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The *Bundesverfassungsgericht* on the Lisbon Treaty and Why the European Union Is Not a State: Some Critical Remarks

By Tobias Lock*

INTRODUCTION

The article will focus on remarks made in the German Federal Constitutional Court's (*Bundesverfassungsgericht*) decision on the Lisbon Treaty regarding the differences between national and international (or rather supranational) law and structure.¹ While holding the Lisbon Treaty² to be compatible with the German Constitution, the Basic Law (*Grundgesetz* – GG), the *Bundesverfassungsgericht* explored, amongst other issues, whether the European Union had attained statehood and whether the European Union's democratic standards were in accordance with the Basic Law's requirements. The *Bundesverfassungsgericht's* remarks on these two questions reveal its conception of the differences between the state and supranational organizations. 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 as tolerable precisely because the European Union is not a state. This surprising argument will be the basis of a critical evaluation of the *Bundesverfassungsgericht's* implicit denial of the European Parliament's importance and the claim that there is no 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

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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.

Europe's 'statist' tradition, according to which sovereignty is indivisible.³ It will be demonstrated that the *Bundesverfassungsgericht'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 must not lead to Germany losing its statehood. Article 23 (1) GG, which provides the legal basis for German integration in the European Union⁴, expressly states that any Act of Parliament ratifying a treaty amending the treaty foundations of the European Union is subject to the Basic Law's 'eternity guarantee clause' Article 79 (3) GG. That article outlaws amendments to the Basic Law which 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* phrased it as follows:⁵

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.

Therefore, the *Bundesverfassungsgericht* entered 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 Jellinek*⁶ 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 latter element. The *Bundesverfassungsgericht's* line of argument whether Germany would lose its sovereignty by ratifying the Lisbon Treaty does not differ from that of the Maastricht decision.⁸ According to the *Bundesverfassungsgericht*, a state is sovereign when it has the *Kompetenz-Kompetenz*, i.e., the competence to determine its own competences. The Basic Law prohibits the transfer of that

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.

⁵ *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, para 228; 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 (visited 15 September 2009).

⁶ G. Jellinek, *Allgemeine Staatslehre*, 3rd edn. (Springer, Berlin 1922) p. 183: 'Als Rechtsbegriff ist der Staat demnach als die mit ursprünglicher Herrschaftsmacht ausgerüstete Körperschaft eines selbständigen 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 C.M.L.R. 57.

competence on the European Union.⁹ The member states must therefore remain 'masters of the Treaties'.¹⁰ The European Union can thus only enjoy competences derived from those of the member states.¹¹ Thus 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 not only a principle of European law but also warranted by the Basic Law.¹² The member states as sovereign states must remain the source of all the competences enjoyed by the European Union. They must be able to revoke the competences at any time.

In the Lisbon decision, the *Bundesverfassungsgericht* was faced with the question whether, measured by these strict standards, the Lisbon Treaty was a step too far. I want to critically examine two points that the *Bundesverfassungsgericht* addressed while concluding that the European Union 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 *Bundesverfassungsgericht* 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.¹³ 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 conferred *Kompetenz-Kompetenz* on the European Union.

Regarding the simplified revision procedure outlined in Article 48 (6) TEU (Lisbon), the *Bundesverfassungsgericht* came to the conclusion that the Treaty did not endow the European Union with *Kompetenz-Kompetenz* as that article expressly states that it cannot increase the European Union's competences.¹⁴ 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 but rather declares a wholly internal procedure to be sufficient. The latter clearly reminds us of the amendment procedures of a domestic constitution and the provision can

⁹ BVerfG, n 5 *supra*, para 233; BVerfGE 89, 155 (187-188).

¹⁰ BVerfG, n 5 *supra*, para 231.

¹¹ BVerfG, n 5 *supra*, para 231.

¹² BVerfG, n 5 *supra*, para 234; the principle can be found in the present Art 5 (1) EC and in Art 5 TEU (Lisbon).

¹³ Art. 48 (2) TEU (Lisbon).

¹⁴ BVerfG, n 5 *supra*, para 314.

therefore be seen as a state-like element in the TEU. Substantively, Art. 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 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 dealing with a simplified revision of the Treaties is Art. 48 (7) TEU (Lisbon), which goes a good deal further. According to that article, the Council and the European Parliament can change the majority required for certain decisions from unanimity to a qualified majority, unless a national Parliament opposes that extension of qualified majority voting. In contrast to Article 48 (6) TEU (Lisbon), the consent of all the member states is not required, making the procedure even more state-like and only granting national parliaments a right to veto. It is, therefore, a wholly internal amendment procedure such as can be found in domestic constitutions. 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.¹⁵ Therefore, the introduction of Article 48 (7) must be regarded as conferring on the European Union the power to decide upon the scope of some of its own competences 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 reacted and 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.¹⁶

Even more obviously, the European Union enjoys *Kompetenz-Kompetenz* with regard to the new Article 352 TFEU (Lisbon), which extends the scope of present Article 308 EC, to all policy areas. According to that provision, the European Union can act even in fields for which it has no competence, where action 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 European Parliament but does not require that the member states approve in accordance with their constitutions.¹⁷ Thus the procedure is again a wholly internal procedure for the European Union. Moreover substantively, Article 352 TFEU (Lisbon) will enable the European Union to extend its own competences quite considerably.¹⁸ The *Bundesverfassungsgericht* expressly stated that Article 352 TFEU (Lisbon)

¹⁵ BVerfG, n 5 *supra*, para 317.

¹⁶ BVerfG, n 5 *supra*, para. 319; that act of parliament would have to satisfy the requirements for amendments of the EU Treaties set out by Art. 23 GG.

¹⁷ BVerfG, n 5 *supra*, para 327.

¹⁸ 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 2007), 93-95.

could lead to a *Kompetenz-Kompetenz* of the European Union and therefore found a similar solution as regards Article 48 (7) TEU (Lisbon).¹⁹ The German representative must not approve of a proposed piece of legislation 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* relied 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.²⁰ 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 majority needed for decisions at internal level. The *Bundesverfassungsgericht* could therefore have argued that a national Parliament ratifying the Treaty can foresee the amendments and therefore this further transfer of competences on the European Union is covered by the ratifying act. Nonetheless, the *Bundesverfassungsgericht* itself must have obviously regarded that provision as laying down a *Kompetenz-Kompetenz* for the European Union. Otherwise it would not have required a national approval of the use of Article 48 (7) on a case-by-case basis.

With regard to Article 352 TFEU (Lisbon), where the extension of the European Union's competences is not at all foreseeable, the *Bundesverfassungsgericht* also realized that the European Union was given a certain degree of *Kompetenz-Kompetenz*. Therefore, the *Bundesverfassungsgericht* 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 national level in order to prevent the erosion of national competences. The *Bundesverfassungsgericht* followed the latter path. Therefore, the *Bundesverfassungsgericht* required that the German parliament decide in accordance with the procedural requirements for the ratification of amendments to the European Union Treaties, before the German representative in the Council may vote for the extension of competences. From the point of view of German constitutional law, the introduction of such a clearance procedure is sufficient: It ensures the participation of the German parliament when it comes to the extension of European Union competences and thus ensures that the transfer of competences is sufficiently legitimized. Incidentally it also gives the *Bundesverfassungsgericht* an opportunity to review the constitutionality of each of these parliamentary decisions. The *Bundesverfassungsgericht*

¹⁹ BVerfG, n 5 *supra*, para 328.

²⁰ BVerfGE 89, 155 (190); BVerfG, n 5 *supra*, para 233.

explicitly terms this type of review ‘identity review’ (*Identitätskontrolle*). The *Bundesverfassungsgericht* employs this new term because it will have to judge whether an Act of Parliament sanctioning the extension of the Community’s competences surrenders Germany’s identity as a state.²¹

The *Bundesverfassungsgericht*’s reasoning is, however, not sufficient to distract us from the fact that *under the Treaties* the European Union has *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.²²

This leads to a rather paradoxical situation: on the one hand, the *Bundesverfassungsgericht* insists that Germany must not agree to the European Union attaining *Kompetenz-Kompetenz* and thus a degree of statehood. On the other hand, the judges clearly sanction the inclusion of provisions granting *Kompetenz-Kompetenz* to the European Union while being satisfied with the erection of national hurdles, which will bind the German representative in the Council.²³ 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.²⁴ As Möllers has already pointed out with regard to the failed European Constitution, the dichotomy of dependence and autonomy is not a workable concept for explaining the relationship between the European Union and national legal systems.²⁵ It would have been more honest and preferable if the *Bundesverfassungsgericht* had expressly recognized that legal situation.²⁶ Such recognition of a limited sovereignty of the European Union would not have been a novelty but would have been in the American federalist tradition.²⁷ Instead the *Bundesverfassungsgericht* chose to cling to its black and white approach and got tangled up in it. However, had the *Bundesverfassungsgericht* acknowledged that the European Union will now 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. I suggest that the latter

²¹ BVerfG, n 5 *supra*, para 240.

²² 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 n 3, p. 1083.

²³ 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.

²⁴ 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.

²⁵ C. Möllers ‘Pouvoir Constituant-Constitution-Constitutionalisation’ in A. von Bogdandy and J. Bast (eds.), *Principles of European Constitutional Law* (Hart, Oxford 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.

²⁶ 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.

²⁷ Schütze n 33 *supra*, p 1077 et seq.

should have been considered. There is nothing in the wording of the Basic Law that suggests that the European Union must not enjoy a limited degree of sovereignty while at the same time Germany retaining 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 emphasizes.²⁸

The significance of the right to withdraw

The *Bundesverfassungsgericht* also grounds its finding that Germany has not lost its sovereignty in 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.²⁹ 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.³⁰ 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.³¹ Thus the *Bundesverfassungsgericht's* simple reference to Article 50 TEU (Lisbon) is not in itself a convincing argument for the member states' sovereignty.

No mention of the codification of the implied powers doctrine

The *Bundesverfassungsgericht's* decision warrants one last remark as regards the issue of sovereignty. The judges leave unmentioned the fact that Articles 3 (2) and 216 TFEU (Lisbon) contain a codification of the European Court of Justice's jurisprudence on the European Union's implied powers in external relations.³² Article 3 (2) TFEU (Lisbon) is phrased in a rather vague manner, stating 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

²⁸ BVerfG, n 5 *supra*, paras 225, 240, 241 and 340.

²⁹ BVerfG, n 5 *supra*, paras 225, 240, 241 and 340.

³⁰ An ethnic minority's right to self-determination does generally not amount to a right to secession outside the context of decolonization. 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.

³¹ C. Möllers, n 25, at p. 201-202.

³² So-called parallelism, first introduced by the ECJ in Case 22/70, *Commission v Council* [1971] ECR 263 (AETR).

common rules or alter their scope'. Art. 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.³³ 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. Thus the provision clearly gives 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 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* explored whether the European Union is in compliance with the democratic requirements of the Basic Law.³⁴ The *Bundesverfassungsgericht* came to the conclusion that the European Union exactly complies with these requirements because it is not a state and its structure is not laid out in analogy to a state.³⁵ Article 23 GG is the provision in the Basic Law which enables the legislature to transfer competences on the European Union. Such a transfer, however, is limited by the 'eternity guarantee clause' of Article 79 (3) GG, which provides that the principles laid down in Articles 1 and 20 GG must not be affected. Article 20 (1) GG contains the principle of democracy so that a transfer of competences can only take place where the principle of democracy is respected. Thus it was for the *Bundesverfassungsgericht* to ascertain that the European Union complies with democratic standards.³⁶ Given the background of the much-discussed democratic deficit at European Union level,³⁷ this assessment proved to be of particular interest as it led to interesting remarks about the differences in structure between a federal state and the European Union. Whether these differences justify the *Bundesverfassungsgericht's* reasoning regarding democracy is however doubtful. I will therefore first outline the *Bundesverfassungsgericht's* argument and then show that it contains certain flaws.

The Bundesverfassungsgericht's line of argument

First, the *Bundesverfassungsgericht* pointed out that the Basic Law allows for the European Union to adopt a different model of democracy than the Basic

³³ 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* (CUP, Cambridge 2008) p. 34, at p. 61-63.

³⁴ Art. 20 GG requires that Germany be a democratic state.

³⁵ BVerfG, n 5 *supra*, para 278.

³⁶ BVerfG, n 5 *supra*, para 244.

³⁷ Cf. D. Chalmers and A. Tomkins *European Union Public Law* (CUP, Cambridge 2007), p. 167-177.

Law's due to the requirements of a European Union that is based on the equality of states and that has been negotiated under international law.³⁸ 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.³⁹

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.⁴⁰ However, as soon as the threshold to a federal state has been crossed, the European Union would have to comply with the democratic requirements of a state.⁴¹ This would be the case if the European Union had become an entity that corresponded to the federal level in a federal state.⁴² The *Bundesverfassungsgericht*, however, was quick to point out that the European Union only exercised derived powers and therefore need not fully comply with the same democratic requirements as a member state.⁴³ The *Bundesverfassungsgericht* rather concluded that precisely because the European Union is not laid out in analogy to a state, it complied with the democratic requirements for supranational organizations set by the Basic Law.⁴⁴ The judges mainly looked at the composition of the European Parliament in order 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) 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. The composition of the European Parliament will still be greatly influenced by the international legal principle of sovereign equality of states.⁴⁵ 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.⁴⁶ Therefore, the question had to be answered, whether the democratic principle of 'one man, one vote' is infringed. The *Bundesverfassungsgericht* held that the rule only applied within a people and consequently went on to explain that there is no single European people. With view of these national quotas, the *Bundesverfassungsgericht* speaks of an 'excessive federalization' of the European Union.⁴⁷ 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.⁴⁸ In this context, the *Bundesverfassungsgericht* mentions that the European Union's model of

³⁸ BVerfG, n 5 *supra*, paras 219 and 227.

³⁹ BVerfG, n 5 *supra*, paras 219 and 228.

⁴⁰ BVerfG, n 5 *supra*, para 262.

⁴¹ BVerfG, n 5 *supra*, para. 263.

⁴² BVerfG, n 5 *supra*, para. 264.

⁴³ BVerfG, n 5 *supra*, para 271.

⁴⁴ BVerfG, n 5 *supra*, para 278.

⁴⁵ BVerfG, n 5 *supra*, para. 284

⁴⁶ The *Bundesverfassungsgericht* recalls that one German MEP represents about 857.000 citizens whereas one Maltese MEP represents about 67.000, para. 285.

⁴⁷ BVerfG, n 5 *supra*, para 288.

⁴⁸ BVerfG, n 5 *supra*, para 288.

democracy is deficient if measured by the standards that would apply within states.⁴⁹ 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 *Bundesverfassungsgericht's* argument, specifically regarding the *Bundesverfassungsgericht's* understanding of the state as opposed to the European Union.

The first point to be made 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 *Bundesverfassungsgericht* came to the conclusion that if the European Union were a state, its standard of democratization 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* discussed this point after it had explicitly stated that under the Basic Law the European Union cannot become a state, as this would automatically deprive Germany of its statehood, which is not possible under the 'eternity guarantee clause' of Article 79 (3) GG. It therefore seems that the *Bundesverfassungsgericht's* discussion of this question was wholly unnecessary, unless it was its aim to criticize the state of the democracy in the European Union in general. The argument can therefore only be understood as a general warning issued to the member states for the negotiation of future amending treaties.

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'. Thus the aforementioned articles were clearly designed to change that and create a European people. Both provisions therefore clearly suggest that there is a European people. The *Bundesverfassungsgericht*, however, was adamant that a European people did not exist and pointed out that representation in the European Parliament was linked to nationality and not to the equality of the citizens of the Union.⁵⁰ 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.⁵¹ Therefore, when determining where a Union citizen casts their vote in a European election and thus by which national

⁴⁹ BVerfG, n 5 *supra*, para 289.

⁵⁰ BVerfG, n 5 *supra*, para 287.

⁵¹ D. Halberstam and C. Möllers 'The German Constitutional Court says "Ja zu Deutschland!" 10 German Law Journal (2009) p. 1242, at p. 1249.

quota of members of the European Parliament this citizen will be represented, the decisive factor is residence and not nationality. Thus there is considerable doubt whether the *Bundesverfassungsgericht's* argument against the existence of a European people is 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 to be democratically legitimate is because the member states' representatives in the Council have been legitimized by national parliaments.⁵² The *Bundesverfassungsgericht* therefore considers that the European Union's structure, if measured against the principle of representative democracy, shows 'excessive federalisation' (*erhebliche Überföderalisierung*).⁵³ The rationale behind this is clearly that the European Parliament is still elected in national quotas. However, what exactly constitutes an 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 to the citizens of Vermont or Wyoming to be overrepresented.⁵⁴ 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 legal status of the European Parliament it is surprising that the *Bundesverfassungsgericht* only considers it to be an 'additional independent source of democratic legitimisation'.⁵⁵ The *Bundesverfassungsgericht* therefore only regards the European Parliament as fulfilling a complementary role, as the European Union is legitimized through its member states and not directly through the people. The *Bundesverfassungsgericht* explicitly equated it with second chambers of national parliaments, which are said to be characterized by imbalances in representation. The *Bundesverfassungsgericht* therefore does not regard the European Parliament to be a necessary institution when it comes to the question of democratic legitimation. This factual denial of the European Parliament's importance is significant considering that its influence will grow even after the Lisbon Treaty has entered into force. The present co-decision procedure, which will become known as the ordinary legislative procedure, has been extended.⁵⁶ This means that the European Parliament's assent will be necessary for most 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 merely complementing the Council's democratic legitimation denies its actual importance and is only accurate where another legislative procedure is followed.

⁵² BVerfG, n 5 *supra*, para 271.

⁵³ BVerfG, n 5 *supra*, para 288.

⁵⁴ 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.

⁵⁵ BVerfG, n 5 *supra*, para 271.

⁵⁶ Art. 294 TFEU (Lisbon).

The *Bundesverfassungsgericht* seems to attach considerable importance to the fact that the European Union only exercises powers that are derived from the member states. This seems to have influenced the *Bundesverfassungsgericht's* leniency with regard to the democratic standards with which the European Union must comply.⁵⁷ The argument seems to be rooted in the *Bundesverfassungsgericht's* denial of the European Union's sovereignty and thus the possibility of the European Union exercising powers in its own right as the European Union is not a State. It has been argued above that the *Bundesverfassungsgericht's* black and white approach towards sovereignty is not suited to the European Union. It should not make a difference for the question democratic legitimacy whether the European Union enjoys its powers thanks to the member states' sovereignty or as a result of its own sovereignty. For this reason alone, the decision between original and derived powers is not convincing. 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.⁵⁸ However, it is hardly conceivable that the *Bundesverfassungsgericht* would accept the democratic deficits described by it at local level. 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 *Bundesverfassungsgericht's* comparison with local government does not scan. 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.

CONCLUSION

Why did the *Bundesverfassungsgericht* reason thus? I suggest that the *Bundesverfassungsgericht* had to avoid stepping into the traps it had laid itself. As has been shown above, the European Union enjoys limited sovereignty in various fields and the *Bundesverfassungsgericht*, at least implicitly, admits that.

As mentioned above, 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.⁵⁹ The problem the *Bundesverfassungsgericht* faces is that it equates the relinquishing of statehood with the transfer of sovereignty (*Kompetenz-Kompetenz*). Even though it could be argued that the European Union has gained some degree sovereignty, the *Bundesverfassungsgericht* had to deny that fact in order to be able to declare the Lisbon Treaty constitutional. Nonetheless, the *Bundesverfassungsgericht* 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 *Bundesverfassungsgericht* felt the need to dedicate seven paragraphs of its judgment to an argument why the European Union's democratic standards would not be satisfactory if the European Union were a

⁵⁷ BVerfG, n 5 *supra*, para 271.

⁵⁸ BVerfG, n 5 *supra*, para 231.

⁵⁹ Art. 23 (1) and 79 (3) GG.

state.⁶⁰ These remarks can therefore only be understood as a warning: The *Bundesverfassungsgericht* made it clear that it would not tolerate a further transfer of competences onto the European Union should the democratic deficit not be removed.

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, the most important requirement being 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 *Bundesverfassungsgericht* 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.⁶¹ In order to show that the Lisbon Treaty nonetheless satisfied 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 *Bundesverfassungsgericht's* intent to uphold the Lisbon Treaty. Yet the *Bundesverfassungsgericht* 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 contradictory.

⁶⁰ BVerfG, n 5 *supra*, paras 289-295.

⁶¹ BVerfG, n 5 *supra*, paras 250-251.