

### 3. Democratic Theory and the Nation-State: Some Remarks on the Concept of Democracy in the German Federal Constitutional Court's Judgement on the Lisbon Treaty

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#### I. Introduction

In its judgement on the Lisbon Treaty<sup>1)</sup> the German Federal Constitutional Court (FCC) presents, in a nutshell, an entire theory of democracy and statehood, claiming that democratic procedures are closely bound to the idea of the nation-state and its people.<sup>2)</sup> The court states that democracy requires representation in an equality-based manner, in the traditional sense of the “one (wo)man, one vote” principle. This principle is then declared to be incompatible with the mechanisms of the European Community (or, according to the new nomenclature of the Lisbon Treaty: the European Union<sup>3)</sup>). For, in addition to the concept of democratic legitimation via parliamentary decision, these mechanisms have to pay tribute to the idea of minority protection on the level of the member states, too. This reasoning of the FCC has been confronted with harsh criticism. However, it has also found firm supporters.<sup>4)</sup> I will approach the subject in three steps. Firstly, I will give a brief outline of the specific character of European law (II.). Secondly, I will shortly describe the judgement and its decisive line of argument (III.). Thirdly, I will ask whether a concept of democracy so closely connected to the figure of homogeneity is still adequate to meet the current challenges of an increasingly globalised world (IV.), and I will conclude with a brief outlook on a possible alternative (V.).

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1) Lisbon Case, BVerfG, 2 BvE 2/08, from 30 June 2009; Engl. translation available at [http://www.bundesverfassungsgericht.de/entscheidungen/es20090630\\_2bve000208en.html](http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html).

2) See on the FCC's concept of statehood and democracy as developed in its previous judicature Robert Chr. van Ooyen, *Die Staatstheorie des Bundesverfassungsgerichts und Europa. Von Solange über Maastricht bis zum EU-Haftbefehl* (Nomos: Baden-Baden, 2006).

3) See Article 47 TEU, stating that now the Union shall have legal personality (thus replacing the Community); hereunto Jörg Philipp Terhechte, ‘Der Vertrag von Lissabon: Grundlegende Verfassungsurkunde der Europäischen Rechtsgemeinschaft oder technischer Änderungsvertrag?’, *Europarecht* (2008), 143, 147 et seq.

4) See for an overview of the different possible perspectives on the ruling Franz C. Mayer, ‘Rashomon in Karlsruhe’, *Neue Juristische Wochenschrift* (2010), 714; furthermore the contributions in 48 *Der Staat* (2009), vol. 4; and 10 *German Law Journal* (2009), no. 8.

## II. The Development of the European Union: From International to Supranational Law

The European integration process started off as a predominantly economic project. Its first aim was the establishment of a common market between the six founding member states. However, from the very beginnings of the integration process, as early as with the creation of the European Coal and Steel Community (ECSC) in 1952, this primary economic approach was not regarded as an end in itself. Rather, it was intended as the first step on the long way towards political unification.<sup>5)</sup> The preamble of the ECSC Treaty explicitly declared that the member states were “resolved [...] to create, by establishing an economic community, the basis for a broader and deeper community among peoples long divided by bloody conflicts; and to lay the foundations for institutions which will give direction to a destiny henceforward shared.”

Viewed from a technical legal perspective, the Union began as a project of international law – several sovereign states bound together by international treaties dealing mostly with economic affairs.<sup>6)</sup> On the one hand, this specific legal character of the Union has not changed yet. In spite of the major changes which the European Union has undergone in recent decades, its so called “primary law” is still constituted by international treaties concluded between the member states. On the other hand, however, the EU itself is no longer merely a product of international law. In particular the jurisdiction of the European Court of Justice (ECJ) has turned it into something different. The ECJ has modified the community’s basic legal character from an international to a so-called “supranational” organisation.<sup>7)</sup> Though the Union is still not a federal state (and, according to its own claims, does not want to become one<sup>8)</sup>), EU law contains several important characteristics typical of classical state law. Basically we can describe two aspects peculiar to European law:

Firstly, the ECJ has stated a primacy of application for community law over the law of the member states.<sup>9)</sup> In order to safeguard the uniform application of Union law, in cases of conflict EU law is supposed to overrule domestic (national) regulations. This legal supremacy of European law accounts for both primary law, the Treaties, and secondary law, the statutory

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5) See Jürgen Schwarze, ‘The development of the European Union from a common market to a political union’, 23 *Ritsumeikan Law Review* (2006), 91.

6) See on the history of the Union Rupert Scholz, ‘Vorlesung Europäisches Verfassungsrecht I: Die Entwicklung der Europäischen Union und der Europäische Verfassungsvertrag’, 23 *Ritsumeikan Law Review* (2006), 31.

7) See Gert Nicolaysen, *Europarecht I. Die europäische Integrationsverfassung* (Baden-Baden: Nomos, sec. ed. 2002), 106 et seq.

8) See e.g. Jörg Philipp Terhechte, ‘Souveränität, Dynamik und Integration – making up the rules as we go along? Anmerkungen zum Lissabon-Urteil des Bundesverfassungsgerichts’, *Europäische Zeitschrift für Wirtschaftsrecht* (2009), 724, 729.

9) See Case 6/64, *Costa v. E.N.E.L.*, 1964 ECR 585; hereunto Tobias Kruis, ‘The Primacy of EU Law – From Theory to Practice’, 28 *Ritsumeikan Law Review* (2011).

law on the European level. Moreover, supremacy affects on the national level not only normal legal statutes, but also constitutional law. Consequently, even national constitutional law can, if it contradicts European legal provisions, be declared an infringement of EU law by the ECJ and thus become non-applicable within the member states. What is more, every “judge, even every civil servant can disregard a law enacted by the democratically elected national parliament if she deems it incompatible with EU law.”<sup>10)</sup>

Thus the ECJ interprets the European legal order in the classical view of a hierarchically organised construction. In this construction, EU law takes the dominating place at the top, a place which on the national level is reserved for constitutional law. Despite the ongoing debate on whether or not the Treaties can be regarded as a “European Constitution” in a comprehensive sense,<sup>11)</sup> we can thus say that at least from this functional perspective taken by the ECJ the constitutional character of the Treaties is hardly deniable.<sup>12)</sup> We should also note, however, that this claim for supremacy was to some extent defied by the German FCC. In its famous “Solange I” decision the Court held that the ultimate responsibility for the German legal order remains with the constitutional court.<sup>13)</sup> As we will see, the judgement in the Lisbon Case follows this line of argument.

If the first characteristic of European law, the primacy of application, can be described as a functional equivalent to national constitutional law, then the second characteristic demonstrates its close relationship to national law in general. The ECJ declares that European law can be directly applicable and thus effective within the member states.<sup>14)</sup> Thus, in contrast to the usual proceedings on the level of international law, European legal provisions, again both on the level of primary as well as secondary law, do not need to be transformed into national law by acts of national legislature in order to become effective. Of course the treaties, being international agreements, have to be accepted and transformed by the national legal orders of the contracting states. Yet if within the boundaries of this general acceptance a specific norm of EU law is “legally perfect”, that is to say if it is applicable without further implementing measures, then it can be applied, even if there is no national statute

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10) Dieter Grimm, ‘The Basic Law at 60 – Identity and Change’, in: 11 *German Law Journal* (Special Issue: The Basic Law at 60, Susanne Baer, Christian Boulanger, Alexander Klose & Rosemarie Will eds., 2010), 33, 45.

11) See on this debate Dieter Grimm, ‘Does Europe Need a Constitution?’, 1 *European Law Journal* (1995), 278; furthermore the contributions in *Developing a Constitution for Europe* (London and New York: Routledge, 2004; Erik O. Eriksen, John E. Fossum & Augustín J. Menéndez eds.); Claudio Franzius, *Europäisches Verfassungsrechtsdenken* (Tübingen: Mohr Siebeck, 2010).

12) See Schwarze, ‘The development of the European Union from a common market to a political union’, *supra* note 5, at 94: “Regarding the structure of the EU and the EC it has been agreed on for quite a period of time, that the Community Treaties as far as their contents and their functions are concerned, are of a constitutional character.” Even the FCC speaks in the Lisbon Case – though still using quotation marks – of the Treaties as the “‘Constitution of Europe’” (BVerfG, Lisbon Case, *supra* note 1, at para. 231).

13) See BVerfGE 37, 271 – Solange I.

14) See ECJ, Case 26/62, van Gend & Loos, 1963 ECR 1.

transforming it into the legal system on the level of the nation-state. In this way EU law provides directly enforceable legal positions not only for the member states, but also for the individual citizens.<sup>15)</sup>

In consequence of this jurisdiction and the above specified character of the European legal order, the European Union is no longer a mere alliance of sovereign states, or, to use the relevant German terminology: not only a “*Staatenbund*”. But it is also not yet a federal state, no “*Bundesstaat*”. According to the terminology of the German FCC, it is a legal entity *sui generis*, a “*Staatenverbund*”,<sup>16)</sup> i.e. a specific compound or interconnection of sovereign states and their legal systems.<sup>17)</sup> In this *Staatenverbund* the “exercise of sovereignty (*Wahrnehmung von Hoheitsgewalt*) is based on the empowerment by nation-states. These nation-states remain sovereign, they act within the inter-state area mainly through their governments as primary agents. Thus, they direct integration.”<sup>18)</sup>

### III. The Basic Reasoning of the FCC’s Judgement on the Lisbon Treaty

This roughly outlined general tension between the traditional approach to law as an either national or international phenomenon and the newly defined supranational perspective sets the stage for a proper understanding of the FCC’s ruling on the Lisbon Treaty.

Taking a first look at the outcome of the decision, the court’s view on the integration process could appear rather supportive. For the FCC explicitly “rejected every objection that had challenged the compatibility of the Treaty of Lisbon with the Basic Law. [...] The Court’s only criticism was directed at the national law of implementation”<sup>19)</sup>. This statute allowed for limited amendments to the Treaty without further participation of the federal legislature, that is to say of the *Bundestag* and *Bundesrat*. The FCC stated that this regulation would not suffice in order to fulfil the parliament’s responsibility with regard to the integration process.<sup>20)</sup> Thus the Court declared a legal statute by the German parliament as an infringement of the constitution, therewith somewhat paradoxically protecting parliamentary rights against parliament itself. The FCC “obliges the democratic legislature to channel and limit the effects of supranationalisation on the German people and the democratic

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15) See Schwarze, ‘The development of the European Union from a common market to a political union’, *supra* note 5, at 92, 94. On the generally increased importance of the individual in the context of union citizenship see Ferdinand Wollenschläger, *Grundfreiheit ohne Markt. Die Herausbildung der Unionsbürgerschaft im unionsrechtlichen Freizügigkeitsregime* (Tübingen: Mohr Siebeck, 2007).

16) See BVerfGE 89, 155, 156 – Maastricht, headnote 8.

17) Interestingly, the official English version of the Lisbon case (*supra* note 1, headnote 1) translates *Staatenverbund* as “association of sovereign national states”.

18) BVerfGE 89, 155, 186.

19) Christian Tomuschat, ‘The Ruling of the German Constitutional Court on the Treaty of Lisbon’, 10 *German Law Journal* (2009), 1259.

20) See BVerfG, Lisbon Case, *supra* note 1, at para. 409 et seq.

process.”<sup>21)</sup> Yet at the same time the Court acknowledged openness towards a united Europe as one of the cornerstones of the constitutional system. What is more, it regards the realisation of a united Europe as not only a possibility left to political discretion, but declares it to be a “constitutional mandate”.<sup>22)</sup> The ruling thus appears to be in favour of the ongoing integration process.

However, a closer view on the reasoning of the decision tells a different, rather eurosceptical story. Of course it is impossible, at least within the context of a short essay, to give a close reading of the entire judgement, as it unfolds its argumentation in more than 400 paragraphs (or about 170 pages in the official collection of the Court's decisions).<sup>23)</sup> Thus I would like to concentrate the analysis on two central aspects. One aspect is the concept of sovereignty and statehood as developed within the ruling, and the other the respective concept of democracy.<sup>24)</sup> Yet the actually problematic part of the Lisbon decision cannot be attributed solely to either one of these concepts. Rather, it is constituted by the specific connection which the Court declares to exist between them. “For the Court, democracy is a concept that is limited to a state with a people and its territory.”<sup>25)</sup> The basic connection between the constitutional boundaries of integration and democracy was already established in the *Maastricht* decision of the FCC. There, the Court had claimed that “the principle of democracy does not preclude the Federal Republic of Germany from becoming a member of a – supranationally organised – inter-state community. However, it is a necessary precondition for the membership that within the *Staatenverbund* sufficient legitimation and exertion of influence by the people are secured.”<sup>26)</sup> This legitimation required “that the performance of state functions and the exercise of state capacities can be traced back to the state people and generally have to be answered to the people. This necessary connecting chain of attribution and legitimation (*Zurechnungszusammenhang*) can be constructed in different modes, not only in one specific form. However, a sufficiently effective content of democratic legitimation, a certain level of legitimation, has to be accomplished.”<sup>27)</sup> The judgement on the Lisbon Treaty takes up this line of argument again and decisively highlights its importance. The possibility of an alternative democratic legitimation besides the one given by national parliament is now

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21) Juliane Kokott, ‘The Basic Law at 60 – From 1949 to 2009: The Basic Law and Supranational Integration’, 11 *German Law Journal* (Special Issue: The Basic Law at 60, 2010), *supra* note 10, at 99, 100.

22) See BVerfG, Lisbon Case, *supra* note 1, at para. 225.

23) See BVerfGE 123, 267-437.

24) See on the general idea of democracy as a structural principle of the *Grundgesetz* Sebastian Unger, *Das Verfassungsprinzip der Demokratie. Normstruktur und Norminhalt des grundgesetzlichen Demokratieprinzips* (Tübingen: Mohr Siebeck, 2008).

25) Daniel Halberstam & Christoph Möllers, ‘The German Constitutional Court says “Ja zu Deutschland!”’, 10 *German Law Journal* (2009), 1241, 1247.

26) BVerfGE 89, 155, 184. Also headnote 2.

27) BVerfGE 89, 155, 182, with reference to BVerfGE 83, 60 (72). See on this decision Joachim Wieland, ‘Germany in the EU – the *Maastricht* Decision of the *Bundesverfassungsgericht*’, 5 *European Journal of International Law* (1994), 259.

explicitly denied. According to the FCC's reasoning in the Lisbon Case, in a true democracy the weight of each voter has to be the same. Democratic representation in a parliamentary body could be constructed only in the form of equal participation.<sup>28)</sup> Within the European parliament, however, citizens of smaller member states are granted greater representation than citizens of larger nation-states.<sup>29)</sup> Luxembourg, for instance, with its about 500,000 inhabitants, sends 6 representatives to the EP, whereas Germany, with its approximately 82,000,000 inhabitants, thus more than 160 times as much as Luxembourg, is granted only 99 parliamentary seats. "The result of this is that the weight of the vote of a citizen from a Member State with a low number of inhabitants may be about twelve times the weight of the vote of a citizen from a Member State with a high number of inhabitants."<sup>30)</sup> Therefore, from the FCC's point of view, the European Parliament cannot be recognised as a truly legitimate parliamentary body. As a parliament should "represent the people in a manner that stems from the principle of personal freedom" and do "justice to equality"<sup>31)</sup>, the European Parliament amounts to merely a representation of the peoples of the member states.<sup>32)</sup> True democracy works, in this perspective, only within the framework of a nation-state and its people. Thus, on the European level we are confronted with a serious democratic deficit.<sup>33)</sup> As state power must be democratically legitimised and controlled, this deficit forbids any more conferral of powers from the nation-states to the European Union.

The next question then is whether this democratic deficit can be cured. The answer of the *Bundesverfassungsgericht* in the Lisbon Case is a vehement no: Democracy presupposes a homogeneous environment which the Union cannot provide. And even if the Union were to develop into a nation-state-like entity, this development could not solve the problem. For the Basic Law is said not only to presuppose, but also to protect and guarantee sovereign statehood.<sup>34)</sup> More specifically, there are several policy areas – as for instance citizenship, civil and military monopoly on the use of forces, elements decisive for realisation of basic liberties, disposition of language, shaping of circumstances concerning family and education, ordering of freedom of opinion, of press and of assembly, dealing with the profession of faith or ideology – which can, according to the Court, never be communitarised.<sup>35)</sup> "The pivotal argument for this non-exhaustive enumeration is reference to a political decision that draws on a linguistically, culturally and historically influenced prior understanding of

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28) See BVerfG, Lisbon Case, *supra* note 1, at para. 210 et seq.

29) See Tomuschat, 'The Ruling of the German Constitutional Court on the Treaty of Lisbon', *supra* note 19, at 1260.

30) See BVerfG, Lisbon Case, *supra* note 1, at para. 284.

31) BVerfG, Lisbon Case, *supra* note 1, at para. 286.

32) See BVerfG, Lisbon Case, *supra* note 1, at para. 284.

33) See on this deficit Karl Doehring, 'Demokratiedefizite in der Europäischen Union?', *Deutsches Verwaltungsblatt* (1997), 1133; Hans-Heinrich Rupp, 'Europäische Verfassung und demokratische Legitimation', 120 *Archiv des öffentlichen Rechts* (1995), 269.

34) See BVerfG, Lisbon Case, *supra* note 1, at para. 216.

35) See BVerfG, Lisbon Case, *supra* note 1, at para. 249.

those involved.”<sup>36)</sup> The fundamental assumption of the ruling is that democratic legitimation and control of sovereign power presuppose that an identity of government and governed, and this can only be managed within the national framework. Democracy is to be based on homogeneity rather than on heterogeneity, on consensus rather than on conflict.

One might be tempted to draw a parallel between this basic assumption of the Court and one of “the worst traditions of German constitutional theory”<sup>37)</sup>. Indeed, the argument seems to have a remarkable predecessor. According to *Carl Schmitt's* text on “*Die geistesgeschichtliche Lage des heutigen Parlamentarismus*” from 1923, democracy requires “first homogeneity, and second – if the need arises – the elimination or eradication of heterogeneity.”<sup>38)</sup> Yet such a parallel is unfair. It does not do justice to the sincerity of the Court's considerations which have a very relevant point in naming the democratic deficit on the EU level on the one hand and the severe problems of a possible tendency towards a European “superstate” on the other hand.<sup>39)</sup> However, the practical consequences of the Court's argument are fatal: The FCC has moved the European Union and the process of European integration in a classical double bind situation, that is to say “a combination with mutually defeating commands”<sup>40)</sup>. Further integration needs sufficient democratic legitimation. Democracy, however, presupposes, according to the ruling, stately structures. Thus the judgement leaves Europe caught between the devil and the deep blue sea. This is particularly evident with regard to the role of the European Parliament. In order to safeguard national interests and the participation of the German *Bundestag*, this role must be downplayed, as it is the Council in which national representatives decide on behalf of the German state. Yet at the same time the FCC apparently admits that in order to guarantee democratic participation parliamentary rights have to be strengthened.<sup>41)</sup> Consequently, democratic participation on the European level is all at once necessary as well as impossible. Additional “novel forms of transparent or participative political decision-making procedures” can supplement, but not substitute, the classical electoral way of democratic participation.<sup>42)</sup> Therefore, though the Court does not openly admit it, it is an inevitable consequence of its argumentation that the

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36) Frank Schorkopf, ‘The European Union as An Association of Sovereign States: Karlsruhe's Ruling on the Treaty of Lisbon’, 10 *German Law Journal* (2009), 1219, 1224.

37) Halberstam & Möllers, ‘The German Constitutional Court says “Ja zu Deutschland!”’, *supra* note 25, at 1247.

38) Carl Schmitt, *Die geistesgeschichtliche Lage des heutigen Parlamentarismus* (Berlin: Duncker & Humblot, 8th ed. 1996), 13 et seq. (English translation by Ellen Kennedy: *The Crisis of Parliamentary Democracy* [Cambridge, MA: MIT Press 1985], 9).

39) See on this problem Karl-Heinz Ladeur, ‘We, the (European) People – Relâche?’, 14 *European Law Journal* (2008), 147; id., ‘European Law as Transnational Law – Europe Has to be Conceived as an Heterarchical Network and Not as a Superstate!’, 10 *German Law Journal* (2009), 1357.

40) Halberstam & Möllers, ‘The German Constitutional Court says “Ja zu Deutschland!”’, *supra* note 25, at 1251, with reference to Gregory Bateson, *Steps to an Ecology of Mind. Collected Essays in Anthropology, Psychiatry, Evolution and Epistemology* (Chicago: University of Chicago Press, 1999), 159 et seq.

41) See BVerfG, Lisbon Case, *supra* note 1, at para. 271; already BVerfGE 89, 155, 185 et seq.

42) See BVerfG, Lisbon Case, *supra* note 1, at para. 272.

integration process has to come to an end.<sup>43)</sup> If we take its concept of democracy for granted, then there is no possible way left to go on for the integration process.<sup>44)</sup>

#### IV. The Challenge of Globalisation

This argument of the ruling and in particular the concept of democracy elaborated therewith have been widely criticised for not respecting the specific legitimation that the parliamentary process as such can give, and for ignoring the fact that there are several parliamentary bodies, such as the U.S. Senate, which according to the FCC's criteria had to be regarded as undemocratic.<sup>45)</sup> In contrast to these comparative approaches, I would like to assess the idea from a rather functional perspective. Thus I take into account that without doubt "new challenges arise when dealing with the preservation and organisation of democracy and parliamentary rights as well as the protection of fundamental rights in the environment of supra- and international systems. They require new answers"<sup>46)</sup>. In this context, the question is whether such a conception of democracy as developed by the FCC is still adequate to meet the current requirements of an increasingly globalised world, that is to say of a world facing the possibility of a "Global law without a State"<sup>47)</sup>. We are currently confronted with the prospect of a fundamental change within our legal systems, a modification that does not apply to single aspects, but challenges the entire traditional understanding. "The hierarchical model of western legal cultures experiences within the emerging world society a mutation that turns it into 'something different'. [...] All our trusted concepts of legitimation, interpretation and justification lose their fundament."<sup>48)</sup> On the level of the globalised world, states still exist, and they still play an important role. However, states act no more only as unitary entities. They have become, as Anne-Marie Slaughter calls it, "disaggregated" phenomena: Their relationship to each other is no longer constituted merely or primarily by contact through their respective Foreign Offices. In contrast, states increasingly relate to each other in a pluralised way, through regulatory, judicial, and legislative channels. In

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43) See Tomuschat, 'The Ruling of the German Constitutional Court on the Treaty of Lisbon', *supra* note 19, at 1260: "The Court does not openly say that the Treaty of Lisbon traces the extreme outward frontiers of any conferral of powers to the Union, but the whole context of its findings suggests that indeed the Court begins with this assumption."

44) See Halberstam & Möllers, 'The German Constitutional Court says "Ja zu Deutschland!"', *supra* note 25, at 1252.

45) See Tomuschat, 'The Ruling of the German Constitutional Court on the Treaty of Lisbon', *supra* note 19, at 1260 et seq. The Court sees the problem, but tries to solve it by (wrongly) declaring the Senate to be no representative body, but merely a second chamber like the German *Bundesrat*. See BVerfG, Lisbon Case, *supra* note 1, at para. 286.

46) Kokott, 'The Basic Law at 60 – From 1949 to 2009: The Basic Law and Supranational Integration', *supra* note 21, at 104.

47) See *Global Law without a State* (Aldershot: Dartmouth, 1997; Gunther Teubner ed.).

48) Marc Amstutz & Vaios Karavas, 'Rechtsmutation: Zu Genese und Evolution des Rechts im transnationalen Raum', 9 *Rechtsgeschichte* (2006), 14, 15.



this context, we can observe the emergence of a legal system established by a network of interacting courts or court-like institutions.<sup>49)</sup> Partly, these courts and institutions, for instance the national constitutional courts, are still organs of the classical nation-states. Yet we also find an increasing number of genuinely international institutions.<sup>50)</sup> Furthermore, there are more and more transnational private legal regimes established by private enterprises operating in a worldwide context. In order to cope with these new developments, the classical strategies established within the context of the individual nation-state will no longer suffice. In the face of increasing fragmentation and pluralisation of law within the international and transnational context, on this level every hope for a hierarchically organised or conceptually dogmatic unity appears to be in vain.<sup>51)</sup> In contrast, what might be needed is a rather heterarchical, network-like model.<sup>52)</sup> What is more, with regard to the concept of democracy as developed in the judgement of the FCC, this emerging new system does not only affect our basic legal conceptions. It also influences the political order and our understanding of it. If democratic structures are so closely tied to the nation-state, then a possible "End of the Nation-State" jeopardises not only the classical idea of sovereignty, but also the traditional concept of democracy.<sup>53)</sup>

## V. Democratic Theory Beyond the State

From this point of view we have two principle opportunities left for a contemporary conceptualisation of democratic theory. One is to conceive of democracy in the way the *Bundesverfassungsgericht* does, i.e. as a form of equal representation closely linked to the idea of the nation-state and its people. Thus we keep a substantial, time-tested understanding of the term. However, we pay for this maintenance of an approved concept with its loss of relevance within the context of the emerging transnational world society. If we want to meet the specific requirements of globalisation, the Court's concept must appear as an anachronistic model.<sup>54)</sup> Moreover, even with regard merely to the national level one might doubt whether our contemporary pluralised society can be adequately grasped by a concept based on the idea of homogeneity.

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49) See on the concept of such a "global community of courts" Anne-Marie Slaughter, *A New World Order* (Princeton: Princeton University Press, 2004).

50) See Andreas Fischer-Lescano/Gunther Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law', 25 *Michigan Journal of International Law* (2004), 999, 1000, naming the "astonishing figure of 125 international institutions, in which independent authorities reach final legal decisions".

51) See Fischer-Lescano/Teubner, 'Regime-Collisions', *supra* note 50, at 1017.

52) See on the relevance of the network-model for modern legal theory the contributions in: 10 *German Law Journal* (Special Issue: The Law of the Network Society. A Tribute to Karl-Heinz Ladeur; Ino Augsberg, Lars Vellechner, & Peer Zumbansen eds., 2009), 305.

53) See Jean-Marie Guéhenno, *The End of the Nation-State* (Minneapolis: University of Minnesota Press, 1995).

54) See Tomuschat, 'The Ruling of the German Constitutional Court on the Treaty of Lisbon', *supra* note 19, at 1261: "In our age of globalization, it seems fairly odd to contend that genuine democracy can exist only within the framework of the nation-state."

The alternative opportunity, then, is to develop a new, more complex concept of democratic participation transcending the nation-state-centred perspective. Consequently, the question that we have to answer is: How can we possibly construct a democratic theory beyond the state? Or, seen another way, does democracy necessarily presuppose stately structures?<sup>55)</sup> The first possible option one might think of in this context could be a rather output-oriented model.<sup>56)</sup> In this model, legitimation no longer functions primarily as a guarantee of state responsibility, securing the “uninterrupted chain of legitimation” which eventually leads to the directly democratically legitimised parliament and thus to the will of the people, the subject of all state power.<sup>57)</sup> In contrast, such an output-oriented model would determine the democratic character of a decision by answering the question whether or not this decision suitably solves the problem at stake.<sup>58)</sup> This approach is already well established in juridical discussions, and we can find some support for it even in the FCC’s own case law. Accordingly, state decisions should be made “as correctly as possible, and that is to say, made by the organs having the best qualifications with regard to their organisation, constitution, function and procedural manner.”<sup>59)</sup> This requirement, though stated in the context of the separation of powers principle, could possibly become relevant in the context of democratic theory, too.<sup>60)</sup> However, the output of a decision can only be a complementary factor for democratic legitimation. Politics cannot entirely be judged by being categorised as right or wrong, true or false. On the contrary, the specific task of politics is to give answers to questions which cannot be determined in a scientific way. Therefore we have to look for another, more specifically political concept of democracy.<sup>61)</sup>

Democracy in this sense would mean not only to substitute the old monarchal sovereign

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55) See Uwe Volkmann, ‘Setzt Demokratie den Staat voraus?’, 127 *Archiv des öffentlichen Rechts* (2002), 575; Karl Heinz Ladeur, ‘Globalization and the Conversion of Democracy to Polycentric Networks: Can Democracy Survive the End of the Nation-State?’, in: *Public Governance in the Age of Globalization* (Aldershot: Ashgate, 2004; Karl-Heinz Ladeur ed.), 89; James Bohman, *Democracy across Borders. From Dêmos to Dêmoi* (Cambridge [MA]: MIT Press, 2007).

56) This model was developed for the first time in Fritz W. Scharpf, *Demokratietheorie zwischen Utopie und Anpassung* (Konstanz: Universitätsverlag, 1970), 21 et seq., 66 et seq.

57) See Ernst-Wolfgang Böckenförde, ‘Demokratie als Verfassungsprinzip’, in: *Handbuch des Staatsrechts der Bundesrepublik Deutschland, vol. I* (Heidelberg: C. F. Müller, 1987; Josef Isensee & Paul Kirchhof eds.), § 22, at 887, 894; id., ‘Demokratische Willensbildung und Repräsentation’, in: *Handbuch des Staatsrechts der Bundesrepublik Deutschland, vol. II* (Heidelberg: C. F. Müller, 1987; Josef Isensee & Paul Kirchhof eds.), § 30, at 29, 36 et seq.

58) See Christoph Möllers, ‘Braucht das öffentliche Recht einen neuen Methoden- und Richtungsstreit?’, *Verwaltungsarchiv* 90 (1999), 187, 201: “The accomplishment of legitimation is transferred from the need of state decision to the need of state responsibility for a correct decision.”

59) BVerfGE 68, 1 (86).

60) See Hans-Heinrich Trute, ‘Die demokratische Legitimation der Verwaltung’, in: *Grundlagen des Verwaltungsrechts, vol. I: Methoden – Maßstäbe – Aufgaben – Organisation* (München: Beck, 2006; Wolfgang Hoffmann-Riem, Eberhard Schmidt-Aßmann, & Andreas Voßkuhle eds.), § 6, at 307, 341 et seq.

61) See for a critique of the output-oriented model Unger, *Das Verfassungsprinzip der Demokratie, supra* note 24, at 278 et seq.

by the new governing subject “demos”. Rather, it would figure as a political conception in which governance is consistently fractured, political power bifurcated,<sup>62)</sup> and the status of political subjectivity always newly disseminated.<sup>63)</sup> Thus the place of the old sovereign, and what is more, even of sovereignty itself, is deliberately left empty.<sup>64)</sup> This empty place of sovereignty “does not refer negatively to God or to any other order of the supersensible; rather, it testifies to society’s nonclosure on itself, which is to say, its nonidentity with itself.”<sup>65)</sup> Democracy in this sense would be based not on identity and exclusion of difference, but on difference itself: Instead of focusing on producing a general consensus, the basic democratic operation would be the institutionalisation of conflict.<sup>66)</sup> Such concepts of democracy have been developed by postmodern theorists as *Jacques Rancière*<sup>67)</sup> and *Claude Lefort*<sup>68)</sup>. The task for contemporary legal scholarship will be to answer the question of whether these modern concepts of democracy can be interpreted and rearranged in a way that fits into our present constitutional framework, both on the national and the supranational level. We may assume that against the background of such newly designed concepts of democracy not only our national traditional legal terms will have to be readjusted. In order to cope with the ongoing transformations within the world society, it will not suffice simply to reproduce the classical conception of democracy on the level of supranational or international communities.<sup>69)</sup> Hence also the traditional approach to the integration process as expedited by the ECJ will have to be modified. Taking dissent rather than consensus as the democratic precondition, European integration ought to be understood as ‘something different’ than merely harmonisation.<sup>70)</sup> Ironically, this change of perspective could therewith in a certain way support the result, though not the reasoning, of the FCC’s judgement on the Lisbon Treaty.

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62) See Niklas Luhmann, *Political Theory in the Welfare State* (Berlin/New York: De Gruyter, 1990), 231 et seq.

63) Jacques Rancière, *Disagreement. Politics and Philosophy* (Minneapolis-London: University of Minnesota Press, 1999).

64) See Karl-Heinz Ladeur, *Negative Freiheitsrechte und gesellschaftliche Selbstorganisation. Zur Erzeugung von Sozialkapital durch Institutionen* (Tübingen: Mohr Siebeck, 2000), 60, 166. For an attempt to disentangle the concepts of democracy and sovereignty Jacques Derrida, *Rogues: Two Essays on Reason* (Stanford: Stanford University Press, 2005).

65) Bernard Flynn, *The Philosophy of Claude Lefort. Interpreting the Political* (Evanston [Ill.]: Northwestern University Press, 2005), XXV.

66) See William Rasch, *Sovereignty and its Discontents. On the Primacy of Conflict and the Structure of the Political* (London: Birkbeck, 2004), 30.

67) See Rancière, *Disagreement*, supra note 63.

68) See Claude Lefort, ‘The Question of Democracy’, in: id., *Democracy and Political Theory* (Cambridge: Polity Press, 1988), 9; hereunto Flynn, *The Philosophy of Claude Lefort*, supra note 65.

69) See hereunto Volkmann, ‘Setzt Demokratie den Staat voraus?’, supra note 55, at 577 et seq.

70) See Ladeur, ‘We, the (European) People – Relâche?’, supra note 39.

