



DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT **C**
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS



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**European Democracy,
Constitutional Identity
and Sovereignty**

STUDY



DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT C: CITIZENS' RIGHTS AND
CONSTITUTIONAL AFFAIRS

CONSTITUTIONAL AFFAIRS

European Democracy, Constitutional Identity
and Sovereignty:
Some Repercussions of the German Constitutional
Court's Lisbon Judgment

STUDY

Abstract

As was to be expected, the judgment of the German Federal Constitutional Court on the ratification of the Lisbon Treaty has engendered a lively debate both in the wider public and in academia. This study evaluates academic interpretations of the verdict. It focuses on the three constitutional issues raised by the Court: democracy at the European level, constitutional identity of the Member States and political sovereignty. Recent initiatives of the European Parliament and new provisions introduced by the Lisbon Treaty are assessed in view of the arguments raised in European constitutional scholarship.

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1. Introduction

Nobody is so naïve as to expect future developments to depend on written clauses rather than on those who will use them. However, written clauses give such developments the necessary underpinnings, pointing in some directions and excluding others. The Treaty of Lisbon does not shut the door to a future of enduring European constitutionalism. To the contrary, it paves the way for it.

Giuliano Amato

Politics and adjudication: mutual supervision or reinforcement ?

Constitutional debates are rarely limited to an exchange of views among specialised adjudicators. First of all, at least in the German system of controlling the respect of constitutional principles enshrined in the Basic Law, complaints before the Federal Constitutional Court (FCC) are often presented by political actors, such as MPs or political groups of the *Bundestag*. These proceedings address issues of high political salience and are therefore reflected in a wide array of public media. More importantly, they are the subject of a continuing dialogue between the legislator and the judicial control organs. Each side makes use of the pronouncements of the other side to further its own agenda. It is thus not possible to dress a clear picture of the implications of the Lisbon verdict of the FCC without taking into account its political aftermath.

Political public statements react more to circumstances than constitutional court decisions. In the course of the Euro crisis Chancellor Merkel has, not without reason, been suspected of an increasingly national outlook on European politics. When she invited the German MEPs of her own party for an exchange of views she reacted very cautiously to any allusions of further EU initiatives: answering a question on possible steps towards a European army, she is reported¹ to have excluded any ambitious proposals because, in her view, the FCC had blocked any further steps towards more integration of the European Union in its verdict of 30 June 2009.² In her speech honouring Prime Minister Tusk for receiving the Charlemagne Prize 2010 she suggested, on the contrary, that efforts towards a European army could soon be undertaken. Comparing the EU to a half-finished building, she also underlined that its present situation was unsatisfactory and invited attacks on its solidity. She even envisaged treaty revisions in the near future, thereby demonstrating her positive attitude towards European integration.³

However, during the meeting of the European Council of 8/9 May 2010, convened to tackle the critical situation of the Euro exchange rate and the liquidity of the bond markets of several Member States, there were widespread media reports on a virtual "hot line" between Berlin and Brussels in order to examine, in real time, the compatibility of any proposed solutions with the German constitution. Constitutional complaints before the Karlsruhe court have been announced as soon as the emergency package was published. Should the FCC judgment of 30 June 2009 indeed be a reason for the foot-dragging of the German government during the Greek sovereign debt crisis, thereby rendering the package more expensive (as is claimed by most financial experts), the 2009 FCC decision would have been a high price to be paid for ensuring the respect of German constitutional principles. It is certainly worth having a debate on whether this political influence of the supreme court of the biggest member state is constitutionally justified and democratically legitimate.

¹ *Der Spiegel* of 29 March 2010, p. 22

² BVerfG, 2 BvE 2/08 of 30.6.2009

³ Cf. Müller-Graff 2009, S. 358

A verdict's echos

Unsurprisingly, the Lisbon judgment entailed a phenomenal echo in both the daily broadsheet newspapers and the academic community. In the meantime, more than a few hundred articles dealing with the content and effects of the decision have been published. Memories of the intellectual debate on the Maastricht treaty are still alive with some journal editors. One sighs "I really do hope that we will not spend the next ten years discussing the *Lissabon-Urteil*, as we did with the *Maastricht-Urteil*." Another reacts "But by all odds we will. There simply is no way around the *Bundesverfassungsgericht's* judgment on the Treaty of Lisbon."⁴

The public debate on the Lisbon-*Urteil* has been particularly intense in Germany. In newspapers, the immediate reactions were quite positive, claiming that the judgment was a necessary and welcome improvement on the transparency and scrutiny of EU decision-making. This is readily understandable since the most obvious result of the judgment was the obligation for the German Parliament to step up its involvement in future EU law-making, notably with respect to treaty articles enabling the EU institutions to streamline decision-making or modify treaty provisions without having recourse to an Intergovernmental Conference.

The academic world came into the fray slightly later. In the meantime, we can speak of two waves of juridical and political commentary in internationally respected specialised journals. Unavoidably, each author chooses different aspects of a judgment which extends to 421 paragraphs and comprises about one hundred pages in the English translation. Nevertheless, it quickly emerged from the doctrine that there were few real innovations compared to the Maastricht decision and that the main thrust - and criticism - of many contributions was concentrated on these. As the President of the FCC has acknowledged in a recent publication, there are supporting and very critical analyses from legal academia, just like in the wake of the Maastricht judgment. It cannot be the purpose of this note to produce a fair picture of the multitude of individual comments and observations.⁵

A further important aspect of the Lisbon-*Urteil* is its impact on other constitutional courts and, of course, on the Court of Justice of the European Union (CJEU). It has been general wisdom for years that Karlsruhe impinges heavily on the jurisprudence and judicial reasoning of national constitutional courts, especially in the new Member States having acceded to the EU in 2004 and 2007. It remains to be seen to what extent the German position on democracy, constitutional identity and sovereignty is reflected in the legal reasoning of other juridical systems.

This note provides a short assessment of some traditional and some new strands of constitutional doctrine. Its added value should be a compact description of the constitutional principles to which the innovative elements of the Lisbon-*Urteil* are referring. It should be read in conjunction with a comprehensive analysis of the decisions and opinions of national constitutional courts subsequent to the 2004 Accession Treaties and the Lisbon Treaty.⁶ The interpretation of this case law is not the subject of the note

⁴ Jan-Herman Reestman, Leonard F. M. Besselink, On the Lissabon-Urteil: democracy and a democratic paradox, *European Constitutional Law Review*, 5: 341-344, 2009

⁵ There are, however, some particularly commendable contributions. For sober and careful analyses see Peter-Christian Müller-Graff, Das Karlsruher Lissabon-Urteil: Bedingungen, Grenzen, Orakel und integrative Optionen, *Integration* 4/09: 331-360, 2009, or Jacques Ziller, The German Constitutional Court's friendliness towards European law: on the judgment of the *Bundesverfassungsgericht* over the ratification of the Treaty of Lisbon, *European Public Law* 16 (1): 53-73, 2009. For passionate but well argued critical accounts see Daniel Halberstam/Christoph Möllers, The German Constitutional Court says "Ja zu Deutschland!", *German Law Journal* 10 (8) 1241-1257, 2009, or Roland Bieber, An association of sovereign states, *European Constitutional Law Review* 5: 391-406, 2009.

⁶ Research Note drawn up by the Legal Service of the European Parliament, doc. SJ-0175-10

but some references to constitutional court decisions are made because they are the material base for much academic work in this field.

2. What is new in the Lisbon-Urteil ?

Maastricht redux and more

As noted above, the Lisbon decision has created the expected wave of commentary and criticism. Some observers were frustrated to see that much legal reasoning in the verdict was a rehash of *solange I-III*⁷ and Maastricht: the control of the protection of fundamental rights and *ultra vires* control of the acts of European institutions are the responsibility of the FCC when carrying out its duty to supervise the compatibility of EU acts with the German Basic Law. The term *Staatenverbund* (close association of states short of a confederation), coined in the Maastricht decision, reappears and is explained in more detail.

However, there are several new lines of reasoning in the judgment. The court goes to great lengths to expound on the fact that the *Staatenverbund* is an association of sovereign national states and to detail the conditions for a state to remain sovereign. Particular interest has been provoked by an enumerative list of inalienable state rights which can never be transferred to European law-making if the constitutional identity and sovereignty of Member States is to be respected. According to Schönberger, this list is only one of "pure political expediency" – with the Court naming almost all fields where Member State jurisdiction is still exclusive or at least predominant – and not one of principled constitutional interpretation.⁸ Other authors agree that the list is a simple compilation and protection of remaining national powers.

There are also long tracts of the judgment speaking about the importance of democracy as a constitutive element for the sovereignty of a member state, notably Germany. It is in these paragraphs that the FCC considers the European Parliament to be structurally unable ever to become a source of direct democratic legitimacy. The main reason for this, according to the court, is the very strong discrepancy between the electoral impact of citizens from different Member States. This is presented to be an unacceptable violation of the principle of electoral equality, which moreover is the result of the attribution of EP seats according to national quota.

Finally, the court felt obliged, contrary to the Maastricht decision, to elaborate in great detail that the Basic Law prohibits the accession of the Federal Republic of Germany to an eventual European federal state. Only the constituent power itself - the people - could make such a decision. But the court is careful not to specify a referendum requirement, referring only to the prerogatives of the constituent power instead; alternative ways for the latter expressing its will remain conceivable, also reflecting the origin of the Basic Law (which was drafted by a constitutional convention on the island of *Herrenchiemsee*).

Some authors have been struck by a contradiction between these abstract constitutional reflections and the practical outcome of the decision, i.e. that the ratification laws are constitutional if revised according to the court's prescriptions. Some criticise that a good part of the text are *obiter dicta* without any direct relation to the final decision to declare

⁷ The FCC's banana market regulation judgment (BVerfGE 102, 147 (163) – 2000, is dubbed "solange III" by some authors because it renders constitutional complaints concerning fundamental rights even more difficult. Cf. also Jacques Ziller, *Solange III, ovvero, La Europarechtsfreundlichkeit del Bundesverfassungsgericht* : a proposito della sentenza della Corte costituzionale tedesca sulla ratifica del Trattato di Lisbona; in: *Rivista italiana di diritto pubblico comunitario* - 2009, n. 5, p. 973-995.

⁸ Christian Schönberger, *Lisbon in Karlsruhe: Maastricht's epigones at sea*. *German Law Journal* 10: 1201-1218. 2009.

the Lisbon Treaty compatible with the Basic Law under certain conditions. Consequently, these authors speculate on the court's intentions when including abstract treatises of state theory, democracy, sovereignty and constitutional identity.

A conciliatory message ?

The President of the court, speaking and writing in a personal capacity, has made an effort to interpret the verdict in a more amenable language.⁹ Seasoned Karlsruhe watchers may suspect here some divergences in outlook between the court's President and the responsible rapporteur of the Second Chamber. In the President's articles a notably stronger emphasis is put on the multi-level character of the EU's constitutional set-up, which has become one of the important new theories on European constitutionalism. The change in the tasks, the institutional position and the efficacy of the FCC are acknowledged and clearly attributed to the role of the Strasbourg and Luxembourg courts. The introduction of the principle of identity control is justified with references to EU law and qualified as an instrument of last resort only, which the court, in view of its experiences with the control of the respect of fundamental rights and "out-breaking" (*ultra vires*) legal acts does not expect to enact but under truly exceptional circumstances. The distinction between international and supranational systems is rendered in a much more transparent manner than in the judgment, both in the section titles and in the article's text. Finally, the preliminary ruling procedure provided for in Article 267 TFEU is praised to be a "highly successful" instrument of judicial dialogue.

However, following the court's long-standing case law the President insists that the primacy of EU law is not genuinely European but anchored in, and consequently limited by, national constitutions. In view of Walter Hallstein's famous bicycle theory of European integration one may be slightly disappointed when the court is described by its President as being "neither engine nor brake" of European integration. Still, his personal contributions are clearly intended to rebuke the more aggressive and polemical academic attacks against the Lisbon decision. These criticisms follow, as mentioned above, the innovative aspects of the judgment and its grounds: a new focus on European democratic legitimacy, a renewed and fortified insistence on the protection of national/constitutional identity, and the strong emphasis, both quantitatively and qualitatively, of the sovereignty of the Member States.

3. Democracy at the European level

Free institutions are next to impossible in a country made up of different nationalities. Among a people without fellow feeling, especially if they read and speak different languages, the united public opinion necessary to the working of representative government, cannot exist.

John St. Mill, On Representative Government, 1861

Democracy as a constitutional principle?

For over thirty years legal science on European integration focused not on the principle of

⁹ A. Voßkuhle, Der europäische Verfassungsgerichtsverbund, *NVwZ* 1, S. 1-8, 2010; --- ---, Weder Motor noch Bremser, *FAZ*, 22.04.2010, Nr. 93, S. 11

democracy, but rather on the rule of law. Democracy slowly became a political request of political actors but was not yet seen as a legal principle that the Community had to respect in order to be legal under its members' constitutions. But with Article F of the EU Treaty in the Maastricht version democracy found its way into the treaties - not as a basis for the Union, but rather with a view to the Member States' systems. This leap was not made until the Treaty of Amsterdam whose Article 6 TEU specified that the principle of democracy also applies to the Union. External provisions buttress this internal constitutional development, for instance national provisions such as the amended Article 23 (1) of the German Basic Law.

When debating democratic principles any analogy to nation-state institutions must be carefully argued. On the European level, the meaning of the principle of democracy is yet to be determined. In the TEU and TFEU, under the headings "The Democratic life of the Union" and "Citizens' Rights" respectively, a number of seemingly unconnected provisions are assembled; according to one observer "it will require a singular intellectual effort to reconstruct them as a meaningful whole."¹⁰

After the FCC's Maastricht decision, it was frequently observed that the theory which understands democracy in a substantive sense as the rule of "the people" in the German sense of a *Volk* is inappropriate to understand the democratic character of the European Union. According to the FCC in the Lisbon decision, 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." Some authors have underlined that this image of bodily representation is a fiction going back to the days of the French revolution: monarchical sovereign rule was replaced by the idea of popular sovereign rule, with the parliament representing the "entire anatomy" of society.¹¹ However, it must be emphasised that this imagination was never dominant in other parliamentary systems, such as the Westminster model.

Others propose that, as an alternative, the individual's opportunities to participate in political decision-making should be put centre-stage. This line of reasoning is again found in some commentary on the Lisbon judgment.¹² Giving the individual a sufficiently effective opportunity to influence the basic decisions of European policy through Union and national level procedures is seen as a sound basis for democratic legitimacy at the European level. This has been phrased as the "unional principle of democracy"¹³.

The FCC defines democracy under two different angles. 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." 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." No definition is given of what is meant by "people" (e.g., inhabitants or citizens).

The duality of European democratic legitimacy

The FCC recognises, however, that the Lisbon Treaty changes the Parliament's character so that it will no longer consist of "representatives of the people of the States brought together in the Community" but of "representatives of the Union's citizens". Yet, it does not give this any importance for its reasoning on democratic legitimacy at European level. Neither the right to stand in European elections nor the right to vote in any given

¹⁰ Armin von Bogdandy 2007

¹¹ Martin Nettesheim, *Wie der König ersetzt wird*, FAZ Nr. 11, 14.1.2010, S. 8

¹² Ulrich Hufeld, *Die Legitimationskraft der europäischen Bürgerfreiheit*. Vortrag in der Konrad-Adenauer-Stiftung, Budapest, 8. September 2009

¹³ Armin von Bogdandy 2007

state is based on possession of the nationality of that state. According to Article 22 (2) TFEU, 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." 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. For this reason alone, each Member of the European Parliament not only represents the nationals of a given state but all citizens of the Union.

Instead of taking these first steps towards transnational democracy seriously the court constructs a constitutional dead end: it describes a certain idea of egalitarian and majoritarian parliamentary democracy which can only apply to certain centralized states; it is inappropriate to account for federal States, including Germany, and cannot be made to fit the constitutional system of the European Union. The current treaties speak on the one hand of the peoples of the Member States and on the other hand of the Union's citizens insofar as the principle of democracy is at issue. The Union is hence based on a dual structure of legitimacy: the totality of the Union's citizens, and the peoples of the EU organised by their respective Member States' constitutions. This theoretical position has been reiterated many times by the European Parliament.¹⁴ However, it appears from the Lisbon decision that the FCC does not see this as a viable approach to increase, over time, the democratic legitimacy of the European institutions, and notably the European Parliament. On the contrary, it sticks to national democratic credentials in a state context and even uses these to make far-reaching conclusions on Member State sovereignty (see section 5 below).

The EU's democratic deficit

In more practical terms the inevitable discourse on the democratic "deficit" has scrutinised for years how the European level of governance could acquire the popular trust and confidence necessary for effective and legitimate government. In the centre of this debate was the institutional role of the European Parliament. It may be summarised as follows:

Lack of parliamentary control over the EU executive

The emergence of the EP as a supranational legislator was often interpreted from a national perspective. The EP's control over the executive EU organs, namely the Commission, the Council and the European Council, of course differs. Scholarly debate is mainly focused on the level of control over the Commission. It was often criticised that the Commission did not represent the political composition of the EP. Hence, the reinforced link between the selection of the Commission President and the outcome of European elections by the Lisbon Treaty is seen as progress, but insufficient progress.

Democratic representation within the EP

The composition of the EP has long been criticized. It is based on a rather unproportional allocation between the Member States that has been qualified as undemocratic, not least by the FCC. The organisation of the political groups in the EP has been observed with some criticism as concerns their lack of independence from national influence. Similar arguments have been made with respect to the European political parties.

¹⁴ To name but a few exemplary resolutions: Resolution on the relationship between international public law, Community law and national constitutional law, OJ C 325 of 27.10.1997, p. 11-26; Resolution on the constitutionalisation of the treaties, OJ C 197 of 12.07.2001, p. 111-186; Resolution on the Treaty of Lisbon, T6-0055/2008 (not yet published in the OJ).

Lack of EP's power in the legislative process

Referring to national parliaments and their influence on the legislative process, the post-Nice period was a peak in the debate on the lack of EP influence in the second and third pillars. This was interpreted as a legitimacy problem through which the governments of the Member states avoid having to go through the usual legislative process at national level (two-level games). More recently, criticism of the lack of an EP right of legislative initiative was seen as a major problem for full democratic legitimacy at the European level.

The FCC has previously dwelt on a purported violation of the principle of electoral equality¹⁵ but it was noted with some surprise that it spent a considerable part of the grounds of the Lisbon judgment on the second of the above aspects. Indeed, national constitutional law sees political equality of all citizens as a core element of democracy that greatly influences the organisational set-up. Moreover, some strands of constitutional doctrine try to construct a link between the supremacy of national constitutions and the principle of democracy. For example, Schilling wrote in 1996:

I defend the pre-eminence, in questions relating to the respective competences of the Community and its Member States, not of 'state sovereignty' but of courts constituted under a national constitution over the ECJ which was set up under international treaty law. This defence, at the present stage of the development of the Community, has more to do with the respect for the democratic credentials of the national constitutions in question than with the aspect of sovereignty.¹⁶

Yet the Union's constitutional set-up must give diversity similar and important instruments of expression. One example may be the radical change in the functioning of the Council of Ministers: the future use of the double majority in the Council's votes can be seen as further democratisation of EU law-making since it reflects the number of inhabitants of the Member States proportionally. The FCC does not take this into account but rather laments an "excessive federalisation" of the Council. 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 reflecting regional diversity cannot imagine a similar concept, in particular the balancing of diversity, in the European Union.

Coming back to the European Parliament, there is a conspicuous absence in the FCC's verdict of any appreciation of the Parliament's efforts to create a European political landscape. The court's remarkable silence about the extra-institutional conditions for meaningful democracy at national and European level may insofar hint at substantive indecision.¹⁷ As Wonka has argued, the European Parliament provides an institutional venue which could fulfil the function of creating public awareness of EU decisions, and has done so increasingly.¹⁸ Voting equality is not a necessary condition for an institution such as the EP to be able to create public awareness of EU politics, thereby allowing citizens in different Member States to learn about EU policies that might affect their personal well-being and provide them with means to hold decision-makers at the EU level directly accountable. The exaggerated weight given by the FCC to the principle of electoral equality leaves aside the importance to select the appropriate political personnel obtaining the mandate to govern and legislate at a particular level. There is a weak link indeed between EU citizens' weight of vote and the political mandate and success of the parliamentarians that represent them.

¹⁵ 2 BvR 635/95 of 31 May 1995 (Accession treaties with Austria, Finland and Sweden)

¹⁶ Schilling, T., Weiler, J. H. H., and Haltern, U. Who in the law is the ultimate judicial umpire of European Community competences? The Schilling - Weiler/Haltern debate; *Jean Monnet Working Paper* nr. 10, 1996.

¹⁷ Thym, D., In the name of sovereign statehood: a critical introduction to the Lisbon judgment of the German constitutional court; *Common Market Law Review* 46: 1795-1822, p. 1817.

¹⁸ Wonka 2010.

Moreover, the Parliament has created EU instruments to further the development of European political parties and European political foundations. These new formations should - at least over the long term - make political debate at the European level more autonomous and transparent, even if there remain a number of serious problems to be solved. For instance, the membership of individual citizens should be rendered possible. Furthermore, despite major difficulties within the House, the Parliament continues to strive for a reform of the Electoral Act of 1976 (in its version of 2002). This reform is intended to create a number of instruments which would increase the electorate's interest in the European elections and symbolise the European character of the political contest, e.g. through a transnational constituency and electoral list.¹⁹

Finally, the European Citizens' Initiative introduced by the Lisbon Treaty will significantly enhance citizens' influence on the political agenda of the EU legislator. The Parliament is presently preparing its position on the proposal of the Commission.²⁰ Debates in the Constitutional Affairs committee have already shown that MEPs consider this new instrument of citizen participation to be of paramount importance for the further evolution of European democracy.

A new role for national parliaments ?

A final point concerns the stepped-up participation of national parliaments in the control of the subsidiarity principle (orange card procedure). Not only is this one of the principal practical prescriptions of the Karlsruhe court but it has also been hailed as one of the major break-throughs during the European Convention and will now become a permanent mechanism of European law-making. Years ago, the European Parliament has started a number of initiatives such as Joint Parliamentary Meetings to promote more parliamentary accountability and transparency and handle efficiently its links with national Parliaments. While most MEPs and many scholars see these innovations as an apt expression of the principle of dual legitimacy mentioned above, there are a number of theoretical and empirical studies raising some doubts whether national parliaments (1) are competent to express a coherent view of the common European interest and (2) have the political mandate and technical expertise to supervise effectively European governance.

According to these studies, national parliaments have to be able to arrive at a view different from that of their government if they want to have the power to control them, as Gisela Stuart, *conventionnelle* in 2002/03, has noted. In many Member States with a parliamentary system this appears quite improbable. Furthermore, according to empirical evaluations in Germany EU issues made up only about 3 % of political parties' issue-specific statements in their national election campaigns during the 1990s. This situation is probably not much different in the other Member States. Thirdly, stronger and more successful involvement of national parliaments could intensify the need of the executive branch to justify its actions in terms of narrowly defined national interest. It could perpetuate the very obstacles that are invoked as a reason not to establish meaningful electoral politics at the heart of the European political process. Some authors claim that a seeming infatuation with the *sui generis* character of the European Union - Europe's constitutional *Sonderweg*, as Joseph Weiler aptly calls it - has led to stigmatising the idea of a robust European parliamentarianism as a sign of intellectual inertia. The case against

¹⁹ For additional aspects of the reform proposal see Draft Report of 15 April 2010 on a Proposal for a modification of the Act concerning the election of the members of the European Parliament by direct universal suffrage of 20 September 1976 (doc. PE440.210).

²⁰ Proposal for a Regulation of the European Parliament and of the Council on the citizens' initiative, doc. COM (2010) 119 final of 31 March 2010. The Parliament's responsible rapporteurs are Zita Gurmai and Alain Lamassoure (for the committee on constitutional affairs) and Gerald Häfner and Diane Wallis (for the petitions committee).

representative democracy in Europe may not be as strong as it seems and the costs of making do without it may be very high.²¹

One suggestion to improve European democracy could be to abandon the conception of democracy as the self-determination of a people. The principle of democracy, whether understood as an opportunity to participate, as a check on governmental abuse, or as self-determination of the citizens, confronts greater challenges under the Union's organisational set-up than it does within the nation-state context. Greater private freedom in the Union is necessarily bought at the cost of less democratic self-determination of countries. Contrasted with the nation-state, the Union's sheer size and constitutive diversity, the physical distance of the central institutions from most of the Union's citizens, and the complexity of its Constitution, which can only be modestly reduced, are some of the factors that place greater restrictions on the realisation of the principle of democracy by way of electing representative institutions.

4. Constitutional identity and supranational integration

If today we were to take stock of our intellectual property, we would find that most of it stems not from our respective homelands but from our common European heritage. In all of us the European's influence is far greater than that of the German, the Spaniard, the Frenchman . . . four-fifths of our inner resources are common European property.

Jose Ortega y Gasset

Identity in popular perception and social science

In a recent questionnaire meant to explore French citizens' attitudes to certain aspects of *identité française* the following items were offered: "our values", "our universalism", "our history"; "our language"; "our culture"; "our countryside"; "our agriculture"; "our culinary art"; "our wine"; "our way of living"; "our architecture"; "our industry"; "our high technology". Speeches invoking "Britishness" mostly give few concrete examples of it, often limiting themselves to invoking civil liberties or "British ideas of flexibility, openness and free trade, whose time has come" or the special relationship with the United States. Some British authors even see euro-scepticism as an expression of national identity.

Lutz Niethammer has characterised identity as one of the "semantic molluscs of our time that mean everything and nothing, but sound scientific." Max Weber underlined in his writings that national identity was not an "empirically acquired quality" and certainly not identical with a people or a linguistic community.²² According to Weber nationalism liaises with cultural "mass products" such as language or religious confession, socio-economic and ethnic elements and common memories of past struggles but at its core it is a value-based utopian vision influenced by specific feelings of solidarity and prestige interests. This vision is based on myths of a common origin and meant to lead towards a political project, the nation state.

Weber's structuralist view of nationalism could usefully be transferred to the European project. If, albeit slowly, common experiences evolved into common memories and common values a European identity would still be difficult to acquire but certainly not impossible. Many historical examples could be cited showing how an intellectual elite construed a narrative out of amorphous historical material, which it then used as a

²¹ Mattias Kumm 2008, p. 136

²² Max Weber, *Wirtschaft und Gesellschaft*

common "whence" (or "where we are from") for a planned, emerging, or existent group.

Ernest Renan, generally considered to be an exemplary proponent of French republican identity, was convinced that "getting history wrong is part of being a nation." Furthermore, he prophesied in "What is a nation?"²³ that "nations are not something eternal. They had their beginnings and they will end. A European confederation will very probably replace them. But such is not the law of the century in which we are living." There is, however, a major difficulty at the European level which Weber, Renan and other scholars of national identity did not have to take into account: The particularly strong role of the present components of the European Union, the nation states, with their constitutional, political and public discourse structures, culminating in the idea of sovereignty, to be addressed in the following section. As Schieman has noted, the historical image of the European nation state has been transformed, from an empirical fact that shaped life in Europe from the Thirty Years War onwards, into a metaphysical entity with its own soul and volition which is taken for granted as the prime actor in political discourse.²⁴

Of course there are many historical influences and memories contributing to feelings of belonging but it is very hard, if not impossible, to define with any measure of objectivity what the rather recent Union's duty to respect the national identities of its Member States legally entails. Over the past ten years the concept of member state identity has gained increasing respect both in scholarly literature and in constitutional law. Under the heading of diversity an increasing current of political and legal science defends the idea that a legitimate and appropriately designed EU needs to guarantee the permanent existence of certain elements of statehood and societal structures. The Lisbon judgment testifies to the fact that identity, formerly the domain of psychologists, political scientists and historians, has now become a necessary object of study for European constitutional scholars.

Identity and diversity

Before analysing the EU Treaty base of the concept of identity it is useful to bear in mind that a growing current of social science is sympathetic with the ideas of cultural diversity and its protection (in Michel Rosenfeld's words: the complex intertwining of convergences and divergences across national boundaries and cultural divides). More profoundly, the obvious linguistic and other differences between the Member States, but also among the regions of some of them, have given rise to proposals of a rather defensive type. To cite a recent typical example, Jan Erk observes that "the real constitution underlying the European continent has eventually come into conflict with the proposed formal constitution for the European Union", adding quite apodictically that "public spaces for democratic deliberation correspond to language communities."²⁵

Erk quotes other scholars saying that the only forms of political participation and deliberation that are truly popular (i.e. easily accessible to the mass of citizens) remain specific to each country, conducted in the national language(s). Politics seems to be most participatory and democratic when it is "politics in the vernacular" conducted in the language of the people. This coincides neatly with some British discourse on the role of elites in the European project. The idea is that the European integration process has been pushed forward by a group of political elites and hence does little to boost democratic legitimacy. As Delanty and Rumford have stated, "while the euro elites blame the masses for not being loyal to Europe, the truth is that it is the elites who are now being

²³ Speech at the Sorbonne, 11 March 1882

²⁴ K. Schieman 2007, p. 477

²⁵ J. Erk, Real constitution, formal constitution and democracy in the European Union. *Journal of Common Market Studies* 45(3): 633-652, 2007.

portrayed as disloyal".²⁶

Quite logically, these doubtful observations lead to proposals of how to interpret the defeat of the Constitutional Treaty and which consequences to draw: non-constitutional solutions, constitutional silences and ambiguities. Other authors suggest that "certain difficult relations can only persist on the basis of mutual misunderstanding".²⁷ The best way for the European Union, in this perspective, would be to emulate the inelegant and ambiguous compromises that multinational federations like Canada, Belgium or Switzerland have picked for themselves as constitutions. According to Erk, "the European constitution should come as close as possible to the recognition that democratic deliberation follows linguistic lines, thereby acknowledging that the basis of democratic legitimacy is likely to remain within the constituent nations."

As Paul Taylor has convincingly shown, European scholarship follows more or less the same "waxing and waning" as the object of their studies.²⁸ These fluctuations in the preferences and projects of scholarly work are reflected in political statements which sometimes refer to such sources (see Annex 1 for a short analysis of three phases of doctrine on European democracy). One illustration of a conspicuous change of opinion is the former President of the FCC and of the German Federal Republic, Roman Herzog. While, in a speech to the European Parliament on 10 October 1995 he included approvingly the introductory quote of Ortega y Gasset's statement on common European heritage, he recently - and repeatedly - published articles in important German broadsheets in which he attacked the CJEU and painted a danger that the German Republic would soon lose its ability to respect its constitutionally guaranteed fundamental rights.²⁹ One explanation for this change of mind may be that it is certainly easier to speak about the common cultural and philosophical heritage of the European Union (and Europe in general) than accept the practical consequences of direct effect and primacy.

Identity in the treaties

The first formal mentioning of identity in the EU context was in the Official Document on European Identity³⁰. The Treaty of Maastricht then introduced, in the first paragraph of Article F TEU (later Article 6 TEU), an enigmatic little phrase stating that "The Union shall respect the national identities of its Member States." This generic reference to national identities could be read as referring mainly to the national constitutions, and in particular to what distinguishes those constitutions from each other. The implicit reference to constitutions was made very explicit in the form of the so-called Christophersen clause,³¹ the later Article I-5 of the Constitutional Treaty and Art. 4 (2) TEU in its Lisbon version,³² which elaborated the text inherited from Maastricht. The term "structures" would seem to cover, among other things, the following matters for which the constitutional autonomy of the Member States is recognized and protected: whether the states prefer to have a written or unwritten constitution, a monarchy or a republic, a presidential or parliamentary system of government, a proportional or majority voting system,

²⁶ Gerard Delanty, Chris Rumford, *Rethinking Europe*, Routledge, London 2005; p. 84. See also Max Haller, *European Integration as an Elite Process: The Failure of a Dream?* New York/London: Routledge 2008.

²⁷ R. Bauböck, *United in Misunderstanding? Asymmetry in Multinational Federations*; Vienna: Austrian Academy of Sciences, Research Unit for Institutional Change; *European Integration Working Paper* 2002.

²⁸ P. G. Taylor, *The end of European integration: anti-Europeanism examined*, Routledge 2008.

²⁹ Roman Herzog, *Stoppt den EuGH*, FAZ of 8 September 2008

³⁰ Document on European Identity adopted by the Foreign Ministers of the Member States of the EC on 14 December 1973 in Copenhagen.

³¹ The text goes back to a contribution by Henning Christophersen, the representative of the Danish government in the European Convention, which held a Council Presidency during the Convention.

³² The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.

constitutional review by the courts or not, and a unitary or rather a regional or federal state structure.³³ As de Witte observes, this is not only a confirmation of the currently existing situation but also a renewed insistence on the fact that certain functions remain, as of their essence, with the separate states and are coupled with the protection of national constitutional structures. This can only be read as a strong reaffirmation of the non-federal nature of the European Union.

The new article on the respect of Member State identity was read by national constitutional courts, notably the German, French and Spanish courts, as containing an implicit limit to the primacy of European law whenever that law would affect national constitutions, or at least their fundamental structures (see Annex 2). For example, the *Conseil constitutionnel* for the first time used the concept of identity when it specified that the limit to the application of EU law in the French legal order was formed by the *règles et principes inhérents à l'identité constitutionnelle de la France*.

It goes without saying that the verification of the respect of constitutional principles by the EU institutions, including the CJEU, follows national traditions and practices. Among the many dimensions characterising Member States' systems the following may be especially useful to distinguish between two groups of countries where the role of constitutional courts is quite different. Leonard Besselink has distinguished "historic" and "revolutionary" constitutions. The first type (e.g., in the UK and the Netherlands) shows an incremental development over a long-term period, is non-formalistic and displays a political character at least as much as a legal one. In opposition to this, revolutionary constitutions tend to have their origin in a political or social cataclysm which forms the founding myth inspiring the constitution. These constitutions have a distinctly legal character and are enforceable by constitutional courts. Examples are the constitutions of Ireland, Germany, Italy, France and the USA as well as most constitutions of the new Member States. The latter have stressed to adopt formal and legally binding constitutions in reaction to their experiences during the Communist period. The European constitution has been likened to the "good old British constitution": historical, thickly layered, and deeply embedded in practice and case law.³⁴

Some well-known areas of contention persist between the national constitutional courts and the European Union institutions. (1) Most constitutional courts have formulated their own national version of the effect and primacy of European law in the national legal order which is based on an interpretation of the national constitution. (2) Several constitutional courts have announced that they may scrutinise the level of fundamental rights protection in the EU and the protection offered by the CJEU. It can be said that at present the issue of diverging levels of protection between the national constitutions and the general principles of EU law has been solved. The entry into force of the Charter on Fundamental Rights should further clarify the situation. (3) The third issue of contention is the question of who can decide on the limits of the competences transferred to the EU (**Judicial Kompetenz-Kompetenz**).³⁵ In federal systems, ultimate authority to decide such questions lies with a court at the federal level. In the EU, however, the claim of ultimate authority by the CJEU has been challenged by several national courts (such as those of Germany, Denmark and Poland). (4) A last domain which could evolve into a field of conflict, especially after the entry into force of the Lisbon Treaty, is related to the respect of national constitutional values in the Area of Freedom, Security and Justice. This was amply demonstrated through a number of court decisions concerning the European Arrest Warrant.³⁶ It is to be hoped that the success story of mutual

³³ Diez-Picazo 2004: 440.

³⁴ T. Eijlsbouts, *The European way: history, form and substance*, *EuConst* 1: 5.

³⁵ as opposed to **constitutional Kompetenz-Kompetenz**, the power of an autonomous self-assignment of new competences.

³⁶ Apart from constitutional debates in a number of Member States before amending national Constitutions, the Constitutional Courts of the Czech Republic, Germany and Poland, and the Supreme Court of Cyprus, were confronted with this constitutional issue. The Polish court, in this case, defined EU citizenship as an "accidental and dependent" relationship and declared the European Arrest Warrant incompatible with the Polish constitution, granting 18 months for the Constitution to be amended.

acquiescence in the first pillar will repeat itself in the former third pillar.

There is one last aspect of national identity which has already played a major role during the referendum campaigns of the opponents of the Constitutional Treaty. They criticised the Constitution for enshrining "in marble" some features of the liberal economic system supervised by the Commission through its defence of "unfettered competition". While this school of thought could be called the "social-democratic" critique of European constitutionalism, a second group of rather more conservative scholars and adjudicators has made similar claims, this time referring to recent ECJ case-law. The ECJ had indeed made some much-criticised decisions which limited the room for manoeuvre of trade unions in some Member States. Seen together with the scrutiny of the European Commission of the role of publicly financed radio and television, or German public banks, there was a perception that the barriers required to defend states against globalisation were coming down. In addition, European law is taught quite selectively in many curricula: in Irish universities, for instance, until recently only the aspects of Union law involving free movement provisions were examined in detail.

In another sense, these ECJ judgments were taken as an indication that Member States were not in a position anymore to defend an important element of their constitutional identity, the defence of non-economic fundamental rights against neo-liberal encroachment from EU institutions. As one important proponent of this critique, Dieter Grimm, puts it:

The Commission has interpreted the Treaties in favour of liberalization and deregulation. This deprives the Member States of the right to decide which activities they leave to market regulation and which they reserve for public service. Of course, the Member States can sue the Commission for an untenable interpretation of the Treaties or even a transgression of its powers. But the Commission can usually count on the backing by the ECJ. [...] For the EU the four economic freedoms enjoy the highest priority, whereas in the Basic Law and in the constitutions of many other Member States, economic rights are the weakest. The Basic Law regards human dignity as an absolute right, and personal, communicative and cultural rights usually prevail over mere economic interests. This is different on the European level. [...] The ECJ even requires that human dignity be balanced against entrepreneurial freedom. [...] It is through this backdoor that national constitutions such as the Basic Law are most endangered.³⁷

Other observers of the conservative critique of the ECJ and of the Lisbon judgment have stressed that, besides the general defence of the constitutional identity check there is no element in the judgment which could be interpreted as a rebuke of liberalising ECJ jurisprudence. The paragraphs on the principle of the "social state" are kept very brief and conclude simply that there are "no indications justifying the assumption that the Member States are deprived of the right, and the practical possibilities of action, to take conceptual decisions regarding systems of social security and other social policy and labour market policy decisions". In striking contrast to the generally critical tenor of the judgment, the FCC affirmatively cites ECJ rulings on EU social citizenship to justify its position.

³⁷ Dieter Grimm, *The Basic Law at 60 – Identity and Change*; *German Law Journal* 11, 1, p. 33-46, 2009.

5. Sovereignty in times of globally inter-twined systems

Sovereignty is one of those words that go straight to your gut. It is difficult for anyone in public life to accept, still less to advocate, a loss of sovereignty.

Konrad Schiemann

The European integration process, and EU law specifically, has put constant pressure on national constitutional systems since the very start. According to de Witte, one can identify three broad and distinctive dimensions of that pressure: (1) the Community Treaties (and also the EU Treaty) vested lawmaking powers in the European Community institutions, and by doing so they removed those powers from their "natural" locus, the domestic institutions of the Member States. (2) The second challenge was to accommodate the claims of European law to have direct effect and precedence over conflicting national law within the existing constitutional hierarchy of sources of law in which the Constitution itself "naturally" claims to occupy the highest rank. (3) The last challenge is more diffuse and has not been openly acknowledged in most national constitutional texts. It consists in the major reshuffling of the internal institutional balance within each member country that results from the operation of the EU institutional system, and from the exercise of EU powers. Such a reshuffling has notably occurred between the courts and the political institutions, and between the government and the parliament (in each case, to the advantage of the former).³⁸

If, with Tommaso Padoa-Schioppa, we understand sovereignty as "independence of an alien will" the above challenges have obviously reduced national sovereignty in its narrow definition. National constitutional systems were forced to react to this loss. By and large, they have tried to persevere in their being; there have been relatively few express adaptations of constitutional texts to the European integration process, but there have been many flexible adaptations (falling short of constitutional revision) through judicial interpretation and institutional practice, and there have occasionally been some forms of resistance against the pressure. In the EU framework, the problems surrounding the strong idea of national sovereignty can be considered under three different perspectives: international law, autonomous attribution of new competences (*Kompetenz-Kompetenz*) and the residual space of law-making necessary to safeguard the continuing existence (identity) of a democratic state. Before addressing these three issues a short assessment of national constitutional reactions to the extension of powers of the EU and the primacy of EU law over national legislation is provided.

National constitutions, Kompetenz-Kompetenz and the primacy of EU law

The problem of an increasing challenge of EU policy-making to national legal systems was already mentioned in the previous section. One typical reaction to these challenges has been to stress that any new constitutional settlement allowing the EU to create its own powers would be unacceptable for the masters of the treaties because it would fundamentally undermine the rights of national parliaments and national governments. A similar reasoning is applied by national constitutional lawyers and judges when examining the limits of EU powers and possible conflicts between EU acts and national constitutions. At the core of this may lie the assumption that a Union without legislative (or constitutional) *Kompetenz-Kompetenz* cannot contain a court with judicial *Kompetenz-Kompetenz*.³⁹

³⁸ Bruno de Witte 2009

³⁹ Cf. Schilling, T., Weiler, J. H. H., and Haltern, U. (1996), op.cit.

In the post-war constitutions of the three largest founding states of the European Communities (France, Italy and Germany) provisions had been inserted that allowed for limitations of sovereignty or transfer of powers to international organizations by means of a treaty. All the other Member States, apart from the United Kingdom and Finland, have enacted similar constitutional clauses prior to their accession to the European Union. However, there still are several constitutions that do not mention the European Union (e.g., the Dutch and the Danish constitution)⁴⁰. De Witte thus speaks of a "European deficit" in the national constitutions, particularly in view of the fact that they are slowly acquiring a different role with regard to the actual distribution of powers.

More recently, of the 27 Member States only France decided to amend its constitution in view of the ratification of the Lisbon Treaty. It did so as a result of the Constitutional Court's decision where certain further encroachments were identified to the "essential conditions of the exercise of national sovereignty". Whilst the issue was considered in some countries, the relevant institutions in Spain, Finland and Estonia, for instance, did not find any amendment necessary, although in Finland a special procedure of "exceptive amendment" was deployed, which permits ratification of treaties that conflict with the constitution. Some countries such as Spain and Estonia are considering introduction of a package of EU-amendments in the longer term.

In Spain and France, the constitutional courts found that the primacy clause of Declaration nr. 17, attached to the Lisbon Treaty, does not change the position of the respective national constitutions, which remain at the top of the national legal orders. Importantly, the Spanish Constitutional Tribunal drew a distinction between supremacy and primacy, where primacy of EC law is limited to the exercise of the competences that have been conferred on the EU, whereas supremacy is implicit in the Spanish constitution, which remains the underlying source of validity. This distinction is also familiar in several other Member States. The use of the word "primacy" instead of "supremacy" in the Lisbon Treaty indicates the recognition of such a distinction at the EU level. According to some authors a combined reading of various Articles of the Lisbon Treaty seems to result in a version of primacy of EU law that confirms the national case law on the so-called *controlimiti* and is more receptive to national constitutional identity than was the case before (see Annex 2 for further examples of the reactions of national constitutional courts).

British legal scholars have drawn attention to the phrase added to Art. 1 TEU by the Lisbon Treaty,⁴¹ claiming that "this asserts the primacy of the Member States in two ways: they are the source of the Union's competences; and the Union exists to enable them to pursue common objectives". Others have suspected that "these provisions are doubtless more concerned with sending signals containing certain symbolic messages about European integration to key national interests".⁴²

The question of international sovereignty

The notion of shared or pooled sovereignty, one that European constitutionalists had long recommended, is not one that has much appeal to the public, who always preferred clarity about such matters. The formula of "pooling of sovereignty" is perhaps a political trick for appearing to reconcile the irreconcilable. Indeed, if one takes into account the

⁴⁰ Art. 15.2.1 of the Irish constitution stipulates: "The sole and exclusive power of making laws for the state is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State."

⁴¹ By this Treaty, the HIGH CONTRACTING PARTIES establish among themselves a EUROPEAN UNION, hereinafter called "the Union" ***on which the Member States confer competences to attain objectives they have in common.***

⁴² Professors Dashwood and Shaw, Oral Evidence, in: European Union (Amendment) Bill and the Lisbon Treaty: Implications for the UK Constitution. Report with Evidence, 6th Report of Session 2007-08 (HL Paper 84). 28 March 2008.

international law origins of the EU it becomes clear that the critical yardstick under international law for the delimitation of states is self-determination. International law does not offer a third alternative to international organisations and federal states. Legal capacity under international law obviously remains of utmost importance for the Member States and is one of the most precious signs of their statehood and sovereignty to act on the international scene. Sovereignty continues to be the decisive aspect of an entity forming a full member of the international community. The internal structure of the EU with its undeniable specificities should not be confounded with the relevance of statehood *vis-à-vis* the rest of the world. Yet it can be seen as an evolutionary step towards a new system of cooperation transcending international law (see Annex 3).

As the Parliament has stressed in its resolution of 2 October 1997 there is a long-standing need for a clear statement of the relationship between international law and European law, notably that international law is applicable not directly but only after it has been declared applicable by an internal legal act of the EU or after its substance has been transposed into EU legislation. Furthermore, Parliament has called for the relationship with international law ultimately also to be regulated for the second and third pillars, in other words for the EU as a whole.⁴³ Such an approach could become viable by the introduction of the EU's legal personality after the entry into force of the Lisbon Treaty. However, according to Griller, most of the Member States of the European Union prefer to uphold the idea that the EU is a community based on international law, leaving untouched their own legal quality as states under international law.⁴⁴

Under the Constitutional Treaty there could have been a possibility to extend the primacy of EU acts to at least some parts of CFSP (notably in view of international agreements). However, the short indication in Art. 24 TEU after Lisbon seems to indicate that this policy will keep its intergovernmental character. Hence, for the time being and even with the Lisbon Treaty in force, the fragile balance between preserving the state quality of the Member States and strengthening the capacity to act of the European Union continues to exist. The solutions found for the organisation and institutional position of the new European External Action Service will provide a first indication of future trends in this domain.

A final observation leads us back to a central concept coined by the FCC in its Maastricht decision and on which it elaborated considerably in the Lisbon judgment: in the latter, the court disenchant the notion of *Staatenverbund*, which had originally been introduced as a potential middle-way between confederation (*Staatenbund*) and federation (*Bundesstaat*). Reactivating the option of European statehood as an alternative model clarifies that the *Staatenverbund* - as an association of sovereign states - does not overcome the dichotomy of international law.

Sovereignty and parliamentary rights

State power under international law is a decisive criterion when ascertaining self-governance among sovereign states, but not when ascertaining the specific degree of centralisation within a state. As far as the necessary degree of centralisation, e.g. in terms of appropriate legislative output, is concerned, neither international law nor legal theory provide for a precise dividing line, neither for a federal state nor for the European Union. In order to defend traditional views on state sovereignty in the context of European integration additional arguments are therefore needed.

The term sovereignty appears more than 40 times in the FCC's Lisbon judgment. This is

⁴³ Resolution on the relationship between international public law, Community law and national constitutional law, Paragraph 14 and 15; OJ C 325 of 27.10.1997, p. 11-26

⁴⁴ Stefan Griller, Is this a constitution? Remarks on a contested concept; in: Griller, S.; Ziller, J. (eds.), The Lisbon Treaty: EU constitutionalism without a constitutional treaty? Springer: Wien, 2008, pp. 21-56.

ample evidence for the primordial role the court attributes to the role of the *sovereign* Member States remaining the masters of the treaties. In the court's view, sovereignty - and its twin, self-determination - are the fundamental condition for the democratic nature of the EU's Member States. In what some commentators call an "overcharged" interpretation of electoral rights the court claims that the principle of democracy can only be respected if the elector can influence a meaningful "residue" of decision-making power at the national level. Hence, in addition to the arguments analysed in section 3 the court finds a second angle under which it arrives at the conclusion that European democracy remains fragile: the delegated nature of European competences and their dependence from the sovereign constituent power of the Member States.

Perhaps recognising that the link between formal aspects of electoral rights and sovereignty is delicate the FCC proceeds to draw up an enumerative list of policies which need to remain under national control. In a slightly surprising juxtaposition the court first admits that, in principle, sovereignty does not mean *per se* that a number of sovereign powers "must remain in the hands of the state", but that these may comprise also a political union ("the joint exercise of public authority, including the legislative authority, which even reaches into the traditional core areas of the state's area of competence"). However, in the next paragraph, the court defines the scope of material areas that Member States need for retaining "sufficient space for the political formation of the economic, cultural and social circumstances of life", namely state citizenship, state monopoly of violence, fiscal decisions, criminal law, culture and education, freedom of opinion, press, assembly, religion and social welfare.

From a British perspective it is interesting to note that most scholars claim that the Lisbon Treaty has not posed any threat to the doctrine of parliamentary supremacy, but in fact complements it through the provisions on enhanced involvement of national parliaments. This is unsurprising since in British constitutional doctrine the UK Parliament could repeal the European Communities Act 1972 at anytime. The British Government's stance on this issue is that the principle of the primacy of EU law—whether formally articulated or not—does not have implications for parliamentary sovereignty.

A catalogue of residual powers

The list just mentioned is one of the most criticised innovations of the Lisbon verdict. The majority of comments has arrived at the conclusion that it seemingly attempts to shut the door for any eventual future transfer of further competences to the EU, especially if seen together with the meticulous manner in which the court has identified all bridging clauses in the Treaty enabling the EU organs to either simplify their law-making or acquire new competences without organising an Intergovernmental Conference or Convention. It should not be forgotten in this context that the Lisbon Treaty already arms the criterion of subsidiarity with a tougher control mechanism: (1) a so-called early warning system, which together with further procedural changes should establish an effective political *ex ante* control and (2) a new type of appeal to the CJEU, the subsidiarity action, to enable a downstream procedural *ex post* review.

Since the list of competences drawn up by the court is linked with the so-called eternity clause of the Basic Law (Art. 79) it acquires the character of a "core" or "essential" structure of the constitutional order which resurfaces in so many ways in the judgments of several national constitutional courts. On this basis, according to Jacques Ziller, the FCC could at least theoretically decide that there is a contradiction between a norm of the EU and the Basic Law's core that is protected by the eternity clause and the above list of powers. As a consequence, the court could order the German government to request from the Union's institutions an amendment of the norm, or, as an extreme case, the activation of the procedure of withdrawal from the Union under Art. 50 TEU. This is also the position held by the Polish Constitutional Court in its ruling on the act of ratification

of the Accession Treaty.

As concerns the FCC, such a reading is certainly hypothetical but might be inferred from the numerous references to the right to withdraw contained in the grounds of the FCC's judgment. In any event there is a striking resemblance between this legal reasoning and recent political statements. For instance, the incoming Foreign Secretary, William Hague, in a much publicised statement entitled *How to promote our National Interest in an open and democratic Europe* listed three priorities of the new Conservative led government: "Any Treaty change transferring competence or powers would require a referendum; the sovereignty bill; and increased parliamentary controls on any use of ratchet clauses".

In a comment on the FCC's verdict, Roland Bieber argues that any rhetoric about "sovereignty" – old fashioned or "modern"– questions the foundations of 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 proponents – and which is precisely the reason why one should avoid its use in the context of European integration.⁴⁵ Realistically, it must be recognised that for several national constitutional courts and many constitutional law scholars the idea that EU law can claim its primacy within the national legal orders on the basis of its own authority seems as implausible as Baron von Münchhausen's claim that he had lifted himself from the quicksand by pulling on his bootstraps. National courts consider the domestic authority of EU law to be rooted in their own constitution, and seek a "sovereign" foundation for the primacy and direct effect of EU law in that constitution.

In the long term the issue of sovereignty and its interpretations will also need to be addressed by legal theorists.⁴⁶ The problem is that legal theory for too long has privileged state law over all other forms of law. The Kelsenian *Grundnorm* seems to be as outdated as Austin's theory of law and state, grounded in the theory of sovereignty as a matter of habitual obedience to sanctioned commands. However, these approaches have been traditionally supported by national constitutional courts.

It would be necessary to escape constitutional fetishism, which overstates the potential of constitutional discourse and detracts attention from other mechanisms through which power and influence are effectively wielded (such as political contest) and through which the political community is formed. Constitutional courts are doing their homework within the existing theoretical framework but redefining the statal terminology of law and constitutionalism should remain on the agenda.

6. Conclusions

Is sovereignty like property, which can be given up only when another person gains it?
Or should we think of it more like virginity, something which can be lost by one without
another gaining it- and whose loss in apt circumstances can even be a matter for
celebration?

Neil MacCormick

This note has tried to grope, within a limited space, with some aspects of European constitutionalism which have been addressed by the FCC's Lisbon judgment. It has demonstrated that the academic responses to the verdict have been as varied as its

⁴⁵ Roland Bieber, An association of sovereign states; *European Constitutional Law Review*, 5: 391-406, 2009, p. 399

⁴⁶ Cf. Peter Schiffauer, Versuch über die Transformation des Staates in der Europäischen Union, in: Häberle P./Morlok M./Skouris V. (Hg.), Festschrift für Dimitris Th. Tsatsos, Baden-Baden 2003, S. 592-608.

political perusals. The European Parliament is unlikely to define its role as a neutral bystander in this debate. Across most political families there still is a strong interest to see further development of the European Union, to make it a more effective law-maker and to equip it with the necessary legal and material means to take on its governing and regulatory responsibilities.

Since the entry into force of the Single European Act it has been endlessly recounted that, with the growing impact of EU legislation on every aspect of national economic life, and the challenge it poses to particular national institutional arrangements for fiscal and monetary politics, the welfare state, and foreign policy, it has become clear to the publics of the Member States that the European Union can no longer be viewed as an *instrument*, but instead has become a *governing body* in need of legitimacy independent from that it receives through national governments. In the end, this is the reason why the subject of European democracy and the democratic deficit has become one of the most hotly debated issues among European scholars.

At the same time, the evolution of the European Union has provoked intellectual, legal and political scepticism. In many Member States, not least Germany, the result of the transformation of the Union into a "governing body" is perceived as an intrusion on longstanding traditions and legal autonomy: the domestic constitution can no longer fulfil its claim to comprehensively regulate acts of public authority on domestic territory. The national constitutions are still relevant when a state transfers powers to the EU, but once they are transferred, their exercise is no longer determined by the national constitution (Dieter Grimm).

The question of who exercises public authority has been complemented by an increasing scrutiny of how to deal with cultural and legal diversity. The respect of the national identities of the Member States not only concerns their diachronic identity, in the words of Maduro their continuing "political existence", but also their synchronic identity, their separate autonomous individuality, which *inter alia* resides in their territory, but also in their structured power relations, of which the fundamental rules are laid down in their constitutions, whether written or unwritten. In its treaty revisions, the Union has itself introduced new language raising the constitutional identity of the Member States to a possible dimension of judicial scrutiny, which could become comparable to the check of subsidiarity and proportionality. In this perspective, the FCC's renewed attention for residual powers and state identity is perhaps quite plausible but carries major risks. In contrast to the *ultra vires* review, the respect for national constitutional identity introduces an autonomous, country-specific standard whose content is defined by the national constitution, thereby opening the spectre of multiple national identity checks.

The equally contested issue of *demos* as the constituent power of a polity, mostly seen in a statal and/or national framework, is certainly the weak point of European integration. But perhaps we should remember that in many instances constitutional doctrine "presupposes the existence of that which it creates: the *demos* which is called upon to accept the constitution is constituted, legally, by that very constitution."⁴⁷ Looking at the problem of constituent power this way the political question is quite simple: where do we go from here? Are we to accept existing diversity as a permanent obstacle for further integration, i.e. should we foremost adopt a "more vigilant, questioning attitude towards the European Union and more diligence in protecting Irish interests" (Sile de Valera)? Or can we continue to propose small steps towards new components of allegiance, such as the deepening of the European political arena?

The FCC stressed that Member States remain "masters of the treaties" but never qualified this notion with the necessary proviso "if and when acting jointly", hence creating the impression that each state – and in particular Germany – could individually

⁴⁷ Joseph Weiler, Federalism without constitutionalism: Europe's *Sonderweg*; in: Kalypso Nicolaidis/Robert Howse (eds.), The federal vision: legitimacy and levels of governance in the United States and the European Union, Oxford University Press 2001.

be considered as such a master and would therefore be superior to the Union. This omission is based on a false premise. Instead of hierarchy, the post-war concept of European integration is rooted in a structured permanent search for balance of all interests involved.⁴⁸ As Maduro has underlined, in a world where problems and interests have no boundaries, it is a mistake to concentrate the ultimate authority and normative monopoly in a single source.

The European Parliament will probably continue to advocate the simplicity and readability of the (unwritten) European constitution and the formulation of political and legal principles that everyone can understand. At the same time it is the institution *par excellence* to uphold the fundamental political interests of the two main component parts of the "unional democracy": the Member States and the citizens. The long-term vision guiding this program would be a political Union open to the outside world, democratic and close to the people.⁴⁹

After a certain number of setbacks in creating a constitutional document the Parliament has adopted a strategy of small incremental steps to be taken within the bounds of the existing Treaties, as the opportunity presented itself and where the political situation allowed. The formal and the pragmatic approach have proved complementary: for instance, the 1984 draft constitution did not come into being but sparked off a process that led to the signing of the Single European Act. The latter took account of a sizeable number of the proposals contained in the text adopted by Parliament on the basis of Altiero Spinelli's report. The Maastricht Treaty, too, established a number of far-reaching constitutional principles (e.g., European citizenship, codecision, or the Protocol on the application of the subsidiarity and proportionality principles).

In present-day European constitutional doctrine one idea is widely shared: if the European Union is to keep its dynamic, the imagination of separate and autonomous sources of public authority must evolve. From public discourse "in the vernacular" to constitutional adjudication it should be better understood that the Union is a mosaic of different fields of application of different sources of political power. Intuitively, one might think that the smaller the polity, the more likely it is that the interests of the individual will be safeguarded. But, applied to Europe, Madison's insight (the larger the polity, the less likely it is that a majority of the majority of the whole will have a common motive to invade the rights of other citizens) might lead one to view the integration process as adding value in terms of democracy.

According to Mattias Kumm, the circular nature of debates on the future of Europe may not be because there is no strong independent European identity; rather, it may be that there is no strong European identity because existing accountability structures perpetuate debates that end up reinforcing the national/European divide and so preclude the development of such an identity. Hopefully, the present note has succeeded in providing at least a cursory picture of the complexities involved in the inter-connected constitutionalism of the European Union.⁵⁰ It should not be forgotten, however, that powerful global actors as well as their preferred information providers do not necessarily acquaint themselves with these intricacies:

Here's the big problem: The treaties that created the ECB don't allow for what the Fed did. The German Supreme Court views German law as superior to European Union law. So you have the makings of Germany leaving the EU if the ECB tries to monetize government debt. That leaves you with an untenable situation: either the destruction of the European financial system because the banks all use government

⁴⁸ Roland Bieber, *op.cit.*

⁴⁹ Explanatory statement of the report on the constitutionalisation of the treaties (rapporteur: Olivier Duhamel). The resolution is at OJ C 197 of 12.07.2001, p. 111.

⁵⁰ Jacques Ziller proposes the term "intertwined constitutionalism" which, in comparison with the concept of 'multi-level constitutionalism' (cf. Ingolf Pernice 2009), has the advantage of conveying better the absence of an absolute hierarchy between the EU and the national political constitutional forums (as is rendered quite well in the German term *Politikverflechtung*).

bonds as collateral, or the destruction of the euro. (Adam Fisher, Commonwealth Opportunity Capital Fund)⁵¹

If the European Union is serious to take on such simplifying and dangerous comments of highly influential individuals and media it needs to overcome "constitutional exhaustion" (Beneyto) and raise its game by showing the political strength to defend the *acquis* and, in the long term, arrive at an efficient European Union which is intelligible and trustworthy for its citizens. As too many checks and balances can lead to imbalance and checkmate, the constitutional focus should shift towards the European decision-making process, i.e. whether this process adequately serves the long-term interests and expectations of the Union's citizens.

⁵¹ Barron's 10 May 2010, p. 53

Annex 1: Three stages of doctrine on European democracy

From the establishment of the European Coal and Steel Community to the early 1990's, the strengthening of the EP's role was seen as the only necessary institutional amendment that needed to be made for the purposes of democratic progress. Certainly, the proposals for reform were primarily made to bring forward the European integration process and to create a dynamic acceleration, though not because of doubts about the legitimacy of the European Communities. The liberal theory of democracy, from the time of the creation of traditional nation states, was not considered to become obsolete at some point in the future. The appropriate standard of democracy was seen to be reached so long as the EP was fulfilling basic standards of legislative power, according to national standards. Therefore the institutional reforms in the 1970's mainly referred to the EP, and thus the introduction of direct elections was viewed as a significant achievement.

Following the entry into force of the Maastricht Treaty and the creation of the pillar system, the character of theoretical discourse changed. Scholars began to wonder whether the EU had perhaps progressed far enough already. The core of the debate now was how the imbalance of powers in favour of the executive had to be restricted by correcting the inter-institutional relationship within the Communities, and not merely by strengthening the EP's role. Traditional nation-state models were applied to the EU and influenced suggestions for institutional amendments, most famously in Claus Offe's one-liner that, had the European Union been a state and were it to apply for membership in the European Union, it would fail to qualify for membership because of the lack of democratic content in its constitution. The discourse on a "democratic deficit" and the democratisation of the EU was linked to the concept of constitutionalism and issues involving "good governance" in the EU.

In the late 1990's the debate entered its third stage. Many academics began to grasp that traditional democratic models were simply not applicable to the complex structure of the EU. This was the result of expanding EU competences and its continuing evolution towards becoming a political organization. The debate was less characterised by the notion of democratic deficit than by the deficits of conventional theories of democracy. Democracy, legitimacy and constitutionalism, it was thought, must be appropriately designed under the conditions of a post-national reality. For example, Martin Nettesheim identified the influence of the integration process on democratic theories as the key issue at this current stage of the EU's development.

Annex 2: Sovereignty and national constitutional courts: some examples

For the **French** *Conseil d'Etat* it took about 20 years to finally abandon its so-called "splendid isolation" from other higher courts in France. In short, the French position is that there is a limitation of French sovereignty, not a transfer of it. Limitations have to be compatible with the French Constitution and shall not affect "essential conditions for the exercise of national sovereignty". The basis for this reasoning has been Article 88-1 of the French Constitution which gives the Republic mandate to participate in the EU.

Since the 1970s the **Italian** constitutional court has affirmed that the Constitution does allow limited constraints to the sovereignty and only on condition that there is no breach of the *principi fondamentali* of the constitutional order or the fundamental rights. The court has the power to exercise a constitutional review of the norms of the Treaty, which are inconsistent with the principles of the Constitution. Moreover, the court has the ultimate *Kompetenz-Kompetenz* to test consistency of any rule of the EU with the Constitution by means of the review of constitutionality of the Italian law for the implementation of the European Treaty. The Italian court argued that European law prevails on Italian law, not in terms of a hierarchy of norms, which implies a problem of sovereignty, but in terms of attribution of competences. Therefore, the Italian court was prepared to adjudicate, not simply on questions of conflict between specific EU measures and fundamental Italian constitutional rights, but also on the basic question of the division of competence between national law and EU law.

The **Latvian** constitutional court, when interpreting the national constitution, has noted that since Latvia is an EU Member State, Latvian laws shall be interpreted in conformity with Latvia's obligations in the EU, except in cases when it concerns fundamental principles enshrined in the national constitution. The position of the Latvian court is similar to that of the **Spanish** court, meaning that EU membership has introduced certain restrictions. However, the membership in the EU cannot affect national sovereignty, basic constitutional structures, values and basic principles included in the Constitution. This has also been emphasised by the **Danish** Supreme Court, which has stated that supremacy applies only in relation to transferred competences.

Polish courts regard themselves as possessing the ultimate *Kompetenz-Kompetenz* (Craig and de Burca 2008: 373). The **Polish** constitutional court has concluded that the accession of Poland to the EU did not undermine the supremacy of the Constitution over the whole legal order within the field of sovereignty of Poland. Accordingly, it has stated that "it is insufficiently justified to assert that the Communities and the European Union are "supranational organizations" – a category that the Polish Constitution, referring solely to an "international organization", fails to envisage" Judgment K18/04 of 11 May 2005). Similarly, the **Lithuanian** court has underlined that "the priority of application of European Union legal acts competes with the legal regulation established in Lithuanian national legal acts, save the Constitution itself.

In a third category, the **Austrian** Constitutional Court has decided in two cases that neither the Constitution nor Constitutional law could be applied since that would entail a conflict with directly applicable provisions of EC law. Similarly, the **Estonian** Chamber of the Supreme Court has pronounced that there has been a material amendment of the entirety of the Constitution to the extent that it is not compatible with the European Union law. Those provisions of the Constitution that are not compatible with the European Union law are inapplicable, and suspended. This means that the European Union acts shall apply in the case of a conflict between EU law and Estonian legislation, including the Constitution

Source: Kristine Kruma 2009

Annex 3: International law, states and the European Union: a utopian scenario ?

Past attempts to find a solution for the above-mentioned Münchhausen-like creation of autonomous EU powers often suffered from the fact that they employed basic terms which originated in eras when it was impossible to conceive of organizations with the composition, extent and regulatory density of the present EU.

One common starting-point, according to which custom and conviction make international law, is structured in such a way that the role of newly emerging or growing organizations (such as the EU) is systematically hindered; it is primarily the custom of the States (which, for no convincing reason, are designated the sole primary subjects of international law) which can create international law. Thus, from the outset international law is placed at the service of States. This fundamentally predetermines the direction to be taken by further developments. However, there is no legal justification for confining the capacity to create customary law to States. Such a restriction is arbitrary and ideologically motivated; it predetermines essential outcomes of the relationship between the various layers of law.

States can be small and weak as well as large and powerful; culturally heterogenous and culturally homogenous; multi-lingual and monolingual; centralized and decentralized. Where in this plethora of differences can we find a common denominator for a sociologically convincing abstract definition? One is left with the impression that 'State' is simply supposed to mean that which is described as such, and the background to such a course of action is - consciously or unconsciously - that the existence of certain States is meant to be perpetuated.

A new approach

States should not have exclusive competence for the primary creation of international law; the largest possible sociological associations with a universal sphere of activity (i.e. a sphere of activity with universal vocation) should also have such competence. That would make institutions such as the EU equal players in the creation of that field of law on which all other law depends: international law. In particular, the principles which have so far only been applied to States could be applied to the EU: the EU would itself be competent for governing the validity of international law within its sphere of influence and be entitled to develop its domestic sphere of influence inwards, including the exclusive right to settle questions regarding the hierarchy between its own law and the law of its Member States. In the current state of European law, these questions are settled by judge-made law.

It is worth noting that, historically, there must have been similar transitions to the next biggest unit; even the family and the clan, as early phenomena in the history of law, must have handed on their role to the next biggest association: the nation State. We could also mention the example of the nation States whose component parts - let us call them *Länder* for sake of simplicity - were in existence even before the nation State itself. Political scientists and international lawyers obviously had no problem in transferring to the next largest unit then.

Source: Explanatory statement by Siegbert Alber (rapporteur) of the report on the relationship between international public law, Community law and national constitutions, op.cit. 1997.

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