Notre Europe
Thinking a united Europe
Penser l'unité européenne

Karlsruhe's Europe

Katrin AUEL and Julio BAQUERO CRUZ

Study & Research 78

Studies & Research 78

Karlsruhe's Europe

By Katrin AUEL and Julio BAQUERO CRUZ

Katrin AUEL

Katrin Auel is a Lecturer in Politics and a Fellow at Mansfield College, University of Oxford and Visiting Fellow at the Centre d'études européennes, Sciences Po Paris. After completing her studies at the University of Konstanz, she held positions at the University of Halle-Wittenberg and the University of Hagen, where she also received her PhD. She has also held visiting posts at Waseda University, Tokyo, the University of Halle-Wittenberg and Stanford University (in Oxford). Her research focuses on Europeanisation, legislative studies, and multilevel governance (EU, German federalism) with a particular interest in the role of national parliaments in EU affairs.

Julio BAQUERO CRUZ

Member of the Legal Service of the European Commission since March 2009. He is also visiting professor at Sciences Po (Paris) and at Universidad San Pablo CEU/Fundación Ortega y Gasset (Madrid). From January 2007 to February 2009 he was a Research Fellow at the Centro de Estudios Políticos y Constitucionales and an Associate Professor at Universidad Carlos III of Madrid. He has been a Marie Curie Fellow at the Robert Schuman Centre (2005-2006). He holds a Ph.D. from the European University Institute, an LL.M. from the College of Europe and a Spanish Law degree. From 2000 to 2004 he was a référendaire at the European Court of Justice, first in the chambers of President Rodríguez Iglesias (2000-2003), then with Advocate General Poiares Maduro (2003-2004). He has lectured and published extensively on European Union law. His publications include: *Between Competition and Free Movement: The Economic Constitutional Law of the European Community* (Hart, 2002); "Beyond Competition: Services of General Interest and European Community Law", in G. de Búrca (ed.), *EU Law and the Welfare State* (OUP, 2005) and "The Legacy of the Maastricht-Urteil and the Pluralist Movement", *European Law Journal*, 2008.

Notre Europe

Notre Europe *is an independent think tank devoted to European integration. Under the guidance of Jacques Delors, who created* Notre Europe *in 1996, the association aims to "think a united Europe."*
Our ambition is to contribute to the current public debate by producing analyses and pertinent policy proposals that strive for a closer union of the peoples of Europe. We are equally devoted to promoting the active engagement of citizens and civil society in the process of community construction and the creation of a European public space.

In this vein, the staff of Notre Europe *directs research projects; produces and disseminates analyses in the form of short notes, studies, and articles; and organises public debates and seminars. Its analyses and proposals are concentrated around four themes:*
• *Visions of Europe: The community method, the enlargement and deepening of the EU and the European project as a whole are a work in constant progress.* Notre Europe *provides in-depth analysis and proposals that help find a path through the multitude of Europe's possible futures.*
• *European Democracy in Action: Democracy is an everyday priority.* Notre Europe *believes that European integration is a matter for every citizen, actor of civil society and level of authority within the Union.* Notre Europe *therefore seeks to identify*

promote ways of further democratising European governance.

• *Cooperation, Competition, Solidarity: « Competition that stimulates, co-operation that strengthens, and solidarity that unites ». This, in essence, is the European contract as defined by Jacques Delors. True to this approach,* Notre Europe *explores and promotes innovative solutions in the fields of economic, social and sustainable development policy.*

• *Europe and World Governance: As an original model of governance in an increasingly open world, the European Union has a role to play on the international scene and in matters of world governance.* Notre Europe *seeks to help define this role.*

Notre Europe *aims for complete freedom of thought and works in the spirit of the public good. It is for this reason that all of* Notre Europe*'s publications are available for free from our website, in both French and English: www.notre-europe.eu. Its Presidents have been successively, Jacques Delors (1996-2004), Pascal Lamy (2004-05), and Tommaso Padoa-Schioppa (since November 2005).*

Foreword

When on June 30th 2009, the German Constitutional court delivered its ruling on the Lisbon Treaty, it met with mixed feelings. On the one hand, by recognising the compatibility of the Treaty with the Basic law, it made possible its ratification by the German President, thereby removing one of the last stumbling blocks on the rocky road to its eventual coming into force. On the other hand, the detailed analysis of European Union it contained was widely perceived as a hostile signal by most readers.

Unlike its 1993 forerunner on the Maastricht Treaty, this ruling did not limit itself to signalling a degree of discontent with the current scope and pace of the integration process, but clearly erected barriers to further integration, by demanding a closer parliamentary scrutiny of decisions taken in Brussels and by threatening to oppose the implementation in Germany of EU rules that would violate the subsidiarity principle. In other words, the objections it raised were more than rhetorical: they aimed at exerting pressure on the federal government.

One year on, it seems clear that this ruling will have a lasting impact on Germany's European policy. In the discussion on the assistance package to Greece, for

instance, opponents to a German participation in the stabilisation effort decided to bring the matter before the Constitutional court. But the latter's influence will also be felt beyond the German borders. The weight of Germany and the prestige of its institutions are such that the Court's concerns are likely to find an echo in other countries, all the more so because the intergovernmental view of Europe that it promotes resonates with the current mood and practice. Hence the need to analyse in detail the implications of this ruling, not only for Germany, but for the rest of Europe as well. This is the ambition of this study, which will focus on two issues of central importance: the impact of the ruling on the authority of EU law, and the role of national parliaments.

Table of Contents

I - A Juridical Götterdämmerung: The Lisbon Decision of the German Constitutional Court

Julio Baquero Cruz*

Zu deinem Unheil
wahrst du den Ring!

1.1. Waiting for Karlsruhe

Once again all Europe, or at least most Europeans with an interest in European affairs, were waiting for Karlsruhe. As with the Maastricht Treaty, the fate of the Treaty of Lisbon, an important step in the process of integration, seemed to depend on what the second chamber of the German Constitutional Court would say about a number of appeals which alleged that that Treaty breached the German Basic Law.

* The opinions contained in this essay are purely personal and do not necessarily reflect the views of the Commission or of its Legal Service. Thanks are due to Julian Currall, Renaud Dehousse, Jürgen Grunwald, Jan Komárek and Franz Mayer for various help, comments and criticism. Respectfully inscribed to the memory of Pierre Pescatore (1919-2010).

The German Court had three basic options. First, it could have declared the Treaty unconstitutional, permanently blocking ratification by Germany. Second, it could have declared the Treaty compatible with the Basic Law, saying little else and reserving any possible problem for concrete cases that could be brought before it in future. Third, it could have done the same, but with such provisos and reservations that the political and legal potential of the Lisbon Treaty would be severely damaged before it entered into force. Finally, the intervention of the German Court could have slowed down ratification in Germany with very negative collateral effects for the prospects of the Treaty.

Indeed, at the time some thought that before the Treaty of Lisbon came into force an early election could take place in the United Kingdom, where the Conservative leader had announced that if he won he would withdraw his country's ratification of the Treaty, submitting it to a referendum. Knowing the popular level of support for integration in that country, the situation was worrying. It could indeed have led to the demise of the Lisbon Treaty, deepening the political crisis of the Union created by the rejection of the Treaty establishing a Constitution for Europe, or else to testing the United Kingdom's commitment to the European Union.

There were therefore many reasons to sigh with relief when the German Court delivered its judgment on 30 June 2009.[1] The Treaty of Lisbon was declared compatible with the Basic Law, with some provisos and if interpreted in a certain way. Its accompanying laws were held unconstitutional in part and had to be amended to provide for stronger participation of the German legislature (*Bundesrat* and *Bundestag*) in a number of procedures provided for by the Treaty. The necessary internal amendments to the accompanying laws were adopted during the summer, before anything could go wrong elsewhere, and the Treaty of Lisbon came into force on 1 December 2009, after the second decision of the Czech Constitutional Court on the Treaty of Lisbon (judgment of 3 November 2009) and the resolution of the last-minute concerns raised by the president of the Czech Republic, an incident which showed once again that it almost takes a miracle to revise the Treaty with 27 Member States and the current revision procedure.

1 BVerfGE, 2 BvE 2/08, of 30 June 2009, available in the original German and in English translation at www.bundesverfassungsgericht.de. The paragraphs of the decision will be cited in the text of this paper.

After the sigh came calm, and with calm the time to try and digest that long and complex judgment (72 pages and 421 paragraphs). It was hard to digest. The judgment could not be broken down into manageable parts and assimilated. It would not assist one's understanding of the relationship between Union law and German constitutional law. It would not help develop it or guide the actors involved in it. It could clip the wings of the Lisbon Treaty before it started to fly, with very negative effects on integration. The judgment just stood there, like a solid piece of masonry, erected to be seen and admired by those who made it, not a bridge but a capricious wall.

It is now time to resume the effort of digestion and to assess the damage.

1.2. What is New in the Lisbon Decision?

Nobody seriously expected that the German Court would radically change its prior position, becoming truly friendly to European Union law and aligning its views with those of the European Court of Justice. What most people expected was a restatement of the Maastricht decision.[2] And most of the judgment on the Lisbon Treaty can indeed be seen as a restatement.

We already knew, for example, that for the German Constitutional Court Article 38 of the Basic Law gives a fundamental right to each German citizen to live under a democratic system in which a sufficient level of political participation is guaranteed. We also knew that for that Court Union law is not an autonomous legal order. It has no legal force of its own in Germany. It acquires it only when the German legislature accepts that the Treaty and its subsequent reforms, and the law adopted pursuant to them are applicable in Germany. We also knew that for the German Court the Union is not a federal State but only an association of sovereign states (*Staatenverbund*) and that the Member States remain the "masters of the Treaty", that the Union has no people but just *peoples*, the peoples of the Member States,

2 BVerfGE 89, 155, of 12 October 1993; English translation in *Common Market Law Reports*, 1994, Vol. 69, No. 2, p. 57. On this judgment and its consequences, see my article "The Legacy of the Maastricht-Urteil and the Pluralist Movement", *European Law Journal*, Vol. 14, No. 4, 2008, pp. 389-422.

while Germany does have a people, and a sovereign one for that matter, which is why Germany is endowed with an autonomous legal order.

We knew as well that for the German Court democracy in Europe is not comparable with democracy in Germany or in other Member States. As a result, the Union is also a derived order in terms of legitimacy: it only has a complementary form of legitimacy, while the main part of it remains with the Member States. That means that the Member States must retain important responsibilities and not be deprived of their functions. That also means that the Union has no power to determine its own competences, while Germany does have such a meta-competence, and that while the interpretation of Union competences might be flexible, it is not unlimited. Acts based on interpretations of those competences which amount to a revision of the Treaty, going beyond acceptable interpretation, would not be applicable in Germany. The German Court would watch over this, although its control will remain limited, to be invoked only in exceptional circumstances. We also knew that the German Court would not normally double-check the decisions of the European Court of Justice concerning fundamental rights, at least as long as the level of protection afforded by Union law remains generally equivalent to that offered by the German Basic Law.

But alongside these well-known things there were some novelties, most of them inimical to European integration, pointing to a more aggressive stance that was truly surprising.[3]

First, all the limits enshrined in the previous case-law are now related to an identity review which is very clearly grounded on the "eternity clause" of the German Basic Law (Article 79(3), the clause according to which the core of the Basic Law cannot be amended). The German Court makes clear that its review will be limited and exceptional, but it also implies that not even a revision of the Basic Law could overcome this reservation. A new German constitution would be needed, a step that is reserved "to the directly declared will of the German people alone" (par. 228).

3 Miguel Poiares Maduro and Gianluca Grasso, "Quale Europa dopo la sentenza della Corte costituzionale tedesca sul Trattato di Lisbona?", *Il Diritto dell'Unione Europea*, 3/2009, pp. 503-529, have referred to a new "aggressive constitutional pluralism", which, they suggest, has replaced the former "defensive constitutional pluralism" (at p. 527).

Second, where the Maastricht decision had been rather open about the future development of democracy in Europe, accepting that it could be deepened in future through a reinforcement of the powers of the European Parliament and the consolidation of a European public space, the Lisbon decision seems to banish the Union forever from the paradise of *true* democracy, which would be confined to nation-States. The European Parliament does not represent the European people but the peoples of the Member States (par. 284), and it does so in a disproportionate and discriminatory manner, so much so that it is seen as a deficient and purely additional democratic organ. The system as a whole seems to show "excessive federalisation" (par. 288), since the principle of equality among the Member States prevails too much over the principle of equality among citizens. Legitimacy, therefore, would rest mainly with national institutions and political processes. The Union could only become a true democracy if it were transformed into a federal State to be organised along strict democratic lines. But for that to be possible Germany would need to give itself a new constitution, because the present Basic Law cannot be amended to achieve that. Since a change of constitution does not seem to be politically feasible in Germany, a European federation – whatever that means – is now out of the question, at least if Germany is to be part of it.

These two tenets lead to new consequences. Where the Maastricht decision had been vague about what functions must be preserved by Germany in order not to be deprived of its "stateness", the German Court now comes up with a series of very concrete fields which are seen as essential State functions: criminal law and procedure, fundamental fiscal decisions on public revenue and public expenditure, the internal and external use of force, social policy, education, culture, language, media, family law and the regulation of religious communities. In these fields, Germany must retain sufficient responsibilities and a "substantial space of action" (par. 253), or "overall responsibility, with sufficient space for political discretion" (par. 256), or the capacity to take "the essential decisions" (par. 259). In contrast, the action of the Union in these fields must remain secondary. It also seems that in these areas a narrow interpretation of Union competences (presumably narrower than in other fields) is mandatory.

A second concrete consequence: in all the new procedures included in the Treaty of Lisbon that may entail a major change without a Treaty revision (simplified revision procedure, several of the *passerelles* from unanimity to qualified majority, and also the old flexibility clause of Article 352 TFEU), the German minister will not be empowered to give Germany's assent in the Council without first having been authorised to do so by the *Bundestag* and the *Bundesrat*. In such cases, the German Court argues, the procedure must ensure the same conditions as those required for ratification of a Treaty revision. Therefore, the German legislature must enact a law beforehand.[4]

Finally, the German Court has not repeated its earlier statement that it intends to work these things out in a relationship of cooperation with the European Court of Justice, which was an important point in the Maastricht decision. Nor does it recognise explicitly the jurisdiction of the European Court as the authoritative interpreter of the law of integration, as it had done in the past.[5]

The main motive behind these novelties is, I think, an effort to render the principles stated in the Maastricht decision more concrete. The new judges probably consider that that decision was correct but too vague and abstract. As a result, years have passed and it has not had the lasting limiting effect on integration that was intended. Yes, they may have thought, for a while the European Court of Justice was more restrictive on competence issues, and that was one of the effects we wanted, but that only happened in a handful of cases, and it was short-lived. The members of the German Court may have said to themselves that integration has continued to expand to ever wider fields and with unprecedented intensity. Since we do not want to be a voice crying in the wilderness, they might have concluded, this time we must come up with something more precise, or the same thing will happen again. Besides, some might have thought, the Union is in crisis, and the Treaty will not be reformed for a long while: this is a perfect time, in legal and political terms, to put forward some actual and lasting limits on European integration.

4 It is not clear whether the German legislature must always decide by the qualified majority of two thirds required by Article 79(2) of the Basic Law, or only in some cases.
5 See the Kloppenburg judgment, BVerfG, 75, 223 (1987); English translation in Andrew Oppenheimer (ed.), *The Relationship Between European Community Law and National Law: The Cases*, Vol 1 (Cambridge University Press, Cambridge, 1994), at pp. 508-509.

It is curious to note, in addition, that this new, more aggressive and more concrete stance of the German Court (second chamber) was adopted unanimously as regards the result and by seven votes to one as regards the reasoning, with no dissenting opinions. This reveals an effort to speak with one strong institutional voice, and also, perhaps, a shift in the internal balance of forces concerning European integration – especially when we compare the Lisbon decision with the compromise behind the problematic but somewhat more balanced Maastricht decision.

For all these negative aspects, there are two novelties that can be seen as positive developments from the point of view of the Union. In the Maastricht decision, it was not clear whether the constitutional review of Union law could be carried out by any German court or only by the German Constitutional Court. In the new judgment, it is clear that this is a monopoly of the German Constitutional Court (par. 241), which even refers to the possibility of creating specific procedures for such review. This is positive in so far as it reduces to one the number of actors that can disrupt the legal system of the Union by questioning its validity from the viewpoint of German constitutional law. The second positive development relates to the issue of the social State. Following some trends in scholarship,[6] one allegation in the appeals was that the European Union is a neoliberal project that undermines German social policy. Since the Basic Law defines Germany as a social State, the argument was made that these neoliberal tendencies were unconstitutional. The German Court rejected the claim. Among other reasons, it emphasised that the case-law of the European Court of Justice strives to find a balance between economic and non-economic aims and that Union law does not hamper the social policies of the Member States (paras. 392-399).

Let us now assess in order these main novelties and new emphases, from the most abstract to the more concrete, and explain why they are problematic not only for the European Union, but also for Germany.

6 See, for example, Fritz Scharpf, "The European Social Model: Coping with the Challenges of Diversity", *Journal of Common Market Studies*, Vol. 40, No. 4, 2002, pp. 645-670; and his more recent statement: "Legitimacy in the Multilevel European Polity", *European Political Science Review*, Vol. 1, No. 2, 2009, pp. 173-204.

1.3. The Permanent Constitution

To grasp the full significance of the Lisbon decision one has to understand first the particular point of view from which the German Court sees the Union and its law. That perspective – the State-centred constitutional perspective – is by no means exclusively German, although it is the German Court that has stated it in its most developed form. The members of the German Court would probably say that they are institutionally bound to take that perspective, but its adoption constitutes a first implicit decision that determines most if not all of what follows.

In terms of legal culture, that perspective can be defined as the ideal normative "place" from which the German Court decides.[7] Spatially, that place is Germany and only Germany. The European Union is just part of the context, but not an essential one. In normative terms it is the German Basic Law and only that: Union law is again only part of the context. The German Court does not present itself as an actor engaged in a wider discourse, but as part of the German legal and political debate. In terms of power, it clearly sees itself as the faithful and exclusive interpreter of the German constituent power of 1949, thus acquiring a supraconstitutional position. In reality, the German Court is not just behaving as the guardian of the Basic Law: it embodies and *becomes* the constituent power. And in terms of time, since everything it says in the Lisbon judgment is grounded on the "eternity clause", the German Court is speaking from the perspective of an eternal time, or at least a time that has a claim to be eternal. Hence part of the German Basic Law effectively becomes a sort of permanent constitution, beyond critique, beyond time and beyond any kind of democratic politics – unless the impossible came to happen: a brand new constitution for Germany.

In a way, it would seem that the German Court still needs to come to terms with the past and with "eternity", a necessary step to be able to come to terms with the present and with a European Union that is, for better or worse, an essential part of that present. But the German Court will not be able to do so as long as it maintains an expansive interpretation of the eternity clause of the German Basic

7 On the cultural approach to law, see Paul W. Kahn, *The Cultural Study of Law: Reconstructing Legal Scholarship*, University of Chicago Press, Chicago, 1999.

Law, an interpretation that is attributed to the "constituent power", and that would be forever entrenched.

For the German Court, the authority of law can only be defined by reference to a privileged origin. This means that when the German Court argues that the European Union is "a derived fundamental order" (par. 231), beyond the technical legal taxonomy, it is automatically putting the Union on a different and lower plane, having no privileged origin, but just human, all too human, beginnings. When it uses this rhetoric, the German Court is using the language of only partially secularised political orders that translate the notions of pre-modern polities into the vocabulary of modernity, while keeping their deep grammar under the new lexicon. This approach, of course, makes things very difficult for the Union, which can never be endowed with such a titanic legitimacy.

This approach overlooks the crucial point that all legal orders are derived from something in one way or another (*ex nihilo nihil fit*): from other orders, from pre-constitutional orders, or from a revolutionary power. No legal order derives its authority from itself, even though all legal orders pretend to do precisely that. Thus, the German Court emphasises that there is "no independent subject of legitimation for the authority of the EU which constitutes itself, so to speak, on a higher level, without being derived from an alien will, and this of its own right" (par. 232), glossing over the evident fact that the Member States acting together constitute a different and higher level from each Member State taken by itself. It is only together that the States can be seen as the "masters of the Treaty". On its own, a Member State can only withdraw from the Union: it cannot change it alone; it cannot alter its scope or meaning unilaterally – although that is what the German Court pretends to do.

In another passage, anticipating perhaps this line of critique, the German Court affirms that "the State is neither a myth nor an end in itself but the historically grown and globally recognised form of organisation of a viable political community" (par. 224). The fact is that in 1945 or 1949 the opposite was true: most European States were failed States with failed constitutions and political regimes. They only became "viable" again through their reconstruction and reinvention, and the fact that their constitutions were themselves put in the wider

context of integration and of other supranational and international institutions was essential to their reinvention. Now that the nation-State is rampant again in Europe, in part as a result of integration itself (and this is especially true of Germany), the time has come to recognise the State as the only viable form of political community…

In fact, seeking for "original" legitimacy, for logical or temporal relations of precedence, makes little sense. The legal orders of the Union and of its Member States are interdependent and closely interlinked. It is not helpful to say that one derives from the other and then draw extravagant consequences from that merely genealogical fact. Such an approach leads to a distorted understanding of the Member States, the Union and their interaction. An alternative, reconstructed and more productive approach is clearly needed.

Finally, the approach taken by the German Court can easily lead it to lose touch with democratic sensibilities in Germany and elsewhere in Europe. This is problematic, for the exercise of constitutional review requires a fine democratic sensitivity. Constitutional judges should be well aware of the trends in democratic opinion, and they take a big risk – undermining their own legitimacy – if they depart from those trends, embracing the ideas of minorities – all the more so when those decisions have a bearing on many Member States and citizens outside their constituency. This consideration alone would suggest that one should have a minimalist attitude towards the abstract constitutional review of Union law vis-à-vis State constitutional law. Through minimalism, courts say just what they need to decide the case in hand and avoid unnecessary pronouncements that could be problematic in future. That also allows them to perform their function without pre-empting the democratic political processes to which policy-making should be reserved, that is, without leading to a government by the judges. Instead, the Lisbon decision is an example of baroque maximalism. It says many things which are not necessary to reach the final result, and which encroach upon the democratic life of Germany and the Union.

1.4. Democratic Perplexities

All this is done, certainly with the best intentions, in the name of the German constituent power and of German democracy. But as German commentators have pointed out themselves, the idea of democracy behind the Lisbon decision is purely formal, outdated and incompatible with a divided-power system, let alone with the German system.[8] It is very odd that judges (of all people) take it upon themselves to define with such degree of precision what democracy should be and moreover that they do so in a decision that seems countermajoritarian, at least if we take into account that the Treaty of Lisbon was approved with extremely large majorities in both chambers of the German legislature.

Consociational or power-sharing democratic models are not even considered in the judgment.[9] According to these models of democracy, some political communities characterised by territorial or ethnic division and high levels of mistrust prefer to remain together, because they value being together more than secession, even if that means sacrificing somewhat the democratic "purity" of their political systems. Arrangements of this kind are clearly at work in the European Union. But that does not mean that the Union is fundamentally undemocratic, or that it undermines the democracies of its Member States. It only means that it has the level and intensity of democracy processes that it can bear without creating too much political stress. It also means that democratic improvements, which are clearly conceivable, can only be incremental and adapted to the "maturing" of the Union in social and political terms. Important enlargements, of course, may slow down this process, for they bring in new relationships and may reduce, at least for a while, the level of trust that was achieved.

On the other hand, the result of even this imperfect democracy at Union level for the democracies of the Member States is probably positive, because it enlarges the territorial scope of democratic decision-making and allows for decisions that affect all the Member States and their peoples to be taken in common. The alter-

8 See Christoph Schönberger, "*Lisbon* in Karlsruhe: *Maastricht's* Epigones At Sea", *German Law Journal*, Vol. 10, No. 08, 2009, pp. 1201-1218, at pp. 1210-1216.
9 See, for a useful introduction, Arend Lijphart, "Constitutional Design for Divided Societies", *Journal of Democracy*, Vol. 15, No. 2, 2004, pp. 96-109.

native, that is, to allow the "more democratic" Member States (as they would presumably see themselves) to take a number of decisions that have important effects outside of their borders for persons and interests which are not represented in those systems, can hardly be seen as more democratic.

A final perplexity is that the democratic imperfections of the Union are the ground for a number of limits and potential unilateral exceptions to the force and autonomy of its law. The German Court seems to see the Union rule of law as a competing, externally imposed and potentially disruptive reality – because of its deficient democratic pedigree. The paradox is that, since the rule of law in the Union is part and parcel of the German rule of law, this attitude could end up undermining the rule of law in Germany without any actual democratic benefit. Indeed, the rule of law is a precondition for the existence of a democratic system. It is not a sufficient condition, but it is a necessary one. What kind of democracy would we have if decisions were taken through perfect democratic processes, but after that those decisions were not enforced for lack of a proper system of law and legal institutions? From this perspective, the Union may be an imperfect democracy, but compromising its law is not likely to help improve it. These unilateral limits and exceptional avenues to selective derogation from the European rule of law would only lead to short-term democratic benefits for Germany, benefits that would probably be outweighed by the attendant disadvantages: the blow to integration and trust; the blow to the imperfect democracy of the Union; and the blow to the rule of law in the Union and Germany.

1.5. Essential State Functions

One of the new concrete consequences of the democratic conceptions of the German Court is the attempt to define a list of policy fields which are seen as "essential State functions" for which the German State should preserve "substantial space of action" and in which Union measures should remain marginal, in order to avoid a loss of statehood. This list is problematic because it is totally

arbitrary.[10] It includes things which are intuitively important, but it does not include others which, like monetary policy, clearly belong to the core of statehood but have been fully transferred to the Union level.

But the main objection is not related to the policies included in it, but to the very idea of such a list. Like similar attempts to define a number of "essential State functions" in other divided-power systems, this attempt is doomed to failure. In the medium-run, it seems to me, those limits will be very difficult to enforce and maintain. The Union is currently present in almost every policy field, in varying degrees and with different levels of intensity, and its presence shows a marked tendency towards spillover. Sometimes the resolution of some common problems leads to new problems that require new action. Sometimes important events suddenly put issues on the agenda of the Union (like global terrorism and security after September 11th). If and when political action is needed in a certain field at the Union level, can one imagine how the German Constitutional Court will be able to stop it or to limit its intensity in any meaningful way? German leaders and German public opinion will be the first to support it. And the German Constitutional Court will have to rubberstamp it, if it deals with it at all.

Before it fails, however, the list of "essential State functions" may have negative effects on policy, for decisions will not be taken only on their merits but also, in part, with an eye to the list of the Lisbon decision (think, for example, about measures related to the economic crisis). For a while, therefore, the list may result in suboptimal policy decisions with pernicious economic or social consequences.

1.6. New Rigidities

The democratic ideas of the German Court also lead it to require the formal *ex ante* intervention of the *Bundestag* and the *Bundesrat*, with the adoption of a law before using a number of procedures included in the Lisbon Treaty. Those mechanisms were designed to make part of Union primary law somewhat less

10 See Ulrich Everling, "Europas Zukunft unter der Kontrolle der nationalen Verfassungsgerichte", *Europarecht*, 2010, pp. 91-107, at p. 100; and Daniel Halberstam and Christoph Möllers, "The German Constitutional Court says 'Ja zu Deutschland!'", *German Law Journal*, Vol. 10, No. 08, 2009, pp. 1241-1258, at pp. 1249-1241.

rigid. That was a good thing in itself, since the European Union is one of the most rigid systems in the world.[11] With the German decision on the Lisbon Treaty, it seems that most of those elements of flexibility will be difficult to use, if they are used at all. It should also be noted that the *Bundestag* and the *Bundesrat* themselves were not interested in this kind of intervention. After all, it was they that had drafted the accompanying law that was held to be unconstitutional in the absence of that intervention. It is the German Court which is forcing them to play that role, for the sake of democracy.

This requirement is especially problematic in the case of Article 352 TFEU (ex Article 308 EC; ex Article 235 EEC), the "implied powers" clause of the Treaty, an essential provision that has been in place since the drafting of the Treaty of Rome (1957) and that has been used in the past by the Council to approve unanimously action which seemed important and necessary to attain common objectives for which no specific legal basis was available. Those occasions tend to be less numerous now, because the Treaty has many more specific legal bases than it used to have, but one never knows what the future will bring, and that provision is still used as the legal basis of many important acts of secondary law that may need to be amended. In addition, the Treaty of Lisbon has introduced a reinforced *ex ante* political subsidiarity review, in the hands of national parliaments. According to Article 352(2) TFEU "the Commission shall draw national Parliaments' attention to proposals based on this Article", which means that the *ex ante* political monitoring of proposals based on that provision will be intense. The German Court does not give any weight to the existence of this new political mechanism and insists in the constitutional necessity of a prior authorisation by a law adopted by the *Bundestag* and the *Bundesrat*.

A number of examples have been given about the possible consequences of this limitation.[12] Let me mention just one. Council Regulation No 431/2009, of 18 May 2009 was based on Article 308 EC (now Article 352 TFEU).[13] It was an emergency measure, prompted by the financial crisis, to raise the ceiling for the outstand-

11 See Bruno de Witte, "Treaty Revision in the European Union: Constitutional Change Through International Law", *Netherlands Yearbook of International Law*, 2004, p. 51.
12 See Martin Selmayr, "Endstation Lissabon? – Zehn Thesen zum "Niemals"-Urteil des Bundesverfassungsgerichts vom 30. Juni 2009", *Zeitschrift für Europarechtliche Studien*, Vol. 12, No. 4, pp. 637-679, at p. 666-667.
13 Amending Regulation (EC) No 332/2002 establishing a facility providing medium-term financial assistance for Member States' balances of payments (OJ L 128, of 27 May 2009, pp. 1-2).

ing amount of loans to be granted to Member States from EUR 25 billion to EUR 50 billion. At present, with the mandatory prior intervention of the German legislature, such a measure would probably not be adopted as quickly as before and as needed by the markets. Hence Article 352 TFEU, the "flexibility" provision on Union powers, is now subject to a new rigidity. Its use will be slowed down, with unforeseeable effects on policy.

The final potential danger of this part of the Lisbon decision is for future developments: it would seem that for the German Court any revision that would render the rules of Treaty change in the Union less rigid would be unconstitutional. So we also seem to be stuck with the rigid and inefficient double unanimity requirement to amend the Treaty.[14] A change in the rules of Treaty change is not on the political agenda, but it could be in the future. For the German Court, however, such a change is impossible *ad eternum*, unless there is a new German constitution and a European federal state is founded. This creates a difficult situation for the future development of the Union, because under the current rules of change, Treaty revision tends to be slow, limited, uncertain and suboptimal. But the Union will have to be developed, and unless the German Court changes its position, those developments will have to take place informally, through interpretation or secondary law.

1.7. What Relationship with the European Court of Justice?

A final important aspect of the Lisbon decision is that the so-called relationship of cooperation with the European Court of Justice seems to have vanished. Whereas in the Maastricht decision the European Court was subject to a number of criticisms and direct threats, on the one hand, while on the other hand it received an invitation to cooperate with the German Court, here very little is said explicitly about the European Court. At least one commentator has decried this omission. He seems to believe that a more moderate German Court, with stick

14 On this issue, see Renaud Dehousse, "Au-delà du plan B: comment réformer les clauses de revisión des traités", in Giuliano Amato, Hervé Bribosia and Bruno de Witte (eds.), *Genèse et destinée de la Constitution européenne*, Bruylant, Brussels, 2007, pp. 939-955; and my own reflections in "Between Unanimity and Utopia: Constitutional Change in the Union", in Julio Baquero Cruz and Carlos Closa (eds.), *European Integration from Rome to Berlin: 1957-2007*, P.I.E.-Peter Lang, Brussels, 2009, pp. 211-228.

and carrot techniques, could still have a beneficial effect on the European Court of Justice. He points as an example to the allegedly virtuous interaction prompted by Solange I and closed by Solange II,[15] which, in his view, led to the development of the fundamental rights jurisprudence of the European Court.[16] Some may even think that the Maastricht decision also had virtuous effects, at least for a while, leading to a more restrained approach of the Luxembourg Court to the definition of Union competences. What the proponents of this kind of argument would regret about the Lisbon decision is that, unlike the Solange I and the Maastricht decisions, it is no longer an invitation to dialogue, but a concrete and ultimate threat to the further development of Union law.

I am rather sceptical about such explanations, and I do not think there are good reasons to be nostalgic for Solange I, even less so for the Maastricht decision. My preferred explanation is that the European Court of Justice developed its constitutional doctrines mainly as a consequence of the inner needs and logic of the Community institutional and normative systems, and that it did so – and would have done so anyway – regardless of the sticks and carrots of the German Court. I think this explanation is more convincing, more enlightening and also more accurate in historical terms.[17] The narrative that presents those developments as a consequence of the pressure created mainly by the German Constitutional Court is seriously misleading. It gives too much credit to a single national institution in a system of integration, and too little credit to the common judicial institution, which would just be reacting to outside pressures. It focuses on just one aspect of the constitutional case-law of the European Court of Justice, fundamental rights, while that case-law has many other aspects. And even if an influence could be ascertained with regard to fundamental rights, I think the European case-law would also have developed autonomously anyway in this field. It was, indeed, a predictable development once direct effect and supremacy were in place.

15 BVerfGE 37, 271 (1974) and BVerfGE 73, 339 (1986); English translations in Oppenheimer, book cited in footnote 5, at pp. 419 and 462.
16 Christoph Schönberger, cited in footnote 8, at p. 1216.
17 I have developed this argument in my article "The Changing Constitutional Role of the European Court of Justice", *International Journal of Legal Information*, Vol. 37, No. 2, 2006, pp. 223-245.

Concerning the issue of the future relationship of the German Court with the European Court, it has been argued that the German Court "will not undertake 'surprise attacks'" and the two courts will be forced to engage in a dialogue in any case.[18] This statement must be qualified. Whereas the decision to engage in a genuine and structured dialogue through the available mechanism of the preliminary procedure (Article 267 TFEU) depends on the willingness of the German Court to use it, the European Court of Justice cannot on its own take the initiative and establish such a dialogue. The key actor here is the German Court, which is obliged by that provision to refer to the European Court of Justice any question concerning the interpretation or validity of Union law when the solution to the case in hand depends on the answer to such a question. Even if the German Court does not undertake unilateral "surprise attacks", anything it may do about European Union law outside the connecting bridge of Article 267 TFEU (for example, informal and implicit "dialogues" without making a preliminary reference) is not strictly respectful of the Union system.

Even within this ordered dialogue through preliminary references, one may want to accept the theoretical possibility of exceptional interventions on the part of national institutions when a fundamental value or principle is at stake, all the resources of the Union system have been tried to no avail, and institutional disobedience is the only way to prompt a political reconsideration of the issue involved by the institutions of the Union.[19] This possibility, however, should not be used lightly. As a matter of fact, in normal conditions I do not think it should be used at all. Most of the time we will be better off allowing the institutions of the Union, including its Court, to make some "mistakes", that is, to take some decisions that we may not like or with which we may even strongly disagree. Realistically, the possibility of "mistakes" from one central institution is to be preferred to that of the eventual unilateral "mistakes" of the 27 separate systems of the Member States – with devastating consequences for the Union at large.

18 Daniel Thym, "In the Name of Sovereign Statehood: A Critical Introduction to the Lisbon Judgment of the German Constitutional Court", *Common Market Law Review*, Vol. 46, 2009, pp. 1795-1822, at p. 1810.
19 I have explored this idea in "Legal Pluralism and Institutional Disobedience in the European Union", in Matej Avbelj and Jan Komarek (eds.), *Constitutional Pluralism in the European Union and Beyond*, Hart, Oxford, forthcoming 2010.

1.8. Possible Consequences of the Lisbon Decision

It is to be hoped that there will be limited actual legal consequences from the German Court itself. In June 2009, two cases before that Court were mentioned as the test cases in which we would see if the rhetoric of the Lisbon decision would be translated into more concrete results: the data retention case; and the *Honeywell* case in which the *Mangold* decision of the European Court of Justice, on discrimination on grounds of age, is questioned as being *ultra vires*.[20] The first has been decided already, on 2 March 2009.[21] In its judgment, the German Court carefully avoids the European Union law issue, declares the German law implementing the data retention directive unconstitutional, but only insofar as the German legislature has acted within the margin of manoeuvre left to it by the directive (in other words, outside of the scope of Union law), thus carefully avoiding any legal pronouncement on the validity of the directive. The German Court also declared itself willing to refer Union law issues to the European Court of Justice if and when that is necessary for the resolution of a case. That did not happen in the case in hand since it could be resolved without affecting the directive, and because the directive, according to the German Court, could be implemented in Germany without violating the Basic Law.

At the time of writing we are awaiting the judgment in the Honeywell case, where the Union law issue may be impossible to avoid, and which is assigned to the second chamber of the Court, the one that ruled on the Lisbon Treaty. But unless the climate is totally different from one chamber to another of the German Court, the data retention judgment indicates that the rhetoric of the Lisbon decision may not lead to actual damage – beyond the real damage already caused by that rhetoric, that is.

It is to be expected, secondly, that the effects on the European Court of Justice will be limited. Indeed, the Luxembourg Court could be led to do odd and unfor-

20 Case C-144/04, *Mangold* [2005] ECR I-9981. For the argument that *Mangold* is an ultra vires act requiring the intervention of the German Constitutional Court, see Lüder Gerken and others, *"Mangold" als ausbrechender Rechtsakt*, Sellier, Munich, 2009.
21 BVerfGE, Cases 1 BvR 256/08, 1 BvR 263/08 and 1 BvR 586/08.

tunate things if forced to adjudicate under pressure.[22] That kind of pressure could lead it to disregard certain interests and to give more weight to things that should not have such weight all things considered (for example, the need to limit Union competences could trump important public interests such as the protection of human health). It is to be hoped, therefore, that the Luxembourg Court will go on adjudicating as before, not intimidated by the threats of the German Court, and giving what it considers to be the best interpretation of Union law.

Thirdly, the judgment could have some domino-effect on other constitutional courts, especially those of those countries most affected by the prestige of German public law dogmatics. We know that something of the sort has happened with the Maastrich decision.[23] And indeed there is at least one paragraph of the Lisbon decision in which the German Court seems to consider that its position must be that of all the constitutional laws of the Member States: "the Member States may not be deprived of the right to review adherence to the integration programme" (para. 334). It is only logical that some will follow, for not following would put your Member State's interests at a permanent disadvantage with regard to Germany. Who would want that? However, there could also be a reaction: some constitutional courts may decide that they are not willing to follow the German Court that far. The second Lisbon decision of the Czech Constitutional Court, of 3 November 2009, could already point in that direction.[24] It is not ideal from the European point of view, but it is friendlier to the Union than the German Lisbon decision.

Finally, there could be some effects on the political process of the Union, especially if Germany starts to play the "Constitutional Court" card in negotiations as a strategic tool to justify certain approaches to policy or Eurosceptic attitudes. This, in turn, could lead to strategic actions and anticipation from other actors (for example, from the Commission, adapting its proposals to the limits set out in the Lisbon decision, or from other Member States, or from the Council). The end result of these strategic games could be suboptimal policy decisions with very

22 Opinion 2/94 [1996] ECR I-1759, on accession to the European Convention of Human Rights, could be a good example. The Opinion was and remains unconvincing to many. In one of its grounds (par. 35), the European Court of Justice differentiates between interpretation and revision of the Treaty, with language that recalls one of the central passages of the Maastricht decision.
23 See my article cited in note 2.
24 For a partial translation of the decision, see *European Constitutional Law Review*, Vol. 5, 2009, pp. 435-352.

real economic and social costs (one thinks, once again, of the response to the crisis), because the best policy options would be outside the realm of political discussion as defined by the German Court. This could be the most significant negative consequence of the Lisbon decision.

If they do materialise, many of these possible consequences will hopefully vanish with time. As happened in part with the Maastricht decision, the authority of the Lisbon decision will begin to erode, for new times bring new challenges and new needs for political action, and law cannot endlessly stand in the way of sound policy.

1.9. Towards a Shared Legal Culture

Until a new judgment of the same sort is rendered, that is. Sixteen years separate the Maastricht and the Lisbon decisions. The Treaties of Amsterdam and Nice were happily spared such a warm welcome from the German Court. These have been sixteen years in which many things have happened in the Union. But the discourse of the German Constitutional Court, which is so influential in other Member States, does not seem to have changed very much. This is, in my view, the true lesson we can learn from the Lisbon decision: that sixteen years later we are very much in the same position.

From a more general point of view, the Lisbon decision also reveals the still imperfect internalisation of the European rule of law, an essential element of the integration project, within national legal cultures, more than half a century since its start. The battle about legal culture, in the end, is a battle about the point of view, a battle between two conflicting paradigms. While those involved in the practice of Union law take a point of view internal to that legal system, most national legal actors still take an external point of view to it: they do not see themselves as actors within that system: that law is not part of what constitutes them as lawyers or citizens, it is not part of their social system, it is a purely external object. That external perspective defines the approach of the German Court and its limits, and predetermines to a large extent the result of cases such

as the appeals about the Lisbon Treaty. Since the success of the law of integration (the project of building a European rule of law to overcome the traditional arbitrariness of the relationships among nation-States) requires the adoption by all lawyers – and also by citizens – practising in the Union of a wider perspective, the external perspective adopted by important national institutions is a limit to that project and undermines it.

This insufficient internalisation of the European legal dimension in national legal cultures has a consequence – what we could call a *non-legal Europe*: that Union law is sometimes, more or less often depending on the Member State, not applied when it should be, or not applied as it should be. And that non-legal Europe has a number of costs, economic and social and also in terms of justice, which may be difficult to calculate but which are likely to be significant.

This is perhaps an important objective for the European Union of the 21st century: to improve and consolidate a shared legal culture and a more perfect supranational rule of law as an essential element of the ongoing project of integration. The Lisbon decision of the German Constitutional Court is useful in this regard, because it goes just in the opposite direction. One is tempted to say: turn around, ignore the signs, tear down the cardboard walls and keep walking.

II - Missing the Point: The Decision of the German Constitutional Court on the Lisbon Treaty and the Democratic Deficit of the EU

Katrin Auel

2.1. 'Yes, but…' - The Court's Decision on the Lisbon Treaty

When the Second Senate of the German Constitutional Court removed one of the final obstacles to the Lisbon Treaty, a collective sigh of relief could be heard in Brussels and Berlin. In its ruling on 30 June 2009[1], the Court declared the Treaty compatible with the German Constitution (German Basic Law, *Grundgesetz* GG) and only demanded that the German parliament's right to participation in EU affairs be strengthened at the national level. Once the domestic legislative changes were made, Germany was able to ratify the Treaty, which has finally come into force on 1 December 2009.

The initial relief over the Court's decision, however, quickly made way for pained groans when the full meaning of the long ruling became clear. Much ink has been spent on the decision since, and most reactions have been highly critical, ranging from disappointed to annoyed and outright angry. Although by now much discussed, it is worth repeating that the Court may have cleared the Lisbon Treaty,

1 BVerfGE, 2 BvE 2/08, 30 June 2009. The paragraphs cited in the text refer to this decision.

but at the same time it has given a rather damning verdict on future European integration. I will only highlight two aspects[2]:

First, the Court took a clear position on sovereignty. Ultimate authority, it argued, always has to be tied to a single political entity – and that is, at least for now, the Member State. A transfer of sovereignty to the EU would make abolishing national constitutions and the adoption of a European Constitution necessary. Until then, all sovereignty in the EU is national. On this basis, the Court ruled that the Lisbon Treaty is compatible with the German Basic Law, because the Treaty will not lead to the formation of a European State.

Second, the Court has also made it very clear where the European integration process needs to end *unless* it leads to the formation of a European State: within an integrated Europe, member states as the ultimate sovereign authorities must retain sufficient room for the political formation of their citizens' economic, cultural and social circumstances of life. Specifically, this includes the areas of citizenship, criminal law, police and military operations, fiscal policy, social policy, family law, education, culture and media policy as well as relations with religious groups (para. 252 ff.). Further steps of integration that go beyond the *status quo*, the Court ruled, must therefore undermine neither the Member States' political power of action nor the principle of conferral. If, however, European integration were to proceed in a way that the legislative competences for the above mentioned political formation of the economic, cultural and social circumstances of life were transferred to the European level; 'it is for the Federal Republic of Germany due to its responsibility for integration, to work towards a change, and if the worst comes to the worst, even to refuse to further participate in the European Union' (para. 264). Thus, European integration ends with the Lisbon Treaty – at least for Germany. While the Court has not openly stated that the Lisbon Treaty marks the limit of possible conferral of powers, it is difficult to imagine a future European Treaty that would both lead to significant further integration and be compatible with its ruling.

2 For a discussion of other aspects of the decision see Julio Baquero Cruz (2010), 'A Juridical Götterdämmerung: The Lisbon Decision of the German Constitutional Court', Notre Europe policy paper, or the contributions in German Law Journal 10 (8) (2009), Special Section: The Federal Constitutional Court's Lisbon Case and in European Constitutional Law Review 5 (3) (2009).

2.2. The Democratic Deficit of the EU - the Court's View

The Court based its decision mainly on considerations of democratic legitimacy, and on the citizens' right to democratic self-determination as an inalienable right exercised through general elections in particular. It is worth remembering, though, that the Court did not pull this specific line of argument purely out of thin air, but reacted to the arguments of the complainants, who, *inter alia*, claimed that the transfer of sovereign powers to the European Union through the Act Approving the Treaty of Lisbon breached their inalienable right to participate in the legitimisation of State authority and to influence its exercise through elections as laid down in the Basic Law (Article 38 GG, right to elect Members of the German *Bundestag* in general, direct, free, equal, and secret elections). They argued that the legitimisation and the exercise of State authority were withdrawn from their influence because the Lisbon Treaty led to a further undermining of the competences of the German *Bundestag* while at the same time not addressing the lack of democratic legitimacy of the European Union (para. 100).

Although the Court did not accept this line of argument, it did, as in its Maastricht decision[3], make clear that it does not recognise the European Parliament (EP) as a genuine legislature representing the will of a single European people, but as a representative body of the people of the Member States and thus only as an 'additional independent source of democratic legitimisation' (para. 271). Its critique is based on the argument that European elections fail to guarantee the principle of electoral equality due to the EP's degressive proportional composition laid out in Article 14.2(1) TEU (284). Therefore it is not the 'European People' that are represented but the peoples of Europe organised in their States (para. 286). That the powers of the EP have been strengthened therefore seems to be more of a problem than a solution for the Court: 'If a decision between political lines in the European Parliament receives a narrow majority, there is no guarantee of the majority of votes cast representing a majority of the citizens of the Union' (para. 281). As a result, it sees the EP as 'insufficiently prepared to take representative and assignable majority decisions on political direction. (...)

3 BVerfGE 89, 155, of 12 October 1993

It therefore cannot support a parliamentary government and organise itself with regard to party politics in the system of government and opposition in such a way that a decision on political direction taken by the European electorate could have a politically decisive effect'[4]. But the argument of the Court goes further:

'Democracy first and foremost lives on, and in, a viable public opinion that concentrates on central acts of determination of political direction and the periodic allocation of highest-ranking political offices in the competition of government and opposition. Only this public opinion makes visible the alternatives for elections and other votes and continually calls them to mind also as regards decisions relating to individual issues so that they may remain continuously present and effective in the political opinion-formation of the people via the parties, which are open to participation for all citizens, and in the public space of information' (para. 250).

And according to the Court, the European Union lacks this kind of arena for public deliberation: 'Even if due to the great successes of European integration, a joint European public that engages in an issue-related cooperation in the rooms of resonance of their respective states is evidently growing … it cannot be overlooked, however, that the public perception of factual issues and of political leaders remains connected to a considerable extent to patterns of identification which are related to the nation-State, language, history and culture' (para. 251).

However, the lack of democratic legitimacy is, according to the Court, presently not a problem, since the European Union is not a State: 'As long as, and to the extent to which, the principle of conferral is adhered to in an association of sovereign States with marked traits of executive and governmental cooperation, the legitimisation provided by national parliaments and governments, which is complemented and carried by the directly elected European Parliament is, in principle, sufficient' (para. 262). Thus, it is national constitutional bodies, and national parliaments in particular, which not only have to retain 'responsibilities and competences … of substantial political importance', but also carry

4 Federal Constitutional Court of Germany, Press release no. 72/2009 of 30 June 2009, online at: http://www.bundesverfassungsgericht.de/pressemitteilungen/bvg09-072en.html.

the primary responsibility for European integration and the legitimisation of EU politics.

The immediate consequence the Court drew from this argument was to declare the 'Act Extending and Strengthening the Rights of the *Bundestag* and the *Bundesrat* in European Union Matters'[5] accompanying the Lisbon Treaty incompatible with the German Basic Law since it did not include provisions for full bicameral ratification for each decision regarding the use of the flexibility clause and *passerelle-type* procedures for future Treaty revisions.[6] Flexible treaty amendment procedures must, according to the Court, ensure that 'the German legislative bodies exercise their responsibility for integration in a given case and also decide on the question of whether the level of democratic legitimisation is still high enough in the given case to accept the majority decision' (para. 319), for which the right of national parliaments to veto such measures within six months does not suffice. And given its criticism of the European Parliament, it is hardly astonishing that the fact that both *passerelle* procedures and the application of the flexibility clause require the assent of the European Parliament did not hold much sway with the Court.

There are a number of arguments that can and have been made against the Court's reasoning.[7] Despite the Court's acknowledgement that 'the constitutional mandate to realise a united Europe, which follows from Article 23.1 of the Basic Law and its Preamble means in particular for the German constitutional bodies that it is not left to their political discretion whether or not they participate in European integration' (para. 225), the decision insists on a strong commitment to State sovereignty and the definition of the EU as merely an intergovernmental association of sovereign national States ('*Staatenverbund*'). It thus ignores that the EU is already more than a mere '*Staatenverbund*,' given that Community institutions have their own competences, which they can exert without the consent of the member states, and that Community law is directly applicable in the Member

5 'Gesetz über die Ausweitung und Stärkung der Rechte des *Bundestag*es und des *Bundesrat*es in Angelegenheiten der Europäischen Union', *Bundestag*s-Drucksache 16/8489.
6 According to the Court, this applies to the exercise of the flexibility clause (Article 352 TFEU) allowing EU action to attain EU goals in the absence of a specific legal basis, as well as passerelle type procedures that allow the introduction of qualified majority voting and co-decision in areas where this does not yet apply. Both require the approval by the *Bundestag* and, to the extent that this is required by the national provisions on legislation, the *Bundesrat*.
7 See footnote 2.

States claiming supremacy over national law. As Schönberger has put it succinctly, '[i]f the judges actually mean what they say, they should never have approved the Treaty of Lisbon. But, as they do uphold the Treaty, they could not possibly justify their decision on the grounds they put forward'.[8]

In line with its argument, and in contrast to the Maastricht decision, the Court also defined specific areas that have to remain in the competence of the Member States. Although the Court admits that 'safeguarding of sovereignty, demanded by the principle of democracy in the valid constitutional system ... does not mean *per se* that a number of sovereign powers which can be determined from the outset or specific types of sovereign powers must remain in the hands of the State' (para. 248), it goes on to do exactly that, namely determine specific areas and types of sovereign powers. In addition, this enumeration of core competencies is ultimately arbitrary. A list truly based on '[w]hat has *always* been deemed especially sensitive for the ability of a constitutional State to democratically shape itself' (para. 252, emphasis added), would probably include the power over monetary policy and the national currency.[9] In fact, it seems to be based simply on a list of almost all competences that remain exclusively or at least substantially within the Member States' authority under the Lisbon Treaty.

In addition, the rather dogmatic concept of democracy based on electoral equality the Court adhered to is very tightly connected to the State: as long as the EU is not a State, it does not have to be democratic, and because it is not democratic, responsibility for democratic legitimacy remains with the Member States, but were it to become ultimately democratic, it would become a State and therefore incompatible with the German Basic Law. For the Court, 'conceptually trapped in a perspective where the strengthening and deepening of the European Union can only be perceived as a further step on the slippery slope to federal statehood'[10], the democratic deficit of the EU is thus foundational and deliberately irresolvable[11] – in the name of democracy. It is, however, at best very debatable

8 Christoph. Schönberger (2009), 'Lisbon in Karlsruhe: Maastricht's Epigones At Sea', *German Law Journal* 10 (8), 1201-1218, p. 1202.
9 Schönberger, op cit., p. 1209
10 Schönberger, op cit., p. 1217
11 Jo Eric Khushal Murkens (2009), 'Identity trumps integration: the Lisbon Treaty in the German Federal Constitutional Court', *Der Staat* 48 (4), 517-534, p. 529.

that democracy is by definition tied to the State in general, and to the Court's interpretation of the German Basic Law in particular.

In the following I want to focus on the two related arguments of the Court regarding the democratic legitimacy in the EU. I will first look at the Court's arguments regarding the European Parliament, namely the lack of equality in representation and the insufficient ability to make effective representative majority decisions based on a clear electoral mandate. I will then turn to the domestic level and discuss the role national parliaments are playing in European politics. I will argue that although national parliaments have become more influential in European politics over time, so far they also do not contribute fully to making EU politics democratic. The main reason is that mainstream parties depoliticise European issues both at the European and at the domestic level and therefore fail to provide citizens with a political choice over Europe and European policies.

2.3. The European Parliament – Not a Genuine Legislature?

The fact that the European Parliament cannot live up to a strict standard of electoral equality is well known. Although we generally speak of *the* election to the EP, it is, of course, in fact not a single election, but rather by now 27 elections that follow different electoral rules. Most importantly, the electoral system, although always based on a formula of proportional representation (either a list or a single transferable vote system), varies between the Member States.[12] The different application of thresholds, for example, means that the chance for small parties to gain seats in the EP varies between Member States. In addition, the number of seats allocated to each Member State is, of course, in fact based on a system of degressive proportionality. As a result, the democratic principle of equality or 'parity of votes' ('one man – one vote') is indeed not fulfilled.

However, the Court's argument fails to take due account of the characteristics of democratic legitimacy in federal States by insisting on electoral quality. While mentioning that a deviation from the principle of electoral equality is accepted for

12 David M. Farrell and Roger Scully (2010), 'The European Parliament: one parliament, several modes of political representation on the ground?', *Journal of European Public Policy* 17 (1), 36-54.

upper chambers in federal systems, it fails to explain why this should be the case, given that they are distinctly '*demos* constraining'[13] institutions often allowing minorities to block majority decisions. In fact, the Court fails to notice that federal systems do not always adhere to the firm principle of electoral equality even with regard to the lower chamber or the election of the Head of Government. According to the US constitution, for example, each State is guaranteed at least one member in the House of Representatives, even if this is not justified by the size of its population as in the case of, for instance, the State of Vermont. The same is true for the elections of the US president, where small States are always represented by at least three members in the Electoral College.[14]

It is, however, worth mentioning that, in contrast to the Court's argument, the right to vote for and to stand as a candidate in elections to the EP is actually not based on nationality, but on residence. In fact, 37.6 per cent (11.3 million persons) of the non-nationals living in EU Member States are citizens of another Member State.[15] And while the absolute number may not be great for the larger Member States, it may be interesting to consider that the famous one MEP in Luxemburg does not represent 82.250 Luxembourgers, but in reality about 47.225 Luxembourgers and around 30.100 EU citizens from other Member States.[16]

The 736 members of the EP now come from 27 states and over 140 national party lists. It is tempting to assume that due to this fragmentation, politics in the EP is incoherent and disorganised, that it is based on national rather than ideological conflicts, and that it functions through an uncompetitive 'grand coalition'. A closer look at the EP reveals, however, that in many ways it does function like the parliaments citizens are used to in their Member States. Although not comparable to national parliamentary party groups, which usually consist of members of a single party, the political groups in the EP function in a rather similar way. Each group must consist of no less than 25 MEPs from seven different EU Member States. The groups 'control who is elected as the President of the Parliament,

13 Alfred Stepan (2001), 'Toward a New Comparative Politics of Federalism, (Multi)Nationalism, and Democracy: Beyond Rikerian Federalism', in *Arguing Comparative Politics*, Oxford,: Oxford University Press.
14 Schönberger, op cit., p. 1215
15 Eurostat 2009, Statistics in Focus, 94, by Katya Vasileva; online at epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-SF-09-094/EN/KS-SF-09-094-EN.PDF.
16 Six per cent of the population of Luxembourg (4.935) are non-nationals from outside the EU. Calculation based on Eurostat 2009 op. cit. and Eurostat data on the total population of Luxembourg as of 2009, online at: epp.eurostat.ec.europa.eu/tgm/information.do?tab=table&plugin=1&language=en&pcode=tps00001.

who will become a committee chair, which MEP writes which legislative report, who can speak in the plenary debates and for how long, which way the MEPs vote in each issue, and just about every other important issue in the European Parliament'.[17]

Essentially, the 'party system' in the European Parliament can be thought of as a 'two plus several' party system. The two main groups, the European Peoples' Party (EPP) and the Progressive Alliance of Socialists and Democrats (S&D) currently hold 35.8 and 25 per cent of the seats, while several smaller groups hold between 11 and 4 per cent. A look back presents a similar picture: the two main parties have always dominated politics in the European Parliament, but neither party has held an outright majority. And even though the lack of a European parliamentary government has made formal coalition formation in the EP unnecessary, studies have shown that in other regards politics in the European Parliament is also surprisingly similar to that in other parliaments.

In their extensive study of EP roll-call voting, Hix, Noury and Roland[18], for example, show that the main political groups have displayed high levels of voting cohesion since the first direct elections in 1979 – comparable to the current levels of cohesion of the parties in the US Congress. Moreover, the cohesion of the EU political groups has increased over time as the powers of the EP have been strengthened. Remarkably, greater internal cohesion has occurred despite the increase in the internal national and ideological fractionalisation due to the enlargement to new Member States. In addition, while the pro- and anti-European integration positions of the parties still play a role, pitting the three main political groups EPP S&D and the Liberals (ALDE) against the smaller political groups, votes in the EP are mainly cast along the classic left-right dimension of democratic politics. In contrast, national interests, independent of national party positions, have only little systematic influence on voting. Thus, the political groups have not only become more cohesive, they have also become more divided as the EU agenda has shifted to more socio-economic issues. As

17 Simon Hix, Abdul Noury and Gerard Roland (2007), *Democratic Politics in the European Parliament*, Cambridge University Press, p. 22.
18 Simon Hix, Abdul Noury and Gerard Roland (2007), op. cit.

a result, 'grand coalitions' between the two large political groups have become less frequent.

Politics in the European Parliament is thus not that different from politics in other democratic legislatures, dominated by left-right positions and driven by the traditional party families of domestic European politics. The political groups at the European level are able to translate national party positions into structured political organisation, competition and coalition formation and thus into clear and effective majority decisions.

However, the Court is right in arguing that so far European elections have clearly failed to produce a choice between rival policy agendas for the EU or a democratic mandate for a majority in the European Parliament. A much-discussed problem is, of course, the fact that European Parliament elections are not fought on European issues or the rival manifestos of Europe-wide parties. The EU lacks genuine European-wide trans-national parties that appeal to the electorate and fight elections on a truly supranational basis. The political groups in the EP neither organise nor control the national EP election campaigns, national parties do. Rather than formulating political platforms offering clear positions on controversial, authentically European issues, the political groups at the European level have been unable to produce anything but vague and lofty statements. They thus fail to offer the European public a real choice at the ballot box. As a consequence, genuinely supranational electoral cleavages, issues and ideologies are both few and weak, and EP elections are unable to divide the electorate into coherent blocs of voters like those in the domestic arena. Instead, EP elections are firmly dominated by 'national' issues, parties and personalities. Voters seem to know very little about the European Parliament. The Eurobarometer regularly tests the EU knowledge of citizens, and although a large majority of EU citizens have heard of the EP, they know little about what the EP does, what powers it actually has, or what kind of issues it is dealing with. A special Eurobarometer survey in autumn 2008[19] revealed that only 23 per cent of the EU citizens feel at least fairly well informed about the EP. Only 26 per cent knew that the EP elections were taking place in June 2009 and thus only about half a year later.

19 Special Eurobarometer 303 (70.1): The 2009 European Elections, December 2008, p. 83 and 13; all special reports can be found online at ec.europa.eu/public_opinion/archives/eb_special_en.htm.

Since European elections are fought by national parties on domestic issues to gain votes from an electorate that believes the EP is of little importance to them, it is hardly surprising that overall the label 'second-order election'[20] seems to fit. The term is used to describe elections that are not, or at least are not believed to be, as important as others, and where voting behaviour is mainly affected by considerations about these other elections. In other words, European elections are not seen as important as national elections, and voting behaviour is mainly related to the national political arena.

One indicator of this is the low turnout in EP elections, which cannot simply be explained by a general electoral apathy. In most Member States, turnout in national elections is generally much higher. Moreover, overall turnout has been declining over the years while the powers of the EP have increased. Thus, voters have not seen the increase in power of the EP as a greater incentive to go to the polls. Indeed, in late 2008, around 60 per cent of respondents said that they would note vote in the elections because they believed that the EP was not dealing with issues that concerned them, because they believed that their vote would not change anything and because they did not feel represented by the EP.[21]

Another indicator is that voters use EP elections to express their opinion on their current national government and its policies. Because EP elections have, of course, also no direct impact on the domestic political system, many voters feel save to vote with their heart by giving their vote to the party which is closest to their policy preferences rather than supporting a less preferred larger party which may have greater chances of forming a government. In addition, European elections give voters the opportunity to express their dissatisfaction with the current government and thus to vote with their boot. To give just two examples of the 2009 election: in Britain the EP election was held amidst scandals over MPs' expenses claims as well as a climate of general unpopularity of the Labour government of Gordon Brown. And voters used the opportunity to give the government of Gordon Brown a bloody nose. In the EP elections Labour suffered its worst result ever and came third after the Conservatives and the anti-European

20 The term has been first and most prominently applied by Karlheinz Reif and Hermann Schmitt (1980), 'Nine Second-Order National Elections - A Conceptual Framework for the Analysis of European Election Results', *European Journal of Political Research* 8 (1), 3-44.
21 Special Eurobarometer 299 (69.2): The 2009 European Elections, September 2008, page 17.

UK Independence Party. In the Netherlands, the anti-European Union Party for Freedom gained 17 per cent of the vote and catapulted itself into the position of the country's second strongest EP party as well. Empirical studies[22] confirm these anecdotes: larger governing parties lose votes in European elections regardless of their party family, while smaller parties, and Green as well as anti-European parties in particular, gain on average.

The latter suggests, however, that European elections have something to do with 'Europe' after all. The gains for Green parties have, for example, been explained with the fact that voters concerned about environmental issues, who feel that the European Parliament is an important institution, are most likely to switch their vote to a Green party in a European election.[23] In addition, voters who are more Eurosceptic than the party they voted for at the previous national election are also more likely to punish this party.[24] Finally, the electoral success of parties in EP elections seems directly affected by the cohesiveness of their stance on the European issue. While parties with a clear and cohesive stance on European integration do better, more divided parties seem to perform worse.[25] The fact that it is mainly the smaller anti-European parties at the fringes of the political spectrum who represent clear and cohesive stances on the EU (see below) may thus partly explain their relative success in EP elections compared to the large and generally pro-European governing parties.

It can, of course, be argued that even elections fought over domestic issues along the left-right dimension of politics still lead to the election of MEPs according to the citizens' socio-economic preferences and thus to an aggregation of these preferences at the European level through the EP's political groups.[26] However, it is debatable whether one can simply assume such an aggregation of voters' preferences: given the competences of the EU, the left-right conflict over European issues is not necessarily the same as left-right conflict over national policies

22 Among many: Federico Ferrara and J. Timo Weishaupt (2004), 'Get Your Act Together. Party Performance in European Parliament Elections', *European Union Politics* 5 (3), 283–306; Simon Hix and Michael Marsh (2007), 'Punishment or Protest? Understanding European Parliament Elections', *The Journal of Politics* 69 (2), 495–510.
23 Cliff Carrubba and Richard J. Timpone (2005), 'Explaining Vote Switching Across First- and Second-Order Elections: Evidence From Europe', *Comparative Political Studies* 38 (3), 260-281.
24 Sara B. Hobolt, Jae-Jae Spoon and James Tilley (2009), 'A Vote Against Europe? Explaining Defection at the 1999 and 2004 European Parliament Elections', *British Journal of Political Science* 39 (1), 93–115.
25 Ferrara and Weisshaupt (2004) op. cit.
26 Peter Mair and Jacques Thomassen (2010), 'Political Representation and Government in the European Union', *Journal of European Public Policy* 17 (1), 20-35.

because it is about social regulation, rather than redistribution.[27] More generally, it is hardly a healthy democratic process if vote choices in European elections are disconnected from the positions and behaviour of the MEPs and European parties. If citizens do not or cannot use European elections to express their preferences about the policy priorities of the EU, it is difficult to conclude that the European Parliament has a clear mandate from EU citizens.

To sum up, the lack of a democratic mandate is indeed a problem of the EP. Not only is the turnout generally low and further declining, the elections are still basically second order elections. After seven rounds of direct elections, the electoral connection between citizens and MEPs has become somewhat stronger, but remains overall weak. European elections do not really provide citizens with a genuine electoral choice regarding European issues and policies, and there are few signs that a further increase in the powers of the European Parliament or a change of the electoral system would be sufficient to change this situation.

2.4. National Parliaments to the Rescue?

Thus, we could at this point conclude that the German Constitutional Court was at least partly justified in its criticism of the EP, and that we need to turn to the domestic level, and national parliaments in particular, to provide democratic legitimacy for the EU.

The argument of the Court can be summarised as follows: democratic legitimacy within the State is guaranteed because national government representatives retain responsibility for European decisions, and are in this capacity accountable to their national parliaments. Thus, within the Member State both office holders involved in European decision-making as well as the scope and content of public authority including EU policy are determined by the people through periodic majority decisions of the citizens. In addition, accountability is achieved by an observing and controlling opposition and public. Thus, governmental action is legitimised not only through elections guaranteeing the principle of electoral

27 Liesbet Hooghe and Gary Marks (2009), 'A Postfunctionalist Theory of European Integration: From Permissive Consensus to Constraining Dissensus', *British Journal of Political Science* 39 (1), 1–23, p. 15-6.

equality, but also through continuous public discourse, fuelled by the opposition, in which these actions as well as alternatives are openly debated. So far so good.

But is this actually the case? The argument of the Court can be split into two separate main arguments: a) decisions made by government representatives at the European level are legitimised through parliamentary scrutiny of these decisions and the overall accountability of government to their parliament, and b) democratic legitimacy is not achieved through elections alone, but also through public debate and control. In the following, I will discuss both arguments in turn.

Parliamentary Scrutiny and Accountability in EU Affairs

With regard to European integration, national parliaments have undergone a remarkable development over the last decades. The early period of integration was characterised as much by parliamentary non-involvement as by a lack of parliamentary inclination to be involved. The process of European integration led to the increasing transfer of large areas of decision-making from the national arena to the EU level, resulting in a loss of legislative competences for national parliaments, whish lack direct control over European policy-making. Indeed, most scholars would probably have replied to a hypothetical Eurobarometer question that European integration was rather 'a bad thing' for national parliaments. Yet national parliaments saw little reason to get involved in EU politics. European matters were mainly considered to be foreign affairs and thus the prerogative of the executive, and since national interests were firmly protected through national governments, parliaments felt little incentive to get caught up in the complicated European business.[28]

However, the voluntary victims of the integration process have since become more assertive participants in the EU policy-making process. In order to regain some of their lost authority, national parliaments implemented formal scrutiny

28 Philip Norton (1996), 'Conclusion: Addressing the Democratic Deficit', in Philip Norton (ed.), *National Parliaments and the European Union*, London: Frank Cass, 177–93.

procedures. These included expanded rights to comprehensive information on European issues covering 'second' and 'third pillar' documents in most national parliaments. In addition they professionalised by setting up European Affairs Committees (EAC) and by implementing procedures, formal or informal, to involve the specialised standing committees in the scrutiny. Finally, scrutiny procedures were tightened including or extending parliamentary rights to voice their opinion on European issues and by setting up scrutiny reserves (giving parliament the right to scrutiny before the final decision in the Council of the EU).

To some extent, this development is actually due to the German Constitutional Court and its famous ruling on the Maastricht Treaty, in which it had already argued that democratic legitimacy in the European Union had to be tied to national parliaments as the main institutions representing the European peoples. The debate on the democratic deficit of the EU, further heated by the 'Maastricht debacle' with the failed referendum in Denmark and the 'almost defeat' in France, brought national parliaments into the limelight and even led to their growing recognition at the European level: not even mentioned in early European Treaties, Declaration 13 annexed to the Maastricht Treaty was a first timid step towards recognising their role. Subsequent Treaties have gone further by including Protocols on national parliaments, and now the Lisbon Treaty even gives them an explicit role in European politics as the new 'guardians' of the subsidiarity principle through the so-called 'Early Warning System' (EWS).

The 'Protocol on The Application of the Principles of Subsidiarity and Proportionality' provides national parliaments with the right to submit a 'reasoned opinion' to the Commission if it finds a legislative draft act to violate the subsidiarity principle (Article 7.1). If one third of the national parliaments submit a reasoned opinion, then the Commission must formally review the proposal and may withdraw or amend it but also maintain it unaltered (Article 7.2). Thus, in these cases national parliaments can only show the Commission the 'yellow card', but not force it to take their concerns into account. If, however, at least half of the national parliaments submit reasoned opinions on a legislative proposal falling under the ordinary legislative procedure (co-decision), and the Commission maintains the proposal, the legislative proposal will be submitted to both the Council and the European Parliament for review. If either body decides with a majority of 55 per cent on the incompatibility of the proposal with the principle of subsidiarity, the 'legislative proposal shall be given not further consideration' (Article 7.3.b). While national parliaments thus still do not have a right to force the Commission directly to take their opinion into account, this last rule enables parliaments to force the Council and the EP to deal with their concerns.

In addition, according to Article 8 of the Protocol the Court of Justice of the European Union (ECJ) will have jurisdiction in actions on grounds of infringement of the principle of subsidiarity by a legislative act, and such action can now also be brought forward by national parliaments through their governments.

And while we have good reason to remain sceptical about the direct impact of the new powers conferred to national parliaments through the EWS[29], one of its advantages is that it may stimulate closer communication not only between national parliaments, but also between national parliaments and the European Commission. As a look at the existing submissions on IPEX[30] shows, some national parliaments use their reasoned opinions to express their concerns regarding legislative proposals even if the opinion finds no breach of the principle of subsidiarity as such. Although not covered by the legal provisions of the Lisbon Treaty, this may give national parliaments some influence over EU legislation independently of their government if they are able to convince the Commission that their concerns are justified, especially if shared by a larger number of parliaments.

Thus, while they may still not be major players, 'parliaments throughout the EU have clearly become better at playing the European game, exerting more control over their government in EU matters and gaining more influence on both the rules

29 Among many Tapio Raunio (2007): 'National legislatures and the Constitutional Treaty, in John O'Brennan and Tapio Raunio (eds.), National Parliaments within the Enlarged European Union: From 'victims' of integration to competitive actors?, *Abingdon: Routledge*, 79-92.
30 The Interparliamentary EU information Exchange (IPEX) is an electronic platform created to facilitate communication and cooperation between parliaments of the European Union (www.ipex.eu).

and the substance of the legislative game'.[31] In addition, their direct involvement in the legislative process via the EWS or the possibility to bring forward action before the ECJ on grounds of infringement of the subsidiarity principle provides national parliaments with the opportunity to be not only attentive watchdogs of their own government's European policy making, but to develop into more autonomous players at the European level – possibly by bypassing or even acting against their own governments. Especially with regard to the EWS this will, however, depend crucially on whether and how the European Commission reacts to submitted reasoned opinions. National parliaments may not be willing to engage in a time-consuming exercise if it remains a purely symbolic measure without any discernable impact at the European level.

A Public Discourse on EU Affairs?

As mentioned above, the Court argued that democratic legitimacy cannot only be measured in institutional terms alone but depends on a viable public debate on policy choices and political alternatives to allow citizens to make informed political (electoral) choices and to exercise democratic control. Effective democratic accountability requires mechanisms for steady and reliable information and communication between decision makers and citizens to ensure that citizens are able to evaluate the actions of their representatives. Parliaments are usually seen as 'the means by which the measures and actions of government are debated and scrutinised on behalf of citizens, and through which the concerns of citizens . . . may be voiced. The extent to which they carry out such actions, *and are seen by citizens to carry out such actions*, may be argued to constitute the essential underpinning of legitimacy of the political system in the eyes of electors'.[32]

What the Court seems to have overlooked in its appraisal of domestic democracy, however, is that while national parliaments may indeed carry out such actions

31 John O'Brennan and Tapio Raunio (2007): 'Introduction: Deparliamentarisation and European integration', in John O'Brennan and Tapio Raunio (eds.), National Parliaments within the Enlarged European Union: From 'victims' of integration to competitive actors?, *Abingdon: Routledge*, 1-26, p. 8.
32 Philip Norton, 'Introduction: The Institution of Parliaments', in Philip Norton (ed.) (1996), *Parliaments and Governments in Western Europe*, London: Frank Cass, 1-15, p. 1 (emphasis added).

with increasing effectiveness in EU affairs, citizens rarely get to see them do so. European politics and policies are also not subject of a broad public debate within national parliaments or the public sphere at the national level.

Although national parliaments have clearly become more influential in EU affairs, many of their European activities take place behind firmly closed doors. In most national parliaments, EU matters are delegated to European Affairs Committees. Agreed, many national parliaments have opened up their European Affairs Committee meetings to the public, but a large number still meet in camera. In addition, most EAC that meet in public can hold sessions behind closed doors when dealing with more sensitive EU matters. Many parliaments now also provide access to their scrutiny documents and/or minutes of their committee meetings on the Internet. However, publishing documents on complicated EU legislation or opening up committee meetings to a small auditorium are rather unsatisfactory instruments to achieve openness and transparency. The use of more effective instruments to achieve publicity in EU affairs, such as plenary debates on EU matters, is still rather rare.[33] For example, the idea, introduced during the Convention on the Future of Europe and later pursued by COSAC[34], to introduce a 'European week' in which all national parliaments would hold a debate on the annual legislative and work programme of the European Commission was received with little enthusiasm by most parliaments.[35]

There are, of course, a number of reasons why parliaments prefer to conduct their EU business away from the prying eye of the public.[36] Negotiations between the government and the parliament (and especially the governing parliamentary party groups) are clearly facilitated by closed doors. Publicity threatens to make divisions and conflict within the governing party or parties public and thus vulnerable to exploitation by the opposition. Greater publicity could also make information on the government's negotiation strategy available to other Member

33 Torbjörn Bergmann, Wolfgang C. Müller, Kaare Strøm and Magnus Blomgren, 'Democratic Delegation and Accountability: Cross-national Patterns', in Kaare Strøm, Wolfgang C. Müller and Torbjörn Bergmann, eds, *Delegation and Accountability in Parliamentary Democracies*, Oxford University Press, 2003), 109-221, p. 175.
34 'Conférence des Organes Spécialisés dans les Affaires Communautaires', a parliamentary conference at the EU level consisting of members of national European Affairs Committees and Members of the EP.
35 Tapio Raunio (2010), 'The Functions of National Parliaments in EU Affairs', paper presented at the Workshop on National Parliaments in the European Union, Viadrina University, Frankfurt/Oder, 14.5.2010
36 Katrin Auel (2007), 'Democratic Accountability and National Parliaments: Redefining the Impact of Parliamentary Scrutiny in EU Affairs', *European Law Journal* 13 (4), 487-504.

States and thus weaken its bargaining position. Finally, the government's bargaining position in Brussels may be weakened by public conflicts between the government and the parliament as other negotiation partners at the European level could easily point out that the government's position is not even supported at home. It is therefore not surprising that both government representatives and their MPs have little incentive to discuss concrete issues in a broad public debate.

But even outside of the narrow context of specific EU legislative procedures, mainstream parties, in particular, usually have an incentive to depoliticise issues of European integration.

First, party positions on European integration deviate from the left-right dimension, which is the basic structure of party competition in Europe.[37] And national mainstream parties across the EU are ideologically less cohesive on integration than on traditional socio-economic issues that dominate the domestic political discourse. Although most mainstream parties publicly support European integration, very few of them are perfectly united on this issue. Indeed, intra-party dissent over the issue has increased fairly consistently over the past twenty years.[38] Thus, the issue of European integration may threaten the internal cohesiveness of political parties, as the example of the French Parti Socialiste during the referendum on the Constitutional Treaty demonstrated. Unsurprisingly, party leaders are reluctant to emphasise an issue that threatens to divide their party since disunity may reduce a party's electoral popularity. As it has been argued above, for example, parties that fail to 'get their act together' and to provide a cohesive stance on European integration tend to do worse in EP elections.[39]

Second, despite intra-party dissent, mainstream parties, and governing parties in particular, are generally more Europhile than their voters.[40] While opposition towards the European Union is found at the extreme left and right, parties in the political centre are usually supportive of European integration – the Eurosceptic

37 Hooghe and Marks (2009), op. cit.,
38 Liesbet Hooghe and Gary Marks (2006), 'Europe's Blues: Theoretical Soul-Searching after the Rejection of the European Constitution', *PS: Political Science and Politics* 34 (2), 247–50.
39 Ferrara and Weisshaupt (2004) op.cit.
40 Mikko Mattila and Tapio Raunio (2006), 'Cautious Voters – Supportive Parties: Opinion Congruence between Voters and Parties on the EU Dimension, European Union Politics, 7 (4), 427-449; Sara B. Hobolt, Jae-Jae Spoon and James Tilley (2009), op. cit.

position of the British Conservatives being a notable exception. In the large majority of Member States, voters for governing parties are more Eurosceptic than their own governing parties.[41] And while these differences are greatest for the new accession countries, the gap is present in most old member states as well. This suggests that at least so far the parties' stance on European integration is clearly less important than domestic issues in national elections. But it also means that politicising European issues may make this gap more obvious and may lead to an alienation of part of the electorate.

Yet, finally, governing parties also cannot suddenly adopt a more Eurosceptic position. On the one hand, they have usually been involved in shaping the course of integration and cannot swiftly alter their stance without loosing credibility. On the other hand, governing parties are also responsible for policy-making at the European level, where a more negative stance may result in less effective bargaining. The same is true for the main opposition parties, which also have to consider both their credibility as well as their effectiveness if they gain office and are, in turn, responsible for EU policy-making.

For mainstream parties, EU issue voting is thus more of a liability than an asset.[42] As a result, European issues play only a minor role in national election campaigns as well. Recent research has shown that while European integration has become slightly more salient for political parties over time, it is still overall of marginal importance. On average, mentions of the EU (both positive and negative) have not surpassed 4.5 per cent of all statements in the EU-15 party manifestos over time.[43] Looking at campaign statements more broadly including newspaper articles, European integration made up only 2.5 per cent of all issue-related statements in the 1970s campaigns, but close to 7.0 per cent in the campaigns of the 1990s.[44]

41 Sara B. Hobolt, Jae-Jae Spoon and James Tilley (2009), op. cit., p. 100.
42 Catherine E. de Vries (2010), 'EU Issue Voting: Asset or Liability?: How European Integration Affects Parties' Electoral Fortunes' *European Union Politics* 11 (1), 89-117.
43 Hooghe and Marks (2006) op. cit., p. 248, based on data from Ian Budge, et al. (2001) *Mapping Policy Preferences. Estimates for Parties, Electors, and Governments 1945–1998*, Oxford: Oxford University Press.
44 Hanspeter Kriesi (2007), 'The Role of European Integration in National Election Campaigns', *European Union Politics* 8 (1), 83–108.

But that means that the politicisation of EU issues and the framing of the debate on Europe in terms of both economic interests and identity and national sovereignty has been left mainly to Eurosceptic parties on the left and right fringes.[45] In contrast to the mainstream parties, parties on the far right or far left have an interest in politicising EU issues to broaden their voter base, which is likely to be limited given their position on the left-right dimension. As a result, these parties have an incentive to politicise issues on which they can successfully compete with other parties, and 'Europe' provides such an issue. And small Eurosceptic parties are indeed a decisive force in swaying popular opinion against Europe by mobilizing the growing uncertainties about the future of European integration among the mass public. Eurosceptic cues are found on both extremes of the political spectrum but for different reasons and with different emphasis: on the extreme right, parties mobilise their voters against the EU with issues such as national sovereignty and national identity; on the extreme left, parties play on citizens' fears of a 'neoliberal Europe' and economic insecurity.[46]

But that also means that European citizens have few opportunities to voice their opinion, let alone their opposition to further integration or specific European policies unless they are willing to vote for parties on the political fringes. European affairs also remain clearly under-emphasised in domestic elections campaigns, and citizens are not presented with clear choices regarding European integration as such or more specific European policies either. According to Van der Eijk and Franklin[47] the EU issue therefore presents a 'sleeping giant' to the extent that it divides voters without giving them an immediate outlet in party competition. In fact, it seems the giant has been firmly put under sedation by most mainstream parties in Europe.

45 Catherine E. De Vries and Erica E. Edwards (2009), 'Taking Europe To Its Extremes: Extremist Parties and Public Euroscepticism', *Party Politics* 15 (1), 5-28; Leonard Ray (2007), 'Mainstream Euroscepticism: Trend or Oxymoron?', *Acta Politica* 42 (2-3), 153–172.
46 Catherine E. De Vries and Erica E. Edwards (2009), op. cit.
47 Cees van der Eijk and Mark N. Franklin (2004), 'Potential for contestation on European matters at national elections in Europe', in Gary Marks and Marco R. Steenbergen (eds.), *European Integration and Political Conflict*, Cambridge: Cambridge University Press, 32-50.

2.5 Conclusion

The argument of the Court regarding democratic legitimacy in the European Union is neither helpful nor consistent. Electoral equality is indeed not given in the EP, but with its dogmatic insistence on this aspect as the main problem, the Court simply misses the point. Neither are the arguments concerning the inability of the EP to function like a proper legislature convincing. Over the decades, the EP has developed into a rather powerful legislature, in which political competition is mainly organised along the classic left-right dimension of politics and where increasingly cohesive political groups fight the 'political battle'.

At the same time, the Court has dealt efforts to address the democratic deficit in the EU through various means a serious blow. Since the EU is not a State, it does not have to be democratic. Thus, the *status quo* is fine, and we can stop worrying about it as long as the status quo is preserved. What is more, following the Court's argument in the Lisbon case, the European Parliament's role cannot be strengthened further, especially at the cost of national parliaments, since that would involve a move towards the establishment of a European State. It is because the EP has only an auxiliary role that it is compatible with national constitutions.

By simply stating that the EU does not have to live up to democratic standards of a nation State because it is not a State, the Court both sweeps away concerns about democratic legitimacy in the EU and fails to provide any further guidance: 'in its rather lengthy and devious arguments and considerations which it itself calls "theoretical", the Court does not make any original contribution to the theory or the understanding of the unique process of European integration in general and to the joint exercise of public authority within a transnational institutional system with direct links to the citizens in particular'.[48]

In addition, even if genuine democracy were, as the Judges argue, tied to the State, which is highly debatable, they fail to acknowledge that EU decision-mak-

48 Roland Bieber (2009), 'An Association of Sovereign States', *European Constitutional Law Review* 5 (3). 391-406, p. 396.

ing within the Member States does not live up to their own standard. According to the Court, a legitimising connection must exist between those entitled to vote and European public authority, and this connection, which is based on both, equal representation through elections and vibrant public debate, is given within the Member States, but not within the EU. However, by this standard, rather than relying on domestic democracy, the Court should have given domestic politicians a stern talking to. The real problem of European democracy is the lack of public debate, contestation and political competition over Europe, and it is a problem as much at the European level as at the domestic level, because the same actors (national parties) are responsible for it. EU issues are uncomfortable and unattractive for most mainstream parties, and they have been rather committed to keeping Europe *out* of the public debate. As a result, to take Lincoln's famous definition, government in EU affairs may be *for* the people, but it is far less *of* or *by* the people.

And the people are not having it. Efforts by political elites to keep the lid on European issues are therefore probably doomed to fail. The lid is off, and such efforts will only leave the field wide open for populist parties to continue to exploit European issues. In addition, the lack of opportunity to voice specific criticism carries the danger of creating general opposition. For the EU, this may mean that opposition against specific aspects of integration or particular EU policies will, in the absence of opportunities to voice it effectively, turn into greater opposition against the European project as a whole. The politicisation of European issues is therefore not a bad development as such, quite the contrary. But it needs to be reflected in the political system by providing public debate as well as electoral and thus political choices. Then it will increase the democratic legitimacy of the European Union, because it will give citizens greater ownership over European decisions. In the short run, this may lead to a brake on further integration, but in the long run a more open debate could create a basis for a more democratic Union.

Previously Published Studies

Regional Integration in the Mediterranean: Moving out of the Deadlock? - Timo Behr [May 2010]

Towards a European Energy Community: A Policy Proposal - Sami Andoura, Leigh Hancher and Marc Van der Woude (March 2010).

Reshaping EU-US Relations: A concept Paper - Reflection Group (Romano Prodi, Guy Verhofstadt (co-chairs), Etienne Davignon, Jacques Delors, Joschka Fischer, Paavo Lipponen, Tommaso Padoa-Schioppa) and Nicole Gnesotto (Rapporteur) / Coordinated by Sami Andoura, Timo Behr and Gaëtane Ricard-Nihoul (March 2010).

The Contribution of 14 European Think Tanks to the Spanish, Belgian and Hungarian Trio Presidency of the European Union - Coordinated by Elvire Fabry and Gaëtane Ricard-Nihoul (March 2010).

An ever less Carbonated Union? Towards a better European Taxation against Climate Change - Eloi Laurent, Jacques Le Cacheux (December 2009).

Italian Entrepreneurs' rush towards Romania. Circulations, Asymmetries, Narrations - Aziliz Gouez and Lynda Dematteo (August 2009).

Democracy in the EU and the Role of the European Parliament - Federal Trust , Institut für Europäische Politik , Centro Studi sul Federalismo , Istituto Affari Internazionali , Notre Europe (March 2009).

Health: A Vital Issue for Europe - Sébastien Guigner (March 2009).

The Czech EU Presidency: Background and Priorities - Petr Drulák (December 2008).

Social Experimentation in Europe: Towards a more Complete and Effective Range of the EU Action for Social Innovation - Marjorie Jouen (November 2008).

UE-ASEAN: Two to Tango? - David Camroux (June 2008).

CAP Reform beyond 2013: An Idea for a Longer View - Jean-Christophe Bureau and Louis-Pascal Mahé (May 2008).

The Political Economy of Regional Integration in Southern Africa – Mills Soko (December 2007).

What Future Framework for Agriculture after 2013? - Jean-Christophe Bureau, Nadège Chambon, Pierre Lepetit, Pierre Rainelli. With the Contributions of François Bonnieux, Sylvie Bonny, Nadège Chambon, Pierre Dupraz, Isabelle Garzon, Aziliz Gouez, Michiel Keyser, sophie Méritet, Karine Latouche and Josef Schmidhuber (December 2007).

A Star Pupil Playing it Safe in the EU: An Inside View of the First Slovenian EU Council Presidency, January-June 2008 - Manja Klemencic (December 2007).

An Open Europe in a Multipolar World: Lessons from the Portuguese Experience - Àlvaro de Vasconcelos (October 2007).

Transnational Production Networks in the Automobile Industry - Heribert Dieter (June 2007).

Power to the People: Promoting Investment in Community-Owned and Micro-Scale Distributed Electricity Generation at the EU Level - Stephen Boucher, Columbia University Workshop (May 2007). **F**unding the EU Budget with a Genuine Own Resource: The Case for a European Tax - Jacques Le Cacheux (May 2007).

Wine and Europe: the Metamorphoses of a Land of Choice – Aziliz Gouez and Boris Petric (March 2007)

Germany and Europe: New Deal or Déjà vu? – Ulrike Guérot (December 2006)

Regional Economic Integration in South America - Alvaro Artigas (November 2006)

The Impact of Television Media on the French Referendum Campaign in 2005 - Jacques Gerstlé (November 2006)

Plan B: How to Rescue the European Constitution? - Andrew Duff (October 2006).

A Transition Presidency? An Inside View of Finland's - Second Presidency of the EU - Teija Tiilikainen (July 2006).

The Vision of Europe in the New Member States – Notre Europe asked different Personalities of the New Member States to give their Vision of Europe in 2020 - Gaëtane Ricard-Nihoul, Paul Damm and Morgan Larhant (July 2006).

The Question of European Identity - Aziliz Gouez, Marjorie Jouen and Nadège Chambon (January 2006).

Report on East Asian Integration: Opportunities and Obstacles for Enhanced Economic Cooperation - Co-ordinated by Heribert Dieter, With Contributions from Jean-Christophe Defraigne, Heribert Dieter, Richard Higgott and Pascal Lamy (January 2006).

An Honest Broker in Difficult Times: Austria's Presidency of the EU - Sonja Puntscher-Riekmann, Isabella Eiselt and Monika Mokre (December 2005).

The European Constitution and Deliberation: the Example of Deliberative Focus Groups ahead of the French Referendum of 29 May 2005 - Henri Monceau (November 2005).

Defining a new European Social Contract - Marjorie Jouen and Catherine Palpant (September 2005).

The French "no" Vote on May 29, 2005: Understand, Act - Gaëtane Ricard-Nihoul (October 2005)

Defining a new European Social Contract - Marjorie Jouen and Catherine Palpant (September 2005).

The best Laid Plans: Britain's Presidency of the Council of European Union - Anand Menon and Paul Riseborough (June 2005).

European Budget: the Poisonous Budget Rebate Debate - Jacques Le Cacheux (June 2005).

Analysis of European Elections (June 2004) - Céline Belot and Bruno Cautrès (June 2005).

Why they wanted Europe: A Call of 12 french Pionners of European integration - Jean-Louis Arnaud (May 2005).

Ratification and Revision of the Constitutional Treaty - Henri Oberdorff (May 2005).

Luxembourg at the Helm: Experience, Determination and Self Denial - Mario Hirsch (December 2004).

A Driving Force Despite Everything: Franco-German Relations and the Enlarged European Union - Martin Koopmann (November 2004).

Europe and its Think Tanks: a Promise to be Fulfilled - Stephen Boucher, Benjamin Hobbs, Juliette Ebelé, Charlotte Laigle, Michele Poletto, Diego Cattaneo and Radoslaw Wegrzyn (October 2004).

A View from Outside: the Franco-German Couple as seen by their Partners - Matt Browne, Carlos Closa, Soren Dosenrode, Franciszek Draus, Philippe de Schoutheete and Jeremy Shapiro (April 2004).

Leading from Behind: Britain and the European Constitutional Treaty - Anand Menon (January 2004).

US Attitudes towards Europe: a Shift of Paradigms? - Timo Behr (November 2003).

Giving Euro-Mediterranean Cooperation a breath of fresh air - Bénédicte Suzan (October 2003).

Italy and Europe 2003 Presidency - Roberto Di Quirico (July 2003).

European Attitudes towards Transatlantic relations 2000-2003: an Analytical Survey - Anand Menon and Jonathan Lipkin (June 2003).

Large and Small Member States in the European Union: Reinventing the Balance - Paul Magnette and Kalypso Nicolaïdis (May 2003).

Enlargement and Investment in Central and Eastern Europe - Bérénice Picciotto (May 2003)

The Institutional Architecture of the European Union: a third Franco-German way? - Renaud Dehousse, Andreas Maurer, Jean Nestor, Jean-Louis Quermonne and Joachim Schild (April 2003).

A New Mechanism of Enhanced Cooperation for the Enlarged Union - Eric Philippart (March 2003).

Greece, the European Union and 2003 Presidency - George Pagoulatos (December 2002).

The Question of the European Government - Jean-Louis Quermonne (November 2002).

The European Council - Philippe de Schoutheete and Helen Wallace (September 2002).

Multilevel Government in three Eastern and Central European Candidates Countries: Hungary, Poland and Czech Republic (1990-2001) - Michal Illner (June 2002).

The Domestic Basis of Spanish European Policy and the 2002 Presidency - Carlos Closa (December 2001).

The Convention of a Charter of Fundamental Rights: a Method for the Future? - Florence Deloche Gaudez (December 2001).

The Federal Approach to the European Union or the Quest for an Unprecedented European Federalism - Dusan Sidjanski (July 2001).

The Belgian Presidency 2001 - Lieven de Winter and Huri Türsan (June 2001).

The European Debate in Sweden - Olof Petersson (December 2000).

An Enlargement Unlike the Others ... Study of the Specific Features of the Candidate Countries of Central and Eastern Europe - Franciszek Draus (November 2000).

The French and Europe: the State of the European Debate at the Beginning of the French Presidency - Jean Louis Arnaud (July 2000).

Portugal 2000: the European way - Alvaro de Vasconcelos (January 2000).

The Finnish Debate on the European Union - Esa Stenberg (August1999).

The American Federal Reserve System: Functioning and Accountability - Axel Krause (April 1999).

Making EMU work - partnership Notre Europe and Centro European Ricerche (March 1999).

The Intellectual Debate in Britain on the European Union - Stephen George (October 1998).

Britain and the new European Agenda - Centre for European Reform, Lionel Barber (April 1998).

Social Europe, History and Current State of Play - Jean-Louis Arnaud (July 1997).

Reinforced Cooperation: Placebo rather than Panacea - Françoise de la Serre and Helen Wallace (September 1997).

The Growth Deficit and Unemployment: the Cost of Non-Cooperation - Pierre-Alain Muet (April 1997).

All our publications are available for free from our Website: www.notre-europe.eu

Legal Mentions

With the support of the European Commission : support to active entities at European level in the field of active European citizenship.

Notre Europe also receives the financial support of the French Government, the Compagnia di San Paolo, the Macif and the Grand Duchy of Luxembourg.

Dépôt légal

Katrin AUEL

Lecturer in Politics and a Fellow at Mansfield College, University of Oxford and Visiting Fellow at the Centre d'études européennes, Sciences Po Paris.

Julio BAQUERO CRUZ

Member of the Legal Service of the European Commission and visiting professor at Sciences Po (Paris).

European Democracy in Action

Karlsruhe's Europe

When on June 30th 2009, the German Constitutional Court delivered its ruling on the Lisbon Treaty, it met with mixed feelings. On the one hand, by recognizing the compatibility of the Treaty with the Basic law, it made possible its ratification by the German President, thereby removing one of the last stumbling blocks on the rocky road to its eventual coming into force. On the other hand, the detailed analysis of European Union it contained was widely perceived as a hostile signal by most readers.

Unlike its 1993 forerunner on the Maastricht Treaty, this ruling did not limit itself to signalling a degree of discontent with the current scope and pace of the integration process, but clearly erected barriers to further centralisation, by demanding a closer parliamentary scrutiny of decisions taken in Brussels and by threatening to oppose the implementation in Germany of EU rules that would violate the subsidiarity principle. In other words, the objections it raised were more than rhetorical: they aimed at exerting pressure on the federal government.

One year on, it seems clear that this ruling will have a lasting impact on Germany's European policy. In the discussion on the assistance package to Greece, for instance, opponents to a German participation in the stabilisation effort decided to bring the matter before the Constitutional Court. But the latter's influence will also be felt beyond the German borders. The weight of Germany and the prestige of its institutions are such that the Court's concerns are likely to find an echo in other countries, all the more so because the intergovernmental view of Europe that it promotes resonates with the current mood and practice. Hence the need to analyse in detail the implications of this ruling, not only for Germany, but for the rest of Europe as well. This is the ambition of this study, which will focus on two issues of central importance: the impact of the ruling on the authority of EU law, and the role of national parliaments.

www.notre-europe.eu
e-mail : info@notre-europe.eu

Notre Europe
Thinking a united Europe
Penser l'unité européenne