

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

Why the European Union is Not a State Some Critical Remarks

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German Constitutional Court decision of 30 June 2009 on the compatibility of the Lisbon Treaty with the German Constitution – Analysis of inconsistencies – Differences between the EU and a state – Sovereignty of the member states and *Kompetenz-Kompetenz* – Argument for a relative concept of sovereignty – Sovereignty and the right to withdraw – Critical analysis of BVerfG's assessment of the EU's democratic deficit and denial of the importance of the European Parliament

INTRODUCTION

The article focuses on German Federal Constitutional Court's (*Bundesverfassungsgericht*) view on the differences between national and international (or rather supranational) law and structure in the decision on the Lisbon Treaty.¹ While holding the Lisbon Treaty² to be compatible with the German Constitution, the Basic Law (*Grundgesetz* – GG), the *Bundesverfassungsgericht* explores, amongst other issues, whether the European Union under this Treaty will attain statehood and whether the European Union's democratic standards are in accordance with the Basic Law's requirements.

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¹ Bundesverfassungsgericht (Second Senate), Cases 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 30 June 2009 (this article refers to the preliminary English translation provided by the Bundesverfassungsgericht, which can be accessed at <http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html>).

² Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 Dec. 2007, *OJ* [2007] C 306/1, 17.12.2007.

European Constitutional Law Review, 5: 407–420, 2009

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doi:10.1017/S1574019609004076

The aim of this article is twofold: it tries to explain the *Bundesverfassungsgericht's* reasoning, while at the same time critically assessing it and highlighting some peculiarities. The article is divided into two parts. The first part deals with the question of the member states' and the European Union's statehood, i.e., the question of sovereignty and *Kompetenz-Kompetenz*. I will argue that the *Bundesverfassungsgericht's* formalistic approach to sovereignty as an absolute concept is worth re-considering when discussing the relationship between member states and the European Union. The second part is concerned with the *Bundesverfassungsgericht's* views on the European Union's democratic deficit, which it regards tolerable precisely because the European Union is not a state. This surprising argument will be the basis of a critical evaluation of the court's implicit denial of the European Parliament's importance and the claim that there is no such thing as a European people.

SOVEREIGNTY: *KOMPETENZ-KOMPETENZ* ÜBER ALLES!?

The Bundesverfassungsgericht's understanding of sovereignty

The first point to be addressed is that of sovereignty or *Kompetenz-Kompetenz*. The *Bundesverfassungsgericht's* view of sovereignty is based on Europe's 'statist' tradition, according to which sovereignty is indivisible.³ However, the court's black-and-white approach, whereby an entity either enjoys *Kompetenz-Kompetenz* and is thus a State, or it does not and is therefore not a State, is not adequate. The division of competences (and *Kompetenz-Kompetenz*) between the European Union and the member states is too complex to be portrayed in such a simple manner. The *Bundesverfassungsgericht's* remarks in this respect are to be understood in the light of the Basic Law's limits to the transfer of competences on the European Union. Such a transfer may not lead to Germany losing its statehood. Article 23(1) GG, which provides the legal basis for German integration in the European Union,⁴ expressly states that any Act of Parliament ratifying a treaty amending the treaty foundations of the European Union is subject to the 'eternity clause' in Article 79(3) GG. That article outlaws amendments to the Basic Law that affect the principles laid down in Articles 1 and 20 GG (and thus guarantees their eternity). The latter article expressly refers to Germany as a state, which means that the statehood of Germany must not be given up. The *Bundesverfassungsgericht* phrases it as follows:

³ On this and the more flexible American tradition, cf. R. Schütze, 'On "Federal" Ground: The European Union As an (Inter)national Phenomenon', 46 *Common Market Law Review* (2009) p. 1069.

⁴ When referring to the European Union, this article means the European Union after the entry into force of the Lisbon Treaty.

The Basic Law does not grant the bodies acting on behalf of Germany powers to abandon the right to self-determination of the German people in the form of Germany's sovereignty under international law by joining a federal state.⁵

Therefore, the *Bundesverfassungsgericht* enters into a lengthy discussion as to whether with the entry into force of the Lisbon Treaty the European Union were to become a State, and whether Germany would lose its statehood as a consequence. In its assessment, the *Bundesverfassungsgericht* follows the traditional definition of statehood first articulated by Georg Jellinek⁶ in his so-called three elements theory (*Dreielementelehre*), according to which a State exists when three conditions are satisfied: a territory, a people and sovereignty.⁷ The focus of my discussion will be on the last element.

The *Bundesverfassungsgericht's* line of argument whether Germany would lose its sovereignty by ratifying the Lisbon Treaty does not differ from that in the Maastricht decision.⁸ The *Bundesverfassungsgericht's* view on sovereignty is primarily based on the notion of *Kompetenz-Kompetenz*, i.e., a state's competence to determine its own competences.⁹ The Basic Law prohibits the transfer of such a competence on the European Union.¹⁰ The member states must therefore remain 'masters of the Treaties'.¹¹ The European Union can thus only enjoy competences derived from the member states.¹² The principle of conferred powers, i.e., the principle that the European Union may only act where it has been given the power to do so, is therefore not only a principle of European law but also one of German constitutional law.¹³ The member states as sovereign states must remain the source of all competences enjoyed by the European Union and they must be able to revoke these at any time.

In the Lisbon decision, the *Bundesverfassungsgericht* was faced with the question of whether, measured by these strict standards, the Lisbon Treaty was a step too

⁵ BVerfG, *supra* n. 1, para. 228.

⁶ G. Jellinek, *Allgemeine Staatslehre*, 3rd edn. (Berlin, Springer 1922) p. 183: 'Als Rechtsbegriff ist der Staat demnach als die mit ursprünglicher Herrschaftsmacht ausgerüstete Körperschaft eines selbsthaften Volkes'.

⁷ A similar definition can be found in Art. 1 of the 1933 Montevideo Convention, 165 *LNTS* 19.

⁸ BVerfGE 89, 155; the English translation can be found at: [1994] 1 *CMLR* 57.

⁹ The BVerfG does not spell this out explicitly, yet it becomes obvious when we look at the decision: when applying the facts to the law, *supra* n. 1, paras. 299 et seq., the BVerfG mainly analyses whether *Kompetenz-Kompetenz* has been transferred on the EU, para. 328. It regards the right of member states to withdraw from the EU as (merely) confirming their sovereignty, para. 329.

¹⁰ BVerfG, *supra* n. 1, para. 233; BVerfGE 89, 155 (187-188).

¹¹ BVerfG, *supra* n. 1, para. 231.

¹² *Ibid.*, para. 231.

¹³ *Ibid.*, para. 234; the principle can be found in the present Art. 5(1) EC and in Art. 5 TEU (Lisbon).

far. I want to critically examine two points of the *Bundesverfassungsgericht's* conclusions that the European Union under the Lisbon Treaty does not enjoy any *Kompetenz-Kompetenz*: amendments to the Treaties and the significance of the right to withdraw from the European Union. Finally, I want to point to the fact that the court seems to have overlooked a Treaty provision codifying the European Court of Justice's implied powers doctrine regarding the European Union's external competences.

Treaty amendments and Kompetenz-Kompetenz

Under the Lisbon Treaty, amendments to the Treaties will generally still require the conclusion and ratification of an amending treaty by all member states.¹⁴ Despite certain procedural peculiarities, this provision therefore reflects the situation under public international law. However, the Lisbon Treaty introduces two simplified revision procedures and extends the scope of the present Article 308 EC, the future Article 352 TFEU. All of these provide for amendments of the Treaties, without requiring the conclusion of an amending treaty. Therefore, the *Bundesverfassungsgericht* had to discuss whether these provisions confer *Kompetenz-Kompetenz* on the European Union.

Regarding the simplified revision procedure outlined in Article 48(6) TEU (Lisbon), the *Bundesverfassungsgericht* comes to the conclusion that the Treaty does not endow the European Union with *Kompetenz-Kompetenz*, as that article expressly states that it cannot increase the European Union's competences.¹⁵ Rather it only allows for substantive modifications of primary law as it stands.¹⁶ Nonetheless, procedurally this provision is a hybrid and a step away from classic public international law. It still contains the requirement that the member states (and not only the European Union's institutions) approve the amendment. At the same time, however, it no longer requires the conclusion of an amending treaty. Rather the amendment is implemented through a mainly internal procedure prescribed by the TEU and not in the classic international law manner. This clearly reminds us of the amendment procedures of a domestic constitution and the provision can therefore be seen as a state-like element in the TEU. Substantively, Article 48(6) TEU (Lisbon) applies to all provisions contained in Part III of the TFEU (Lisbon), i.e., provisions that lie at the very heart of European Union primary law, such as those on the Common Market. The *Bundesverfassungsgericht*, however, did not have any problems finding this provision to be in accordance with the Basic Law as the

¹⁴ Art. 48(2) TEU (Lisbon).

¹⁵ BVerfG, *supra* n. 1, para. 314.

¹⁶ R. Streinz, et al., *Der Vertrag von Lissabon zur Reform der EU*, 2nd edn. (C.H. Beck, Munich 2008) p. 43.

provision expressly requires the approval of the member states in accordance with their constitutional requirements. Therefore, from the point of view of the Basic Law, the member states' *Kompetenz-Kompetenz* is preserved since each member state has to expressly approve of an amendment.

The other provision which holds a simplified revision procedure of the Treaties is Article 48(7) TEU (Lisbon) and it goes further. According to this provision, the European Council, *inter alia*, can change the unanimity required for certain decisions in the Council of Ministers to a qualified majority. National Parliaments can oppose such extension of qualified majority voting. In contrast to Article 48(6) TEU (Lisbon), the consent of all the member states as such is not required, making the procedure even more state-like, and only national parliaments are granted a veto right. It is, therefore, an internal amendment procedure such as can be found in domestic constitutions even though national parliaments will be given a right to veto such an amendment. It is internal because the national parliaments' veto right exists only by virtue of the Treaty and does not mirror international law requirements for two reasons. First, only the national parliaments may veto such an amendment and not the member states as such. Second, the right given to the national parliaments is merely a veto right, which means that they must act in order to prevent the amendment, which means that their consent is not a necessary requirement for the amendment. Substantively, the introduction of a qualified majority leads to a reduction in powers of the individual member state, as it can no longer block decisions taken in accordance with the amended procedure.¹⁷ Therefore, the introduction of Article 48(7) must be regarded as conferring on the European Union the power to decide upon the way some of its competences are exercised without the prior consent of the member states. While the *Bundesverfassungsgericht* did not choose to expressly acknowledge that Article 48(7) TEU (Lisbon) confers some *Kompetenz-Kompetenz* on the European Union, it nonetheless required that the German representative in the Council may only approve of such a Treaty amendment after the German parliament has adopted an Act of Parliament sanctioning the amendment.¹⁸

That the European Union enjoys some degree of *Kompetenz-Kompetenz* is more obvious when looking at Article 352 TFEU (Lisbon), which extends the scope of present Article 308 EC to all policy areas. According to the former provision, the European Union can act even in fields for which it has no competence if this is necessary for the attainment of one of the objectives set out in the Treaty. Procedurally, Article 352 TFEU (Lisbon) provides for a decision by the Council and the

¹⁷ BVerfG, *supra* n. 1, para. 317.

¹⁸ *Ibid.*, para. 319; that act of parliament would have to satisfy the requirements for amendments of the EU Treaties set out by Art. 23 GG.

European Parliament but does not require that the member states approve it.¹⁹ Thus the procedure is a wholly internal procedure for the European Union since no national authority can block the decision. Substantively, Article 352 TFEU (Lisbon) will enable the European Union to extend its own competences.²⁰ The *Bundesverfassungsgericht* expressly states that Article 352 TFEU (Lisbon) can lead to a *Kompetenz-Kompetenz* of the European Union.²¹ It therefore comes to the (inevitable) conclusion that the German representative may not approve of a proposed piece of legislation under this provision unless the German parliament has given its prior approval.

The *Bundesverfassungsgericht*'s reasoning and its solutions warrant a few comments. In sanctioning the procedures above, the *Bundesverfassungsgericht* relies on a rather formal notion of *Kompetenz-Kompetenz* and thus of sovereignty. It regards Germany to be sovereign as it (together with the other member states) still has the formal right to decide upon the extension of the European Union's competences. Ultimately the member states, at least in theory, have the right to dissolve the European Union at any time they want.²² This rather formal approach works well when dealing with the ordinary amendment procedure and also when looking at Article 48(6) TEU (Lisbon), which expressly states that it cannot lead to an increase in European Union competences and requires the member states' consent. Even when we look at Article 48(7) TEU (Lisbon), where the European Union can clearly extend its competences, this approach could have still been employed: the extension of competences is limited to changes in the decision-making procedures at Union level.

With regard to Article 352 TFEU (Lisbon), where the extension of the European Union's competences is not at all foreseeable, this is however not possible. Here the Union is clearly given a certain degree of *Kompetenz-Kompetenz*. Therefore, the court had to choose: either it could declare the Lisbon Treaty to be incompatible with the Basic Law, which would have created a major political crisis, or it could introduce a hurdle at the national level in order to prevent the erosion of national competences. It followed the latter path and requires that the German parliament beforehand approves the extension of competences in accordance with the procedural requirements for the ratification of amendments to the European Union Treaties. From the point of view of German constitutional law, the intro-

¹⁹ BVerfG, *supra* n. 1, para. 327.

²⁰ The current Art. 308 EC has been used as a basis for competence in a number of cases and has generally been interpreted widely, cf. Paul Craig and Grainne de Búrca, *EU Law*, 4th edn. (Oxford, OUP 2007) p. 93-95.

²¹ BVerfG, *supra* n. 1, para. 328.

²² BVerfGE 89, 155 (190); BVerfG, *supra* n. 1, para. 233.

duction of such a ‘clearance procedure’ ensures that the transfer of competences is sufficiently legitimised. Incidentally, it also gives the *Bundesverfassungsgericht* an opportunity to judge whether an Act of Parliament sanctioning the extension of the Community’s competences surrenders Germany’s identity as a state, the so-called *Identitätskontrolle*.²³

To conclude, the *Bundesverfassungsgericht*’s reasoning cannot hide that *under the Lisbon Treaty* the European Union has a certain *Kompetenz-Kompetenz*, albeit in certain limited areas. In addition, member states can no longer unilaterally exercise some of their powers to the detriment of the European Union and have thus lost their *Kompetenz-Kompetenz* in this respect as well.²⁴ This leads to a rather paradoxical situation: on the one hand, the *Bundesverfassungsgericht* insists that the European Union may not attain *Kompetenz-Kompetenz* and thus a degree of statehood. On the other hand, the court clearly sanctions the inclusion of provisions granting *Kompetenz-Kompetenz* to the European Union while being satisfied with the erection of national hurdles that will bind the German representative in the Council.²⁵

This shows that, at least with regard to the European Union, sovereignty is a relative concept. Both the member states and the European Union enjoy *Kompetenz-Kompetenz* in certain fields.²⁶ As Möllers has already pointed out with regard to the European Constitution, the dichotomy of dependence and autonomy is not workable for explaining the relationship between the European Union and national legal systems.²⁷ It would intellectually have been more honest and preferable if the *Bundesverfassungsgericht* had expressly recognised that legal situation.²⁸

Instead the *Bundesverfassungsgericht* chose to cling to its black-and-white approach and got tangled up in it. It is easy to understand why the court followed this path.

²³ BVerfG, *supra* n. 1, para. 240.

²⁴ A. von Bogdandy and J. Bast, ‘The European Union’s Vertical Order Of Competences: The Current Law and Proposals For Its Reform’, 39 *Common Market Law Review* (2002) p. 227 at p. 237; Schütze, *supra* n. 3, p. 1083.

²⁵ On similar procedures in other member states cf. P. Kiiver, ‘German Participation in EU Decision-Making after the *Lisbon* Case: A Comparative View on Domestic Parliamentary Clearance Procedures’, 10 *German Law Journal* (2009) p. 1287.

²⁶ J.A. Frowein, ‘Das Maastricht-Urteil und die Grenzen der Verfassungsgerichtsbarkeit’, 54 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1994) p. 1 at p. 7.

²⁷ C. Möllers ‘Pouvoir Constituant-Constitution-Constitutionalisation’, in A. von Bogdandy and J. Bast (eds.), *Principles of European Constitutional Law* (Oxford, Hart 2005) p. 184 at p. 201; in a similar manner Herdegen questions with regard to the Maastricht decision whether the BVerfG’s approach is suitable, cf. M. Herdegen, ‘Maastricht and the German Constitutional Court: Constitutional Restraints For an “Ever Closer Union”’, 31 *Common Market Law Review* (1994) p. 235 at p. 242-244.

²⁸ Interestingly, Udo di Fabio, the reporting judge in the Lisbon decision, conceded in 1993 already that the EU enjoyed a factual *Kompetenz-Kompetenz*, cf. U. di Fabio, ‘Der neue Art. 23 des Grundgesetzes’, 13 *Der Staat* (1993) p. 191 at p. 197.

Had it acknowledged that the European Union will enjoy a certain degree of sovereignty, it would have either had to declare the Lisbon Treaty incompatible with the Basic Law or it would have had to give up its long-standing jurisprudence according to which Germany must not grant any *Kompetenz-Kompetenz* to the European Union. In my view the latter should have been considered. There is nothing in the wording of the Basic Law that suggests that the European Union may not enjoy a limited degree of sovereignty as long as at the same time Germany retains its status as a state. Moreover, such a solution would be in accordance with the Basic Law's openness towards European law (*Europarechtsfreundlichkeit*) as enshrined in Article 23 GG, which the *Bundesverfassungsgericht* repeatedly emphasises.²⁹

The significance of the right to withdraw

The *Bundesverfassungsgericht* also considers its finding that Germany has not lost its sovereignty to be underlined by Article 50 TEU (Lisbon), which explicitly gives member states a right to withdraw from the European Union and sets out the procedure that needs to be followed.³⁰ At first glance at least, this provision shows that there is a crucial difference between the European Union and federal states. The constitutions of the latter do not allow their constituent states to withdraw from the federation. Under international law, such a withdrawal would have to be regarded as an illegal secession.³¹ Therefore, the explicit right to withdraw from the European Union may well be regarded as evidence for the thesis that the European Union is not a state and that the member states have not lost their sovereignty. However, the inclusion of that right can equally be regarded as a sign for the growing autonomy of the European Union legal order. As Möllers has pointed out, we must not forget that the opportunity to withdraw is granted by virtue of Article 50 TEU (Lisbon), i.e., by European law itself. Equally, the conditions for a lawful withdrawal are spelt out by the TEU and not by domestic constitutional or by international law. Therefore the Article draws the line between a lawful withdrawal (i.e., in accordance with Article 50) and an illegal withdrawal.³² Thus the *Bundesverfassungsgericht's* simple reference to Article 50 TEU (Lisbon) is not in itself a convincing argument for the total survival of the member states' sovereignty.

²⁹ BVerfG, *supra* n. 1, paras. 225, 240, 241 and 340.

³⁰ *Ibid.*, para. 329.

³¹ An ethnic minority's right to self-determination does generally not amount to a right to secession outside the context of decolonisation. On the discussion in international law, cf. S. Mancini, 'Rethinking the boundaries of democratic secession: liberalism, nationalism, and the right of minorities to self-determination', *International Journal of Constitutional Law* (2008) p. 553.

³² See Möllers, *supra* n. 27, at p. 201-202.

No mention of the codification of the implied powers doctrine

The decision warrants one last remark as regards the issue of sovereignty. The court leaves unmentioned that Articles 3(2) and 216(1) TFEU (Lisbon) contain a codification of the European Court of Justice's jurisprudence on the European Union's implied powers in external relations.³³ Article 3(2) TFEU (Lisbon) states that the 'Union shall have exclusive competence for the conclusion of an international agreement, when its conclusion is provided for in a legislative act of the Union, or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.' Article 216(1) has a similar wording. The exact extent of these provisions, and thus of the European Union's competences in external relations, is hard to foresee.³⁴ It will therefore be for the European Union itself to decide when it has an external competence, and the only body which has jurisdiction to review such a decision is the European Court of Justice, which again is an European Union institution, albeit under the supervision of the *Bundesverfassungsgericht*. The provisions clearly give the European Union a right to establish its own external competence by passing a legislative act providing for such a competence. Therefore, Article 3(2) TFEU is another provision giving the European Union some degree of *Kompetenz-Kompetenz* for external action. Why this provision escaped the scrutiny of the *Bundesverfassungsgericht* is not clear, but it is certainly striking.

IS THE EUROPEAN UNION DEMOCRATIC BECAUSE IT IS NOT A STATE?

Apart from the question of whether the member states still enjoy sovereignty and therefore statehood, the *Bundesverfassungsgericht* explores whether the European Union is in compliance with the democratic requirements of the Basic Law.³⁵ The *Bundesverfassungsgericht* came to the conclusion that the European Union complies with these requirements precisely because it is not a state and its structure is not the same as that of a state.³⁶ Article 23 GG is the provision in the Basic Law that enables the legislature to transfer competences to the European Union. Such a transfer, however, is limited by the 'eternity clause' of Article 79(3) GG, which provides that the principles laid down in Articles 1 and 20 GG, among which the principle of democracy, may not be affected. A transfer of competences must

³³ So-called parallelism, first introduced by the ECJ in Case 22/70, *Commission v. Council* [1971] ECR 263 (AETR).

³⁴ On the scope of this provision, cf. M. Cremona, 'Defining competence in EU external relations: lessons from the Treaty reform process', in A. Dashwood and M. Maresceau (eds.), *Law and Practice of EU External Relations* (Cambridge, CUP 2008) p. 34 at p. 61-63.

³⁵ Art. 20 GG requires that Germany be a democratic state.

³⁶ BVerfG, *supra* n. 1, para. 278.

therefore respect the principle of democracy. Thus it was for the *Bundesverfassungsgericht* to ascertain that the European Union complies with democratic standards.^{37, 38} This assessment leads to interesting remarks about the differences in structure between federal states and the European Union. Whether these differences justify the court's reasoning regarding democracy is, however, doubtful. I will first outline the *Bundesverfassungsgericht's* argument and then show its flaws.

The Bundesverfassungsgericht's line of argument

First, the *Bundesverfassungsgericht* points out that the Basic Law allows for the European Union, which is based on the equality of states and has been negotiated under international law, to adopt a different model of democracy than the Basic Law's.³⁹ This is possible because the Basic Law is generally open towards international law. This openness, however, cannot affect the German people's right to self-determination, which is the basis for Germany's sovereignty.⁴⁰

For the *Bundesverfassungsgericht*, the crucial point seems to be that the principle of conferred powers is preserved. As long as that is the case, the democratic legitimation provided by national parliaments and governments, which is complemented by the European Parliament, is sufficient.⁴¹ However, as soon as the threshold to a federal state is going to be crossed, the European Union will have to comply with the democratic requirements of a state.⁴² This would be the case if the European Union becomes an entity that corresponds to the federal level in a federal state.⁴³ However, this is not the case as the European Union also under Lisbon only exercises derived powers. Therefore it need not fully comply with the same democratic requirements as a member state.⁴⁴ So precisely because the European Union is not organised as a state it complies with the democratic requirements for supranational organisations set by the Basic Law.⁴⁵

The court mainly looks at the composition of the European Parliament to prove that the structure of the European Union is different to that of a state. Even after the entry into force of the Lisbon Treaty, members of the European Parliament will be elected according to national quotas. According to Article 14(2)

³⁷ Ibid., para. 244.

³⁸ Cf. D. Chalmers and A. Tomkins, *European Union Public Law* (Cambridge, CUP 2007), p. 167-177.

³⁹ BVerfG, *supra* n. 1, paras. 219 and 227.

⁴⁰ Ibid., paras. 219 and 228.

⁴¹ Ibid., para. 262.

⁴² Ibid., para. 263.

⁴³ Ibid., para. 264.

⁴⁴ Ibid., para. 271.

⁴⁵ Ibid., para. 278.

TEU (Lisbon), each member state shall be allocated a minimum of six seats but no more than 96 seats. This can lead to a considerable difference in the number of people represented by one member depending on the member state.⁴⁶ While each member state's quota is based on the size of its population the quotas still do not reflect the real differences in size.⁴⁷ Therefore, the question had to be answered, whether the democratic principle of 'one man, one vote' is infringed.

The *Bundesverfassungsgericht* holds that the rule only applies within a single people and that there is no single European people. With a view to these national quotas, the court speaks of an 'excessive federalisation' of the European Union.⁴⁸ Not only is the composition of the European Parliament determined by state quotas, but also the composition of the Council, the Commission and the Court of Justice.⁴⁹ In this context, the court mentions that the European Union's model of democracy is deficient if measured by the standards that apply within states.⁵⁰ However, since the European Union is not measured by these standards, the Lisbon Treaty does not violate the Basic Law's requirement that the European Union be democratic.

Some critical remarks

The *Bundesverfassungsgericht's* argument warrants some remarks. While I do not wish to dismiss the concerns regarding the European Union's democratic deficit, I would like to point to some inconsistencies and peculiarities in the court's argument, specifically regarding the state as opposed to the European Union.

The first point is of a more general nature and addresses the question of why the *Bundesverfassungsgericht* chose to address the problem of the democratic deficit in the way it did. The court comes to the conclusion that if the European Union were a state, its standard of democratisation would not be sufficient to satisfy the requirements of the Basic Law. But since the European Union is not a state, its democratic standards are sufficient. The *Bundesverfassungsgericht* discusses this point after having explicitly stated that under the Basic Law the European Union may not become a state, as this would automatically deprive Germany of its statehood, which is not possible under the 'eternity clause' of Article 79(3) GG. It therefore seems that the discussion of this question was wholly unnecessary, unless the aim is to criticise the state of the democracy in the European Union in general. The argument can therefore best be understood as a warning issued to the member

⁴⁶ Ibid., para. 284.

⁴⁷ The *Bundesverfassungsgericht* recalls that one German MEP represents about 857.000 citizens whereas one Maltese MEP represents about 67.000, para. 285.

⁴⁸ BVerfG, *supra* n. 1, para. 288.

⁴⁹ Ibid., para. 288.

⁵⁰ Ibid., para. 289.

states for the negotiation of future amending treaties: The court will not accept any further integration unless the democratic deficit is overcome.

Furthermore, the denial of the existence of a European people is quite remarkable in this respect since Article 9(1) TEU (Lisbon) expressly mentions the ‘citizen[s] of the Union’, Article 10(2) TEU (Lisbon) states that these Union citizens are represented in the European Parliament and Article 14(2) TEU (Lisbon) reaffirms that the ‘European Parliament shall be composed of representatives of the Union’s citizens.’ Up until now, Article 189 EC stipulated that the European Parliament consisted of a representation of the ‘peoples of the States’. Both provisions therefore clearly suggest that there is something which might be called a European people. The *Bundesverfassungsgericht*, however, was adamant that a European people does not exist and points out that representation in the European Parliament is linked to nationality and not to the equality of the citizens of the Union.⁵¹ This, however, is not true. As Halberstam and Möllers have correctly pointed out, an Italian citizen who lives in Lithuania votes for the Lithuanian contingent in the European Parliament.⁵² Therefore, when determining where a Union citizen casts his or her vote in a European election and thus by which national quota of members of the European Parliament this citizen will be represented, the decisive factor is residence and not nationality. Thus the argument against the existence of a European people is not convincing.

Another surprising point in this context is that the *Bundesverfassungsgericht* attaches only very little importance to the European Parliament as an institution of the European Union. The foremost reason why it considers European Union legislation and decision-making democratically legitimate is that the member states’ representatives in the Council have been legitimised by national parliaments.⁵³ The court therefore considers that the European Union’s structure, if measured against the principle of representative democracy, would be ‘considerably overfederalised’ (*erheblich überföderalisiert*).⁵⁴ The rationale behind this is clearly that the European Parliament is still elected in national quotas. However, what exactly constitutes excessive federalisation as opposed to ‘regular’ federalisation remains unclear. This is not surprising when one considers that measured by the *Bundesverfassungsgericht*’s standards, existing federal systems would suffer from the same defect. The constitution of the United States, for instance, provides that each state shall have at least one Representative in the House of Representatives, which leads

⁵¹ Ibid., para. 287.

⁵² D. Halberstam and C. Möllers, ‘The German Constitutional Court says “Ja zu Deutschland!”’,

10 *German Law Journal* (2009) p. 1242 at p. 1249.

⁵³ BVerfG, *supra* n. 1, para. 271.

⁵⁴ Ibid., para. 288.

to the situation that the citizens of Vermont or Wyoming are overrepresented.⁵⁵ This is even more evident when we look at the United States Senate, which consists of two senators per state, independent of the state's population. It can hardly be doubted, however, that the United States is a federal democracy.

Given the actual and future legal status of the European Parliament it is surprising that the *Bundesverfassungsgericht* considers it to be only an 'additional independent source of democratic legitimisation'.⁵⁶ The court explicitly equates the Parliament with second chambers of national parliaments, which are said to be characterised by imbalances in representation and find the Parliament not a necessary institution when it comes to democratic legitimation. Under the Lisbon Treaty the Parliament's influence will grow. The present co-decision procedure, which will become known as the ordinary legislative procedure, will be extended.⁵⁷ This means that the European Parliament's assent will be necessary for almost all pieces of Union legislation. It will therefore become as important as the Council in the ordinary European legislative process. To reduce the role of the European Parliament to one of merely complementing the Council's democratic legitimation therefore denies its importance.

The *Bundesverfassungsgericht* seems to attach fundamental importance to the fact that the European Union only exercises powers that are derived from the member states. This seems to have influenced the court's leniency with regard to the democratic standards with which the European Union must comply.⁵⁸ Nevertheless, it could be argued that it should not make a difference for the question of democratic legitimacy whether the European Union enjoys its powers thanks to the member states' sovereignty or as a result of its own sovereignty. In this context, it is interesting to note that at another place in the decision, the *Bundesverfassungsgericht* draws a comparison between the European Union's derived autonomy and that of local self-government.⁵⁹ However, it is hardly conceivable that the *Bundesverfassungsgericht* would at the local level accept the democratic deficits it finds in the Union. Article 28(1) GG, which deals with local government, explicitly provides that local government must be democratic and that it must be based on the principle of equal elections. Therefore, the court's comparison with local government is not convincing. Merely pointing at the fact the European Union's powers are derived from those of the member states is therefore not a sufficient justification for different democratic standards.

⁵⁵ Example taken from C. Schönberger, 'Lisbon in Karlsruhe: *Maastricht's* Epigones at Sea', 10 *German Law Journal* (2009); Art. I, s. 2 of the US Constitution.

⁵⁶ BVerfG, *supra* n. 1, para. 271.

⁵⁷ Art. 294 TFEU (Lisbon).

⁵⁸ BVerfG, *supra* n. 1, para. 271.

⁵⁹ *Ibid.*, para. 231.

CONCLUSION

The *Bundesverfassungsgericht's* doctrine as regards the transfer of competences onto the European Union is based on the premise that Germany must not give up its own statehood.⁶⁰ The problem the court faces is that it equates the relinquishment of statehood with the transfer of sovereignty (*Kompetenz-Kompetenz*). Even though it could be argued that the European Union has gained some degree of sovereignty, the court had to deny that fact in order to be able to declare the Lisbon Treaty constitutional. Nonetheless, it was obviously not satisfied with such an outcome. This is why it introduced the requirement for a national clearing procedure in cases of a transfer of further competences on the European Union. And for the same reason the court felt the need to dedicate seven paragraphs of its judgment to argue why the European Union's democratic standards would not be satisfactory if the European Union were a state.⁶¹ These remarks can therefore only be understood as a warning. The *Bundesverfassungsgericht* makes it clear that it would not tolerate a further transfer of competences onto the European Union should the problem of the democratic deficit not be resolved.

The Lisbon decision shows that the *Bundesverfassungsgericht* had to struggle to reconcile an increasingly state-like European Union with the requirements of the Basic Law, and especially the preservation of Germany's statehood. Despite the criticism of the *Bundesverfassungsgericht's* reasoning, its concerns about the state of democracy in the European Union should not be disregarded. It is dissatisfying for Union citizens from large member states that their vote in a European election carries less weight than that of a Union citizen living in a smaller member state. Equally, the court is correct in pointing out that democracy needs a viable public opinion, which at present does not exist due to the lack of a European public.⁶² In order to show that the Lisbon Treaty nonetheless satisfies the requirements of the Basic Law, the *Bundesverfassungsgericht* chose to point out the differences between the European Union and a sovereign state. In doing so, it was obviously the intent to uphold the Lisbon Treaty. Yet the court equally did not want to compromise on the requirements for democratic standards and the strict definition of sovereignty. This explains why parts of the decision appear so contradictory.



⁶⁰ Art. 23(1) and 79(3) GG.

⁶¹ BVerfG, *supra* n. 1, paras. 289-295.

⁶² *Ibid.*, paras. 250-251.