu den Gerichten der Mitgliedstaaten die abschließende Entscheidungsbefugnis über die Auslegung des Vertrages sowie über die Gültigkeit und die Auslegung der dort genannten abgeleiteten gemeinschaftlichen Akte zu;…'.

186 Pernice (1998), 61.

187 See Chapter 1.

force, even when interpretations and practices have significantly deviated from its original or textual meaning.[188] In the German case, we may observe the same effect with regard to the impact and relevancy of the provisions that are considered the core identity of the Basic Law (Article 1, 20, and 79(3): although the meaning of these provisions has changed as a consequence of European integration, they have remained relevant because, doctrinally, they still provide the highest authority on any legal question about European integration that may arise.

With regard to the rest of the Basic Law, however, it may be said to have lost at least part of its impact and relevance during the process of Europeanization. In principle, there is no tension with Basic Law provisions outside this document's core identity, and the evolution of European integration. As a consequence of the general acceptance of the autonomy and supremacy of European law, even above national constitutional law, the Basic Law must be interpreted in light of EU law; in case of conflict, EU law takes precedence over the Basic Law.[189] This means that the Basic Law remains supreme (and relevant) with regard to issues that are solely regulated at a national level, but once powers are transferred to the European level, the Basic Law provisions that regulate or establish these powers lose (part of) their impact and relevance.[190] Indeed, the process of Europeanization has moved the Basic Law (further) away from the ideal of what the Germans call '*Urkundlichkeit*'; that is, the idea of a comprehensive constitutional text that codifies the entire body of fundamental rules that govern the government.[191]

5.5 Concluding observations

The German Basic Law has been amended several times in connection with the evolution of European integration. At the same time, this evolution has effected some important constitutional changes outside of the Article 79(2) formal amendment procedure of the Basic Law. In this chapter, I have listed several examples of what we may call 'informal Europeanization' of the Basic Law, including changes concerning the relationship between EU law and German domestic law, the powers of several state organs, the principle of federalism and human rights. In German constitutionalism, it has been widely recognized that the material meaning of the provisions regulating these subjects has changed substantially as a consequence of the evolution of European

188 See: Chapter 3 and 4.
189 Maurer (2007), 127.
190 Grimm (2010), 45.
191 'Die integrationsoffenheit der Bundesrepublik last offenbar die kodifikatorische Geschlossenheit ihrer Verfassungsurkunde nicht mehr zu.' Hufeld (1997), 138.

integration, even though these changes do not explicitly show on the face of the Basic Law.

Subsequently, the chapter explored some factors that might explain why these significant constitutional developments have not come about in the form of formal amendments to the Basic Law. In a sense, it is surprising that changes regarding such an important issues as the issue of the relationship between EU law and German domestic law have taken place outside the Article 79(2) amendment procedure of the Basic Law. After all, post-WWII German constitutionalism is known for its 'positivism' – that is, its commitment to bringing about constitutional change by way of formal constitutional amendment as embodied by Article 79(2) of the Basic Law – and its lively 'amendment culture'. In Germany, a well-developed doctrine indicates what kind of informal constitutional changes are and are not allowed under the Basic Law. In short, this doctrine does not categorically prohibit informal constitutional change, but it does suggest that statutes cannot 'breach' the Basic Law without explicitly changing the text of the constitution through the Basic Law's formal constitutional law-making track (cf. Article 79(1) BL). However, since 1947, post-WWII German constitutional doctrine has made an exception for Ratification Acts. In accordance with the principles of 'international openness' and 'Europe friendliness', as embodied by the Preamble, Article 24 and, from 1992, Article 23(1) of the Basic Law, such acts are exempted from the textual change commandment of Article 79(1). This means that informal constitutional changes that occur in connection with the evolution of European integration are only circumscribed by the much broader limits of Article 73(3) and, in principle, do not necessarily require a formal constitutional amendment. As a consequence of this doctrine, it has not always been considered necessary to explicitly amend the Basic Law with regard to every single constitutional change that has occurred in connection with European integration.

Another important factor may explain why some significant constitutional changes that have occurred in connection with the Basic Law have not been subject of formal constitutional amendment. That is, even though the formal constitutional amendment procedure of the Basic Law does not seem to provide an insurmountable hurdle for textual change, changing the German Basic Law with regard to anything truly important may still prove to be a formidable undertaking. Furthermore, the German Basic Law makes certain types of amendments formally impossible, including amendments affecting the principle of federalism and human rights.[192] As the formal amendment route is blocked for these changes, they can only adapt to changing circumstances and demands through alternative mechanisms of change.

Indeed, the question to what extent the Basic Law's eternity clauses can change informally appears to be a vital one for the EU, in particular for the

192 Articles 1, 20 and 79(3).

EMU. From the EU perspective, this question would be a good candidate for future research.

Lastly, this chapter has explored whether and to what extent the alternative mechanisms of constitutional change that have Europeanized the Basic Law have functionally substituted the Basic Law's formal constitutional amendment procedure. In accordance with Article 23(1) of the Basic Law and the jurisprudence of the Constitutional Court, to the extent the informal Europeanization of the Basic Law has been covered by Ratification Acts and has stayed within the boundaries of the core identity of the Basic Law, alternative mechanisms of change have produced equivalent amounts of legitimacy in the same way as a formal constitutional amendment would have. On the other hand, to the extent the informal Europeanization has (allegedly) transgressed the limits of the integration program as originally laid down by the Treaties or the fundamental core of the Basic Law, difficult constitutional questions have been asked about the permissibility of (further) European integration under the present Basic Law. However, the German Constitutional Court has not yet actually deemed any concrete constitutional implications of European integration illegitimate: it has not made the ratification of a European Treaty impossible or even difficult, nor has it reviewed whether concrete EU acts transgressed the integration plan of the Treaties. Moreover, this chapter has considered that the alternative mechanisms of change that have Europeanized the Basic Law have substituted the Basic Law's formal amendment procedure in the sense that they have been particularly effective means of constitutional change. At the same time, alternative mechanisms of constitutional change have obviously not precluded the fact that, as a consequence of Europeanization, the text of the Basic Law no longer provides a comprehensive account of German constitutional law.

Until now, the larger part of the German Community of constitutional actors, including the Constitutional Court seem to have largely accepted the implications of the evolution of European integration, even though these implications have not always showed up on the face of the Basic Law. The question many ask is: how long will this be the case? Perhaps new formal constitutional amendments will be necessary before German constitutional actors can accept new phases in the development of the European Union. At the same time, tension is clearly mounting between the unamendable core identity of the Basic Law and the evolution of European integration. At least for the moment, this core identity seems to have substantial normative force; it might even halt the progress of European integration as the German Constitutional Court seems to interpret this core ever more extensively and makes it more easy for German citizens to challenge EU act before German courts. In the long run, however, the material meaning of Article 1, 20 and 79(3) may further be adapted by interpretation in order to permit further progress in the evolution of European integration. Much will depend on the German Constitutional Court, or so it seems, and on the question of whether the EU

will develop in a way that is perceived as consistent with the core identity of the Basic Law.