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Jean Monnet Working Paper 05/10

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**Rashomon in Karlsruhe -  
A reflection on Democracy and Identity in the European Union**

NYU School of Law • New York, NY 10011  
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ISSN 1087-2221 (print)  
ISSN 2161-0320 (online)  
© Franz C. Mayer 2010  
New York University School of Law  
New York, NY 10011  
USA

Publications in the Series should be cited as:  
AUTHOR, TITLE, JEAN MONNET WORKING PAPER NO./YEAR [URL]

**RASHOMON IN KARLSRUHE-  
A REFLECTION ON DEMOCRACY AND IDENTITY IN THE EUROPEAN UNION**

*The German Constitutional Court's Lisbon decision  
and the changing landscape of European constitutionalism*

By Franz C. Mayer \*

**Abstract**

On June 30, 2009, the German Constitutional Court declared the Lisbon Treaty to be compatible with the German constitution. The Lisbon decision marked the end of an intense constitutional battle. The following text illustrates how different views on and different understandings of European constitutional law and European integration and, more generally speaking, different backgrounds and perspectives may lead to different readings of the decision. It also suggests an assessment of the state of European constitutionalism and of some changes in its landscape, arguing that democracy as the central constitutional concept of reflection and debate is being replaced by identity.

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## Epilogue

*On June 30, 2009, the German Constitutional Court declared the Lisbon Treaty to be compatible with the German constitution.<sup>1</sup> At the same time, the Court held that the German statute implementing the participatory rights of national Parliaments, which the Lisbon Treaty provides for, was unconstitutional. It emphasized that Germany could only deposit its ratification instrument after a new statute on the German Parliament's rights had been drawn up. In spite of an upcoming electoral campaign, the statute on Parliament's rights was re-drafted over the summer of 2009 and entered into force in September 2009.<sup>2</sup> After a last, futile attempt to have the Lisbon Treaty stopped by the German Constitutional Court,<sup>3</sup> Germany ratified on September 25, 2009. The Treaty of Lisbon entered into force on December 1, 2009, following the second referendum in Ireland and the ratifications of Poland and the Czech Republic.<sup>4</sup>*

*The Lisbon decision marked the end of an intense constitutional battle, which began when the Treaty establishing a Constitution for Europe of 2004<sup>5</sup> was challenged before the German Constitutional Court in May 2005, which continued with the constitutional challenge of the Lisbon Treaty in 2008 and which delayed German ratification of the Lisbon Treaty for more than one year, a battle that saw hundreds of pages of legal arguments being exchanged, two full days of oral hearings in February 2009 and that ended with a decision of 147 pages.*

*These 147 pages may be seen as the first elaborate, long – in pages<sup>6</sup> – and deep – considering the time it took eight co-authors to prepare the text – reflection on the state of European*

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<sup>1</sup> *Bundesverfassungsgericht*, Case 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09, Decision of June 30, 2009 (Treaty of Lisbon), available in German, English and French at <<http://www.bverfg.de>>. The decision is also published in the official reports of the German Constitutional Court *Entscheidungen des Bundesverfassungsgerichts* (BVerfGE) vol. 123, p. 267.

<sup>2</sup> *Gesetz über die Wahrnehmung der Integrationsverantwortung des Bundestages und des Bundesrates in Angelegenheiten der Europäischen Union (Integrationsverantwortungsgesetz - IntVG)*, *Bundesgesetzblatt* [Federal Official Journal] 2009, Vol. I No. 60, p. 3022. See for a documentation of the case containing the briefs of the parties, translations of the decision and a transcript of the two days of hearings in February 2009 Karen Kaiser (ed), *Der Vertrag von Lissabon vor dem Bundesverfassungsgericht. Dokumentation des Verfahrens mit Einführung* (Springer Verlag, Berlin, Heidelberg, forthcoming 2011).

<sup>3</sup> *Bundesverfassungsgericht*, Case 2 BvR 2136/09, Decision of September 22, 2009 (*Integrationsverantwortungsgesetz – interim measures*).

<sup>4</sup> Treaty of Lisbon amending the Treaty on European Union and the Treaty Establishing the European Community (signed 13 December 2007, entered into force 1 December 2009), consolidated version, [2010] OJ C 83.

<sup>5</sup> After the negative outcome of ratification referenda in France and in the Netherlands in 2005, the project of a Constitutional Treaty was given up.

<sup>6</sup> The mere length of the text has been subject to criticism, cf. T Oppermann, 'Den Musterknaben ins Bremserhäuschen! – Bundesverfassungsgericht und Lissabon-Vertrag' (2009) 20 *EuZW* 473, 473: 'How did the

*constitutionalism under the Lisbon Treaty. The decision has triggered a widespread debate on its message and its scope, and on the role of the German Constitutional Court in European integration.<sup>7</sup>*

*The following text illustrates how different views on and different understandings of European constitutional law and European integration and, more generally speaking, different backgrounds and perspectives may lead to different readings of the decision (I.). The Lisbon decision and the debate allow an assessment of the state of European constitutionalism and changes in its landscape (II.).*

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Almighty once manage with just Ten Commandments?' (*“Wie konnte der liebe Gott einst mit 10 Geboten auskommen?”*).

<sup>7</sup> See the references listed in A. Voskuhle, ‘Der europäische Verfassungsgerichtsverbund’, 29 *NVwZ* 2010, 1 (available online at <<http://www.sfb597.uni-bremen.de/pages/pubApBeschreibung.php?SPRACHE=de&ID=146>>); for an English version see A. Voskuhle, ‘Multilevel Cooperation of the European Constitutional Courts – Der Europäische Verfassungsgerichtsverbund’ (2010) 6 *ECLR* 175. Since 2010 Andreas Voskuhle has been the President of the German constitutional court and this article, based on a speech given in Brussels, suggests a differentiated reading of the Lisbon decision

## **I. Rashomon in Karlsruhe – the script<sup>8</sup>**

Japanese director *Akira Kurosawa* rose to fame with his movie *Rashomon* (1950). Seven individuals witness the same murder, which each one of them recounts in a different way. The movie inter alia deals with the question of the existence of an objective reality.<sup>9</sup>

Outline of a script: A Rashomon Gate, the setting is the palace grounds (*Schlosspark*) in Karlsruhe, Germany, right next to the German Constitutional Court (*Bundesverfassungsgericht*, *BVerfG*) – fade in caption:

“Karlsruhe, 21<sup>st</sup> century, evening of June 30<sup>th</sup>, 2009...”<sup>10</sup>

### NARRATOR (voiceover):

“Eight persons,<sup>11</sup> among them perhaps even current and former judges of the German Constitutional Court as well as claimants of the Lisbon Treaty action, reflect on the Lisbon judgment of the Constitutional Court of June 30<sup>th</sup>, 2009.”

### JUSTUS LIPSIUS (agitated):

“Well - at least the Treaty as such is not halted. Apart from that: what a ghastly judgment! Just take the admissibility of the constitutional complaints: in order to give standing to the plaintiffs, the Court uses a construct of a constitutional right to a parliamentary representative having a say. That was already an absurd construct in the 1993 Maastricht decision of the German Constitutional Court, where it came up for the first time.<sup>12</sup> The constitutional complaint was invented to protect fundamental rights. And now, the Court states that you may file a constitutional complaint if you consider Germany’s statehood to be in danger because of EU law; you may invoke the German constitution’s principle of social justice and the welfare state, probably all constitutional principles, if only you manage to somehow construct a link to democracy.<sup>13</sup> It is therefore not only an individual<sup>13</sup> right to democracy that results from this

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<sup>8</sup> For German and French versions of the script see 63 *NJW* 2010, 714 and 46 *RTDE* 2010, 77.

<sup>9</sup> For more detail see D Richie (ed), *Rashomon* (Rutgers University Press, New Brunswick 1987).

<sup>10</sup> Cf opening credits, *Rashomon*.

<sup>11</sup> These are fictional characters.

<sup>12</sup> BVerfGE 89, 155 – Maastricht, see also 33 *ILM* 395 (1994).

<sup>13</sup> *Bundesverfassungsgericht*, Case 2 BvE 2/08 et al., Decision of June 30, 2009 (Treaty of Lisbon), paras 178 *et seq.*, 181 *et seq.* References to paragraphs in subsequent footnotes also refer to this judgment and the English translation published on the website of the German Constitutional Court. The decision is also published in the official reports

decision; it is also an individual right to sovereignty. A surge of constitutional complaints will be the consequence.<sup>14</sup>

It is an introvert, retrograde, and in a sense a very German judgment. It is all about *Volk* (people) within the Member State, saying that there can be no democracy without a people.<sup>15</sup> It leaves no room for the emergence of democracy on the European level. Even the Maastricht judgment at least left a perspective for such a European democracy sometime in the future. The Lisbon decision, however, emphasizes the independence of supranational forms of democracy in a first step,<sup>16</sup> only to show in a second step that these do not meet the standards of national democracy.<sup>17</sup> Outrageous.

The European Parliament is downright deconstructed. The past 30 years of its remarkable development are completely ignored. The Court seems to think that there is just no remedy for what they consider to be the inbuilt democracy deficit within the structure of the European Parliament: its unequal composition because of national quotas, which lead to the small Member States such as Malta being overrepresented, and large Member States such as Germany being underrepresented.

An especially absurd piece of reasoning in the judgment: should there ever be a genuine election of the Commission by the European Parliament, this would apparently violate the German Constitution. The judges seem to seriously think that democracy in the EU is preserved though the intergovernmental. Sadly enough, the alleged democracy deficit was not even discussed in detail during the oral proceedings.

There is an exclusively binary way of thinking in that judgment – either state or non-state. This leads them to the assumption that *European* democracy can only exist within a European federal

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series *Entscheidungen des Bundesverfassungsgerichts* (BVerfGE) vol. 123, p. 267, but this version does not contain the paragraph numbers referred to in this article.

<sup>14</sup> The constitutional challenges of the German statute allowing the Federal government to participate in the financial aid scheme for Greece brought to the German Constitutional Court in May 2010 were based, inter alia, on the claim that the German constitution's principle of *Sozialstaat* was violated if the currency became unstable. The Court left the validity of that argument open in its decision on interim measures: *Bundesverfassungsgericht*, Case 2 BvR 987/10, Decision of May 7, 2010 (Financial aid for Greece – interim measures). See also the challenge of the European Financial Stabilization mechanism introduced by the same persons as the challenge to the Lisbon Treaty, Case 2 BvR 1099/10, Decision of June 10, 2010 (Euro – interim measures). Both cases are still pending.

<sup>15</sup> Paras 229, 270.

<sup>16</sup> Paras 219 *et seq.*

<sup>17</sup> Paras 231 *et seq* and 280 *et seq*, see also para 289.



state. Such a state, however, is only available via a referendum under Article 146 GG,<sup>18</sup> the provision that deals with the possibility of replacing the current with a new German constitution. But to read of the European federal state in a Member State Constitutional Court judgment is also something quite new. Still: the major flaw here is that a conceptual scaling of democracy beyond the state remains impossible.

Speaking of democracy: according to the judgment, democracy is foreclosed from being balanced against other constitutional elements, inviolable.<sup>19</sup> That is not really convincing, considering that there is a voting age in Germany, too, and that political parties have to receive a minimum of five percent of all votes in general elections in order to be represented in the German Parliament. The Court seems to be using different standards here, being more severe on the European polity than on the German.

The most regrettable element of the judgment is that it departs from a foundational consensus of the Federal Republic of Germany: for a long time, conventional wisdom held that the establishment of a European federal state would have been possible even under the current constitution.

The judgment is first and foremost concerned with sovereign statehood, *souveräne Staatlichkeit*, not with the notion of open statehood, *offene Staatlichkeit*,<sup>20</sup> and public international law friendliness, which served West Germany so well. It comes down to saying “Now, after reunification, we are someone – again.”, or, using the language of constitutional law: “Let’s talk sovereignty”. Sadly enough, this is a step backwards.

Emphasizing sovereignty at a time of globalization is not only outdated but also counterproductive for the largest EU Member State, which does not really have a need for doing so. Are they seriously afraid of Germany being marginalized at the European level? What are they actually afraid of?

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<sup>18</sup> GG is the abbreviation for *Grundgesetz*, Basic Law, which for historical reasons is the name of the German constitution of 1949.

<sup>19</sup> Para 216.

<sup>20</sup> Klaus Vogel, *Die Verfassungsentscheidung des Grundgesetzes für eine internationale Zusammenarbeit*, 1964.

The German constitution, on that note, does not even contain any reference to sovereignty or statehood – you will find neither *Staatlichkeit* nor *Souveränität*.

Moreover, the judgment's concept of sovereignty is ludicrous: sovereignty is presented as a license to break the law, to violate public international law obligations.<sup>21</sup> It is no surprise, therefore, that in this context a monograph dating 1888 must serve as a reference<sup>22</sup> and that a view drawn from the local law of municipalities<sup>23</sup> is used to argue against the much more realistic concept of 'autonomy'. True, they speak a lot of *Volk* (people), but all of this is state-centered really, merely concealed by the use of 'people'.

The decision is not mere constitutional theory, it will have real life effects: The 'dynamic integration provision' (former Article 308 EC, now Article 352 TFEU<sup>24</sup>), that makes common market legislation possible if no specific competence exists, is dead. The procedures to be followed in Germany designated by the Court in that context are essentially equivalent to the procedures required for the ratification of treaty amendments<sup>25</sup> - this is not going to work. The flexibility clause, as Article 352 is also called, will be inflexible. Again, the subject should have been discussed at the oral proceedings, in particular the possible far-reaching consequences of crippling the scope of application of Article 352 TFEU.

If they have such a huge problem with this kind of provision, the Constitutional Court should simply have said from the outset that the federal government must never participate in the use of Article 352 TFEU. Annually, more than 30 legislative acts were based on Article 308 EC – and useful ones like ERASMUS or merger control. The provision is important, and its use must not be impaired by a clumsy ratification procedure in a Member State. A possible solution to the problem could be an increased use and a broad interpretation of Article 114 TFEU (the former Article 95 EC), the common market provision. Such a development would be highly regrettable, as it would go against all efforts to make the European competence architecture transparent and coherent.

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<sup>21</sup> Para 340.

<sup>22</sup> Para 223.

<sup>23</sup> Para 231.

<sup>24</sup> Treaty on the Functioning of the European Union.

<sup>25</sup> Para 325 *et seq.*

Strengthening the *Bundestag* (Parliament) is a central theme of the decision. This may be well intended, but it happens at the expense of the European Parliament, and in the end the German *Länder* (states), via the *Bundesrat*, a sort of second chamber, probably are the real winners. The Court's new buzzword is the concept of *Integrationsverantwortung*, 'integration responsibility'. This concept is actually not about responsibility *for* European integration, as the term seems to suggest. It is about (parliamentary) responsibility for safeguarding the German constitution in times of a dynamic evolution of European integration. Supposedly, the German Parliament has a central role and responsibility here. But isn't *Integrationsverantwortung* just masking the fact that the judgment is all about confirming the Constitutional Court's grip on European integration, and the judges' final say on Germany's path in Europe? Because ultimately it is the Court that will control the legislator's and the government's efforts to exercise their *Integrationsverantwortung*.

It is a wary and hostile judgment, which uses so-far-and-no-further-blockades wherever possible and which wants to make sure that the Court has access to European law at all times. There is no more reference to the 'relationship of cooperation' with the European Court of Justice (ECJ), which the Maastricht judgment had mentioned, let alone to an obligation under European law to submit preliminary references to the ECJ.

We will witness a blockade of the further development of European Union law, with the foreseeable effect of an increased use of the informal and the intergovernmental at the European level. In other words: even more open method of coordination, even more intransparent intergovernmentalism.

Then, there is the aspect of the Court's role as a gatekeeper and ultimate umpire: The arrogation of a unilateral ultimate decision-making power of the Court concerning European *ultra vires* acts (acts breaking out of the boundaries of European powers, *ausbrechende Rechtsakte*) was already laid down in the Maastricht judgment, but has never been reconcilable with Germany's legal obligations emanating from the European Treaties. It is unacceptable that the German Constitutional Court should declare European legislation – which is binding law for all 27 Member States – inapplicable in Germany. The German Constitutional Court lacks the necessary European law expertise, just to begin with.

With the Lisbon judgment, the whole thing is expanded even further – and worse,<sup>26</sup> although the terminology of ‘acts breaking out’ with its connotation of dangerous animals beyond control is abandoned. In addition to controlling *ultra vires* acts, explicitly including ECJ judgments,<sup>27</sup> the Constitutional Court now also intends to monitor EU acts for infringements of national constitutional identity. This will probably put an end to the balance created by the ‘*Solange II*’ jurisprudence as well as to the stability of the relationship between German constitutional law and European law in the realm of fundamental rights; fundamental rights problems are simply going to be declared identity problems.<sup>28</sup>

In addition to all of this, the judgment calls on the legislator and demands that a new type of proceeding for the two types of control be established under German law – the Court, through this self-aggrandizement, contradicts its own emphasis of the significance of Parliament.<sup>29</sup> The Constitutional Court as the chief watchdog in Europe, whom other Courts are soon going to emulate, with disastrous consequences. This is the spirit of discord for European integration.

It is unacceptable that eight quite indirectly democratically legitimated individuals, who happen to be members of the Constitutional Court, decide on the future of the European integration process. Before there is a *guerre de juges*, for which nobody within the EU has any use, there has to be a political decision. Parliament, the *Bundestag*, should finally put an end to the *gouvernement de juges* by statutory amendment or – if that is not possible – by establishing a third Constitutional Court Senate, in charge of public international and European law, composed of judges who know what they’re doing. Perhaps these judges could then exercise the constitutional identity control after all, in judicial dialogue with the ECJ.

Finally, I wonder whether the approach of the Constitutional Court makes any sense at all. In the end, its concern is all about the inalterable core of the Constitution, laid down in Article 79

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<sup>26</sup> Para 240.

<sup>27</sup> Para 338.

<sup>28</sup> Note that in the decision on the constitutionality of data retention, the first Senate of the German Constitutional Court made a reference to the *Lisbon* decision that can be interpreted in that sense, *Bundesverfassungsgericht*, Cases 1 BvR 256/08, 1 BvR 263/08, 1 BvR 586/08, Decision of March 2, 2010 (data retention), para 218.

<sup>29</sup> The German Parliament, so far, did not react to this aspect of the Lisbon decision: the new legislation introduced in September 2009 did not bring any new type of proceedings. The *Bundesverfassungsgericht* made quite clear in its Honeywell decision (Case 2 BvR 2261/06, Decision of August 26, 2010, cf. supra, note 57) that – although not giving up the control-option – an *ultra vires*-control of European acts by the German Constitutional Court would only occur in extraordinary circumstances and obvious cases, and apparently a preliminary reference to the ECJ would have to take place first.

paragraph 3 GG as an ultimate stop sign to Germany's participation in European integration. The reasoning is that what is precluded from alteration by constitutional amendment is also 'integration proof'. Yet wasn't Article 79 paragraph 3 GG, shielding the guarantee of human dignity and the fundamental principles of democracy, rule of law etc. from any amendment, primarily designed to protect the Germans from themselves, from a relapse into inhuman dictatorship, bondage and tyranny? Using this provision against Europe, where almost nothing else – at least from the point of view of our neighbors – has prevented more effectively the relapse of Germany into dictatorship, bondage, and tyranny than our participation in European integration, is – to say the least – remarkable.”<sup>30</sup>

#### OPTIMISTICA:

“It is a good judgment for Europe, not only because the Treaty of Lisbon is held to be compatible with the German Constitution, and not only because Parliament, the *Bundestag*, is finally strengthened vis-à-vis the government in European affairs.

The *Bundestag* now has certain managerial prerogatives vis-à-vis government in European affairs - the decision even speaks of instructions (*Weisungen*)<sup>31</sup> the *Bundestag* may give to the Federal Government. Government is constitutionally obliged to inform the *Bundestag* adequately, e.g. concerning WTO policy.<sup>32</sup> This is new and significant.

The few changes to be made to the accompanying legislation concerning the *Bundestag*<sup>33</sup> that was declared unconstitutional actually carry no real weight, because the simplified treaty amendment and *passerelle* mechanisms are never going to be used anyway, which the failed attempts to activate their predecessors have clearly demonstrated in the past. However, for Parliament it is a huge opportunity now over the summer of 2009 to take its fate into its own hands and to establish rules that give it a real say in European affairs. Therefore, striking down the statute and not the Treaty is a way of helping Parliament to obtain the tools it needs to maintain democracy.

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<sup>30</sup> Cf. the dissenting opinion of Judge Lübbe-Wolff in the European Arrest Warrant Case of 2005, *Entscheidungen des Bundesverfassungsgerichts* 113, 273 (Darkazanli) at 327.

<sup>31</sup> Para 365.

<sup>32</sup> Para 375.

<sup>33</sup> See *supra* note 2.

Beyond that, it is necessary to read the details and between the lines to really understand the decision, for the judgment goes beyond the Maastricht judgment and improves a number of things.

The ultimate goal of a federal European state is recognized for the first time! At the same time, the declarative statement that at the moment and with the Treaty of Lisbon there is no such European state yet, is helpful for ratification debates in the Czech Republic<sup>34</sup> and elsewhere. Generally, the judgment insists very markedly on the advantages of European integration, that is, maintaining peace and strengthening the political scope for design through common action.<sup>35</sup> The greatest successes of European integration are acknowledged as such.<sup>36</sup>

The judgment explicitly affirms that there is no choice when it comes to participating in European integration; in Germany, it is a constitutional obligation.<sup>37</sup>

The judgment emphasizes several times that there is a “principle of European law friendliness” (*Europarechtsfreundlichkeit*) in the Constitution, which is part of Constitutional Court jurisprudence.<sup>38</sup> Loyal cooperation is also mentioned. They even bring up the c-word: As a matter of course the judgment speaks of a functional Constitution on the European level.<sup>39</sup> The existence of an independent political decision-making process on the European level as well as the objective of a political union is also accepted. The judgment clearly gives up concepts of hierarchy in favor of a non-hierarchical system.<sup>40</sup> The Maastricht judgment’s fixation upon the *Staat*, the state, has disappeared, the individual takes centre stage. Carlo Schmid<sup>41</sup> is cited, not Carl Schmitt.

The judgment’s clear statement that the EU does not have to be constituted the way states are constituted, i.e. that the EU constitution is not necessarily a copy of nation state constitutions, is highly significant.

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<sup>34</sup> See in that context the two decisions of the Czech Constitutional Court on the Lisbon Treaty: Decision of January 26, 2008, Pl. ÚS 19/08, and Decision of November 3, 2009, Pl. ÚS 29/09.

<sup>35</sup> Paras 220 *et seq.*

<sup>36</sup> Para 251.

<sup>37</sup> Para 225.

<sup>38</sup> Para 225.

<sup>39</sup> Para 231.

<sup>40</sup> Para 340.

<sup>41</sup> Para 231. Carlo Schmid, born 1896 in Perpignan (France), was one of the founding fathers of the German constitution of 1949.

The judgment also clearly states that the *Grundgesetz*, which is open to European integration, by no means requires a determinable sum or specific types of sovereign rights to remain in the hands of the nation state.<sup>42</sup> Collectively exercised public power may very well extend to the traditional core of national competences, they say – especially where transnational issues are concerned.<sup>43</sup> The 80 percent myth – supposedly, 80 percent of national legislation is Europeanized one way or another – is irrelevant, the judgment says.

The judgment also finally clarifies that a potential national reserve jurisdiction (action against European *ultra vires* acts) rests with the Constitutional Court and only with the Constitutional Court (monopoly), it also clarifies that this jurisdiction is highly restricted and will only be exercised exceptionally in evident cases.<sup>44</sup> This reserve jurisdiction is to engage only, verbatim: “if legal protection is unavailable on the Union level,”<sup>45</sup> that is, in plain language, if the ECJ has been consulted. The judgment also emphasizes that the *Grundgesetz*’s European law friendliness must be taken into account in this context.<sup>46</sup> Apparently, the Constitutional Court also has *Integrationsverantwortung*,<sup>47</sup> a responsibility for European integration in the literal sense, as a responsibility *for* European integration. This is new and much better than in the Maastricht judgment, which did not have this kind of prospective element. In general, the judgment finally gives reasons for a number of issues the Maastricht judgment left unsubstantiated.

The judgment’s considerations – not demands, the word used is “conceivable” – on the introduction of one or two new types of proceedings for constitutional identity control and/or *ultra vires* control<sup>48</sup> may sound hostile, but one should not ignore that this also opens up an opportunity for the democratically legitimized, politically – including European policy – responsible German legislator to simply proscribe any jurisdiction of the Constitutional Court or to link it to an obligatory preliminary reference to the ECJ on the matter.

*Ultra vires* control and constitutional identity control are in fact quite different concepts: whereas *ultra vires* control remains a highly problematic idea, as the *ultra vires* issue is a matter to be

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<sup>42</sup> Para 248.

<sup>43</sup> Para 248.

<sup>44</sup> Para 340.

<sup>45</sup> Para 240.

<sup>46</sup> Para 241.

<sup>47</sup> Paras 240 *et seq.*

<sup>48</sup> Para 241.

decided by the ECJ, a role for national constitutional courts in constitutional identity control is more plausible, because European law by its very nature cannot determine the national constitutional identity referred to in Article 4 para 2 TEU.

Primacy of European law is confirmed several times. Looking closer, one realizes that the reach of primacy is conceptualized as ending at the limits of Article 79 paragraph 3 GG (the inalterable core of the Constitution, cf supra),<sup>49</sup> which seems to mean that primacy is accepted for the rest, the major part of the Constitution.

Another new aspect is that the reasoning on constitutional identity control and *ultra vires* control is based not only on constitutional law, but also on European law.<sup>50</sup>

The judgment also clarifies that European Parliament and Council must not be looked at through national spectacles. It concedes that the Lisbon Treaty strengthens participatory democracy and that a European public is developing,<sup>51</sup> which is a hint to the debate on a European public space as a pre-condition for European democracy. Moreover: the merits of the ECJ concerning the establishment of a social Europe are acknowledged.<sup>52</sup>

#### BRUTUS:<sup>53</sup>

“I am perfectly content – the Treaty is dead. The aim is to delay the ratification as long as possible. Most crucial is the link and the conditionality established in the judgment between amending the accompanying German legislation and depositing the German ratification documents.<sup>54</sup> First, the legislation has to enter into force, then Germany may deposit the ratification documents.

This ensures that the Lisbon Treaty will never enter into force: Surely, the *Bundesrat*, who represents the interests of the *Länder*, is finally going to intervene. If nothing else does, this is going to lead to long and complicated negotiations on the scope and content of the new accompanying legislation. Possibly, a constitutional amendment will be discussed, e.g. to

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<sup>49</sup> Paras 240, 332.

<sup>50</sup> Headnote 4 and para 240: reference to Article 4 para. 2 TEU.

<sup>51</sup> Para 251.

<sup>52</sup> Para 398.

<sup>53</sup> Cf The Anti-Federalist, 1787/88.

<sup>54</sup> Cf para 128.



establish the new proceedings for constitutional identity and *ultra vires* control provided for by the judgment.<sup>55</sup>

Perhaps the government will even have to take the new accompanying legislation to the Constitutional Court for an abstract judicial review, in order to prevent excessive restrictions of its rights. In any case, one of the Lisbon Treaty action claimants is surely going to file proceedings with the Constitutional Court again; the new legislation will not enter into force and another judgment will be necessary before Germany can ratify.<sup>56</sup>

My hope: Germany is not going to be able to ratify the Treaty before 2010, and until then the UK is going to have a new government, which will withdraw British ratification. Then, the Lisbon Treaty is finished – fortunately.”

BRUTALUS (MACHIAVELUS), laconically:

“It is all about power in Europe. One must run rings around the EU, and especially the European Court of Justice. We are a sovereign state and will only take part in matters on the European and international level that are within our interests. The Maastricht judgment had already established the foundation for this, through the concept of controlling *ultra vires* acts of the EU. Unfortunately, this control has never been activated. Yet things are going to change now. Control of European acts, naturally first and foremost those of the ECJ, will become tangible. The possibilities for control are even expanded to include a constitutional identity control. The judgment even suggests establishing a new type of proceedings for this control, which would require a constitutional amendment of Article 93 GG, which contains the list of Constitutional Court proceedings. It is possible that this may cause trouble, maybe there will even be a treaty infringement case against Germany at the European level, but a decision finally needs to be made about power in Europe.

The ECJ’s time as the ‘engine’ of European integration is over.

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<sup>55</sup> The introduction of new constitutional law procedures which would have allowed each citizen to challenge European acts at the German Constitutional Court as *ultra vires* acts or as infringing national constitutional identity was briefly discussed during the parliamentary debate on the new accompanying legislation in the summer of 2009, but this was quickly dismissed.

<sup>56</sup> This has happened, indeed. This time, though, the Constitutional Court decided almost immediately and rejected the complaint as inadmissible in a three-page-decision, *Bundesverfassungsgericht*, Case 2 BvR 2136/09, Decision of September 22, 2009; 63 *NJW* 2009, 3778.

The data retention issue concerning the implementation of the data retention directive and a post-Mangold case, Honeywell, are proceedings pending in Karlsruhe. Both provide an opportunity for the Constitutional Court to actually control the ECJ, and to prove that the Lisbon decision is not only talk - which it will undoubtedly use. The only question is which one of the Court's two Senates is faster.<sup>57</sup>

And let's be frank: Politics actually likes this. Isn't it conceivable that negotiations in Brussels become much easier from a German point of view if one hints at the German Constitutional Court's reserve jurisdiction at the right time?"

DEMOCRATICUS (with a very traditional understanding of democracy):

"All state authority is derived from the people. There is no way around it. Democracy is based on the people of a state, in this case the Member State; there is just no other way to conceive democracy.

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<sup>57</sup> See for data retention *Bundesverfassungsgericht*, Cases 1 BvR 256/08, 1 BvR 263/08, 1 BvR 586/08, Decision of March 2, 2010. Contrary to the hope of Brutalus, the Constitutional Court did not attack European law. The German statute implementing directive 2006/24 was held unconstitutional without making any statement on the directive. Note that this decision of the first Senate of the German Constitutional Court barely mentions the second Senate's Lisbon decision. This may be read as a tacit critique of the Lisbon decision, or as an indication that the first Senate ignores European law. The latter would be rather surprising, considering that the first Senate is generally viewed to be more friendly towards European affairs than the second Senate (which is the Senate responsible for European affairs). Note also that, once again, the Constitutional Court avoided to submit a preliminary reference to the ECJ. This may be explained by the simple wish to decide the case before the Court's President's end of term on March 16, 2010. See also Cases 2 BvE 1/08, 2 BvR 236/08 and 2 BvR 237/08, equally concerning data retention, but within the second Senate's jurisdiction.

Brutalus turned out to be wrong on the Honeywell-case: Roughly one year after the Lisbon-decision, the German Constitutional Court decided the Honeywell-case in August 2010. The question at stake was whether the ECJ's 2005 Mangold decision was compatible with the German constitution or whether it was an European ultra vires-act. In the Mangold case (ECJ, Case C-144/04, *Werner Mangold v Rüdiger Helm*, [2005] ECR I-9981), the ECJ held a provision of German labor law that facilitated the dismissal of elder employees to be incompatible with EU law. The *Bundesverfassungsgericht* made quite clear in Honeywell (Case 2 BvR 2261/06, Decision of August 26, 2010) that – although not giving up the control-option – an ultra vires-control of European acts by the German Constitutional Court would only occur in extraordinary circumstances and obvious cases, and apparently a preliminary reference to the ECJ would have to take place first. This sober and de-escalating decision puts the Lisbon decision's principle of European law friendliness into practice, deceiving in particular commentators in the general media who, apparently out of some strange desire for conflict, had hoped to see some kind of dramatic showdown between German Constitutional court and ECJ.

Therefore, the European Parliament cannot possibly convey democracy.<sup>58</sup> This is never going to change. On the European level, the Parliament may name itself as it pleases, but it is not a real representation of the people, due to its unequal composition.<sup>59</sup> It is a representation of the peoples, not a representation of the people. Calling the European Parliament a representation of EU citizens is really only a ploy,<sup>60</sup> for the EU citizen is not a suitable subject of democratic attribution on the European level.<sup>61</sup> The population, which includes all residents, likewise is an unsuitable subject of attribution, because what matters is the act of election with a view to an equal participation in the exercise of public powers.<sup>62</sup> This may sound somewhat simplistic, but one must realize that the Constitutional Court cannot simply disregard its entire prior case law on democracy and demos, in particular the decision on voting rights for foreigners, where it clearly said that there is just one demos in Germany.

What's relevant when it comes to democracy, therefore, is the *Bundestag*, as it is the constitutional entity that is constituted directly according to the principle of free and equal elections – not so much the *Bundesrat*, where the *Länder* are represented. Perhaps I've got a misty-eyed, romantic idea of the national Parliament. Nevertheless, only the *Bundestag* is capable of democratically justifying the European construct.

All of this also justifies that violations of the democratic principle can be reprimanded via Article 38 paragraph 1 GG by means of the constitutional complaint, which normally allows invoking fundamental rights only.<sup>63</sup> The judgment does not change the fact that any constitutional complaint based on Article 38 GG must establish a link to the principle of democracy.

The judgment actually creates a unique experimental design for this summer of 2009, right after the decision, under optimal, almost laboratory conditions: when re-writing the legislation that accompanies the Treaty of Lisbon in Germany, members of Parliament (of the *Bundestag*) act in conditions of insecurity, in a way under a veil of ignorance, because they cannot predict whether they will be members of government or opposition after the elections [of September 2009]. They

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<sup>58</sup> Paras 271, 276 *et seq.*, 295.

<sup>59</sup> Para 284.

<sup>60</sup> Para 280.

<sup>61</sup> Paras 347 *et seq.*

<sup>62</sup> Para 292.

<sup>63</sup> Paras 173-177.

are pushed for time, due to the British situation. And: due to the circumstances, the executive (ministerial bureaucracy) is neutralized, incapable of wielding the pen for Parliament this time.

If not now, when will the *Bundestag* finally jump and codify its rights?

Of course, one must not get carried away and disturb the balance between the legislative and the executive branch: the judgment also clearly states that all German constitutional institutions have *Integrationsverantwortung*, the lasting responsibility in European integration.<sup>64</sup>

The Lisbon judgment is not really about the state - that is the Maastricht judgment's thinking, old thinking. It is essentially about the individual, although not to the extent of allowing for an individualized understanding of democracy. It is also about sovereignty, the question of the right measure of freedom and obligation.<sup>65</sup> Even the constitutional state does not allow for reckless self-importance and unbound individualism. Just as the individual is bound e.g. by marriage, the state is bound by international law. Sovereign statehood means to be able to break these bounds by breaking the law. This, however, is where the analogy to the freedom and bonds of marriage fails, for naturally there is no license to commit adultery.”

#### PAULUS:<sup>66</sup>

“Open statehood (*offene Staatlichkeit*), the German constitution's self-perception as being open for the international, was never more than the description of a problem. Sovereign statehood (*souveräne Staatlichkeit*) is the sovereign answer of the state to this problem. The Lisbon judgment seamlessly continues where the Maastricht judgment left off. The concept of *Staatenverbund* (compound of states, between federation [*Bundesstaat*] and confederation [*Staatenbund*]), introduced by the Maastricht decision in 1993, is asserted. It emphasizes the *sui generis* nature of the European. The Lisbon judgment defines the *Staatenverbund* and uses the concept. The citizen's freedom conceptually unfolds within the *Staatenverbund*, and within it alone. The citizen commits himself within the state and through the state. Therefore, the decision is a judgment for the citizen, but also for the state.

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<sup>64</sup> Para 245.

<sup>65</sup> Para 220.

<sup>66</sup> A type of *Günter Netzer* (the German football hero who has become the standard TV expert of the national football team's games) of German constitutional law doctrine; his signature feature are constitutional law comments from the sideline. Disclaimer: This is not to be understood as a reference to Judge Paulus, appointed to the German Constitutional Court in March 2010.

The Court says literally:<sup>67</sup>

the concept of *Verbund*, compound, implies a close, durable connection of sovereign states, which exercises public powers on a contractual basis, whose basic structure remains solely at the disposal of the member states and in which the peoples of the member states – that is, the member states’ nationals – remain the subjects of democratic legitimization.

The Maastricht judgment is alive, and it is all about the state after all. Solely about the state.”

#### NATIONALUS:

“It is the entire direction of European integration that I don’t like. And I am not the only one. What matters is preserving the national, that’s where there is cohesion. The European is subordinate; it is a political sphere of secondary importance, perhaps only a passing phenomenon. That is why the judgment is right in emphasizing the protection of national identity and in asserting a possibility for constitutional control in this context.

At last, the judgment enumerates what must remain at the national level, the indispensable minimum, concerning preconceptions or where political discourse and public opinion are essential.

These are,<sup>68</sup> inter alia, citizenship, the state’s civil and military monopoly on the use of force, fiscal decisions on revenue and expenditure, including government borrowing. There can be no question of introducing a European tax: according to the judgment, the sum of encumbrances on the individual must be determined on the national level. The same applies to those intrusions which are relevant for the realization of fundamental rights, especially intensive intrusions such as imprisonment as a criminal justice measure or committals. Today, it is no longer merely a question of the free movement of goods, such as bottled milk or mushroom preserves, as it had been in 1974 (in the *Solange I* case). Today, we are concerned with *habeas corpus* questions - just think of the European arrest warrant. The judgment states that anything pertaining to criminal justice must be interpreted restrictively on the European level. Cultural questions, such as language or family and educational affairs, are also among those subject matters that must not

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<sup>67</sup> Para 229.

<sup>68</sup> Paras 249, 252, 256-260.

be transferred to the European level. A harmonization of school curricula on the European level is therefore proscribed.

The regulation of the freedom of opinion, press and assembly, the treatment of religious and ideological creeds as well as basic decisions on welfare policy are also on the list.

All of this happens to correspond to those policy areas which have not yet been Europeanized. True, since *Bodin*, currency is among the “*marques de souveraineté*.” However, we’ve already given up our monetary sovereignty. This far and no further.”

PUBLIUS (a true<sup>69</sup> federalist):

“The *Bundesrat*, a kind of second chamber, and the *Länder* were not intensively involved in the proceedings at the Constitutional Court. Therefore, I have had little interest in it so far. However, the rewriting of the accompanying legislation now is an opportunity for the *Länder* to assert long-standing interests vis-à-vis the federal state. After all, the *Länder* need to give their consent to the legislation in order for it to pass. Admittedly, very much like the EP, the *Bundesrat* is unequally composed if one applies the Constitutional Court’s strict democracy standards. Yet the Constitutional Court has its difficulties anyway with classifying second chambers, which the misclassification of the US Senate as ‘no representation of the people’ proves.<sup>70</sup> Moreover, the touching up of the accompanying legislation admittedly is actually about democracy, not about federalism, so that the *Länder* really should only play a minor part in its drafting.

But perhaps nobody will notice if they do otherwise – in any case: there is a long list of wishes of the *Länder* when it comes to having a say in European affairs, which have been disregarded thus far. The most important issue: In matters that are within *Länder* competence, federal government must be obliged to represent the *Länder*’s position in Brussels as it is prescribed by them, and not just ‘essentially consider’ it. The government’s capacity to act is really only a spurious counter-argument here.

Apart from Brussels: one must improve the shining hour and secure positions and approval requirements, which can then be used to the advantage of the *Länder* in future negotiations and

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<sup>69</sup> Unlike Publius in the *The Federalist* [Papers], 1788.

<sup>70</sup> Para 286.

package deals between the *Länder* and the federal level. The consent of the *Bundesrat*, where it is required by the numerous new Article 23 GG requirements introduced with the Lisbon Treaty, will not be handed to the federal government and the *Bundestag* on a silver platter.”

NARRATOR (voiceover):

A long-standing practitioner of the “reality of the political power play”<sup>71</sup> in Bonn/Berlin, Brussels and Luxembourg observed everything. He turns away and shakes his head.

Rain.

---THE END---

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<sup>71</sup> Para 205.

## II. A critical analysis of the script

### 1. The cast of characters

The original *Rashomon* by *Kurosawa* was based on 7 individuals. Here, we have 8 individuals, which happens to be the number of judges constituting the Second Senate of the German Constitutional Court. But this is a mere coincidence. The characters are not modeled after the actual judges.

The characters are not all equally convincing and equally relevant. Three of them stand out: *Justus Lipsius*, who voices an angry critique of the judgment and whose anger and frustration resembles the deep frustration of many of the European Law scholars in Germany and elsewhere. *Optimistica*, who emphasizes the positive elements of the Treaty, albeit with a defensive undertone. *Democraticus*, who defends the decision by pointing to a certain understanding of what democracy is all about.

*Democraticus* is probably the character whose views have the most overlap with the views of an actual judge, Judge *Udo Di Fabio*, the judge rapporteur in the Lisbon case. *Di Fabio* has written extra-judicially on many aspects of European constitutional law,<sup>72</sup> and his views on the democracy issue are described by some as rather traditional.<sup>73</sup> But among the judges of the Second Senate, he is not the only one having written on democracy. Judge *Gertrude Lübbe-Wolff*, for example, has also written on European integration and democracy, also with a rather skeptical undertone, albeit from a more liberal perspective.<sup>74</sup> Her 2000 report to the association of German constitutional law scholars, for example, is a 40-page diagnosis of a European

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<sup>72</sup> U Di Fabio, *Das Recht offener Staaten* (Mohr Siebeck, Tübingen 1998); U Di Fabio, 'Mehrebenendemokratie in Europa' (Lecture at Humboldt University Berlin, FCE Paper 10/01, 15 October 2001).

<sup>73</sup> His more recent writings revolve around the topic of liberty and freedom in modern societies, see U Di Fabio, *Die Kultur der Freiheit* (CH Beck, Munich 2005). Here, Di Fabio insists on a link between individual liberty and freedom and "indispensable communities" such as families, nations, religious communities. Family and state are presented as primary communities (ibid, at 138).

<sup>74</sup> G Lübbe-Wolff, 'Europäisches und nationales Verfassungsrecht' in *Berichte und Diskussionen auf der Tagung der Vereinigung der Deutschen Staatsrechtslehrer in Leipzig vom 4. bis 6. Oktober 2000* (Walter de Gruyter, Berlin 2001), 60 *VVDStRL* 2001, 246; G Lübbe-Wolff, 'Volk, Demokratie, Verfassung – Die "Verfassung für Europa" als Herausforderung an die Verfassungstheorie' in W Kluth (ed), *Europäische Integration und nationales Verfassungsrecht* (Nomos, Baden-Baden 2007) 47-64.



democracy deficit and recommendation on how to cope with it, arguing inter alia for a strengthening of the European Parliament.<sup>75</sup>

*Justus Lipsius*, on the other hand, is clearly not a judge on the court. The decision itself reveals that there was an 8 to 0 majority on the actual decision – constitutionality of the Lisbon Treaty, but unconstitutionality of the statute that was supposed to flesh out the German Parliament’s rights. But there was only a 7 to 1 majority on the grounds of the decision, which means that there was one judge who did not want to be associated with the reasoning that leads to the result. But as no dissenting or concurring opinion has been annexed to the judgment, we have to assume that the hesitations of this judge were not that strong - definitely not as strong as the reaction of *Justus Lipsius*.

*Optimistica* is not an actual judge either, but she does reflect views from within the Court that must have impacted on the Court’s decision. Clearly, the decision is some sort of compromise. And someone must have brought up the idea to establish the concept of “European integration friendliness” of the constitution as a constitutional principle - a premiere in the case law of the German Constitutional Court, a principle working in favor of European integration confirmed in the Court’s 2010 Honeywell decision.<sup>76</sup> So there were pro-integration voices inside the Court.<sup>77</sup>

*Brutus*, a name that is associated with resisting, if not killing, tyrants, is a character that evokes a certain strand of hard core Euro-skepticism as displayed e.g. by Czech president Klaus in the Lisbon ratification debate or certain forces in the United Kingdom. In Germany, this kind of brute rejection of the EU is a fringe position. There is some evidence that the plaintiffs in the Lisbon case from the extreme left (DIE LINKE.) and from the rightwing right (MP Gauweiler) did hope for a scenario where the delay of German ratification due to the Lisbon decision would be long enough to see a possible British referendum on the Treaty in 2010. What we do know is

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<sup>75</sup> G Lübke-Wolff, ‘Europäisches und nationales Verfassungsrecht’ in *Berichte und Diskussionen auf der Tagung der Vereinigung der Deutschen Staatsrechtslehrer in Leipzig vom 4. bis 6. Oktober 2000* (Walter de Gruyter, Berlin 2001), 60 *VVDStRL* 2001, 246, at 263 *et seq.*

<sup>76</sup>

<sup>77</sup> See *Bundesverfassungsgericht*, Case 2 BvR 2261/06, Decision of August 26, 2010 (Honeywell), in particular the dissenting opinion by Judge Landau, accusing the majority of giving up the Lisbon Decision, see also *supra*, note 57. For the concept of European law friendliness see A Vosskuhle, ‘Der europäische Verfassungsgerichtsverbund’ 29 *NVwZ* 2010, 1 (available online at <<http://www.sfb597.uni-bremen.de/pages/pubApBeschreibung.php?SPRACHE=de&ID=146>>); = ‘Multilevel Cooperation of the European Constitutional Courts – Der Europäische Verfassungsgerichtsverbund’ (2010) 6 *ECLR* 175.

that there were links and contacts between MP Gauweiler and Czech President Klaus.<sup>78</sup> However, it is nevertheless highly unlikely that the Constitutional Court's decision to halt ratification was motivated by a wish of a majority of judges to seriously bring down the Treaty by the backdoor of a British referendum. In a way, it is worse: The judges probably did not even consider or know about this British scenario. This seems to apply to the majority of the Court. Therefore, there may still be one or two of them who did see the risk that the delay in ratification bore and who did hope for a delay sufficient for a British referendum to halt the Treaty. In the end, Germany ratified much faster than expected.

The better explanation for the Court's decision to halt ratification, although the Treaty itself turned out to be constitutional, is the one voiced by *Democraticus*: The halt in ratification put a huge pressure on the Bundestag to get things done and to take its fate into its own hands. In a way, it worked, as the parliamentarians managed to agree on a new statute in spite of upcoming elections and an ongoing electoral campaign.

*Paulus* is a character obviously modeled after Paul Kirchhof, a law professor from Heidelberg and former judge on the German Constitutional Court, the judge rapporteur of the Maastricht decision. He had been hired by one of Germany's nationwide TV networks to comment live in Karlsruhe as the judgment – most of it – was still being read in the court room on June 30, 2009. His interest must be to keep up the legacy of the Maastricht-decision, so that it is no surprise that he insists on the continuity between Maastricht and Lisbon.<sup>79</sup> But *Democraticus* seems to be right, when he points to the fact that the Lisbon decision is not about the *Staat*, this thick concept of constitutional thought in Germany that has been coined the “central constitutional complex”.<sup>80</sup> In the oral proceedings, Judge *Di Fabio* seemed to be eager to distance himself from a state-focused constitutional law tradition by stating that he did not particularly like *Carl Schmitt*, the constitutionalist who is generally considered to be the inspiration for the underlying theme of the Maastricht decision. And the comments of one of the former clerks of Judge *Di Fabio*, who repeatedly points to the fact that the Lisbon decision is about the individual – implying that it is

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<sup>78</sup> See e.g. the speech given by P Gauweiler on May 18, 2009 in honor of V Klaus (*Verleihung der Goldenen Peutingger-Medaille*).

<sup>79</sup> See for his academic position on the issue and in particular the defense of the concept of *Staatenverbund* that he invented P Kirchhof, ‘The European Union of States’ in A v Bogdandy and J Bast (eds), *Principles of European Constitutional Law* (Hart, Oxford 2nd ed 2010), 735.

<sup>80</sup> P Allot, ‘The Crisis of European Constitutionalism’ (1997) 34 CMLRev 439.

not about an abstract entity of ‘State’<sup>81</sup> – seem to confirm that there was at least an attempt to recalibrate. It is not “The State über alles”<sup>82</sup> anymore.

The character of *Brutalus (Machiavelus)* is not likely to be a sitting judge in a constitutional court, as he thinks in categories of power only, an operating mode generally associated with the world of politics. On the other hand, the German Constitutional Court in recent years has been criticized for increasingly becoming a political player. And it is definitely possible to read the Lisbon decision as an attempt to defend the national constitutional courts’ power against any encroachments from the European level.

But probably the position represented by *Nationalus* is more likely to reflect at least some of the judges’ views. It is more a feeling than a defined position, a feeling that, somehow, this European integration thing goes too far and that, somehow, there must be a stop sign. A feeling that is shared by a considerable part of the population, not only in Germany, albeit not by a majority.<sup>83</sup>

Then, there is *Publius*, who argues from the perspective of the *Länder*, who were not involved in the proceedings. In the ensuing remake of the legislation over the summer of 2009, *Publius’* position was visible among the *Länder*, though. There were attempts to hijack the situation in order to promote *Länder* interests. Interestingly, however, these attempts remained limited in a way that one could not necessarily expect. Still, the *Länder* did make sure that through the *Bundesrat*, a type of second chamber of Parliament, they will remain involved and relevant.

Finally, there is a person without a name. The “long-standing practitioner of the ‘reality of the political power play’ in Bonn/Berlin, Brussels and Luxembourg” who turns away at the end and shakes his head. Incidents of alienation between the world of politics and the judges in Karlsruhe are neither new nor limited to the European integration context. Still, it is striking to note that the political establishment in Berlin seemed to be rather unhappy about the entire case, and also about the judgment. This skeptical reaction of the majority of the political establishment

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<sup>81</sup> F Schorkopf, ‘Der Mensch im Mittelpunkt’ *Frankfurter Allgemeine Zeitung* (Frankfurt aM 16 July 2009), 6; F. Schorkopf, Die Europäische Union im Lot – Karlsruher Rechtsspruch zum Vertrag von Lissabon, *EuZW* 2009, 718.

<sup>82</sup> JHH Weiler, ‘The State “über alles”’ in O Due and others (eds), *Festschrift für Ulrich Everling* (Nomos, Baden-Baden 1995).

<sup>83</sup> See the Eurobarometer findings according to which the majority of Union citizens support EU membership, Eurobarometer No 71 (September 2009), part II.

contrasts the reaction in the media, immediately after the decision, that was close to euphoric, and the reactions from scholars,<sup>84</sup> which were almost all hostile, with just two or three exceptions. Among those who deal with European affairs on a day-to-day basis, there seemed to be a general perception that the judges in Karlsruhe probably do not know enough on the reality of European integration and on parliamentary reality in Berlin.

One character is probably missing, though: A Thales-like character, insisting on *Nosce te ipsum*: Know thyself. It is the character of an insider of European integration who is not a Euro-skeptic but who still acknowledges that there are problems and issues at the European level that remain unresolved even under the Lisbon Treaty, and that concerning some things, the Constitutional

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<sup>84</sup> J Fischer, 'Ein nationaler Riegel' *Die Zeit* (Hamburg 9 July 2009) <<http://www.zeit.de/2009/29/Lissabon>> accessed 13 July 2009; A Grosser, 'Deutschland auf dem Sonderweg' *Frankfurter Allgemeine Zeitung* (Frankfurt aM 11 July 2009) 2; F Schorkopf, 'Der Mensch im Mittelpunkt' *Frankfurter Allgemeine Zeitung* (Frankfurt aM 16 July 2009) 6; T Oppermann, 'Den Musterknaben ins Bremserhäuschen! – Bundesverfassungsgericht und Lissabon-Vertrag' (2009) 20 *EuZW* 473; M Nettesheim, 'Entmündigung der Politik' *Frankfurter Allgemeine Zeitung* (Frankfurt aM 27 August 2009) 8; N Beer, 'Das Lissabon-Urteil und die Hausarbeiten für Berlin' (2009) 20 *EuZW* 593; C Hillgruber 'Die besseren Europäer' *Frankfurter Allgemeine Zeitung* (Frankfurt aM 10 September 2009) 8; M Nettesheim, 'Ein Individualrecht auf Staatlichkeit? Die Lissabon-Entscheidung des BVerfG' (2009) 62 *NJW* 2867; KF Gärditz and C Hillgruber, 'Volksouveränität und Demokratie Ernst genommen – Zum Lissabon-Urteil des BVerfG' (2009) 64 *Juristenzeitung* 872; F Chaltiel, 'Le Traité de Lisbonne, Avant-Dernière Ligne Droite? À Propos de la Décision de la Cour Constitutionnelle Allemande du 30 Juin 2009' [2009] *RMCUE* 493; H Sauer, 'Kompetenz- und Identitätskontrolle von Europarecht nach dem Lissabon-Urteil – ein neues Verfahren vor dem Bundesverfassungsgericht?' (2009) 42 *ZRP* 195; N Reich, "'Europarechtsfreundlichkeit" und "Integrationsverantwortung" – eine lettische Variante' (2009) 20 *EuZW* 713; F Schorkopf, 'Die Europäische Union im Lot – Karlsruhes Rechtsspruch zum Vertrag von Lissabon' (2009) 20 *EuZW* 718; JP Terhechte, 'Souveränität, Dynamik und Integration – making up the rules as we go along? – Anmerkungen zum Lissabon-Urteil des Bundesverfassungsgerichts' (2009) 20 *EuZW* 724; W Frenz, 'Unanwendbares Europarecht nach Maßgabe des BVerfG?' (2009) 20 *EWS* 297; C Schönberger, 'Lisbon in Karlsruhe: Maastricht's Epigones At Sea' (2009) 10 *German Law Journal*, 1201; F Schorkopf, 'The European Union as An Association of Sovereign States: Karlsruhe's Ruling on the Treaty of Lisbon' (2009) 10 *German Law Journal* 1220; D Halberstam and C Möllers, 'The German Constitutional Court says "Ja zu Deutschland!"' (2009) 10 *German Law Journal* 1241; C Tomuschat, 'The Ruling of the German Constitutional Court on the Treaty of Lisbon' (2009) 10 *German Law Journal* 1259; A Grosser, 'The Federal Constitutional Court's Lisbon Case: Germany's "Sonderweg": An Outsider's Perspective' (2009) 10 *German Law Journal* 1263; M Niedobitek, 'The Lisbon Case of 30 June 2009 – A Comment from the European Law Perspective' (2009) 10 *German Law Journal* 1267; C Wohlfahrt, 'The Lisbon Case: A Critical Summary' (2009) 10 *German Law Journal* 1277; P Kiiver, 'German Participation in EU Decision-Making after the Lisbon Case: A Comparative View on Domestic Parliamentary Clearance Procedures' (2009) 10 *German Law Journal* 1287; S Leibfried and K van Elderen, "'And they shall Beat their Swords into Plowshares" – The Dutch Genesis of a European Icon and the German Fate of the Treaty of Lisbon' (2009) 10 *German Law Journal* 1297; Editorial, 'Karlsruhe has spoken: "Yes" to the Lisbon Treaty, but...' (2009) 46 *CMLRev* 1023; JHH Weiler, 'The "Lisbon Urteil" and the Fast Food Culture' (2009) 20 *EJIL* 505; D Thym, 'Europäische Integration im Schatten souveräner Staatlichkeit' (2009) 48 *Der Staat* 559; D Grimm, 'Das Grundgesetz als Riegel vor einer Verstaatlichung der Europäischen Union. Zum Lissabon-Urteil des Bundesverfassungsgerichts' (2009) 48 *Der Staat* 475; C Schönberger 'Die Europäische Union zwischen „Demokratiedefizit“ und Bundesstaatsverbot. Anmerkungen zum Lissabon-Urteil des Bundesverfassungsgerichts' (2009) 48 *Der Staat* 535; R Wahl 'Die Schwebelage im Verhältnis von Europäischer Union und Mitgliedstaaten. Zum Lissabon-Urteil des Bundesverfassungsgerichts' (2009) 48 *Der Staat* 587; J Ziller, 'Le dialogue judiciaire et la Cour de Karlsruhe' (2010) 46 *RTDE* 93; J Ziller, 'The German Constitutional Court's Friendliness towards European Law, *European Public Law* 2010, 53.

Court may be quite right. A self-critical European, pointing to the flaws in the electoral system governing EP elections, to the inconsistencies in the case law of the ECJ – just take the problems that an obstacle-based interpretation of the four freedoms (as opposed to a discrimination based regime) causes –, legislative mishaps such as the ban of light-bulbs decided by some obscure committee,<sup>85</sup> the problem of controlling bureaucrats at the working level in the Commission and in Council Working Groups and many other things.

This much on the cast of characters. But what is “Rashomon in Karlsruhe” all about? There is more than one answer to this.

## **2. A first response: The plot**

“Rashomon in Karlsruhe” has no defined plot. It takes place on the evening of the day the decision was published, June 30, 2009.

This is why subsequent developments are not mentioned in the script. The two most important developments: The *Bundestag* did come up with new legislation before the end of September 2009, thus fulfilling the conditions laid down by the Constitutional Court for German ratification. And, although another constitutional complaint was filed with the German Constitutional Court challenging this new legislation, the Constitutional Court gave a speedy decision within a couple of days,<sup>86</sup> so that Germany was able to ratify the Treaty before the second Irish referendum took place. The Lisbon Treaty finally entered into force on December 1, 2009, having been ratified in the following weeks by the remaining Member States, Ireland, Poland, and even the Czech Republic.

“Rashomon in Karlsruhe” is about an exchange of views that reveals how the Lisbon decision can be integrated into entirely different narratives:

- A national constitutional court defending its power in the process of European integration.
- A constitutional court putting citizens first.

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<sup>85</sup> See Directive 2005/32/EC.

<sup>86</sup> *Bundesverfassungsgericht*, Case 2 BvR 2136/09, Decision of September 22, 2009, 63 *NJW* 2009, 3778.

- A court saying on European integration what they had been eager to say for quite some time.
- An attempt to decide a power struggle with the ECJ on the question of who is the ultimate umpire.
- An attempt to put the brakes on any further integration steps in the form of implicit or explicit treaty revisions.
- An attempt to put the brakes even on current EU law, for example by restricting the use of Article 352 TFEU.
- An attempt to defend Germany's national identity.
- An attempt to defend Germany's sovereignty.
- An attempt to enhance the national Parliament's standing vis-à-vis the executive.

Most of these narratives are related to the landscape of European constitutionalism. This becomes visible when reflecting on the issues underlying the Lisbon decision.

### **3. The underlying issues of the Lisbon decision: a tale of democracy and identity**

The answer to the question 'What is the Lisbon decision all about?' seems to be obvious: The Lisbon decision is about the Lisbon Treaty. But considering that the Treaty turned out to be constitutional, the 147 pages must be about something else.

Obviously, there are numerous pages on procedural issues. Moreover, the history of European integration is retold, starting out from 1945. The question of 'Who is to be the ultimate umpire on European *ultra vires* acts?' that dominated the Maastricht decision of 1993 comes back. The power to nullify European *ultra vires* acts is even a major topic of the Lisbon decision,<sup>87</sup> but it is nothing conceptually new compared to Maastricht. The same applies to the issue of fundamental rights protection, which is almost absent from the Lisbon decision.

This is different with the following topics, which are central to the Lisbon decision. The core issues of the decision, which are also the most relevant issues for an assessment of the landscape of European constitutionalism today, are democracy (a) and identity (b).

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<sup>87</sup> Cf para 338 *et seq.*

It appears to be the relation between democracy and identity visible in the Lisbon decision that reveals the current dynamics of European constitutional discourse.

### **a. Democracy**

The entire decision is built around the issue of democracy. Standing of the plaintiffs is based on an interpretative trick of the German Constitutional Court by which the principle of democracy is read into a fundamental right – the right to vote, Article 38 GG – that may be invoked by individuals before the Constitutional Court. Once the question of standing is settled, the yardstick for the constitutionality of the Lisbon Treaty is the principle of democracy itself.

The democracy test suggested by Article 23 of the German constitution is twofold: Is the European Union based on a democratic principle, so that – once more – sovereign rights may be transferred to a sufficiently democratic EU by the Lisbon Treaty? And: Does this transfer of sovereign rights by the Lisbon Treaty affect the democracy principle in Germany in its core? Is Germany still a democracy after the transfer of sovereign rights?

The answer of the Court is that the EU is sufficiently democratic and that democracy within Germany as a Member State is not affected in its core by the Lisbon Treaty. This is not due to the progress of democracy at the European level, though. The fundamental democracy flaw at this level, from the perspective of the Court, is a lack of equality in the EP voting system. The German Constitutional Court's example: under the new rules of composition of the European Parliament,

a Member of the European Parliament elected in France would represent approximately 857,000 citizens of the Union and thus as many as a Member elected in Germany, who represents approximately 857,000 as well. In contrast, a Member of the European Parliament elected in Luxembourg would, however, only represent approximately 83,000 Luxembourg citizens of the Union, i.e. a tenth of them, in the case of Malta, it would be approximately 67,000, or only roughly a twelfth of them; as regards a medium-sized Member State such as Sweden, every elected Member of the European Parliament would represent approximately 455,000 citizens of the Union from his or her country in the European Parliament (...). In federal states, such marked imbalances are, as a general rule, only tolerated for the second chamber existing beside Parliament; in Germany and Austria, the second chamber is the *Bundesrat*, in Australia, Belgium and the United States of America, it is the Senate. They are, however, not accepted in the representative body of the people because this body would otherwise not represent

the people in a manner that stems from the principle of personal freedom and does justice to equality.<sup>88</sup>

That is why the European Parliament is essentially inexistent in the German Court's assessment of democracy: against the explicit wording of Article 14 TEU (representation of the Union's citizens) it "remains, due to the Member State's [sic] contingents of seats, a representation of the peoples of the Member States".<sup>89</sup> And because of this, the fundamental flaw of not being constituted on the basis of equality<sup>90</sup> is not relevant:

The democratic fundamental rule of the equality of opportunities of success ("one man, one vote") only applies within a people, not in a supranational body of representation, which remains a representation of the peoples linked to each other by the Treaties.<sup>91</sup>

The only remaining safeguard for democracy at the *European* level then is, logically from the point of view of the Court, the national Parliament. And as it is the national Parliament that carries the burden of safeguarding European democracy, it has to be equipped with sufficient power to do so. Hence the knockout for the – according to the Court - inadequate German statute on the German Parliament's rights under the new Treaty and the Court's demand that the statute be redrafted.

Many elements of this argument sound familiar, and were already established in the 1993 Maastricht decision of the German Constitutional Court. Maybe the Maastricht decision was even more optimistic on the potential for democracy at the European level, as the Lisbon decision seems to exclude even the mere possibility of a positive development at the European level.

The Court's reasoning in the Lisbon decision is in fact easier to criticize than the reasoning in the Maastricht decision: if Maastricht was on the state *über alles*,<sup>92</sup> Lisbon could be read as arguing the *Volk über alles*. The lack of a "joint European public", of "patterns of identification that are

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<sup>88</sup> Para 285 *et seq.*

<sup>89</sup> Para 284.

<sup>90</sup> This aspect is brought up repeatedly in the decision.

<sup>91</sup> Para 279.

<sup>92</sup> JHH Weiler, "The State "über alles"" in O Due and others (eds), *Festschrift für Ulrich Everling* (Nomos, Baden-Baden 1995).



related to the nation-state, language, history and culture” are given as reasons why European democracy is limited.<sup>93</sup>

Again, most of this sounds familiar and has been subject to debate earlier: Democracy without a demos, the preconditions for democracy, can one belong to more than one demos? We’ve been there already in the Nineties.<sup>94</sup>

To some extent it is striking that developments in the concept of German citizenship that have taken place since the Maastricht decision over the past 15 years and that may roughly be described as a softening of the exclusiveness of citizenship, e.g. when it comes to accepting dual citizenship, are not reflected at all in the Lisbon decision. Instead, the concept of Union citizenship is reduced to something that must not be analyzed by means of historical comparisons:

Historical comparisons, for instance with the German foundation of a federal state via the North German Confederation of 1867 [...], do not help very much in this context.<sup>95</sup>

Beyond historical comparisons, the Court also appears to be uninterested in approaches that deal with democracy at the European level in a differentiated way: Other concepts of democracy or legitimacy than the one that starts out from a people in a given state seem to be irrelevant. At best, participative democracy “can complement the legitimization of European public authority.”<sup>96</sup>

There is something unsettling about this refusal to admit any progress in terms of European democracy since the Maastricht Treaty, a time span of 15 years. It seems to me that it would be too easy to simply accuse the judges of some kind of constitutional ignorance. The European Parliament of 2009 is not the European Parliament of 1992, it is much more powerful.

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<sup>93</sup> Para 251.

<sup>94</sup> See i.a. D Grimm, ‘Does Europe need a Constitution?’ (1995) 1 *ELJ* 282 and the reaction by J Habermas, ‘Remarks on Dieter Grimm’s ‘Does Europe Need a Constitution?’’, (1995) 1 *ELJ* 303.

<sup>95</sup> Para 347.

<sup>96</sup> Para 272.

But isn't it true that it is still impossible to "throw the scoundrels out",<sup>97</sup> still impossible to hold individuals responsible for European decisions, for no matter how much the EP insists on its ever increasing powers? That simple observation is difficult to argue away. Of course, it is a typical problem of multilevel polities that it is not that easy to detect who the actual scoundrels are.<sup>98</sup> But the perception of a European democracy deficit is just there.

Maybe democracy is about perceptions. Sometimes, an institutional configuration is not questioned and accepted as democratic, whereas a similar institutional configuration elsewhere is challenged. I am not sure whether the legislative process in Germany, which involves an opaque committee, the *Vermittlungsausschuss*, coming in at the end of the process when there is a disagreement between federal government and the *Länder* (states), which in reality is often enough a disagreement between different political parties and not a genuine federal conflict, is that much more democratic than the law-making process at the European level. If this is an example for the power of perceptions, this raises the question: Who is responsible for perceptions? One possible answer is: the media. The Lisbon proceedings in Germany were an example that illustrated how the media do not quite succeed in explaining the political process when it comes to European integration.<sup>99</sup> Uninformed at best, pursuing their own agenda at worst.

But to blame the media alone would be too easy. Because even with a more comprehensive and less biased media coverage and a general level of knowledge of European affairs in the population, there would still be no difference in that fundamental flaw: beyond perceptions, it is difficult to affect European politics by a vote.

The static view of the German Constitutional Court may reflect the very general trend, that, to some extent, most people have given up on democracy at the European level. There may be an understanding - maybe just a feeling - that there are limits to what can be achieved in terms of

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<sup>97</sup> JHH Weiler, *The Constitution of Europe* (Cambridge University Press, Cambridge 1999) 329. See also K Nicolaïdis, 'We the Peoples of Europe...' 83 *Foreign Affairs* 2004, 97.

<sup>98</sup> See the joint decision trap literature by Scharpf and others in this context. FW Scharpf, 'The Joint Decision Trap. Lessons from German Federalism and European Integration' (1988) 66 *Public Administration* 239.

<sup>99</sup> See e.g. the coverage of the oral proceedings in the Lisbon case in the two largest German newspapers, the *Frankfurter Allgemeine Zeitung* and the *Süddeutsche Zeitung* (see *Frankfurter Allgemeine Zeitung*, February 21, 2009, 8 for the claim by R Möller that there is no serious legal discussion taking place at oral proceedings at the ECJ; see *Süddeutsche Zeitung*, February 11, 2009, 1 with H Prantl promoting a court-induced German referendum on the Lisbon Treaty although this was no issue at all in the proceedings).

democracy at the European level and a weariness to re-iterate all aspects of democratic theory to prove the opposite.

To shift the democratic focus from the European Parliament towards national Parliaments appears to be the logical consequence of the deconstruction of the EP. It is true, though, that it was not the German Court who introduced this shift towards national Parliaments. The Member States brought this up,<sup>100</sup> with the Declaration on the Future of European Integration (Declaration No 23) annexed to the Nice Treaty, with the provisions on national Parliaments in the Constitutional Treaty and now in the Lisbon Treaty. Apparently, national Parliaments are the ones to save us.

Empowering national Parliaments is not without risks for some of the Member States with weak Parliaments. And there is a frequent skepticism concerning the ability of national Parliaments to live up to this kind of responsibility. One element that has substantial potential is not discussed by the Constitutional Court: the interaction of national Parliaments and EP with a view to an emerging multilevel parliamentarianism, parallel to the multilevel structure of constitutional law adjudication by the highest courts of the Member States and the ECJ.<sup>101</sup> But in the end, time will tell whether the national Parliaments will make a substantial contribution to European democracy.

## **b. Identity**

If democracy appears as an issue where questions and possible answers to these questions seem to have remained more or less static over the last 15 years, identity appears to be a more recent and more dynamic issue in the EU context. With the endless debate on a real or perceived democracy deficit not having had any significant effect on perceptions, despite all kinds of modifications of institutional settings and treaty text design,<sup>102</sup> identity may be the new central issue of European integration.

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<sup>100</sup> Supposedly, this was initially a British proposal.

<sup>101</sup> See for this idea A Vosskuhle, 'Der europäische Verfassungsgerichtsverbund' 29 *NVwZ* 2010, 1 (available online at <<http://www.sfb597.uni-bremen.de/pages/pubApBeschreibung.php?SPRACHE=de&ID=146>>); see also F Mayer, 'Multilevel Constitutional Jurisdiction' in A v Bogdandy and J Bast (eds), *Principles of European Constitutional Law* (Hart, Oxford 2<sup>nd</sup> edn 2010), 399.

<sup>102</sup> Remember how Title VI of the Treaty establishing a Constitution for Europe displays that the Convention (or its President) got carried away, at times: "The democratic life of [!] the Union". Title II of TEU-Lisbon went back to a more sober style, it reads "Provisions on democratic principles".

The German Constitutional Court mentions identity in the context of national identity or national constitutional identity roughly thirty times in the Lisbon decision. The core statement is the following one:

...integration into a free community neither requires submission that is removed from constitutional limitation and control nor forgoing one's own identity.<sup>103</sup>

Note though, that national identity and national constitutional identity are not altogether new issues in the context of European constitutionalism.

Since the Maastricht Treaty, Article 6(3) TEU stated that the European Union shall respect the national identities of the Member States. Article 4(2) TEU-Lisbon now clarifies that national identity includes constitutional identity, as it refers to 'fundamental structures, political and constitutional', a supplement to the provision that the Constitutional Treaty introduced.

Theoretical reflection on national identity and European integration is also not new.<sup>104</sup> Years ago already, there was a suggestion<sup>105</sup> that the national identity provision in the EU Treaty could be interpreted as a starting point on the European level for revoking the claim of primacy of European law over Member States' constitutional identity.<sup>106</sup> It is hardly surprising that it was an Irish academic contribution that developed the idea of protecting fundamental (constitutional) national choices inherent in Article 6(3) TEU (now Article 4(2) TEU-Lisbon) further into

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<sup>103</sup> Para 228.

<sup>104</sup> See B De Witte, 'Droit communautaire et valeurs constitutionnelles nationales' 14 *Droits* 1991, 87 at 95; see also A v Bogdandy, 'Europäische und nationale Identität: Integration durch Verfassungsrecht?', (2003) *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer (VVDStRL)* 62, De Gruyter Verlag, Berlin 2003, 156.

<sup>105</sup> DR Phelan, *Revolt or Revolution* (Round Hall Sweet & Maxwell, Dublin 1997) 416. In order to avoid a revolt or a (legal) revolution and to maintain the legitimacy of the national legal orders, Phelan suggests an amendment of the Treaties giving primacy over European law to the basic principles of Member States' constitutions relating to life, liberty, religion, and the family, which are predicated on visions of personhood and morality (not on the market or the proper distribution of goods) peculiar to each Member State. The rights expressing these principles would take precedence over European law within their sphere of application. The exact range of this reservation would be established by the respective national courts or other institutions of last resort, *ibid*, 416, 417 *et seq.* Critical of Phelan MP Maduro, 'The Heteronyms of European Law' (1999) 5 *ELJ* 160, and N MacCormick, 'Risking Constitutional Collision in Europe?' (1998) 18 *Oxford Journal of Legal Studies* 517; see in this context also DR Phelan, 'The Right to Life of the Unborn v the Promotion of Trade in Services' (1992) 55 *Modern Law Rev* 670.

<sup>106</sup> Obviously, the Member States must be involved in the process of clarifying the concept. This is where a European version of the American Certification procedure could play a role. The basic idea of respecting Member States' constitutional principles at the European level can also be detached from Article 6(3) TEU (now Article 4(2) TEU-Lisbon): on the basis of Article 4(3) TEU-Lisbon (the former Article 10 EC), an argument could be made for a duty of the Union to consider and respect national constitutional structures when exercising its competences.

attributing to national courts of last instance the role of determining the content of such choices, as recognized and protected by European law.

The German Constitutional Court pointed to national constitutional identity as a possible limit to European integration as early as 1974 in the infamous *Solange I* decision.<sup>107</sup> According to the Court, constitutional identity means “the fundamental architecture, the constituting structures” of the Constitution.<sup>108</sup> This essentially refers to the principles codified in Article 79 para 3 GG, according to which certain elements of the constitution cannot be amended or abolished.

Clearly, identity-related arguments are not new. But the identity issue has gained new momentum recently with Member States’ courts beginning to use the idea of national constitutional identity to build a bridge between European and national constitutional law. Interestingly, these statements were more or less related to the Constitutional Treaty. It was the French *Conseil constitutionnel* who stated implicitly in 2004 and explicitly in 2006<sup>109</sup> that national constitutional identity is a limit to the primacy of European law. A similar approach can also be found in the recent jurisprudence of the Spanish Constitutional Court.<sup>110</sup>

Now, the German Constitutional Court places the protection of national constitutional identity in the center of its reasoning:

What corresponds to the non-transferable identity of the constitution (Article 79.3 of the Basic Law), which is not amenable to integration in this respect, is the obligation under European law to respect the constituent power of the Member States as the masters of the Treaties. Within the boundaries of its competences, the Federal Constitutional Court is to review, if necessary, whether these principles are adhered to.<sup>111</sup>

The German Constitutional Court seems to be serious about this idea of identity control, as it comes back to it a little bit later in the decision:

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<sup>107</sup> *Entscheidungen des Bundesverfassungsgerichts* 37, 271 (*Solange I*) at 279; see also *Entscheidungen des Bundesverfassungsgerichts* 73, 339 (*Solange II*) at 375.

<sup>108</sup> “durch Einbruch in ihr Grundgefüge, in die sie konstituierenden Strukturen”, *Entscheidungen des Bundesverfassungsgerichts* 73, 339 (*Solange II*) at 375 *et seq.* Here, the Court refers to the jurisprudence of the Italian Constitutional Court.

<sup>109</sup> CC 19 November 2004, *Traité établissant une Constitution pour l’Europe*; CC 27 June 2006, *Loi relative au droit d’auteur et aux droits voisins dans la société de l’information*; see F C Mayer, E Lenski, M Wendel, ‘Der Vorrang des Europarechts in Frankreich’ *Europarecht* 2008, 63 and 57.

<sup>110</sup> *Tribunal Constitucional*, judgment of 13 December 2004, DTC 1/2004.

<sup>111</sup> Para 235.

Furthermore, the Federal Constitutional Court reviews whether the inviolable core content of the constitutional identity of the Basic Law pursuant to Article 23.1 sentence 3 in conjunction with Article 79.3 of the Basic Law is respected (see BVerfGE 113, 273 <296>).

It does realize that this may cause problems with obligations under European law:

The exercise of this competence of review, which is rooted in constitutional law, follows the principle of the Basic Law's openness towards European Law (*Europarechtsfreundlichkeit*), and it therefore also does not contradict the principle of loyal cooperation (Article 4.3 TEU Lisbon); with progressing integration, the fundamental political and constitutional structures of sovereign Member States, which are recognized by Article 4.2 sentence 1 TEU Lisbon, cannot be safeguarded in any other way. In this respect, the guarantee of national constitutional identity under constitutional and the one under Union law go hand in hand in the European legal area.

Whether "cannot be safeguarded in any other way" is sufficient as an argument may be subject to debate.

The identity review makes it possible to examine whether due to the action of European institutions, the principles under Article 1 and Article 20 of the Basic Law, which are declared inviolable in Article 79.3 of the Basic Law, are violated. This ensures that the primacy of application of Union law only applies by virtue of, and in the context of, the constitutional empowerment that continues in effect.<sup>112</sup>

The Court seems to believe that there is the option of an identity control under current constitutional law already. Nevertheless, the Court even addresses the legislator:

What is also conceivable, however, is the creation by the legislature of an additional type of proceedings before the Federal Constitutional Court that is especially tailored to *ultra vires* review and identity review to safeguard the obligation of German bodies not to apply in Germany, in individual cases, legal instruments of the European Union that transgress competences or that violate constitutional identity.<sup>113</sup>

When re-writing the statute on Parliament's rights during the summer of 2009, the *Bundestag* was not eager at all to touch this hot potato and to take the responsibility for the invention of this

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<sup>112</sup> Para 240.

<sup>113</sup> Para 241.

kind of identity review away from the Court.<sup>114</sup> Note that there is still the option that the legislature in the future creates additional types of proceedings related to EU law that explicitly impose on the Constitutional Court a national law duty<sup>115</sup> to submit any kind of identity issue related to European law to the ECJ.

The national identity mentioned in Article 4 TEU-Lisbon or in the Lisbon decision is *prima facie* not related to individual identity, but refers primarily to some sort of collective identity, inter alia the identity of the national constitution.<sup>116</sup> But obviously, the identity of an individual living in, say, Germany is not unaffected by a claim that there is such a thing as a national identity and a national constitutional identity. This is where a core issue of the democracy debate, the question of multiple demoi, comes back: Can one belong to more than one polity? Probably yes, but national identity and national constitutional identity trump any other kind of allegiance.

It is probably not a coincidence that identity as a topic of European constitutional law gains momentum at this time, at the beginning of the 21<sup>st</sup> century and with the Treaty of Lisbon.

One of the most important institutional novelties of the Lisbon Treaty, if not *the* most important one, considering the ever increasing number of Member States, is the introduction of qualified majority voting in many areas that, so far, were in the realm of unanimity. What can you do if you find yourself in a minority? Invoke national identity.

Then, there seems to be a link between national identity and sovereignty. Remember that ten out of twelve of the newest Member States plus Germany have gained full sovereignty at the beginning of the 1990s only. In these countries, which comprise more than a third of the EU population, the longing to define something that under no condition may be determined by ‘outsiders’ is probably particularly strong.<sup>117</sup>

Finally, there has been a general debate on identity in several Member States, which was unrelated to European integration. In Germany, the question of “who are we?” led to a debate on

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<sup>114</sup> This became particularly clear during the expert hearings on the new legislation.

<sup>115</sup> The duty to submit a reference in such a case already exists under EU law (Article 267 TFEU).

<sup>116</sup> See CONV 375/1/02 REV 1 at 11 for the discussion on the identity clause in Working Group V of the European Convention.

<sup>117</sup> The ugly and malicious version of this legitimate perspective is the equation of European Union and Soviet Union, suggested i.a. by Czech President V Klaus, *The Times* February 20, 2009.

the concept of *Leitkultur*.<sup>118</sup> In France, where the government sponsored a “Grand débat sur l’identité nationale”<sup>119</sup> in 2009 and in the UK,<sup>120</sup> the debate on national identity is much more recent. One may add other states such as the Netherlands or Belgium.

What is the problem with national identity and the European constitutional order? Allowing the concept to have a substantial function in legal terms may turn out to be a Pandora’s box. Member States will be tempted to declare all kinds of issues to be part of their national identity in order to shield them from European law. If anything is national identity, nothing will be. If, for example, Germany were to argue that Opel automobile industries or the Deutsche Bank are somehow part of German national identity and must be saved at all cost, e.g. by granting state aids violating EU law, that would be a threat to legal certainty, legal unity and the community of law. Others would soon follow with similar national identity claims.

On the other hand, if the identity issue is dealt with within the framework of European law, i.e. by using the preliminary reference procedure and by establishing a constitutional discourse between the European level and the Member State level, the concept may even help to pursue the aim of any multilevel polity: as much unity as necessary, as much multiplicity as possible. And if the German Constitutional Court really shifts the question of fundamental rights protection and the protection of fundamental rights protection standards in the Member State to the identity arena, as some sentences in the judgment seem to indicate,<sup>121</sup> this may introduce a new dynamic into a field that has become moot with the unreachable condition of the Solange II decision.

What about *European* identity? It seems to me that the debate on European identity has calmed down since the days of external attempts to construct a dichotomy of old vs. new Europe. The rather sober approach that I suggested in more detail elsewhere,<sup>122</sup> which argued that European identities have come to be expressed first and foremost through EU institutions and EU law,

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<sup>118</sup> See B Tibi, ‘Leitkultur als Wertekonsenz. Bilanz einer missglückten deutschen Debatte’ (2001) *Aus Politik und Zeitgeschichte* B 1-2/2001; S Manz, ‘Constructing a Normative National Identity: The Leitkultur Debate in Germany, 2000/2001’, 25 *Journal of Multilingual and Multicultural Development* 2004, 481.

<sup>119</sup> See the government website <<http://www.debatidentitenationale.fr>>.

<sup>120</sup> See ‘Britain ‘needs national identity’ to get through recession, says Gordon Brown’, *The Guardian*, March 25, 2009.

<sup>121</sup> See also the First Senate’s decision in the data retention case, *Bundesverfassungsgericht*, Cases 1 BvR 256/08, 1 BvR 263/08, 1 BvR 586/08, Decision of March 2, 2010 (data retention), para 218.

<sup>122</sup> FC Mayer and J Palmowski, ‘European Identities and the EU – The Ties that Bind the Peoples of Europe’ (2004) 42 *JCMS* 573.



seems to be confirmed by the stability that the institutions have displayed so far during the economic crisis of 2009 and 2010. The fact that the power of European law was – erroneously – considered too overwhelming by Czech President Klaus, who insisted at all costs on an exception – which, in fact, was none - from an obligation imposed by European law, may be considered proof of the stability attributed to the European legal order.

### **III. Conclusion: The landscape of European constitutionalism - where do we stand?**

Landscapes change over time, by the effects of erosion and other forces. Or they change because of dramatic sudden events.

The German Constitutional Court's Lisbon decision is no such dramatic event. But it may be evidence of a certain trend that could have the potential of transforming the landscape of European constitutionalism over time. In other words: the German *Lissabon-Urteil* is better understood as being rather a symptom than a problem: a symptom for unresolved issues of European integration that remain unresolved even with the new legal order that the Lisbon Treaty establishes. This insight goes along with a general sense of uneasiness with the way things have developed, acknowledging at the same time that there is no way back and that giving up the European integration project is no alternative.

One of the general trends that have to do with these unresolved issues is the shift from democracy talk to identity talk that I described. This shift is also a shift from a proactive attitude (reaching out for participation) towards European integration to taking a defensive attitude. Insisting on democracy at the European level means you still want to be a part of the process, you want to control, but also shape that process. Safeguarding national identity, on the other hand, is a different approach, as it is defensive. It insists on a “them and us”-perspective.

If it is true that there are unresolved issues of European integration, it seems quite clear after the experience of the Lisbon Treaty that solutions by Treaty reform are far far away. Lisbon was the last major Treaty reform for long years.<sup>123</sup>

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<sup>123</sup> There will be the possibility of minor Treaty amendments in the context of accession Treaties, though, and there is also an intensifying debate on modifying the provisions governing the monetary union in the context of the European Financial Stabilisation mechanism and the financial aid for Greece. There is a link here with cases pending at the German Constitutional Court on these measures where the legality of the measures taken under

Maybe it is easier to accommodate questions of belonging and identity outside European constitutional law. The democracy debate will always point to real or perceived democracy deficits of the decision-making process, subject to a revision of the Treaties requiring a unanimous will of the Member States to introduce the respective democracy-enhancing change. Identity, be it European or national, is nothing that can simply be written into a constitutional text and then it is there. It has to develop over time, which also means that it *can* in fact develop over time.

We may have reached the limits of what European law, even European constitutional law, can do.

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European law may come up, see *Bundesverfassungsgericht*, Case 2 BvR 987/10, Decision of May 7, 2010 (Financial aid for Greece – interim measures); Case 2 BvR 1099/10, Decision of June 10, 2010 (Euro – interim measures).