

Comments on the German Constitutional Court's Decision on the Lisbon Treaty

'An Association of Sovereign States'

Roland Bieber*

German Constitutional Court decision of 30 June 2009 on the compatibility of the Lisbon Treaty with the German Constitution – Continuing sovereignty of member states under the EU Treaty – Extended constitutional limits to European integration ('eternity clause') under German Constitution, but these are not violated by Lisbon Treaty – Composition of European Parliament does not satisfy fundamental requirement of democracy but does not violate German Constitution since EU is not a state – Critical assessment of conceptual foundations of decision

INTRODUCTION

In its decision of 30 June 2009 the German Constitutional Court (*Bundesverfassungsgericht*) formally examined the 'Act approving the Treaty of Lisbon' (hereafter 'Act') and the accompanying instruments, the 'Act amending the Basic Law' (Amending Act) and the 'Act extending and strengthening the rights of the Bundestag and the Bundesrat in European Union Matters (Extending Act)', adopted by the Bundestag on 23 May 2008. It declared the Act approving the Treaty of Lisbon and the Act amending the Basic Law to be constitutional, subject to the provisos specified in the decision. The Extending Act was declared unconstitutional in part, because rights of participation of the Bundestag and the Bundesrat had not been elaborated to the extent required.¹

In the first part the main lines of argument will be presented. In the second part those arguments will be critically assessed.

* Dr. iur., professor, Centre de droit comparé et européen, university of Lausanne, Switzerland.

¹ German Federal Constitutional Court, Decision of 30 June 2009, 2BvE 2/08 et al. An English version has been published by the Court.

ARGUMENTS

The State

The Court summarizes its understanding of the State (which it repeatedly qualifies as ‘sovereign’) as ‘a pacified area and the order guaranteed therein on the basis of individual freedom and collective self-determination. The State is neither a myth nor an end in itself but the historically grown and globally recognised form of organisation of a viable political community’.²

The Court does not expressly say so, but this definition is obviously understood as an exclusive one; the State, according to this concept is not *a* form (among others) but *the* (ultimate) form of a political community. Such an entity has to maintain under all circumstances its ability to ‘politically and socially shape the living conditions on (its) own responsibility’.³ According to the Court those conditions are ‘always’ decisions on criminal law, disposition over the police monopoly on the legitimate domestic use of force and over the military monopoly on the use of force towards the exterior, the fundamental fiscal decisions on public revenue and public expenditure, decisions which shape the circumstances of life in a social state and decisions which are of particular cultural importance (family law, school and education system, religious communities). It is interesting to note that this list does not mention monetary matters, which are traditionally considered of primary concern to states.⁴ In fact, the list avoids any conflict with the present distribution of competences between the European Union and its member states.

Sovereignty

A central notion of the decision is the term ‘sovereignty’ which is supposedly contained in the German constitution (although it is mentioned nowhere). Besides the State, the Court qualifies power and the people as sovereign. Its understanding of sovereignty is ‘independence of an alien will’.⁵ As a consequence the European Union must comply with the principle of conferral of competences and must exercise them in a ‘restricted and controlled manner’.⁶ Furthermore, supremacy of EU law would not affect the continuing sovereignty of the member states, since the Constitutional Court would establish the inapplicability of legal instruments issued by the EU ‘if the mandatory order to apply the law were evi-

² Para. 224.

³ Para. 226.

⁴ Cf. T. Padoa-Schioppa, *The Road to Monetary Union in Europe* (Oxford, Clarendon Press 1994) p. 35 et seq.

⁵ Para. 231.

⁶ Para. 298.

dently lacking⁷ and in cases when 'obvious transgressions of the boundaries take place when the European Union claims competences.'⁸

According to the Court, sovereignty also implies that legal relations under international law 'must be revocable' and withdrawal from an international organisation, e.g., the European Union cannot be prevented by the Union or other member states. As a consequence of their continued sovereignty, member states are the 'Masters of the Treaties'.⁹

Democracy

The review of the Act approving the Treaty of Lisbon mainly considered possible infringements of the right to vote, as guaranteed by Article 38 of the Basic Law of 23 May 1949.¹⁰ The right to vote is considered as the central element of democracy and hence inalienable according to Articles 20 and 79(3) of the Basic Law. The individual right to vote, according to the Court, is anchored in human dignity and therefore enjoys protection under the Basic Law equivalent to a fundamental right.

Democracy is understood by the Court in two different and unconnected senses. On the one hand, democracy consists of 'the citizens right to determine, in equality and freedom, public authority with regard to persons and subject matters through elections and other votes.'¹¹

On the other hand it is 'the people' which in a democracy must be 'able to determine government and legislation in free and equal elections.'¹² No definition is given of what is meant by 'people' (e.g., inhabitants or citizens).

The Court acknowledges the existence of different models of democracy for states. It also accepts that European integration follows methods of shaping political opinion that are not identical with the German constitutional order, as long as the limits of inalienable constitutional identity are observed.¹³ The principle of democracy does, however, set limits to the process of integration, because the latter renders more difficult the creation of a will of the majority that can be asserted and that goes directly back to the people.¹⁴ The acceptance of differences between the democratic foundations of the European Union and German governance is not seen as part of the general margin of appreciation of political

⁷ Para. 339.

⁸ Para. 240.

⁹ Paras. 231, 235, 334.

¹⁰ Paras. 208-213.

¹¹ Official Press summary by the Court, n° 2 a).

¹² Para. 270.

¹³ Paras. 219 and 267.

¹⁴ Para. 247.

structures. According to the Court, the constitutional requirements placed by the principle of democracy on the organisational structure and on the decision-making procedures of the European Union depend on the extent to which powers had been transferred to the Union. A structural ‘democratic deficit’ would exist, if the extent of competences, the political freedom of action and the degree of independent formation of opinion on the part of the institutions of the Union reached a level corresponding to the level of a State.¹⁵ In the present system of division of competences between the Union and its member states, ‘the democracy of the European Union *cannot*, and need not, be shaped by analogy to that of a State.’¹⁶

The Union under the Treaty of Lisbon would not have a political decision-making body that has come into being by equal election of all citizens of the Union and which is able to uniformly represent the will of the people. What would also be lacking is an institution which would aggregate the will of a European majority and result in the formation of a government in such a way that the will can be traced back to free and equal electoral decisions and a genuine competition between government and opposition that is transparent for the citizens. According to the Court, the European Parliament is not a body of representation of a sovereign European people, since it is not ‘laid out as a body of representation of the citizens of the Union as an *undistinguished unity according to the principle of electoral equality*.’¹⁷ The European Parliament is seen as an ‘additional independent source of democratic legitimisation’,¹⁸ as a representative body of the peoples in a supranational community, which as such is characterized by a limited willingness to unite, *it cannot, and need not*, as regards its composition, comply with the requirements that arise on the state level from the citizens ‘equal political right to vote’.¹⁹

According to the Court the European Parliament remains, due to the member states’ contingents of seats, a representation of peoples of the member states. This representation does not take as its nexus the equality of the citizens of the Union but *nationality*, a criterion that would otherwise be prohibited within the sphere of application of Union law. Hence the Union shows an assessment of values that is in contradiction to the basis of its own concept of a citizens’ Union. This contradiction could only be explained by the character of the Union as an association of sovereign states.²⁰

¹⁵ Para. 264. Instead of ‘democratic deficit’ it would be more appropriate to use expressions like ‘democracy deficit’ or ‘deficit in democracy’.

¹⁶ Para. 272 (emphasis added).

¹⁷ Para. 280 (emphasis added).

¹⁸ The Court quotes here its statement in the ‘Maastricht’ decision BVerfGE 89, 155 (184-185).

¹⁹ Para. 271 (emphasis added).

²⁰ Para. 287 (emphasis added).

European integration and implementation of the Lisbon Treaty

The Court mentions the Federal Basic Law's 'openness to European law', which is similar to its openness to international law.²¹ Integration is understood as a 'voluntary mutual commitment *pari passu*, which secures peace and strengthens the possibilities of shaping policy by joint coordinated action.'²² Integration would not lead to a change in the system of exercise of public authority in the Federal Republic.

With regard to the simplified revision clause in Article 48(6) Treaty on European Union as amended by the Treaty of Lisbon of 13 December 2007 (hereafter Treaty of Lisbon), the Constitutional Court confirms its statement in the 'Maastricht' decision of 12 October 1993, according to which amendments to the Treaties pursuant to this provision in Germany would always require a statute within the meaning of Article 23(1) Basic Law.²³

On the various 'bridging clauses' which change the voting modalities in the Council and the applicable legislative procedure (cf. Article 48(7) EU Treaty, Lisbon version), the Court requires that any approval by the German government to Treaty amendments, brought about by their use, be authorised by a statute approved by Bundestag and Bundesrat. No such prior legislative approval would be required when the use of bridging clauses is restricted to areas that are already sufficiently determined by the Treaty of Lisbon.²⁴

The Court pays particular attention to the procedure for revising the founding Treaties in Article 48(6) EU Treaty (simplified revision) and the provision on supplementary competences in Article 352 of the Treaty on the Functioning of the European Union (at present Article 308 EC Treaty). The Court considers this provision as a violation of 'the ban on transferring blanket empowerments or on transferring *Kompetenz-Kompetenz*.' Because the newly amended provision would make it possible to substantially amend Treaty foundations of the European Union without the mandatory participation of legislative bodies, each use of this provision would, prior to the approval by the German representative in the Council, require ratification by Bundestag and Bundesrat.²⁵

²¹ Para. 221.

²² Para. 220.

²³ Para. 312 and BVerfGE 89, 155 (199).

²⁴ Para. 319-320.

²⁵ Para. 328.

ASSESSMENT

General impression

A first critique of the Constitutional Court's decision has to note that far-reaching political conclusions are formulated as legal statements. European integration, like any exercise of public authority, is first and foremost a political project. Any legal perception of such phenomena raises questions about the adequacy of the tools used for such a task. Inevitably the choice of tools is a political decision or at least has political implications. The Court has chosen yardsticks for the examination of the Lisbon Treaty, which are not beyond doubt.

Strongly influenced by its 'Maastricht' decision of 1993, it gives a one-sided reading of the Basic Law, built on premises which are not openly presented as political choices but are worded as if they were uncontroversial and nothing else but the law. This is particularly obvious with regard to the notion of the 'State', which is used by the Court as the focal point of its argument. It is furthermore at odds with Germany's traditionally open attitude towards European integration.

The Court perceives the European Union through the looking glass of state doctrine of the early 20th century. In its rather lengthy and devious arguments and considerations which it itself calls 'theoretical', the Court does not make any original contribution to the theory or the understanding of the unique process of European integration in general and to the joint exercise of public authority within a transnational institutional system with direct links to the citizens in particular.

On admissibility the Court follows the controversial line which it had taken in its 'Maastricht' decision of 1993²⁶ and admitted individual complaints based on the argument that the Act could deprive the plaintiffs of their voting rights under Article 38 of the German Basic Law, since it could reduce the impact of the Bundestag on decisions of the public authority concerning the individual.

Furthermore, with regard to the merits of the case, the Court remains close to the position taken and to the arguments used in its 'Maastricht' decision.²⁷ Notwithstanding the severe criticism of that decision by academics and practitioners, the Court stiffens its defensive and rather negative attitude towards European integration and the institutions of the European Union.

The 'State' according to Karlsruhe

According to the Court, all conclusions about democracy, self-determination, citizenship and judicial control derive from that one supreme notion, the 'sovereign

²⁶ See *supra* n. 18.

²⁷ The relationship between both decisions is described as 'epigonic' by C. Schönberger, 'Lisbon in Karlsruhe: Maastricht's Epigones At Sea', 10 *German Law Journal* (2009), p. 1201 at p. 1207.

state'. Within this conceptual framework, the only theoretically possible alternative is a European state with a people.²⁸ In this view, the Union is not a State, and therefore nothing but 'an association of sovereign national states' under the control of its member states. This approach is neither consistent with theories on democracy²⁹ nor does it give an accurate account of the modes of transnational governance, nor does it take into account the intentions of the Treaty's authors.³⁰

In the first part of the operational section, the Court sets out its concept of Germany's role within the process of European Integration (recitals 207-272). The Union is presented as a foreign entity, not as part of Germany's identity. Hence, the main task of the Court seems to be the defence of Germany against intrusions by this entity. In an obstinate manner, the Court stresses that member states remain 'Masters of the Treaties'.³¹ It does so in a revealing ambiguity: the Court never qualifies this notion with the (necessary) addition '*if and when acting jointly*', hence creating the impression that each state – and in particular Germany – could individually be considered as such a 'master' and would therefore be superior to the Union. This omission reflects the Court's concept throughout the decision. It is, however, based on a false premise. Instead of hierarchy, the postwar concept of European integration is rooted in a structured permanent search for balance of all interests involved.

The distance between political reality and the Court's one-dimensional concept of States as the sole form of political organisation becomes even more visible when the history of European integration is taken into account. The evolution of the European Union cannot be seen as a long series of implementation at a European level of German, French, Dutch, etc., competences. By creating the Union (and its predecessor, the Community), the member states have brought about a new source of law. As the European Court of Justice formulated in *Costa/ENEL*: 'The Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.'³² No single member state had powers comparable to those vested in the Union. No individual state could, for example, impose fines on companies

²⁸ The original German version is even more explicit: '*ein souveränes europäisches Volk*' (recital 280) (emphasis added).

²⁹ Cf. R.A. Dahl, *Democracy and its critics* (New Haven, Yale University Press 1989) p. 193 et seq.; D. Held, *Models of democracy*, 2nd edn. (Oxford, Polity Press 1996) p. 337; A. Augustin, *Das Volk der Europäischen Union* (Berlin, Duncker & Humblot 2000); P. Häberle, *Europäische Verfassungslehre*, 4th edn. (Baden-Baden, Nomos 2007); U. Schliessky, *Souveränität und Legitimität von Herrschaftsgewalt* (Tübingen, Mohr 2004).

³⁰ Treaty on European Union of 13 Dec. 2007, Art. 1: 'This Treaty marks a new stage in the process of creating *an ever closer Union among the peoples of Europe*' (emphasis added).

³¹ Paras. 231, 235, 334.

³² ECJ 15 July 1964, Case 6/64 (*Costa/ENEL*).

acting outside its borders. No state could fix a customs tariff to be applied by other states.

Furthermore it has become obvious, that no state alone is able to provide for security, economic and social welfare of its citizens. Nor is the State the ultimate institution for the protection of the values that its citizens consider relevant. The State is certainly not a myth,³³ but it is a myth of the State that the Court takes at face value. The Court explicitly relies on definitions conceived by German scholars at the end of the 19th century under completely different circumstances and long before European integration was contemplated.³⁴

The limits of modern states apparently are better perceived in smaller states.³⁵ If states are no longer capable of fulfilling the tasks that citizens expect from any public authority and the constitution provides for additional or different means of exercising power – like for example joint governance within the European Union – this shift in authority cannot leave the concept of the State unaffected. This is particularly true with respect to individual rights. According to one line of argument of the Constitutional Court, the foundation of democracy within a state is rooted in the principle of self-determination of the individual. If one takes self-determination, the rule of law and fundamental rights seriously, any entity must refrain from considering itself as an absolute and exclusive polity. At the very least, shared responsibility for the common good and common principles such as the inclusion of people with different identities have to be acknowledged and respected.

The joint exercise of power according to rules applicable beyond the borders of a state may enhance self-determination and hence the effectiveness of a democracy.

Sovereignty

On *sovereignty* it should first be noted that the notion is neither used in the Basic Law nor in the EU Treaties. The Court, despite its frequent use of the term, remains ambiguous as to its meaning. ‘National sovereignty’ is not given any precise definition in the context of European integration. In accordance with 19th century doctrine, it is perceived by the Court as ‘freedom that is organized by international law and committed to it.’³⁶ No mention is made, however, of the

³³ Cf. para. 224.

³⁴ E.g., recital 344 refers to G. Jellinek, *Allgemeine Staatslehre*, 3rd edn. (Berlin, Julius Springer 1922) p. 394 (on the significance of territory for the definition of a state). The book was first published in 1900.

³⁵ See for example the book authored by a Swiss constitutional lawyer, P. Saladin, *Wozu noch Staaten?* (Berne/Munich/Vienna, Stämpfli/Beck/Manz 1995).

³⁶ Para. 223.

extensive debate about the justification of this notion in the context of European Integration.³⁷

The Court admits that a transfer of 'sovereign powers' to the Union had taken place. One must therefore conclude, that both, member states *and* the Union exercise some kind of 'sovereignty'. But would this be a divided or a joint exercise? In the context of the European Union 'sovereignty' can only describe a situation, where power is exercised within legally binding rules. No unqualified 'national sovereignty' is compatible with EU Membership.

The authors of the EU Treaty deliberately avoided the term 'sovereignty'. They emphasized instead the joint responsibility for the 'national identities' of the member states.³⁸

Any rhetoric about 'sovereignty' – old fashioned or 'modern' – in such a system questions the very foundations of the European Integration.

It is therefore not visible what additional value the use of such a vague notion can provide by comparison to 'competences' or 'powers'. Most likely it is the intrinsic historical and political message of some kind of autonomy beyond legal restrictions that stimulates its adepts – and which is precisely the reason why one should avoid its use in the context of European integration.

Democracy, individual rights and self determination

If the Court had taken seriously its isolated reference to individual self-determination as the true foundation of democracy³⁹ it would have drawn conclusions not only for the admissibility of constitutional complaints on grounds of a violation of voting rights due to a diminishing of powers of the Bundestag. It would also have admitted that individual self-determination requires the possibilities of making use of individual rights which are guaranteed by the EU Treaty and of giving voice to multiple belongings.

The Constitutional Court insists on voting rights as the essence of democracy. This is a rather formalistic view: democracy is based on the possibility of exercising fundamental rights and freedoms by the individual. Many of those rights are guaranteed by the Treaty on European Union only and are not at the disposal of individual member states.⁴⁰

³⁷ E.g., N. MacCormick, *Questioning Sovereignty* (Oxford, Oxford University Press 1999); F. Chaltiel, *La souveraineté de l'Etat et l'Union Européenne, l'exce francais* (Paris, L.G.D.J. 1999); A. Peters, *Elemente einer Theorie einer Verfassung Europas* (Berlin, Duncker & Humblot 2001) p. 163 et seq.; U. Schliessky, *Souveränität und Legitimität von Herrschaftsgewalt* (Tübingen, Mohr 2004); N. Walker (ed.), *Sovereignty in transition* (Oxford/Portland, Hart 2006).

³⁸ Art. 6(3) EU Treaty = Art. 4(2) EU Treaty (Treaty of Lisbon version).

³⁹ Cf. Official Press Summary by the Court, n° 2 a).

⁴⁰ E.g., Arts. 18 to 24, Treaty on the Functioning of the European Union of 13 Dec. 2007 (hereafter TFEU).

More than 40 years after *Van Gend en Loos* it seems still necessary to recall a statement made by the European Court of Justice and which has since been accepted by all member states, therefore forming part of the ‘*acquis communautaire*’: ‘The Community constitutes a new legal order (...) *the subjects of which comprise not only Member States but also their nationals.*’⁴¹

Individual self-determination in any society leads to multiple loyalties and requires a plurality of channels of expression. An individual can never be reduced to just one dimension as the national of a given state. No entity can pretend to represent totally and exclusively its component individuals.

Arrangements between states are crucial for citizens in order to achieve security, welfare and other legitimate public purposes. Pooling and delegating competences (‘sovereignty’) expands the scope of democratic choice and improves democratic control over policies that affect the citizens. As is obvious from the additional protection for individuals – even against their home state – deriving from the European Convention of Human Rights and from the various rights an individual enjoys under EU law against the authorities of the state of which it is a citizen, European law offers an additional and different layer of protection.

Establishing a constitutional setting which combines the exercise of power at national with supranational level may increase the inclusiveness of the exercise of power, the respect for minority rights and its efficiency, because it may be a more genuine reflection of the interests of the peoples.

Optimal self-determination of the individual – and hence democratic governance – is not possible within any kind of institutional closure, inherent in the notion of sovereignty. Self-determination is misunderstood and misused, when combined with a claim for exclusivity restricted to the nation-state. Hence, division of power beyond the border of a state is a guarantee for self-determination.

An efficient constitution takes this potential diversity into account – as does the Basic Law when it refers in its preamble and in Article 23 to Germany’s participation in European integration. This constitutional proposition does not simply create ‘a friendly attitude towards European Law’, (*‘Europarechtsfreundlichkeit*’, as the Court puts it generously), but it fundamentally questions the traditional concept of the State based on exclusiveness. It is prepared to offer transnational guarantees for the individual, even if this implies questioning national traditions.

Such a transnational guarantee results not only from the protection, offered by individual access to international judicial bodies, but in a more general way by formally exposing each legal subsystem to scrutiny and control by the entire polity. As Article 7 of the EU Treaty indicates, the creation of an additional system of protected values may bring about conflicts between one member state and the

⁴¹ ECJ 5 Feb. 1963, Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen* (emphasis added).

rest, united in the Union. This risk is accentuated by the fact that member states are explicitly bound by the fundamental principles and values written into the founding text of the EU.⁴² The Union is entitled to examine the internal situation of member states in the light of these common principles. At the same time, the Union is bound to respect the national 'identity' of its member states. This dichotomy offers an insight into the delicate balance and the potential tensions between the Union and member states.

Representation of the citizens and the peoples in the EU

In basing its argument simultaneously on individual *and* collective self-determination, the Court enters into contradictions, which hide behind seemingly innocent notions like 'the German people'⁴³ or 'a sovereign European people'.⁴⁴ Those notions follow the much criticised line of the 'Maastricht' decision on the homogenous people forming a state.

Elections in national boundaries do not restrict, for example, the role of Members of the European Parliament to the representation of the people of one state.⁴⁵ The Court justifies its different concept and its implication, the 'association of states', with the argument that representation in the European Parliament takes nationality as its nexus. This observation is incorrect as it suggests a link between nationality and the corresponding state. For the purpose of European elections, such a link has been replaced by EU citizenship. It is true that each member state is allocated a certain number of seats in the European Parliament. Neither the right to stand in European elections nor the right to vote in any given state is, however, based on possession of the nationality of that state. According to Article 19 EC Treaty (Article 22(2) Treaty on the Functioning of the European Union), every *citizen of the Union* residing in any member state 'shall have the right to vote and to stand as a candidate in elections to the European Parliament in the Member State *in which he resides* under the same conditions as nationals of that state.' If one wished to confine the capacity of an MEP to represent one country, this representation would have to refer to the *inhabitants* of that country and not to its *nationals*. It is one of the key features of European citizenship that one qualifies for participation in European and local elections irrespective of nationality, instead depending on residence only.⁴⁶ For this reason alone, each Member of the

⁴² Art. 6(1) EU Treaty/Art. 2 EU Treaty (Lisbon).

⁴³ Para. 217.

⁴⁴ Para. 280.

⁴⁵ Cf. Art. 6(1) Direct Elections Act of 20 Sept. 1976, *OJ* (1976) L 278/1, 8.10.1976.

⁴⁶ Art. 19(2) EC Treaty = Arts. 20(2) and 22(2) TFEU. Cf. also Directive 93/109, *OJ* (1993) L 329/34, 30.12.1993. For details see C. Lenz, *Ein einheitliches Verfahren für die Wahl des Europäischen Parlaments* (Baden-Baden, Nomos 1995) p. 279 et seq.

European Parliament not only represents the nationals of a given state but all peoples of the Union.⁴⁷

The Court's position with regard to composition and powers of parliaments in federal systems does not resist a comparative constitutional analysis. It is not correct to say that equality of representation in the legislative body is an absolute criterion for democratic governance. Equal representation undoubtedly is a relevant factor in any democratic system. However, other factors, representing values which are considered equally important for the legitimacy of the public authority may and do indeed influence constitutional settings and may therefore increase instead of diminish the legitimacy of the system. In many parliaments, representation of minorities is such a factor, which attenuates application of strict equality and which is accepted as part of the political culture of those countries.⁴⁸

This is precisely the situation concerning the representation of the peoples in the European Parliament. Its composition and its powers reflect a constitutional compromise about the balancing of complex interests at a given moment within an evolutionary system that exercises public authority and that is founded on the principle of legitimacy. Whether or not this system will one day transform into something which a nostalgic terminology might like to call a 'State' is – *contra* the Constitutional Court – irrelevant for the requirements of democratic decision-making.

It is equally difficult to follow the Constitutional Court's argument that due to the absence of EU statehood, the European Parliament would be structurally not qualified to adopt politically relevant decisions. Any composed system derives its legitimacy from a plurality of institutions, each representing parts of the overall legitimacy and therefore not claiming any monopoly of representation. This does not put into question the capacity of any of the institutions to fully contribute to the legitimacy of public authority. It is surprising that the Constitutional Court of a country where the legitimacy of the federal public authority results from a balance of several sources cannot accept a similar concept, in particular the balancing of diversity, in the European Union.

Balance of interest and learning instead of hierarchy – genuine qualities of governance in the EU

A balance among a multitude of actors brings about tensions. However, such tensions should not be understood, as the Constitutional Court seems to do, as

⁴⁷ Lenz, *supra* n. 46.

⁴⁸ E.g., the US Congress. For details see Schönberger, *supra* n. 27; M. Niedobitek, 'The Lisbon Case of 30 June 2009 – A comment from the European Law perspective', 10 *German Law Journal* (2009) p. 1267-1275.

flaws or an ill-constructed form of multi-layered governance. Trying to eliminate those potential conflicts in creating 'once and for all' a hierarchy between the systems would destroy much of its unique additional value as compared with closed systems of nation states. By *not* subordinating one order to the other, the Treaties created a sophisticated system, capable of balancing individual and group interests, aggregated in states, sub-state entities or on a supranational level. The balance results from an ongoing dynamic that obliges all member states and the institutions of the Union to permanently adjust to each other.

Accepting the fact that values are shared implies abandoning the pretence that their understanding is unquestionable in a given state.

Therefore the creation of the European Union did not simply introduce a new and additional level of regulation. It started a process of continuing exposure of national legal orders to comparison, to critique, in short: to learning. This process is based on the interaction of all participating systems (and even beyond, as the case of Switzerland and candidate countries demonstrate).

The process of learning and adjustment may bring about comparable results and may strengthen the sense of responsibility of all actors for 'internal' questions as matters of a common interest. It does, however, not necessarily lead to identical solutions. The notion of democracy, for example, is wide enough to tolerate different forms of government in the member states whilst at the same time leading to a genuine form of democratic governance of the Union that takes into account its specific functions and conditions of existence.

The Court is not sensitive to this unique and precious quality of the Union, but rather reasons in binary categories. Therefore it does not accept the idea of a transnational exercise of political rights and genuine legitimacy for the European Parliament. It considers provisions for legitimating public authority of the European Union as being exclusively rooted in the nation-state and serving exclusively to represent the states and their peoples in the EU institutions. It answers the complex questions of 'who makes up the people?' and 'of what group must the majority be a majority?'⁴⁹ by way of a counter-productive simplification.

Withdrawal from EU membership

The Court quotes Article 50 of the revised EU Treaty in order to conclude 'if a Member State can withdraw on account of decision made on its own responsibility, the process of European integration is not irreversible. The membership of the Federal Republic of Germany depends instead on its lasting and continuing will to be a member of the European Union.'⁵⁰ This statement may be of theo-

⁴⁹ Cf. MacCormick, *supra* n. 37.

⁵⁰ Para. 329.

retical relevance only, but it is interesting to note that it blatantly contrasts with declarations made by the German government and approved by the German Bundestag before German unification.⁵¹ The Court does not contemplate whether unilateral withdrawal could be excluded by way of an international agreement, thus rendering withdrawal illegal from the point of view of the organisation. This was precisely the situation under the EU treaties before the entering into force of the Lisbon Treaty.

The Court not only ignores the political declarations and commitments made by the German authorities, it also ignores the concurring legal interpretation of the EU treaties by parts of international academia.⁵² Taking these into account would have undermined the Court's concept. Hence the Court pretends that 'the (Lisbon) Treaty makes the *existing right* of each Member State to withdraw from the European Union *visible ...*'.⁵³ Had this right been new (as is the case), the Court's theory of an 'association of sovereign states' would have lost its foundation since according to this theory, the EU in this case would have been a State until the coming into force of the Treaty of Lisbon.⁵⁴

One may furthermore have doubts whether the right to unilateral withdrawal is compatible with the fundamental rights provided for all EU citizens by the EU Treaty. Does the right to withdraw imply the power to introduce national discriminations against citizens of other EU member states? Does it authorise a withdrawing state to deny its own citizens the rights deriving from the EU Treaty? How is withdrawal compatible with Article 23 of the Basic Law? Member states were probably not aware of consequences and possible limits to unilateral withdrawal when they introduced Article 50 into the EU Treaty.

Conclusion: blind spots of the decision

Nowhere does the Court discuss the fundamentals of integration: the joint responsibility of peoples and states for the future of Europe. Also conventional terminology translating the unique quality of the European Union, e.g., *solidarity* and *loyalty* are unknown terms to the Court, although these key notions are en-

⁵¹ Cf. n° 5 and 6 of the program of the German Government of 28 Nov. 1989, *Bulletin, Federal Government* n° 134/89, p. 1141. Approval by the Bundestag (Doc.11/5947/1989). See also T. Giegerich, 'The European Dimension of German Reunification', 51 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1991), p. 384, 404 et seq.

⁵² Cf. K. Lenaerts/P. van Nuffel, *Constitutional Law of the European Union*, 2nd edn. (London, Sweet and Maxwell 2005) p. 363; M. Zuleeg, *Der rechtliche Zusammenhalt der Europäischen Union* (Baden Baden, Nomos 2004) p. 35.

⁵³ Para. 329.

⁵⁴ On the background of Art. 50 EU Treaty (Lisbon version) cf. J.-P. Jaqué, *Droit institutionnel de l'Union Européenne*, 3rd edn. (Paris, Dalloz 2004) p. 112/113.

shrined in Article 10 EC Treaty (Article 4(3,4) of the EU Treaty after Lisbon).⁵⁵ Nowhere does the Court make the slightest effort to understand and to explain what is meant by the statement in Article 1 of the EU Treaty (before and after Lisbon) 'creating an ever closer union among the peoples of Europe.' Only in a closed world (i.e., a state) is it consistent for the Court to stress its power to unilaterally declare EU law inapplicable in Germany, which would, in the opinion of the Court, violate the EU Treaty.

Nor does the Court discuss the problems possibly resulting from its claim to be the final authority with regard to the applicability of EU acts in the German legal order. The Court defends its view with the argument, 'the exercise of this competence of review, which is rooted in Constitutional law, follows the principle of the Basic Law's openness towards European Law and it *therefore* also does not contradict the principle of loyal cooperation (Article 4.3 TEU Lisbon).'⁵⁶ This is a rather peculiar logic. Instead of giving a substantive reason, the Court relies on a self-referential argument. Unwittingly, the Court delivers an example that the claim of autonomous national interpretation of the EU treaties leads to: each member state can feel free to decide what the notion 'loyalty' means, even though it was agreed in common. How damaging such claims for unilateral action within a united system of decision-making are, has already been stated by the European Court of Justice ('failure in the duty of solidarity accepted by Member States by the fact of their adherence to the Community strikes at the fundamental basis of the Community legal order').⁵⁷ Potential conflicts between national constitutional orders and EU law (as interpreted by the institutions established for that purpose) cannot be excluded.⁵⁸ Does the German Constitutional Court seriously believe that European citizens can make full use of their rights and that the EU can fulfil its tasks if judicial or other authorities of individual member states claim the 'last word' about the interpretation of EU law? Europe is a joint project based on the striving for dialogue, for co-operation, for solidarity. Those fundamentals are incompatible with isolation and hierarchy.

The Court's claim for an isolated constitutional review of EU law is even more irritating in the light of its use of the so called 'eternity clause' of the Basic Law

⁵⁵ Cf. A. Hatje, *Loyalität als Rechtsprinzip der Europäischen Union* (Baden-Baden, Nomos 2001); Zuleeg, *supra* n. 52, p. 153 et seq.

⁵⁶ Para. 240 (emphasis added).

⁵⁷ ECJ 7 Feb. 1973 Case 39/72, *Commission v. Italy*, para. 25.

⁵⁸ E.g., the provision (Art. 11) in the Constitution of Luxembourg, which reserved certain employments in the public sector to Luxembourg citizens. Only with the help of the European Court of Justice the resulting discrimination, which violated Arts. 12 and 39 EC Treaty could be brought to an end. Cf. ECJ 2 July 1996, Case C-473/93, *Commission v. G.D. of Luxembourg*, paras. 37, 38. Luxembourg had in fact argued before the Court that those provisions would reflect national identity, cf. paras. 35, 36.

(Article 79(3)) in the context of such review. The Court gave such a broad interpretation to this clause that it will be difficult for the Bundestag to decide any further steps towards European integration. It is a rather ironic outcome of this case that a judicial body, in the name of democracy, took away a considerable margin of appreciation from the German Parliament.⁵⁹

The only way out of antagonisms in power-sharing systems is a mutual effort to reconcile diverging positions and the use of mechanisms provided for by the Treaty for the settlement of such conflicts. The preliminary ruling procedure of Article 234 EC Treaty/ Article 267 TFEU is perfectly adequate for a dialogue between national constitutional courts and the European Court of Justice. Despite the clear mandate of the German *Grundgesetz* to contribute to the development of the European Union, the Court does not even care to contemplate the use of this instrument itself.

The decision reveals a legally outdated and politically deplorable attitude towards the most original and successful constitutional invention of the 20th century.



⁵⁹ For details cf. Schönberger, *supra* n. 27 at p. 1208.