CEU
Instituto Universitario
de Estudios Europeos
Universidad San Pablo

Documento de Trabajo
Serie Unión Europea
Número 41 / 2011

Lisbon before the Courts: Comparative Perspectives

Mattias Wendel

CEU Ediciones

Documento de Trabajo
Serie Unión Europea
Número 41 / 2011

Lisbon before the Courts: Comparative Perspectives*

Mattias Wendel

* This paper is part of the book *Europe´s Constitutional Challenges in the Light of the Recent Case Law-Lisbon and Beyond*, edited by I. Pernice and J.M. Beneyto, Baden-Baden, Nomos, 2011.

CEU *Ediciones*

El Instituto Universitario de Estudios Europeos de la Universidad CEU San Pablo, Centro Europeo de Excelencia Jean Monnet, es un centro de investigación especializado en la integración europea y otros aspectos de las relaciones internacionales.

Los Documentos de Trabajo dan a conocer los proyectos de investigación originales realizados por los investigadores asociados del Instituto Universitario en los ámbitos histórico-cultural, jurídico-político y socioeconómico de la Unión Europea.

Las opiniones y juicios de los autores no son necesariamente compartidos por el Instituto Universitario de Estudios Europeos.

Serie *Unión Europea* de Documentos de Trabajo del Instituto Universitario de Estudios Europeos

Lisbon before the Courts: Comparative Perspectives

CEU *Ediciones*
Julián Romea 18, 28003 Madrid
www.ceuediciones.es

Instituto Universitario de Estudios Europeos
Avda. del Valle 21, 28003 Madrid
www.idee.ceu.es

ISBN: 978-84-92989-79-9
Depósito legal: M-17815-2011

Maquetación: Servicios Gráficos Kenaf s.l.

Table of contents

1. Introduction

The constitutional foundations of European integration have been subject to far-reaching transformation. The entry into force of the Lisbon Treaty on 1 December 2009 is a milestone in this ongoing journey. However, the reform of EU treaty law is just one, albeit important stone in the game. Focusing exclusively on it does not capture the whole picture, for it is the remarkable development of national constitutional law just as well which has shaped and conditioned the reform of European constitutional law. Both activities on Union and on Member State level were closely interrelated and may literally be told as a story of 'multilevel-constitutionalism in action[1]'.

A considerable part of today's national constitutional law relating to the EU has found its current shape in recent times. Many of the Central and Eastern European countries which joined the Union in 2004 and 2007 enacted new integration clauses providing the normative basis for EU membership[2]. However, founding members such as France and Germany as well as 'old' Member States such as Ireland and Portugal also passed important EU related amendments. Here, the provisions regulating the constitutional permeability[3] for supranational law were significantly reframed in the course of the Constitutional Treaty and the Lisbon Treaty[4]. This process of adjustment is continuing. In July 2010 the Austrian legislator passed a detailed constitutional amendment with regard to parliamentary rights in EU matters[5]. In Sweden, the modernization of EU related articles is expected to come into force on 1 January 2011 in the course of a major constitutional reform package[6]. In other countries, there are calls for the introduction of explicit EU-provisions in the constitution[7].

Alongside the textual evolution, national supreme jurisdictions all over Europe have delivered an unprecedented series of landmark-decisions within a relatively short framework of time. These decisions address key questions of European constitutionalism. Just recall the declaration of the Spanish Constitutional Tribunal (CT) on the Constitutional Treaty in 2004 with its already famous distinction between primacy

---

1 I Pernice, 'The Treaty of Lisbon: Multilevel constitutionalism in action' (2009) 15 CJEL 349 ff.

2 See on that AE Kellermann et al (eds), *EU-Enlargement - The Constitutional Impact at EU and National Level* (The Hague, TMC Asser Press, 2001); id et al (eds), *The Impact of EU Accession on the Legal Orders of New Member States and (Pre-) Candidate Countries* (The Hague, TMC Asser Press, 2006); A Albi, *EU Enlargement and the Constitutions of Central and Eastern Europe* (Cambridge, Cambridge University Press, 2005) 67–121; id, '"Europe" Articles in the Constitutions of Central and Eastern European Countries' (2005) 42 CMLRev 399 ff.

3 For the concept of constitutional permeability see M Wendel, *Permeabilität im europäischen Verfassungsrecht* (Tübingen, Mohr Siebeck, 2011, forthcoming), chapter 1.

4 For a systematic analysis of integration clauses in the constitutions of the EU Member States cf M Wendel, above n 3, chapter 4–11. For an overview see C Grabenwarter, 'National Constitutional Law Relating to the European Union' in A v Bogdandy and J Bast (eds), *Principles of European Constitutional Law* (2nd ed, Oxford, Hart, 2009) 83 ff.

5 Federal constitutional law, Austrian federal law gazette I No 57/2010.

6 Bill No 2009/10:80. The bill includes the introduction of a general clause indicating Sweden's Membership in the EU (future Chapter 1 § 10 of the Swedish 'Form of Government') as well as the reform of the existing integration clause (currently Chapter 10 § 5, in future Chapter 10 § 6). For information about the reform I would like to thank Carl Fredrik Bergström.

7 An example is Spain, where the Spanish State Council (*Consejo de Estado*) pleaded as early as 2006 for the introduction of a new and explicit 'Europe-clause' in its opinion of 16 February 2006, No E 1/2005, available at http://www.consejo-estado.es/pdf/modificaciones%20constitucion%20esp.pdf.

(*primacía*) and supremacy (*supremacía*)[8]. Similarly, the decision of the Polish CT on the accession treaty in 2005[9], the sugar-quota-cases in Hungary, Estonia and the Czech Republic from 2004 to 2006[10] and the Arrest-Warrant-decisions in Poland, Germany, Cyprus and the Czech Republic between 2005 and 2006 are worth noting[11]. Not to forget about the French *Conseil constitutionnel* (ConC) which, in 2004, delivered not only a leading case on the Constitutional Treaty[12], but also started an entirely new generation of decisions related to the transposition of directives[13], followed by the *Conseil d'Etat* (ConE) in its landmark decisions Arcelor in 2007[14] and Perreux in 2009[15]. Another major decision was delivered recently by the German Federal Constitutional Court (FCC). By order of 6 July 2010 in the case of Honeywell the FCC has set up important procedural and substantive limits to the exercise of ultra vires review in Germany[16].

When 'Lisbon' was brought before the courts, it was thus in the context of a highly dynamic evolution of European constitutional law, both on textual and jurisprudential level. Supreme jurisdictions of several EU Member States – old and new – took Lisbon as an opportunity to add major voices to this jurisprudential choir. It is not an exaggeration to claim that the three year Lisbon-saga has become one of the most important cross-border lines of jurisprudence in the history of European constitutionalism, not only in numbers but particularly in terms of substance.

The first decision was issued on 20 December 2007 by the French ConC[17], followed by the order of the Austrian Constitutional Court (CC) on 30 September 2008[18], the first judgment of the Czech CC on 26 November 2008[19], the judgment of the Latvian CC on 7 April 2009[20], the judgment of the German FCC on 30 June 2009[21], the second judgment of the Czech CC on 3 November 2009[22], the judgment of the Hungarian CC on 12 June 2010[23]

---

8 Spanish CT, case 1/2004 *Constitutional Treaty*, declaration of 13 December 2004, with case notes of F Castillo de la Torre, (2005) 42 CMLRev 1169 ff, CB Schutte, (2005) 1 EuConst 281 ff and AC Becker (2005) EuR 353 ff.

9 Polish CT, case K 18/04 *Accession Treaty*, judgment of 11 May 2005. An English summary is available at: http://www.trybunal.gov.pl/eng/summaries/documents/K_18_04_GB.pdf. For comments see M Bainczyk and U Ernst EuR (2006) 247 ff; A Łazowski (2007) 3 EuConst 148 ff; S Biernat, 'Offene Staatlichkeit', in A v Bogdandy and PM Huber (eds), *Ius Publicum Europaeum* (vol 2, Heidelberg, CF Müller, 2008) § 21 Polen, para 45.

10 For a comparative analysis see A Albi, 'Ironies in human rights protection in the EU: pre-accession conditionality and post-accession conundrums' (2009) 15 ELJ 46, 52 ff; id, 'Supremacy of EC Law in the New Member States' (2007) 3 EuConst 25, 48 ff; W Sadurski, '"Solange, chapter 3": Constitutional Courts in Central Europe – Democracy – European Union' (2008) 14 ELJ 1, 6 ff.

11 See on that J Komárek, 'European constitutionalism and the European Arrest Warrant – in Search of the Limits of "Contrapunctual Principles"' (2007) 44 CMLRev 9, 16 ff; Z Kühn, 'The European Arrest Warrant, Third Pillar Law and National Constitutional Resistance/Acceptance' (2007) 3 CYELP 99 ff.

12 French ConC, case 2004-505 DC *Constitutional Treaty*, decision of 19 November 2004. Cf the comments of G Carcassonne (2005) 1 EuConst 293 ff; F Chaltiel (2005) 484 RMC 5 ff; X Magnon (2005) 62 RFDC 329 ff; J Roux (2005) RDP 59 ff.

French ConC, case 2004-496 DC *E-Commerce*, decision of 10 June 2004. See the case notes of FC Mayer (2004) EuR 925 ff (also relating to the decision on the Constitutional Treaty); J Dutheil de la Rochère (2005) 42 CMLRev 859 ff; J-H Reestman (2005) 1 EuConst 302 ff.

13 French ConC, case 2006-540 DC *Information Society*, decision of 27 July 2006. For comments see F Chaltiel (2006) RFDC 837 ff and C Charpy (2007) 3 EuConst 436, 445 ff.

14 French CE, case 287110 Ass. *Arcelor*, decision of 8 February 2007, para 11. Cf the case notes of P Cassia (2007) RTDE 406 ff; F Chaltiel (2007) RMC 335 ff; X Magnon (2007) RFDA 578; A Levade (2007) RFDA 564, 577; C Charpy (2007) 3 EuConst 436, 440 f and 452 ff; FC Mayer and E Lenski and M Wendel (2008) EuR 63 ff.

15 French CE, case 298348 *Mme P*, decision of 30 October 2009, para 9; cf C Charpy (2010) 6 EuConst 123 ff and C Classen (2010) EuR 557 ff.

16 German FCC, case 2 BvR 2661/06 *Honeywell*, order of 6 July 2010, paras 58 ff. The decision was published not until 26 August 2010. An English translation is available at http://www.bundesverfassungsgericht.de/en/decisions/rs20100706_2bvr266106en.html.

17 French ConC, case 2007-560 DC *Treaty of Lisbon*, decision of 20 December 2007.

18 Austrian CC, case SV 2/08-3 et al *Treaty of Lisbon I,* order of 30 September 2008.

19 Czech CC, case Pl ÚS 19/08 *Treaty of Lisbon I*, judgment of 26 November 2008. An English translation is available at http://angl.concourt.cz/angl_verze/doc/pl-19-08.php. See the case note of P Bříza (2009) 5 EuConst 143 ff.

20 Latvian CC, case 2008-35-01 *Treaty of Lisbon*, judgment of 7 April 2009. An English translation is available at http://www.satv.tiesa.gov.lv/upload/judg_2008_35.htm.

21 German FCC, Case 2 BvE 2/08 et al Treaty of Lisbon, judgment of 30 June 2009, BVerfGE 123, 267 ff. An English translation by the FCC (final version) is available at: http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html. For the multitude of comments compare the 9 pages (sic) of bibliography in the first special issue of (2010) EuR 325–333. For mainly critical assessments see in particular the comments of D Thym in I Pernice and JM Beneyto Pérez (eds), *Europe's Constitutional Challenges in the Light of the Recent Case Law - Lisbon and Beyond* (Baden-Baden, Nomos, 2011); id, (2009) 46 CMLRev 1795 ff; R Bieber (2009) 5 EuConst 391 ff; C Schönberger (2009) 10 GLJ 1201 ff; D Halberstam and C Möllers (2009) 10 GLJ 1241 ff; C D Classen (2009) 64 JZ 881 ff; M Jestaedt (2009) 48 Der Staat 496 ff; U Everling (2010) EuR 91 ff; J Schwarze (2010) EuR 108 ff; C Tomuschat (2010) 70 ZaöRV 251 ff; T Eijsbouts (2010) 6 EuConst 199 ff. For more affirmative appraisals cf F Schorkopf (2009) 10 GLJ 1219 ff; D Grimm (2009) 5 EuConst 353 ff; KF Gärditz and C Hillgruber (2009) 64 JZ 872 ff.

22 Czech CC, case Pl ÚS 29/09 *Treaty of Lisbon II,* judgment of 3 November 2009. An English translation of the most important sections by J Komárek is contained in (2009) 6 EuConst 345 ff. For the perspective of a German legal scholar see I Ley (2010) 65 JZ 165 ff.

23 Hungarian CC, case 143/2010 (VII. 14.) *Treaty of Lisbon*, judgment of 12 July 2010. An English translation has not been rendered yet, except for a short press

and the second order of the Austrian CC the very same day[24]. The most recent Lisbon-decision so far was delivered by the Polish CT on 24 November 2010[25]. Another case is still pending before the Danish Supreme Court[26]. Alongside the decisions of national supreme jurisdictions, there were a number of important advisory opinions and reports, such as the opinion of the Dutch State Council of 12 September 2007 on the pre-Lisbon IGC mandate[27], the opinion of the Danish Ministry of Justice of 4 December 2007[28] and the report of the British House of Lords of 13 March 2008[29].

Although all of these decisions and opinions paved (or confirmed) the way for ratification in one way or another, they reveal significant differences in procedural as well as in substantial terms. This article will assess the Lisbon-jurisprudence from a comparative perspective[30]. After a brief preliminary reflection about how to compare (below II), the analysis addresses the procedural background and gives a general overview of the decisions (below III). It then tackles the substantial key issues for the future development of EU law which were raised by the decisions, particularly the demands of the supreme jurisdictions regarding democratic legitimacy of EU-authority (below IV) and the courts' claims of constitutional limits and judicial reservations (below V). A concluding remark aims at a question of judicial methodology as the Lisbon-decisions reveal a remarkable quality of comparative dialectics between the supreme jurisdictions of the Member States (below VI).

2. A preliminary word about comparison

Comparing must not be cherry picking. This is why the attempt of a comparative analysis is a challenge if not a difficult affair in the present context. Some of the judgments under review extend to almost epic sizes. The judgment of the German FCC alone consists of 421 paragraphs which add up to more than 140 pages in the original print version. These circumstances make it inevitable to focus on the essential lines of argument in order to compare. But how to separate the essential from the nonessential? The particular difficulty here lies not so much in length, but first and foremost in diversity and (deliberate) ambiguity.

Taking the Lisbon-judgment of the German FCC as an example, it soon becomes clear that this decision can hardly be described as a monolithic product of judicial reasoning made up all of a piece. It is, rather, an expression and reconciliation of a variety of dissonant voices within the FCC's Second Senate[31]. The above-mentioned Honeywell-decision is a prime example in this respect. While the majority of the FCC's Second

---

review. For translation and important information I would like to thank Adél Holdampf and Attila Vincze.

24 Austrian CC, case SV 1/10-9 *Treaty of Lisbon II*, order of 12 June 2010.

25 Polish CT, case K 32/09 *Treaty of Lisbon*, judgment of 24 November 2010.

26 See on that JH Danielsen, 'One of Many National Constraints on European Integration: Section 20 of the Danish Constitution' (2010) 16 EPL 181, 190 f.

27 Dutch State Council, case W02.07.0254/II/E *Lisbon-Mandate*, opinion of 12 September 2007. An English translation is available at http://www.raadvanstate.nl/adviezen. For a comment see J Ziller, 'The Law and Politics of the Ratification of the Lisbon Treaty', in S Griller and J Ziller (eds), *The Lisbon Treaty* (Wien, Springer, 2008) 309, 319 ff.

28 Contrary to what it had said in respect to the Constitutional Treaty, the Danish Ministry of Justice qualified the Lisbon Treaty as a treaty which did not transfer competences in the sense of the constitutional integration clause (Article 20) and thus could be ratified like an ordinary treaty of public international law under Article 19 of the Danish constitution.

29 'The Treaty of Lisbon: an impact assessment', report of 13 March 2008, available at: http://www.publications.parliament.uk/pa/ld200708/ldselect/ldeucom/62/62.pdf.

30 Apart from the almost uncountable number of comments on the decision of the German FCC, there are apparently only three contributions dealing with some of the Lisbon-decisions in a comparative perspective, cf J-H Reestman, 'The Franco-German Constitutional Divide' (2009) 5 EuConst 374 ff specifically concerning the aspect of constitutional identity; A Weber, 'Die Europäische Union unter Richtervorbehalt' (2010) 65 JZ 157 ff with a comment on the German Lisbon-decision in a broader comparative perspective and RU Krämer, 'Looking through Different Glasses at the Lisbon Treaty: The German Constitutional Court and the Czech Constitutional Court' in A Fischer-Lescano et al (eds) *The German Constitutional Court's Lisbon Ruling: Legal and Political Science Perspectives* (Bremen 2010) 11 ff. comparing the first decision of the Czech CC with the Lisbon-judgment of the German FCC.

31 An author has aptly compared the resulting multitude of interpretations with the Japanese film Rashomon. All characters have experienced or suffered the same incident, but recount it completely different. See FC Mayer, 'Rashomon in Karlsruhe – A Reflection on Democracy and Identity in the European Union', Jean Monnet Working Paper 5/10.

Senate establishes remarkable limits to the exercise of ultra vires review[32], dissenting judge Herbert Landau holds that the leading majority hereby 'departs from the consensus on which the Lisbon judgment was based[33]'. It is interesting to see that the merits of the case as well as the dissenting opinion refer basically to the same sections of the Lisbon-judgment dealing with the principle of *Europarechtsfreundlichkeit* (literally 'friendliness towards European Law[34]'). These sections apparently leave enough margin of interpretation for the judicial actors to draw almost antithetic conclusions. If the judges involved cannot agree on the precise content of the consensus on which the Lisbon-judgment was based, how should we?

Abstract notions such as the principle of friendliness towards European Law[35] or the principle of sovereign statehood[36] become even more problematic when it comes to cross-border comparison. In this context, it is not only potential ambiguities inherent in the concepts themselves that cause confusion. Misunderstandings may also arise because of different legal cultures and traditions[37]. Comparison then runs the risk of getting lost in presuppositions and preconceptions. Picking out an abstract figure of argument contained in judgment A and seeking for possible equivalents in judgment B might end up in comparing cherries with bananas.

In order to achieve more conclusive results, it is thus reasonable to restrict comparative efforts specifically to those statements which have materialised at least to some degree in the legal outcome. As a consequence, scholarly obiter dicta with generic statements about the nature and finality of the EU are not central to this comparative review, even if it was true that they were written with the intention to have a lasting impact on the (academic) debate[38]. Instead, the following analysis focuses particularly on those sections of the merits which determine the judgments' results.

Even compared in this rationalized way, the Lisbon-decisions reveal considerable discrepancies. In particular, the varying premises of democratic legitimacy in multi-level-systems entail varying conclusions regarding the constitutional requirements for the participation of national parliaments. Further, different institutional self-conceptions and normative ideas of sovereignty and (national) identity entail different conceptions of constitutional limits and judicial reservations. But before addressing these questions of substance, let us recall the procedural background of the Lisbon-cases and give a general overview over the decisions. Notably, enlightening differences become apparent even following such an examination.

3. Procedural background and general overview

Three procedural settings must be distinguished. Firstly objective treaty reviews before ratification, secondly objective treaty reviews after ratification and finally individual complaints or petitions being admissible only if the complainant demonstrates an individual encroachment.

---

32 German FCC *Honeywell*, above n 16, para 58 ff.

33 ibid, para 102.

34 The term is translated by the FCC as 'openness towards European law'. It must be doubted that this is an appropriate translation as the German term then would have been – semantically even more precise – framed 'Europarechtsoffenheit'.

35 German FCC *Treaty of Lisbon*, above n 21, para 225, 240 f, and 340. For possible meanings of the concept see A Voßkuhle, 'Der europäische Verfassungsgerichtsverbund' (2010) NVwZ 1, 5; id, 'Multilevel cooperation of the European Constitutional Courts' (2010) 6 EuConst 175 ff; FC Mayer, 'Europarechtsfreundlichkeit und Europarechtsskepsis in der Rechtsprechung des Bundesverfassungsgerichts', in T Giegerich (ed), *Der offene Verfassungsstaat des Grundgesetzes nach 60 Jahren* (Berlin, Duncker & Humblot, 2010) 237, 256 ff.

36 German FCC *Treaty of Lisbon*, above n 21, para 224, 228 f, 247 ff, 263, 280 ff, 299 ff.

37 For the obscurity and polysemy of the term sovereignty in a comparative context see Wendel, above n 4, chapter 3.

38 In that sense D Thym, 'In the Name of Sovereign Statehood' (2009) 46 CMLRev 1795, 1821.

3.1. Preventive Treaty Reviews: France and the Czech Republic

Preventive, i.e. ex ante treaty reviews were carried out in France and the Czech Republic.

3.1.1. France – Necessity of a Prior Constitutional Amendment

The only judicial body to have ruled in substance[39] both on the Constitutional Treaty as well as on the Lisbon Treaty is the French ConC[40]. In both cases it was asked by the president to review the compatibility of the respective treaty with the constitution by means of an objective, ex ante review under Article 54 of the French constitution.

The two decisions of the ConC illustrate that the Constitutional Treaty and the Lisbon Treaty are largely congruent. Not congruent in terms of terminology and symbols, as the Dutch State Council aptly pointed out in its advisory opinion on the IGC mandate 2007[41], but congruent certainly with regard to their substantial implications on Member State level. In the Lisbon-decision the French ConC could thus widely refer[42] to its previous decision on the Constitutional Treaty by which it had decided that the authorisation to ratify the treaty required a prior revision of the French constitution. Not surprisingly the given reasons for the necessity of such an amendment were neither the binding character of the Charter of Fundamental Rights nor the principle of primacy as enshrined in Article I-6 CT[43]. In this respect the decision of the ConC was in line with the declaration of the Spanish CT[44], the advisory opinion of the Belgian CE[45] and the report of the Swedish legislative council (*lagrådet*) which did not deem a constitutional revision necessary in view of the Constitutional Treaty[46].

However, the French ConC demanded a prior constitutional amendment for several other reasons: Firstly the conferral of certain new competences to the EU, secondly the introduction of supranational modes of decision-making for competences already conferred to the EU, thirdly the introduction of the general bridge clause (now Article 48.7 TEU) and its equivalents in specific fields and, last but not least, the new powers given to national parliaments under EU law[47]. Hence, in the aftermath of both decisions a constitutional amendment had to be passed[48]. These two constitutional laws respectively introduced an express authorisation which enabled France to participate in the EU under the conditions laid down in the

---

39 The Austrian CC has also delivered decisions on both occasions, but rejected all remedies as inadmissible, see below.

40 See the contribution of J Dutheil de la Rochère in I Pernice and JM Beneyto Pérez (eds), *Europe's Constitutional Challenges in the Light of the Recent Case Law - Lisbon and Beyond* (Baden-Baden, Nomos, 2011).

41 Dutch State Council *Lisbon-Mandate*, above n 27, point 3.4. See on that J Ziller, 'The Law and Politics of the Ratification of the Lisbon Treaty', in S Griller and J Ziller (eds), *The Lisbon Treaty* (Wien, Springer, 2008) 309, 322 f.

42 French ConC *Treaty of Lisbon*, above n 17, in particular paras 12, 21, 24, 26 f and 29.

43 French ConC *Constitutional Treaty*, above n 12, paras 13 and 22.

44 Spanish CT *Constitutional Treaty*, above n 8, in particular points II-4 and II-6.

45 The advisory opinions are not published. For an analysis cf F Delpérée, 'Le Conseil d'Etat de Belgique et le traité établissant une Constitution pour l'Europe' (2005) 21 RFDA 242 ff.

46 cf J Nergelius, 'Sweden's Possible Ratification of the EU Constitution: A Case-study of "Wait and See"', in A Albi and J Ziller (eds), *The European Constitution and National Constitutions* (The Hague, Kluwer, 2007) 183, 187.

47 French ConC *Constitutional Treaty*, above n 12, paras 27 ff and later French ConC *Treaty of Lisbon*, above n 17, in particular paras 18 ff. With regard to parliamentary rights, the ConC demanded in its Lisbon-decision – in addition to what it had already decided in its previous decision concerning the Constitutional Treaty – a constitutional revision also with regard to the parliamentary veto right under Article 81.3 TFEU and the subsidiarity control mechanism under the reframed Article 7.3 of Protocol no 2 on the exercise of the principles of subsidiarity and proportionality. See paras 30-32 of the Lisbon-decision.

48 Constitutional laws no 2005-204 of 1 March 2005 (with view to the Constitutional Treaty) and no 2008 103 of 4 February 2008 (with view to the Lisbon Treaty). In addition, the EU related provisions of the French constitution were amended significantly by the constitutional reform-package contained in constitutional law no 2008-724 of 23 July 2008 which aimed at the 'modernisation of the institutions'. With Article 61-1 this law also introduced the constitutional basis for the new a posteriori review-powers of the French ConC (so-called *question prioritaire de constitutionnalité*).

Constitutional Treaty or the Lisbon Treaty[49]. Both revisions also aimed at the constitutional implementation of the new parliamentary rights under EU law[50]. However, most of the amendments and supplementations were enacted under the condition of the coming into force of the respective treaty. As the ratification of the Constitutional Treaty failed in 2005, the major part of those provisions contained in the first constitutional law never came into effect, while their successors in the second constitutional law could not until 1 December 2009[51]. The French revision procedure is thus a classic example of the mutual interaction and interdependence of national and supranational constitutional law.

3.1.2. Czech Republic – Two Decisions, No Amendments

Like in France, the Lisbon Treaty was submitted to an ex ante review in the Czech Republic[52]. The Czech Senate filed a petition under Article 87.2 of the Czech constitution. This provision had been introduced in the course of the pre-accession amendment in 2001 in order to provide a basis for the preventive review of international treaties[53]. In its voluminous landmark-decision of 26 November 2008 – consisting of 218 paragraphs – the Czech CC found the Lisbon Treaty to be compatible with the Czech constitutional order[54]. However, the court limited its scrutiny to those provisions of the Lisbon Treaty which had been expressly contested by the petitioner[55].

In doing so the CC left the door open for another petition and thus allowed the political opponents of the Lisbon Treaty to initiate a second proceeding. Indeed, almost a year later on 29 September 2009, a group of Senators filed a second petition which was apparently influenced by the reasoning of the German Lisbon-decision. In its second Lisbon-judgment of 3 November 2009 the Czech CC also confirmed that the Lisbon Treaty as a whole did not conflict with the Czech constitutional order[56]. The second judgment is particularly interesting from a comparative perspective as the Czech CC expressly underlined the principle of judicial self restraint and set a clear and articulate contrast to central parts of its German counterpart.

Furthermore, the Czech CC tried to establish limits to a potential procedural abuse of the ex ante treaty review. Referring to obligations under international as well as domestic (constitutional) law the CC established a requirement to remove doubts on the constitutionality of an international treaty 'without undue delay[57]'. Although it made perfectly clear that the second petition of the Senators – filed about a year later than the first – did not meet this requirement, the CC declared the petition admissible in order to avoid 'retroactively burden[ing] the petitioners' with this new interpretation of the relevant procedural rules[58]. Furthermore, the CC held that the Czech president had an obligation to ratify without undue delay an international treaty duly

---

49 Article 88-1. Before the coming into force of the Lisbon Treaty Article 88-1 contained a separate paragraph 2 according to which France 'can participate' ('*peut participer*') in the EU under the conditions laid down in the Constitutional Treaty or the Lisbon treaty (see the respective first article of the constitutional laws no 2005-204 and no 2008-103).

50 cf Articles 88-4, 88-6 and 88-7 of the French constitution. Similar to Article 23.1a of the German Basic Law, Article 88-6.3 frames the subsidiarity action as a parliamentary minority right.

51 With the coming into force of the Lisbon Treaty, the general integration clause in Article 88-1 was also recast, according to Article 2 of the constitutional law 2008-103. Article 88-1 now states that the French Republic 'shall participate in the European Union constituted by States which have freely chosen to exercise some of their powers in common by virtue of the Treaty on European Union and of the Treaty on the Functioning of the European Union, as they result from the treaty signed in Lisbon on 13 December, 2007.'

52 For the decisions of the Czech CC see in detail the contribution of J Zemánek in I Pernice and JM Beneyto Pérez (eds), *Europe's Constitutional Challenges in the Light of the Recent Case Law - Lisbon and Beyond* (Baden-Baden, Nomos, 2011).

53 Constitutional law no 395/2001 of 18 October 2001.

54 Czech CC *Treaty of Lisbon I*, above n 19.

55 Albeit including some provisions which were already in force within the framework of the EU- and the EC-treaty, cf ibid, paras 75, 77 f and 85-87. See on that P Bříza, above n 19, 145 f.

56 Czech CC *Treaty of Lisbon II*, above n 22.

57 ibid, paras 115 ff.

58 ibid, para 121.

negotiated by the executive and approved by the democratically elected legislator. The CC stated that this obligation persists, a fortiori, when a treaty has been approved with the qualified constitutional majority under the terms of the Czech integration clause (Article 10a)[59]. In other words, when doubts about the constitutionality of an EU treaty arise, only a preventive treaty review which has been initiated within an appropriate period of time can postpone ratification until either a decision of conformity is issued or a constitutional amendment is passed in case of conflict[60].

3.2. Ex post Treaty Reviews: Hungary and Poland

In Hungary and Poland the Lisbon treaty was reviewed within the framework of an objective ex post review.

3.2.1. Hungary – 'The Use of the Ex Ante Review Would Be Desirable'

In Hungary ratification had been conducted without a prior review of constitutionality. Although this procedure is explicitly provided for in the relevant procedural law[61], none of the potential petitioners – neither the Hungarian parliament, nor the president or the government – introduced a request in view of the Lisbon Treaty. Instead, the Hungarian CC decided on the constitutionality of the Act of promulgation of the Lisbon Treaty[62] within the framework of an ex post review introduced by a person acting in private capacity (actio popularis)[63]. The petition emphasized that the treaty reform jeopardized the existence of Hungary as an independent and sovereign state, governed by the rule of law.

While the Hungarian CC declared the petition admissible, it dismissed the case on the merits[64]. In dealing with the procedural point that the Hungarian ratification had already been completed, the CC underlined that even if the treaty in question was declared unconstitutional, the adherence to Hungary's legal commitments deriving from EU-membership would not be threatened. Instead in the hypothetical case that the treaty was found unconstitutional it would be up to the legislator to find a solution in which the obligations arising under EU law were observed without the violation of the Hungarian constitution[65]. But it did not come to this worst case scenario as the CC found the Lisbon treaty to be entirely compatible with the constitution. However, it gave the competent political actors a broad hint, that in case of a major reform package like the Lisbon Treaty, the use of the ex ante treaty review would be desirable[66].

---

59 Czech CC *Treaty of Lisbon II*, above n 22.

60 ibid, para 116.

61 Under Article 36.1 of the Act on the Constitutional Court the Hungarian parliament, the president and the government may request the examination of the constitutionality of provisions of the international treaty before its confirmation.

62 Act CLXVIII of 2007.

63 According to Article 1 lit b) of the Act on the Constitutional Court the competence of the Constitutional Court includes ia the ex post examination for unconstitutionality of laws.

64 Hungarian CC Treaty of Lisbon, above n 23. Two separate opinions (supporting the over-all result but differing as to the grounds) and a dissenting opinion were delivered with the judgment. While the first separate and the dissenting opinion tackled the question of admissibility in a 'Euro-friendly' way, the second separate opinion highlighted the constitutional limits to the conferral of competences and the principle of primacy.

65 ibid, point IV.2.

66 ibid, point IV.2.2.

3.2.2. Poland – Protest During the Oral Hearing

In relation to the use of the preventive treaty review, the situation was similar in Poland. The President of the Polish Republic ratified the Lisbon Treaty on 9 October 2009 without having exercised his power to initiate an ex ante review under Article 133.2 of the Polish constitution[67]. The parliamentary statute approving the act of ratification had been adopted pursuant to the procedure of Article 90.2 of the Polish constitution which requires an even more demanding majority for the transfer of competences than for a constitutional amendment[68]. After the ratification had been completed, a group of deputies and a group of senators filed petitions for an ex post treaty review under Article 188 no 1 of the Polish constitution[69].

In its judgment of 24 November 2010 the Polish CT found the Lisbon Treaty to be compatible with the Polish constitution. Taking into account that the Polish ratification had been authorised by a qualified legislative procedure and carried out by the president who himself had an obligation to ensure that the Polish constitution was respected, the CT took the view that the Lisbon Treaty enjoyed a presumption of constitutional conformity which could not be overturned in the present case. Like its Hungarian counterpart, the Polish CC had to cope with the procedural particularities of an ex post review and found an answer on its own with this line of argument.

In addition, the Polish Lisbon case was characterised by a procedural curiosity. Ultimately, the Polish CT decided only in relation to the senators' petition which was essentially about the constitutionality of the simplified revision procedure, the general regime of Union competences and the flexibility clause under Article 352 TFEU. In contrast, the CT had to drop the case relating to the much more comprehensive petition of the group of deputies. The simple reason for this was that their representative member had left the court room in protest during the oral hearing and was therefore regarded as being absent[70]. However, it is not out of the question that the same group of deputies will make a second effort to bring the case before the CT, including the review of constitutionality of the new accompanying legislation which regulates the cooperation of the Polish government and the parliament in EU affairs.

3.3. Individual Complaints and Petitions: Germany, Austria and Latvia

While in France, the Czech Republic, Hungary and Poland the constitutionality of the Lisbon treaty was examined within the procedural framework of an objective treaty review, in Austria, Germany and Latvia the proceedings were initiated by individual complaints or petitions which demand the complainant to establish (prima facie) a personal interest for review deriving from an individual encroachment, such as the alleged infringement of a fundamental right.

---

67 According to this provision the president, before ratifying an international agreement may refer it to the CT with a request to adjudicate upon its conformity to the Polish constitution.

68 Both Articles 90.2 (parliamentary procedure in case of a conferral of competences to international organisations) and 235.4 (amendment procedure) require a two-thirds majority vote in the chamber of deputies in the presence of at least half of the statutory number of Deputies. The difference is that Article 90.2 also requires a two-thirds majority vote in the Senate in the presence of at least half of the statutory number of Senators, while Article 235.4 only requires an absolute majority of votes in the presence of at least half of the statutory number of Senators.

69 This provision establishes the competence of the Polish CT to decide on the conformity of statutes and international agreements with the Polish constitution.

70 The representative of the group of deputies, deputy Antoni Macierewicz, stormed out of the auditorium after the CT had rejected his motion to postpone the judgment until the bill regulating the cooperation of the government and the parliament in EU affairs came into force. The CT rejected the motion because the initial proceeding covered only the constitutionality of the Lisbon Treaty but not of the (future) accompanying legislation.

3.3.1. Germany – The Right To Vote As Catalyst To A Full-Scale Review

The Lisbon-judgment in Germany was predominantly[71] based on individual constitutional complaints under Article 93.1 no 4a of the German Basic Law. In 2005 the German FCC had already been confronted with two complaints directed against the act approving the ratification of the Constitutional Treaty[72]. But after the negative outcome of the referenda in France and the Netherlands and the following period of reflection, the German FCC – informally– decided not to decide for the time being. The reason given was that the FCC did not want to 'actively contribute' to the discussion about the future of European constitutional development[73]. It could be argued, however, that the decision not to decide is a political contribution as well, given the context that, at that time, it was more than unclear whether the constitutional reform process would continue.

However, unlike the French ConC the German FCC only delivered a decision on the Lisbon Treaty. Like in the previous Maastricht-judgment[74] the catalyst for admissibility was the right to vote under Article 38 § 1 of the German Basic Law. The FCC construes this right dogmatically as 'equal to a fundamental right' and substantially as

> a right to democratic self-determination, to free and equal participation in the state authority exercised in Germany and to compliance with the principle of democracy including the respect of the constituent power of the people. In the present combination of procedural circumstances, the review of a violation of the right to vote also comprises encroachments on the principles which are codified in Article 79 § 3 of the Basic Law as the identity of the constitution[75].

According to the FCC, the complainants in the Lisbon-case could thus rely on Article 38 § 1 in order to claim a violation of the principle of democracy, the loss of German statehood and 'a violation of the principle of the social state'[76]. The wide interpretation of Article 38 § 1 had already been vividly criticised in the aftermath of the Maastricht-judgment[77] as it enables virtually every German having the right to vote to initiate a de facto objective review of constitutionality, although this specific procedure is only open to an enumerated circle of petitioners under Article 93 § 1 no 2 of the Basic Law[78].

What is new in the Lisbon-decision is that the FCC connects the right to vote with the constitutional identity as a *whole* and, furthermore, with the 'respect of the constituent power of the people'. It thus extends its scrutiny in two ways[79]. First, by invoking Article 38 § 1, a German individual can now claim the violation of theoretically all principles protected by the eternity clause of Article 79 § 1 as far as he or she plausibly demonstrates a 'necessary connection' of these principles with the principle of democracy[80]. Hence, the FCC could not only declare admissible the allegation that the principle of democracy was violated, but also that the principle of the social state was encroached upon[81]. In contrast, it considered the complaints to be

---

71 The intra-institutional proceedings initiated by the parliamentary group of the Left Party against the chamber of deputies (Bundestag) were declared inadmissible to a large extent.

72 Cases 2 BvR 839/05 and 2 BvE 2/05.

73 This argument was given in a letter by former reporting judge Broß addressed to the parties.

74 German FCC, case 2 BvR 2134 et al *Treaty of Maastricht*, judgment of 12 October 1993, BVerfGE 89, 155, 171 ff.

75 German FCC *Treaty of Lisbon*, above n 21, para 208.

76 ibid, para 168. The 'principle of the social state' is part of the basic principles under Article 20.1 and therefore protected in its material core by Article 79.3.

77 See already C Tomuschat, 'Die Europäische Union unter der Aufsicht des Bundesverfassungsgerichts' (1993) EuGRZ 489; KM Meessen, 'Maastricht nach Karlsruhe' (1994) NJW 549, 550 f. In the context of the Lisbon-judgment see now R Bieber, 'An Association of Sovereign States' (2009) 5 EuConst 391, 396.

78 These privileged applicants are: the Federal Government, a Land government, or one fourth (until 30 November 2009 a third) of the Members of the Bundestag.

79 Thym, above n 38, 1796 f.

80 German FCC *Treaty of Lisbon*, above n 21, paras 172 ff, in particular 182.

81 ibid, paras 168, 181.

inadmissible as far as they were based on an alleged infringement of the rule of law and the separation of powers[82]. The second extension relates to the pre-constitutional (sic!) concept of the constituent power of the people and thus virtually transcends the legal order of the Basic Law[83]. According to the FCC, a complainant can rely on Article 38 § 1 in order to challenge the loss of sovereign statehood because the only power with the right to repeal the Basic Law – and with it the German state – is the constituent power of 'the people[84]'. The key idea is that what is exclusively reserved to the *pouvoir constituant* must not be touched by the *pouvoir constitué*[85]. The FCC held that the 'pre-constitutional right' to give oneself a constitution[86] is not prescribed but merely declaratively mirrored in Article 146 of the German Basic Law[87]. To frame it differently, Article 38 § 1 ensures an *inner-systemic* right of participation within the *existing* system, while Article 146 reflects an *outer-systemic* right of participation to create a new system. The logical fracture is that, according to the FCC, the inner-systemic voter shall be entitled, by relying on Article 38 § 1, to become the guardian of the outer-systemic constituent power reflected in Article 146![88]

In brief, the German FCC put the right to vote in the centre of its reasoning and thus enabled several claimants, acting in private capacity, to challenge the parliamentary approving act as well as the accompanying laws. Ultimately, the German FCC found the approving act to be compatible with the constitution. However, it declared the accompanying legislation unconstitutional to the extent that it did not meet the court's demands for an adequate degree of parliamentary 'responsibility for integration'. The particular quirk of this outcome, unique in Europe, was that the FCC allowed ratification only under the condition that a new accompanying legislation fulfilling its demands came into force. The German legislator followed the court by enacting a new package of legislation, including the so-called 'Responsibility for Integration Act' (RIA)[89]. After the German FCC had rejected the remedies directed against these laws as inadmissible[90], the package could enter into force and thus paved the way for ratification.

Not every EU citizen has a comparable right to initiate a de facto full-scale review of constitutionality regarding the national ratification procedure. Even an institutionally strong constitutional jurisdiction[91] is no guarantee that a citizen acting in private capacity may question the ratification procedure by means of an individual complaint.

---

82 The FCC took the view that the complainants had not convincingly established a 'necessary connection' with the principle of democracy in this regard, ibid, para 183.

83 Critically concerning the pre-constitutional construction also M Jestaedt, 'Warum in die Ferne schweifen, wenn der Maßstab liegt so nah?' (2009) 48 Der Staat 496, 501 and 512 f.

84 For a critique of the FCC's concept of 'people' see T Eijsbouts, 'Wir sind das Volk: Notes About the Notion of "The People" as Occasioned by the Lissabon-Urteil' (2010) 6 EuConst 199 ff.

85 German FCC *Treaty of Lisbon*, above n 21, para 179 f and 228.

86 Can this really be a 'right' in legal categories?

87 Article 146 states: This Basic Law, which since the achievement of the unity and freedom of Germany applies to the entire German people, shall cease to apply on the day on which a constitution freely adopted by the German people takes effect.

88 See German FCC *Treaty of Lisbon*, above n 21, para 180. See also the critique of D Halberstam and C Möllers, 'The German Constitutional Court says "Ja zu Deutschland!"' (2009) 10 GLJ 1241, 1256.

89 The RIA is contained in Article 1 of the new Act Extending and Strengthening the Rights of the Bundestag and the Bundesrat in European Union Matters of 22 September 2009, Official Federal Law Gazette 2009 I no 60, 3022 ff. The very same day, two other laws were passed, concerning the cooperation between Federal Government and Bundestag in EU matters (Official Federal Law Gazette 2009 I no 60, 3026 ff) as well as the cooperation between the Federal state and the Länder in EU matters (Official Federal Law Gazette 2009 I no 60, 3031 ff). For a comment see M Nettesheim, 'Die Integrationsverantwortung – Vorgaben des BVerfG und gesetzgeberische Umsetzung' (2010) 63 NJW 177 ff.

90 German FCC, case 2 BvR 2136/09 *Accompanying laws to the Lisbon Treaty*, order of 22 September 2009.

3.3.2. Austria – Total Inadmissibility

The restrictive approach which was taken by the Austrian CC illustrates this. In 2005 the Austrian CC had already rejected the remedies against the Constitutional Treaty as inadmissible. In 2008 it proceeded similarly with two individual petitions (*Individualanträge*) directed against the ratification of the Lisbon Treaty. The petitioners argued in particular that the ratification would amend the basic principles of the Austrian constitutional order in the sense of a 'total revision' and therefore require a national referendum[92]. By order of 30 September 2008 the Austrian CC denied the admissibility, stating that neither the act of ratification nor the parliamentary resolution authorising it could be challenged. Also the treaty itself could not, according to the CC, be subject to review as long as it was not in force and therefore not published yet in the Austrian official law gazette[93]. Hence, in Austria an individual had no legal means of preventively challenging the Lisbon Treaty under the given procedural circumstances, while in Germany individual complainants could attack the parliamentary act approving the Lisbon Treaty before the German ratification was being completed[94].

By order of 12 June 2010 the Austrian CC also finally rejected an individual petition which had been filed after the coming into force of the Lisbon Treaty. This time the petitioner was a group of deputies who had not achieved the necessary majority in parliament to imperatively demand an objective review of constitutionality[95]. Therefore they filed an individual petition. Under Austrian constitutional law such a petition is declared admissible only if the petitioner establishes a prima facie infringement of 'personal rights' which affects him or her 'directly'. The deputies claimed i.a. that their constitutional right to participate in a national referendum was infringed and that the conferral of competences to the EU limited the constitutionally required contribution of the deputies to the exercise of legislative powers as guaranteed in Article 24 (legislative power of parliament) and Article 26 § 1 (right to vote) of the Austrian Federal Constitutional Law. However, the Austrian CC found that the petitioners did not sufficiently establish that there was an infringement on personal rights affecting them directly[96]. A comparable criterion of being directly affected is also required for the admissibility of constitutional complaints under German constitutional law. But interestingly, in spite of these similarities, the Austrian CC and the German FCC took a completely different approach.

3.3.3. Latvia – A Middle Way

The Latvian CC went a middle way between the Austrian solution of total inadmissibility and the German approach of a de facto all-encompassing objective review. Within the framework of a constitutional complaint[97], the Latvian CC had to decide if the applicants' fundamental rights under Article 101 of the Latvian constitution were infringed because the ratification of the Lisbon Treaty had – like in Austria – not been submitted to a national referendum[98]. According to Article 101 every Latvian citizen 'has the right, as

---

91 For an overview over the 'constitutional' jurisdictions in the EU Member states see 'FC Mayer, 'Multilevel Constitutional Jurisdiction' in A v Bogdandy and J Bast (eds), *Principles of European Constitutional Law* (2nd edn, Oxford, Hart, 2009) 399, 400 f.

92 Under Article 44.3 of the Austrian Federal Constitutional Law any 'total revision of the Federal Constitution shall ... be submitted to a referendum by the entire nation, whereas any partial revision requires this only if one third of the members of the National Council or the Federal Council so demands.'

93 Austrian CC *Treaty of Lisbon I*, above n 18, point II.2.

94 German FCC *Treaty of Lisbon*, above n 21, para 170 in line with established case-law.

95 The necessary threshold consists of a third of the National Council's (chamber of deputies) members, Article 140.1 sentence 2 of the Austrian Federal Constitutional Law.

96 Austrian CC *Treaty of Lisbon II*, above n 24, point II.3.

97 cf Articles 16 no 1, 17.2 no 11 and 192 (sic) of the Latvian Act on the Constitutional Court.

98 Latvian CC *Treaty of Lisbon*, above n 20.

provided for by law, to participate in the work of the State and of local government, and to hold a position in the civil service. (...)'

In its judgment of 7 April 2009 the Latvian CC declared the case admissible on the basis of an alleged violation of Article 101 which, according to the CC, protects the individual right to participate in a referendum as far as the latter is provided for in the constitution or in another normative act[99]. Two constitutional provisions were claimed to require a national referendum in the present context. The first provision was Article 68.4, according to which 'substantial changes' regarding EU membership shall be decided by a national referendum if at least one-half of the members of parliament so request. The second stipulation was Article 77 which requires a referendum for the amendment of certain fundamental articles, such as the sovereignty-clause in Article 2[100]. As the Latvian CC declared the case admissible on the basis of the alleged violation of Article 101 in connection with these two provisions, it consequently limited its scrutiny to the question of whether the Lisbon Treaty had been ratified in compliance with the *procedures* established in the constitution[101]. Article 68.4 did not provoke major irritations in this respect. Its wording alone indicates that the question whether to submit ratification to a referendum or not lies within the sole hands of parliament[102]. In contrast, the question of whether the ratification of the Lisbon Treaty touches upon the principle of sovereignty as enshrined in Article 2 and therefore requires a referendum under Article 77, required the Latvian CC to present more detailed reasoning to demonstrate that it did not[103].

3.4. Differences of Institutional Self-Conception?

To sum up, while in France, the Czech Republic, Hungary and Poland the control of constitutionality was carried out under the procedural rules of objective – ex ante or ex post – treaty reviews, the constitutional courts in Germany, Austria and Latvia were confronted with individual complaints or petitions.

Although the Austrian, German and Latvian CCs are all institutionally 'strong' constitutional courts in the classic sense, they came to significantly differing solutions concerning the question of admissibility. While the Austrian CC rejected the complaints as entirely inadmissible, the German carried out a de facto full-scale review of constitutionality. The Latvian CC in turn went a middle way as it affirmed admissibility but limited its scrutiny to the outlined constitutional grounds for review.

Taking into consideration that the relevant procedural provisions in Austria and Germany share significant similarities, one might ask if the opposing results can be explained by different forms of institutional self-conception or varying degrees of judicial self-confidence. While the Austrian CC sticks closely to the wording of the procedural provisions and thus precludes a private person from a preventive challenging of the treaty reform, the German FCC creates a de facto preventive treaty review by means of judicial interpretation. Do not be mistaken: The decision of the French ConC and the obiter dictum of the Hungarian CC demonstrate clearly how practical and effective an ex ante treaty review can turn out if constitutional conflicts are prevented before ratification. But the crucial question remains if it is up to a judicial body to create such a procedure in a case unforeseen by the constitution or when the procedural conditions of an objective review of constitutionality

99 Latvian CC *Treaty of Lisbon*, above n 20, points 9 and 13.

100 Article 2 reads as follows: 'The sovereign power of the State of Latvia is vested in the people of Latvia.'

101 Latvian CC *Treaty of Lisbon*, above n 20, points 9 ff.

102 ibid, point 19.4.

103 ibid, points 16.1–18.10. Thus the Latvian CC also rejected a violation of Article 101.

are not met in the particular case. The approach of the FCC is even more dubitable if one takes into consideration that the former competence of the FCC to deliver advisory opinions was explicitly abolished in the early years of the Basic Law. Seen in this light, the FCC's approach of declaring the case admissibility comes close to an act of constitutional 'self-authorisation[104]'.

4. Legitimizing the EU: a case of multi-level democracy?

As all decisions under review paved the way for ratification in one way or another, the substantial key question is their legal impact on the future development of European law and policies. The Lisbon-decisions underlined that a decisive factor in this respect is the courts' visions of democratic legitimation of EU public authority. On this point the Lisbon-decisions reveal considerable differences.

4.1. Parliamentary Assent to the Future Application of 'Dynamic Treaty Provisions'

These differences become particularly apparent when it comes to the question of the extent to which constitutional courts demand the prior assent of national parliaments in cases when EU (treaty-) law is developed dynamically, i.e. without an ordinary amendment procedure.

Five categories of so-called[105] 'dynamic treaty provisions' can be distinguished. The first is the simplified treaty revision procedure according to the general clause in Article 48.6 TEU and the specific provisions in Article 42.2 (1) TEU and Articles 25.2, 218.8 (2), 223.1 (2), 262, 311.3 TFEU. The second group is composed of the 'bridge' or 'passerelle' mechanisms enshrined in the general clause of Article 48.7 TEU[106] and the specific regimes under Article 31.3 TEU and Articles 81.3 (3), 153.2 (4), 192.2 (2), 312.2 (2), 333.1, 333.2 TFEU. The third category is the flexibility clause in Article 352 TFEU (ex 308 EC). The fourth case concerns the so-called 'emergency brakes' under Articles 48.2, 82.3 and 83.3 TFEU which allow the preliminary suspension of the ordinary legislation procedure if a Member State so requests. Finally, the fifth constellation relates to specific stipulations according to which the Council – after obtaining the consent of the European Parliament – can adopt unanimously decisions in 'sensitive' fields such as criminal law (Article 83.1 (3) TFEU). It is important to note that only the first and the second category concern the simplified (and insofar 'dynamic') amendment of EU treaty law. The other categories relate essentially to the legislative process at EU level. Taking into account their demanding procedural requirements of, one may doubt if the term 'dynamic treaty provisions' is an adequate description for them.

---

104 For judicial 'acts of self-authorisation' see – in a historical-comparative perspective – D Herrmann, 'Akte der Selbstautorisierung als Grundstock institutioneller Macht von Verfassungsgerichten', in H Vorländer (ed), *Die Deutungsmacht der Verfassungsgerichtsbarkeit* (Wiesbaden, VS-Verlag, 2006) 141, 157 ff.

105 cf German FCC *Treaty of Lisbon*, above n 21, para 239.

106 Cases in which Article 48.7 could be applied are, for instance, Articles 82.2 (2) (d), 83.1 (3), 86.4 and 308.3 TFEU.

4.1.1. Similarities and Peculiarities

The German FCC is the only constitutional court in Europe that demands a constitutive authorisation of national parliament in all five cases[107], be it by act of parliament or by simple parliamentary resolution[108].

As far as the simplified revision procedure under Article 48.6 is concerned, the German FCC takes a similar approach as the French ConC which ruled in both decisions that the ratification of a simplified revision under Article 48.6 TEU requires the authorisation of the French parliament[109]. In this respect the German FCC refers explicitly to its French counterpart[110].

But that is the extent of the parallels between the two judicial bodies. As to the application of bridge-clauses, the French ConC does not demand a prior assent of the French parliament. Instead the passerelle-clauses are one argument for the ConC to require a singular constitutional amendment for the ratification of the Lisbon Treaty[111]. In other words, in France a constitutional authorisation (which has been introduced in the French constitution in the aftermath of the Lisbon-decision) anticipates all future applications of passerelle-clauses. Therefore the French representative in the Council is entitled to vote for such an application without being previously authorised by parliament to do so. This entails important consequences for the judicial branch as well. As there is no requirement of prior parliamentary assent, the future application of passerelle-clauses will not be subject to review of constitutionality in France. In contrast, in Germany each application of a passerelle-clause could be challenged before the FCC just because the national instrument of parliamentary authorisation is principally subject to constitutional review. According to the German FCC, the same logic of parliamentary 'responsibility for integration' – which is in fact a judicial one as well[112] – applies to the flexibility clause under Article 352 TFEU and the other cases mentioned above[113].

4.1.2. National v. Multi-Levelled Democracy

The peculiarities of the German FCC become even more apparent if contrasted to the Lisbon-judgments of the Czech CC, the Latvian CC, the Hungarian CC and the Polish CT. Like the French ConC, these constitutional courts did not make the ratification of the Lisbon Treaty conditional on the passage of accompanying legislation ensuring the prior assent of national parliaments in the above-mentioned cases. Instead the courts highlight the parliamentary right to veto as a sufficient procedural safeguard within EU law[114]. Namely the Latvian CC states:

> The TL would introduce additional democratic guarantees, namely, *national Parliaments would have the right to object* if the EU, based on Article 352 of the TFEU, will draft new legal acts. … Accordingly, the Constitutional Court concludes that Latvia will have the rights and the ability to block changes in the decision-making procedure that

---

107 See German FCC *Treaty of Lisbon*, above n 21, paras 412–419.

108 For the differences see in detail I Pernice, 'Motor or Brake for European Policies? Germany's new role in the EU after the Lisbon-Judgment of its Federal Constitutional Court', point IV, in this volume.

109 French ConC *Constitutional Treaty*, above n 12, para 36 and later French ConC *Treaty of Lisbon*, above n 17, para 26. According to the ConC Article 53 of the French constitution applies in this respect.

110 German FCC *Treaty of Lisbon*, above n 21, para 312 with reference to French ConC *Treaty of Lisbon*, above n 17, para 26.

111 French ConC *Constitutional Treaty*, above n 12, para 33–35 and French ConC *Treaty of Lisbon*, above n 17, paras 23 f and 27.

112 See explicitly German FCC *Treaty of Lisbon*, above n 21, para 236 at the end.

113 In contrast, particularly Article 352 TFEU does not seem to be a constitutional problem for the French ConC at all.

114 See Czech CC *Treaty of Lisbon I*, above n 19, paras 161–164, 172–175; Czech CC *Treaty of Lisbon II*, above n 22, para 134; Latvian CC *Treaty of Lisbon*, above n 20, point 18.6; Hungarian CC *Treaty of Lisbon*, above n 23, point IV.2.5 and Polish CT *Treaty of Lisbon*, above n 25.

> are undesirable for Latvia and the *Saeima will have the possibility to express its opinion* before changes come into force[115].

The Czech CC additionally draws on the jurisprudence of the ECJ in order to establish that Article 352 TFEU is not a 'blanket norm' amending the competency system of the treaties[116]. Further, it emphasises the decisive role of the European Parliament whose consent is not only mandatory under Article 352.1 TFEU but also under Article 48.7 (4) TEU. It is precisely in this context that the Czech CC underlines in its first Lisbon-decision the multi-levelled nature of democratic legitimation within the EU context[117]. In their second decision the Czech judges highlight that point even further. They quote the opinion of Advocate General Miguel Poiares Maduro regarding the multi-levelled character of the principle of representative democracy[118] and openly object to the argument of the German FCC:

> Insofar as [Article 10.1] of the TEU provides that 'The functioning of the Union shall be founded on representative democracy', that does not mean that only processes at the European level should ensure fulfilment of that principle. That article is directed at *processes both on the European and the domestic level, not only at the European Parliament, as stated by the German Constitutional Court in point 280 of its decision (...).*
>
> In other words, the democratic process on the Union and domestic levels *mutually supplement and are dependent* on each other. (...)
>
> For similar reasons, one cannot see conflict of Article 14.2 of the TEU, which governs the number of members of the European Parliament, with the principle of equality (...). As pointed out above, the European Parliament is not the exclusive source of democratic legitimacy for decisions adopted on the level of the European Union. *That is derived from a combination of structures existing both on the domestic and on the European level, and one cannot insist on a requirement of absolute equality among voters in the individual Member States*[119].

The Czech CC thus puts a certain degree of trust in the multi-levelled structure of democracy in the EU and particularly in the ability of the European Parliament (EP) to provide for a genuine – albeit not exclusive – link of democratic legitimacy, even despite the EP's degressively proportional composition. In addition, the CC highlights the concept of 'pooled' sovereignty[120].

In contrast, the German FCC takes the view that the necessary degree of democratic legitimacy of EU public authority can – at the moment – only derive from the national 'state people' (*Staatsvolk*). As a consequence, the FCC needs to tie the application of the bridging-clauses and the other provisions mentioned above to the prior and *constitutive* assent of the German parliament. The autonomous democratic mechanisms and institutions on EU-level may have, so the argument goes, a complementary character at best, but not a constitutive one.

> In so far as the people itself is not directly called upon to decide, *democratic legitimation can only be achieved by means of parliamentary responsibility.* (...) In so far as the Member States elaborate treaty law in such a way as to

---

115 Latvian CC *Treaty of Lisbon*, above n 20, point 18.6 (emphasis added).

116 Czech CC *Treaty of Lisbon I*, above n 19, para 151 f.

117 ibid, para 173: 'The Treaty of Lisbon transfers powers to bodies that have their *own regularly reviewed legitimacy*, arising from general elections in the individual member states. Moreover, the Treaty of Lisbon permits several ways of involving domestic parliaments (the possibility for a parliament, or one of its chambers, to *directly express its lack of consent, is one of the forms of participation by domestic parliaments)*' (emphasis added).

118 Czech CC *Treaty of Lisbon II*, above n 22, para 138 with reference to the opinion of AG Poiares Maduro of 26 March 2009, case C-411/06 *Commission v Parliament and Council* [2009] ECR I-07585

119 ibid, para 137 ff (emphasis added).

120 ibid, para 147 and Czech CC *Treaty of Lisbon I*, above n 19, para 104.

> allow treaty amendment without a ratification procedure solely or mainly by the institutions of the Union, albeit under the requirement of unanimity, whilst preserving the principle of conferral, *a special responsibility is incumbent on the legislative bodies*, in addition to the Federal Government, within the context of participation which in Germany, has to comply internally with the requirements under Article 23.1 of the Basic Law (*responsibility for integration*) and which may be invoked in any proceedings before the Federal Constitutional Court. (...)
>
> Measured against requirements in a constitutional state, even after the entry into force of the Treaty of Lisbon, the European Union lacks a political decision-making body created in equal elections by all citizens of the Union and with the ability to uniformly represent the will of the people. (...) Even in the new wording of Article 14.2 Lisbon TEU, and contrary to the claim that Article 10.1 Lisbon TEU seems to make according to its wording, *the European Parliament is not a representative body of a sovereign European people*. This is reflected in the fact that it is designed as a representation of peoples in the respective national contingents of Members, not as a representation of Union citizens in unity without differentiation, according to the principle of electoral equality. (...)
>
> *The deficit of European public authority that exists when measured against requirements on democracy in states cannot be compensated for by other provisions of the Treaty of Lisbon and, to that extent, it cannot be justified.* (...)[121].

If one was asked to trace back the arguments of the German FCC to a leading principle, it would neither be sovereignty nor identity, but democracy. The principle of democracy is the corner stone of the German Lisbon-decision. It is the substantial key argument for the FCC to declare the case admissible on the basis of an alleged infringement of the right to vote. Moreover, the principle of democracy underlies and even predetermines the principle of sovereign statehood as developed in the Lisbon-judgment[122]. But above all, the principle of democracy is placed at the heart of Germany's constitutional identity, for the right to free and equal participation in public authority is, according to the FCC, 'enshrined in human dignity' itself[123].

The tragedy is that the FCC's conception of democracy is existentially bound to the (pre-)existence of statehood and is blind to constitutive forms of democratic legitimation within multi-levelled entities. The FCC thus leaves the Germans with an astonishing binary choice: We may either keep being part of the so-called association of sovereign and 'fully democratically' (*volldemokratisch*) organised states whose 'peoples' remain the only subjects of democratic legitimation or we may participate in the creation of a European federal state which would require a change of the 'subject of democratic legitimation[124]' and the superseding of one of Germany's most vaunted post-war-inventions: the Basic Law[125].

If the Germans do not wish to give up their constitution – and who would be surprised if they didn't want to? –, the application of all forms of 'dynamic treaty provisions' must be previously legitimised by the German parliament and remain under the control of the FCC. Or to frame it differently, as long as the German 'people' do not opt for a European federal state, dynamic treaty mechanisms shall not be too dynamic. Here it becomes clear that the specificities of the FCC's conception of democracy entail direct consequences for the future of European constitutional development.

---

121 German FCC *Treaty of Lisbon*, above n 21, paras 236, 280 and 293 (emphasis added).

122 ibid, para 248: 'The safeguarding of sovereignty, *demanded by the principle of democracy* in the valid constitutional system ...' (emphasis added).

123 ibid, para 211.

124 The FCC demands that democratic requirements in this new entity would have 'to be fully consistent with the requirements for the democratic legitimation of a union of rule organised by a state', cf ibid, para 263. However, it is not clear what the normative basis for this claim shall be, as it can't be the (then superseded) Basic Law.

125 ibid, paras 179, 229, 263, 298 and 334. See also D Halberstam and C Möllers, above n 88, 1255 f.

4.1.3. Who Demands Prior Parliamentary Assent: Division of Powers I

One might object of course that the strong critique which is directed against the FCC's Lisbon-decision inside and outside Germany[126] ignores that Germany is by far not the only country in which the prior parliamentary assent is deemed necessary for the application of dynamic treaty provisions. Examples can be found in section 6 of the British European Union Amendment Act of 2008[127] (to which the German FCC refers[128]) or the new Article 23i of the Austrian Federal Constitutional Law which requires even a qualified majority in both houses of parliament. Most interestingly, the Czech legislator also passed a statute in 2009 establishing such requirements not only with respect to the passerelle-clauses but even with view to the application of Article 352 TFEU[129].

So, much ado about nothing? Not really, because even if such requirements are set up in several Member States, the question still remains who took the decision to do so. This leads to the second peculiarity. While in Germany it was a court which forced the legislator to establish precisely defined rules to exercise parliamentary responsibility for integration, in all other countries such a decision was taken freely by the (constitutional) legislator. In particular the Czech CC left it to the legislative branch to decide how and to what extent national parliaments' rights are to be framed.

> However, in this regard we cannot help but see that there are as yet no related provisions in the legal order of the Czech Republic that would allow implementation of the decision making procedures set forth in paragraphs six and seven of Art. 48 on the domestic level. The absence of these procedures, in and of itself, *does not affect the question of whether the Treaty of Lisbon is constitutional*, but because the Treaty of Lisbon presumes the intervention of domestic parliaments, the government, as the sponsor of the Treaty of Lisbon (...) *should reflect that in a timely manner and adequately, by proposing relevant procedures on the domestic level, and should ensure that the Treaty is compatible and interconnected with the constitutional order of the Czech Republic*, not only in view of the participation of the parliament, but also in view of the possibility of preliminary review of an amendment of the Treaties by the Constitutional Court[130].

In other words, the comparative perspective reveals how deeply the German FCC mistrusts not only EU policies, but also the political and parliamentary process in Germany[131].

4.2. Popular Vote as a Requirement for Ratification?

The question of democratic legitimation of EU public authority is of course not limited to the roles of European and national parliaments. It also concerns forms of direct democratic expression.

As seen above, both the Austrian as well as the Latvian CC were being confronted with the question whether the ratification of the Lisbon Treaty required a national referendum or not[132]. The Latvian CC held that a

---

126 cf above n 21.

127 British European Union (Amendment) Act of 19 June 2008, available at http://www.statutelaw.gov.uk/content.aspx?activeTextDocId=3490003.

128 German FCC *Treaty of Lisbon*, above n 21, para 320.

129 Act No 162/2009.

130 Czech CC *Treaty of Lisbon I*, above n 19, para 165, confirmed in Czech CC *Treaty of Lisbon II*, above n 22, para 134.

131 This is a line of argument which also characterised the European Arrest warrant case. It is probably one of the great ironies that it is a constitutional court which obliges the national parliament to observe its responsibility for integration.

132 See also the High Court for England and Wales (Queen's Bench Division, Divisional Court), *R (on the application of Stuart Wheeler) v Prime Minister and Foreign Secretary* [2008] EWHC 1409 (Admin), which 'found nothing in the claimant's case to cast doubt on the lawfulness of ratifying the Lisbon Treaty without a referendum' (para 59).

referendum was neither mandatory under the EU related provision of Article 68.4, nor under the general clause of Article 77 of the constitution[133]. The Austrian CC already rejected the individual petitions as inadmissible and laconically repeated its established jurisprudence according to which an individual has only a right to participate in a legally arranged referendum, but not the right to demand that such a referendum be held[134]. The German FCC in turn stated for the first time that a (hypothetical) participation of Germany in a federal European state would require a new constitution by referendum under the pre-constitutional right reflected in Article 146.

In the end, the only country in which a referendum was held on the Lisbon Treaty was Ireland[135]. Here, the *Crotty*-decision of the Irish Supreme Court (dating back to 1987[136]) had initiated a constitutional practice, according to which the Irish constitution is supplemented with a specific authorisation for ratification each time a major treaty reform is under way[137]. As an amendment of the Irish constitution requires a national referendum[138], the ratification of every major treaty reform is consequently presumed by a popular vote[139].

In all other Member States a referendum was not deemed necessary, particularly not in France and the Netherlands. In France the decision to hold a referendum fell, according to Article 11 of the French constitution, in the discretionary power of the President of the Republic. Unlike his predecessor Jacques Chirac who scheduled a popular vote as regards the Constitutional Treaty[140], Nicolas Sarkozy opted against a referendum in the case of the Lisbon Treaty.

In the Netherlands the referendum on the Constitutional Treaty had been – legally speaking – of pure consultative nature[141]. In its opinion on the detailed mandate of the IGC in 2007 the Dutch State Council underlined that, regarding the Lisbon Treaty, a consultative referendum was constitutionally admissible but not required, neither by constitution nor by the mere precedent that a referendum had been held previously in view of the Constitutional Treaty[142].

In Denmark the decision not to hold a referendum in the course of the ratification of the Lisbon Treaty was preceded by an astonishing opinion of the Ministry of Justice. According to the wording of Article 20 of the Danish constitution, which allows the 'delegation' of competences, a referendum is required only if the specific majority of fifth-sixths of the members of parliament is not achieved. However, in Denmark a constitutional practice has evolved, according to which a referendum is generally held when Article 20 applies, regardless of

---

133 Latvian CC *Treaty of Lisbon*, above n 20, points 18 and 19.

134 Austrian CC *Treaty of Lisbon II*, above n 24, point II.3.1.

135 The first referendum was held on 12 June 2008 and resulted in a negative outcome. The second referendum was held on 2 October 2009 and resulted in a positive outcome. See on that M Cahill, 'Ireland's Constitutional Amendability and Europe's Constitutional Ambition: the Lisbon Referendum in Context' (2008) 9 GLJ 1191 ff.

136 Irish Supreme Court, case 1986 No 12036P, *Crotty v. An Taoiseach,* [1987] IR 713.

137 Now Article 29.4 No 5 of the Irish constitution. As to the Constitutional Treaty see G Hogan, 'Ratification of the European Constitution – Implications for Ireland', in A Albi and J Ziller (eds), *The European Constitution and National Constitutions* (Alphen aan den Rijn, Kluwer, 2007) 137 ff.

138 Article 46.2 of the Irish constitution.

139 Whether an express constitutional authorisation is really necessary under the Crotty-doctrine is contentious, see eg A Maurer and B Roth, 'Warum Irland abstimmen muss(te) – oder auch nicht', available at http://www.swp-berlin.org/common/get_document.php?asset_id=5575.

140 The referendum concerning the Constitutional Treaty was appointed by presidential decree No 2005-218 of 9 March 2005.

141 See LFM Besselink, 'Constitutional Referenda in the Netherlands: A Debate in the Margin', 11 EJCL (May 2007) 1, 14 and id, 'The Dutch Constitution, the European Constitution and the Referendum in the Netherlands', in A Albi and J Ziller (eds), *The European Constitution and National Constitutions* (Alphen aan den Rijn, Kluwer, 2007) 113, 118.

142 Dutch State Council *Lisbon-Mandate*, above n 27, point 4.2: 'There is nothing in the Constitution to prevent the legislator from holding such referendums on an ad hoc basis, provided that it indicates that there is a special justification for departing from the self-contained arrangements for approving treaties and provided that the referendum procedure is governed by an Act of Parliament. Mere precedent will not suffice. That would create a substantive basis for the referendum as a structural instrument (in this case, for use when approving treaties) which would not be in keeping with the self-contained arrangements in the Constitution.' See on that J Ziller, 'The Law and Politics of the Ratification of the Lisbon Treaty', in S Griller and J Ziller (eds), *The Lisbon Treaty* (Wien, Springer, 2008) 309, 317 ff.

whether the qualified majority has been met or not[143]. Contrary to its legal assessment of the Constitutional Treaty, the Danish Ministry of Justice took the view that the ratification of the Lisbon Treaty would not entail a 'delegation' of competences in the sense of Article 20 and thus would not require a (customary) referendum[144]. This legal evaluation is neither convincing as regards the constitutional implications of the Lisbon Treaty on Member State level nor consistent with the Ministry's previous evaluation of the Constitutional Treaty. It seems quite clear that the political desire to avoid holding a referendum determined the legal argument.

In summary, the ratification of the Lisbon Treaty shows that in almost all Member States a popular vote is not viewed as constitutionally mandatory for ratification, even in cases of fundamental treaty reform. Instead, in most constitutional orders which allow a consultative or legally binding referendum, the final decision as to whether to hold a referendum rests with the legislative or the executive branch[145].

5. Constitutional limits and judicial reservations

The supreme jurisdictions also shape future developments of European constitutionalism by establishing constitutional limits and claiming judicial reservations. Here we touch upon the legal consequences of the courts' conceptions of sovereignty and (national) constitutional identity.

5.1. Substantive Constitutional Limits to Future Developments of EU law

The first point in this regard aims at substantive constitutional limits to the future development of European primary law.

5.1.1. Two Categories of Constitutional Limits

It is imperative to distinguish two categories of constitutional limits in this respect. On the one hand there are limits which indicate the necessity of a constitutional amendment, on the other hand there are red lines marking the inalienable substantive core of a constitutional order which, in some countries, is not even subject to constitutional revision.

The jurisprudence of the French ConC provides an example of the first category. According to established case-law[146], the ConC verifies whether the ratification of a new treaty requires a prior constitutional amendment. According to the ConC, a revision of the French constitution is necessary if the treaty in question

---

143 See H Koch, 'The Danish Constitutional Order', in AE Kellermann et al (ed), *EU-Enlargement – The Constitutional Impact at EU and National Level* (The Hague, TMC Asser Press, 2001) 109, 111. Critically to this practise H Rasmussen, Denmark's Waning Constitutionalism and Article 20 of the Constitution on Transfer of Sovereignty, in A Albi and J Ziller (eds), *The European Constitution and National Constitutions* (Alphen aan den Rijn, Kluwer, 2007) 149, 150.

144 Opinion of 4 December 2007. In the aftermath of this opinion, on 11 December 2007 the Danish government took the decision to ratify the Lisbon Treaty according to the ordinary procedure under Article 19 of the Danish constitution. The approval of the Danish parliament followed on 24 April 2008.

145 See particularly Articles 3a.2 of the Slovenian, 68.4 of the Latvian, 90.3 of the Polish and 10a.2 of the Czech constitution, allowing the *national parliament* to take a decision to substitute or complement its own act of approval by a referendum. In France, according to Article 88-5 of the constitution any bill authorizing the ratification of a treaty pertaining to the accession of a state to the EU shall be submitted to referendum by the President of the Republic. But also here, by passing a motion adopted in identical terms in each house by a three-fifths majority, parliament may authorize the passing of a bill according to the (parliamentary) constitutional amendment procedure.

146 See in particular French ConC, case No 92-308 DC *Maastricht I*, decision of 9 April 1992.

contains a clause expressly contrary to the French constitution, calls into question constitutionally guaranteed rights and freedoms or affects the 'essential conditions of the exercise of national sovereignty[147]'. The last mentioned is the most important threshold in practice. If the essential conditions of the exercise of national sovereignty are affected, the constitution must be revised, as was the case for both the Constitutional Treaty and the Lisbon Treaty. The French ConC thus has been described aptly as a pointsman (*aiguilleur*) which only indicates the procedural way that has to be taken: Ratification with or ratification without prior amendment of the constitution[148]. A further example of the first category is that a constitutional court admits constitutional limits to the integration clause, as long as such limits are not constitutionally inalienable. Examples for such an approach are given by the Lisbon-decisions of the Hungarian CC[149] and the Polish CT[150] as regards the integration clauses in both countries.

The most explicit example for the second category is given by the Lisbon-judgment of the German FCC. As already pointed out, the key argument of this decision is the principle of democracy as protected in its essential content by the so-called 'eternity clause' under Article 79.3 of the German Basic Law[151]. Hence, the absolute constitutional limits to integration under the German Basic Law begin particularly where the principle of democracy (and with it the right to vote) would be eroded at its substantive core. In the Lisbon-judgment the German FCC identified five key areas within which the future conferral of competencies to the EU would bear a high risk of violating this material core as protected by the eternity clause.

> Particularly sensitive for the ability of a constitutional state to democratically shape itself are [since time immemorial[152]] decisions on substantive and formal criminal law (1), on the disposition of the monopoly on the use of force by the police within the state and by the military towards the exterior (2), fundamental fiscal decisions on public revenue and public expenditure, the latter being particularly motivated, *inter alia*, by social policy considerations (3), decisions on the shaping of living conditions in a social state (4) and decisions of particular cultural importance, for example on family law, the school and education system and on dealing with religious communities (5)[153].

This catalogue is spelled out in more detail in the following paragraphs of the Lisbon-judgment[154]. In a remarkably apodictic way – which has been vividly criticised[155]– the FCC positions constitutional stop signs against further conferrals of competences. We learn, for instance, that the task of securing the individual's livelihood is and must remain a 'primary task' of the Member States[156]. The only reason why the right of coinage – which has also been a classical state competence – does not figure in the FCC's list is probably the mere fact that this *marque de souveraineté* (Bodin[157]) has already been conferred to EU level[158].

---

147 cf French ConC *Constitutional Treaty*, above n 12, para 7 and Treaty of Lisbon, above n 17, para 9.

148 L Favoreu, *La politique saisie par le droit* (Paris, Economica, 1988) 30.

149 Hungarian CC *Treaty of Lisbon*, above n 23, point IV.2.3.2.

150 According to the Polish CT *Treaty of Lisbon*, above n 25, this limit is constituted by the key principles determining the 'constitutional identity' of Poland, i.e. the protection of human dignity and the constitutional rights and freedoms, the respect of sovereign statehood and the principles of democracy, the rule of law, social justice and the bases of the economic system.

151 According to Article 79.3 of the German Basic Law amendments 'affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 [human dignity – human rights – legally binding force of basic rights] and 20 [constitutional core principles] shall be inadmissible'.

152 The little, albeit characteristic part 'seit jeher', which suggests historic continuity instead of providing substantial arguments, was left out in the official English translation.

153 German FCC *Treaty of Lisbon*, above n 21, para 252.

154 ibid, paras 253–260.

155 cf C Schönberger, 'Lisbon in Karlsruhe: Maastricht's Epigones At Sea' (2009) 10 GLJ 1201, 1208 f who speaks even of an 'arrogation of power'.

156 German FCC *Treaty of Lisbon*, above n 21, para 259.

157 cf J Bodin, *Les six livres de la République* (10th ed 1593 – reprint 1986), book I, chapter XX 295, 306 and 309.

158 Similarly C Schönberger, above n 155, 1209.

5.1.2. Who Determines Constitutional Limits: Division of Powers II

From a comparative perspective, it is not so striking that a constitutional court derives constitutional limits to European integration from an eternity-clause. But the German Lisbon-judgment must be seen as unique first and foremost because of the extent to which the FCC relies on Article 79.3[159]. No other court has spelled out an eternity clause in such a detailed, albeit apodictic manner as the German FCC did with Article 79.3.

The French ConC, for instance, showed extreme reluctance with regard to Article 89.5 of the French constitution[160]. Its Maastricht-jurisprudence illustrates this. After it had ruled in a first decision that the ratification of the Maastricht Treaty required a prior constitutional amendment in 1992[161], the ConC was asked to review the constitutionality of the Maastricht Treaty a second time. The group of senators who introduced the second proceeding was unsatisfied that the French constituent authority had not altered pre-existing provisions, such as the sovereignty-clause under Article 3, but had decided merely to supplement the French constitution with several EU related provisions. In other words, the second proceeding would have given the ConC the opportunity to make its views on the constitutionality of the constitutional amendment. However, the ConC did not follow the argument of the applicants, according to which the ratification of the Maastricht Treaty was still unconstitutional. Instead it decided that

> [s]ubject to the provisions governing the periods in which the Constitution cannot be revised (Articles 7 and 16 and the fourth paragraph of Article 89) and to compliance with the fifth paragraph of Article 89 ('The republican form of government shall not be the object of an amendment'), *the constituent authority is sovereign; it has the power to repeal, amend or amplify constitutional provisions in such manner as it sees fit; there is accordingly no objection to insertion in the Constitution of new provisions which derogate from a constitutional rule or principle; the derogation may be express or implied*[162].

Although the ConC referred to Article 89.5 as a potential limit to the constituent authority, it has never relied on this provision in order to establish constitutional limits to European integration[163]. Hence, Article 89.5 does not belong to the relevant norms of reference, neither in the decision on the Constitutional Treaty nor in that on the Lisbon Treaty.

A restrictive approach towards constitutional eternity clauses can be observed also for Article 139 of the Italian[164], Article 110 of the Greek[165], Article 288 of the Portuguese[166], Article 152.1 and 152.2 of the Romanian[167] and Article 182 of the Cypriot constitution[168].

---

159 cf Weber, above n 30, who draws a comparable conclusion.

160 According to Article 89.5 of the French constitution, the 'republican form of government shall not be the object of any amendment'.

161 French ConC, case 92-308 DC *Maastricht I*, decision of 9 April 1992.

162 French ConC, case 92-312 DC *Maastricht II*, decision of 2 September 1992, para 19. See J Ziller, 'Sovereignty in France: Getting Rid of the Mal de Bodin' in N Walker (ed), *Sovereignty in Transition* (Oxford, Hart, 2003) 261, 271 f.

163 In its third Maastricht-decision the ConC declared itself not competent to decide on the constitutionality of the law approving the ratification as this law had been subjected to a referendum and was thus a direct expression of national sovereignty('expression directe de la souveraineté nationale'), French ConC, case 92-313 DC *Maastricht III*, decision of 23 September 1992, para 2.

164 M Cartabia, 'The Legacy of Sovereignty in Italian Constitutional Debate', in N Walker (ed), *Sovereignty in Transition* (Oxford, Hart, 2003) 305, 316.

165 See J Iliopoulos-Strangas, 'Offene Staatlichkeit', in A v Bogdandy and PM Huber (eds) *Ius Publicum Europaeum* (vol II, Heidelberg, CF Müller, 2008) § 16 Griechenland, para 43 ff.

166 M Poiares Maduro, 'EU Law and National Constitutions: Portugal', manuscript for BIICL (ed) FIDE XX *Congress London* (vol 1, London, BIICL, 2002), formerly available at www.fide2002.org, 13 ff.

167 V Duculescu and A Ruxandra, 'Romania', in AE Kellermann et al (eds), *The Impact of EU Accession on the Legal Orders of New Member States and (Pre-)Candidate Countries* (The Hague, TMC Asser Press, 2006) 113, 118 ff.

168 For the legal situation in Cyprus see N Emiliou, 'Cyprus', in AE Kellermann et al (eds), *The Impact of EU Accession on the Legal Orders of New Member States and (Pre-) Candidate Countries* (The Hague, TMC Asser Press, 2006) 303, 304 ff.

But the peculiarity of the German FCC's approach towards the eternity clause – which was drafted primarily in order to prevent a slide back into dictatorship[169] – was expressed most explicitly by the second Lisbon-judgment of the Czech CC. The Czech judges articulately rejected the petitioners' demand to denominate an abstract catalogue of non-transferrable rights deduced from the Czech eternity clause under Article 9.2 in connection with Article 1.1 of the Czech constitution[170]:

> [T]he petitioners ask the Constitutional Court to set 'substantive limits to the transfer of powers', and (...) attempt to formulate these themselves, *evidently inspired by the decision of the German Constitutional Court dated 30 June 2009* (...) which provides such a catalogue in point 252 (...).
>
> However, the Constitutional Court *does not consider it possible, in view of the position that it holds in the constitutional system of the Czech Republic, to create such a catalogue of non-transferrable powers and authoritatively determine 'substantive limits to the transfer of powers', as the petitioners request*. It points out that it already stated [reference to Lisbon I] that '*These limits should be left primarily to the legislature to specify, because this is a priori a political question, which provides the legislature wide discretion*' [reference to Lisbon I, para 109]. *Responsibility for these political decisions cannot be transferred to the Constitutional Court; it can review them only at the point when they have actually been made on the political level.*
>
> For the same reasons, the Constitutional Court does not feel authorised to formulate in advance, in an abstract context, what is the precise content of Article 1.1 of the Constitution, as requested by the petitioners, supported by the president, who welcomes the attempt 'in a final list to define the elements of the "material core" of the constitutional order, or more precisely, of a sovereign democratic state governed by the rule of law' (...).
>
> (...) *This does not involve arbitrariness, but, on the contrary, restraint and judicial minimalism, which is perceived as a means of limiting the judicial power in favour of political processes*, and which outweighs the requirement of absolute legal certainty (...). The attempt to define the term 'sovereign, unitary and democratic state governed by the rule of law, founded on respect for the rights and freedoms of the man and of citizens' once and for all (as the petitioners, supported by the president, request) *would, in contrast, be seen as an expression of judicial activism, which is, incidentally, consistently criticized by certain other political figures*[171].

The reasoning of the Czech CC goes beyond the sole aspect of constitutional limits to European integration and addresses the more fundamental question of where the limits of law and the judicial process begin. To frame it differently, at the heart of its reasoning, the Czech CC raises the question of institutional choice in the sense of to what extent a court should (re-)write the constitution by means of interpretation and where it should leave the decision to the legislator. The answer given is clearly in favour of the political process. Does the second Lisbon-judgment of the Czech CC bear the hand-writing of those authors who had underlined the limits of judicial reasoning on earlier occasions, particularly within the context of the European Arrest Warrant?[172]

Anyway, as regards the determination of constitutional limits to further steps of European integration, the comparative analysis reveals that the French ConC and the Czech CC throw the ball back into the political arena[173]. In contrast, the German FCC claims to be competent to determine constitutionally irrevocable limits

---

169 For the historic background of the German eternity clause see M Herdegen, 'Article 79', in T Maunz and G Dürig (eds), *Grundgesetz – Kommentar* (loose-leaf, Beck, Munich, 59 ed 2010) paras 63 ff.

170 According to Article 9.2 of the Czech constitution, the 'substantive requisites of the democratic, law-abiding State may not be amended'. According to Article 1.1, the 'Czech Republic is a sovereign, unitary and democratic, law-abiding State, based on respect for the rights and freedoms of man and citizen'.

171 Czech CC *Treaty of Lisbon II,* above n 22, paras 110–113 (emphasis added).

172 See in particular J Komárek, above n 11, 38 f within the context of the European Arrest Warrant cases.

173 This does not mean, however, that the Czech CC would pass the buck to the legislator in all cases. But it holds that the 'interference by the Constitutional Court should come into consideration as ultima ratio' only, see Czech CC *Treaty of Lisbon I*, above n 19, para 109.

to European integration which could only be overcome if the German Basic Law was abrogated. While the French ConC and the Czech CC stay within the existing constitutional system by referring to the legislator or the constituent authority, the German FCC transcends the constitutional order (by which it is itself constituted) and refers to a pre-constitutional right to give oneself a constitution[174].

5.2. Challenges to the Applicability of EU law

Alongside the manifestation of substantial constitutional limits to future developments of EU (primary) law, the Lisbon-decisions also address challenges to the applicability of EU law in force. Some of the courts particularly highlight their review power in cases of alleged ultra vires acts and violations of the so-called national constitutional identity.

5.2.1. Ultra Vires Review

As far as national constitutional courts claim to be competent for ultra vires review – that is to review if an act of EU law has transgressed the Union's competences and to declare it inapplicable in case it does[175] – the courts agree in principle that restrictive conditions must apply to its exercise.

In the Lisbon-judgment the German FCC refined its previously developed[176] concept of ultra vires review on several crucial points[177]. The court underlined that the decision to declare an act of EU law inapplicable within the framework of an ultra vires review is reserved for the FCC alone[178]. In a surprising obiter dictum the court even went so far as to propose that the legislator could introduce a new constitutional proceeding being 'tailor made' for this kind of review[179]. But the most important novelty in substance was that the court limited ultra vires review to 'obvious transgressions' and to cases where 'legal protection cannot be obtained' at EU level[180].

In its Honeywell-decision of 6 July 2010 the FCC confirmed this restrictive approach, albeit with a dissenting opinion. The case dealt essentially with the question of whether the German Federal Labour Court could lawfully align its jurisprudence with the Mangold-judgment of the ECJ[181].

According to the FCC, ultra vires review requires a prior reference to the ECJ i*n terms of procedure*[182]. *In terms of substance*, an act of Union law may only be declared inapplicable if the breach of competences is 'sufficiently qualified'. This criterion depends on a double test which might produce affirmative results only in very exceptional, not to say hypothetical circumstances. Firstly, the act in question must constitute an evident violation of competences. Secondly, the impugned act must entail a significant impact on the system

---

174 See again German FCC *Treaty of Lisbon*, above n 21, para 179.

175 'Ultra vires act' is here understood in the narrower sense of the word, in contrast to the wider concept which covers also infringements of other principles of EU law than only the principle of conferral, such as the fundamental rights for example. For the different notions see FC Mayer, *Kompetenzüberschreitung und Letztentscheidung* (München, CH Beck, 2000) 24 ff.

176 German FCC *Maastricht*, above n 74, 187 f. The claim to exercise an ultra vires review could already be identified previously in case 2 BvR 255/69 *Lütticke*, order of 9 June 1971, BVerfGE 31, 145, 174 and case 2 BvR 687/85 *Kloppenburg*, order of 8 April 1987, BVerfGE 75, 223, 235.

177 This cannot be dealt with in detail here.

178 ibid, para 241.

179 At the moment there is no political majority which would opt in favour of such a solution, which might even, for good reasons, give impetus to an infringement procedure under Article 258 TFEU (ex-Article 226 TEC).

180 German FCC *Treaty of Lisbon*, above n 21, para 240.

181 Case C-144/04, Werner Mangold v. Rüdiger Helm [2005]. ECR I-9981

182 German FCC *Honeywell*, above n 16, para 60.

of distribution of competences between the Member States and the Union. In brief, the violation must be obvious and simultaneously produce a severe structural anomaly as to the principle of conferral[183]. Concerning possible ultra vires acts committed by the judicial branch and the ECJ in particular, the FCC affirmed the 'respect for the Union's own methods of justice' and even highlighted that the ECJ had a 'right to tolerance of error'[184].

The question of whether the ECJ had transgressed the Union's competences by excessively interpreting EU law in its Mangold-judgment was left expressly open by the FCC[185] as it took the view that, in any case, the second requirement of the double test was not fulfilled. According to the FCC 'neither a new field of competences was created for the Union to the detriment of the Member States, nor was an existing competence expanded with the weight of a new establishment[186].'

This restrictive approach should, however, not overshadow the fact that the Honeywell-case marks the first time that a national constitutional court actually *undertook* an ultra vires review[187], even if the FCC rejected the constitutional complaint as unfounded.

The ultra vires claim is a prominent example for cross-border migration[188] of constitutional ideas. Originally developed by the FCC, it was taken up by the Danish Highest Court in its Maastricht-decision[189], the Polish CT in its decision on the Accession Treaty[190] and also the Czech CC in its Lisbon-decisions[191]. The Polish and the Czech decisions even drew explicitly on the German Maastricht decision for inspiration[192].

Although not being equally sophisticated in terms of dogmatics, the jurisprudence of the Danish Highest Court and the Czech CC principally correspond to the restrictive course of the FCC. Both courts underline that ultra vires review must be exercised only in exceptional circumstances[193]. A similar conclusion can be deduced from the jurisprudence of the Polish CT[194], even despite some rhetorical differences[195].

In brief, the Lisbon-jurisprudence and subsequent cases confirm that the constitutional courts which claim to be competent for ultra vires review construe it as an exceptional review of last resort.

---

183 German FCC *Honeywell*, above n 16, para 61.

184 German FCC *Honeywell*, above n 16, para 66.

185 The question was whether the ECJ could derive a 'general principle of the prohibition of discrimination based on age' from the constitutional traditions common to the Member States and from their international agreements.

186 German FCC *Honeywell*, above n 16, para 78.

187 One could have interpreted as early as the *Kloppenburg*-decision – above n 176 – in that way.

188 For the concept cf S Choudhry, 'Migration as a new metaphor in comparative constitutional law', in id (ed), *The Migration of Constitutional Ideas* (Cambridge, CUP, 2006) 1 ff.

189 Danish HC, case I 361/1997 *Carlsen v Rasmussen*, judgment of 6 April 1998.

190 Polish CT *Accession Treaty*, above n 9, points 10.3 and 4.5.

191 Czech CC *Treaty of Lisbon I*, above n 19, paras 120, 139 and 216; *Treaty of Lisbon II*, above n 22, para 150 referring to the first decision.

192 This expression is used by the Czech CC in its first Lisbon decision, above n 19, para 111. The Czech CC regularly refers to other constitutional courts. One of the most striking examples in this respect is its second sugar quota case of 2006 in which it quotes the assembled prominence of European landmark decisions relating to the principle of primacy, see Czech CC, case Pl ÚS 50/04 *sugar quotas II*, decision of 8 March 2006, point VI.A.

193 cf above n 188 and n 190.

194 In that sense also S Biernat, above n 9, para 46.

195 The Czech CC distances itself expressly from the Polish CT: 'The Polish Constitutional Tribunal, for example, expressly rules out the jurisdiction of the Court of Justice to evaluate the limits of conferral of competences on the EU, as, according to the Tribunal, that is a question of interpretation of domestic constitutional law. Although, in terms of the dogmatics of domestic constitutional law, we can agree with that conclusion to a certain extent, it is questionable whether it is necessary to formulate it as sharply as the Tribunal did' (Czech CC *Treaty of Lisbon*, above n 19, para 139).

5.2.2 Identity Review

The picture is more heterogeneous in relation to claims to review whether an act of EU law violates the national constitutional identity.

This begins with the term 'identity'. Whereas the concept of 'ultra vires act' can be defined in a relatively clear manner, the notion of identity remains obscure[196]. But although (or just because?) it runs risk of drifting away in the cloudy spheres of nebulosity, it nevertheless seems to have the potential of becoming a universal term[197] of European constitutional law.

The notion of 'constitutional identity' is used by several national supreme jurisdictions as a synonym for constitutional core principles protected against the primacy of EU law[198]. While this alone is hardly revolutionary[199], the concept of constitutional identity has recently turned out to be a genuine phenomenon of multilevel-constitutionalism. Some of the courts no longer rely exclusively on national constitutional law, but also on the new framed identity-clause in EU law (Article 4.2 TEU) in order to justify the protection of the said core principles.

The first decision interesting in this respect is the declaration of the Spanish CT on the Constitutional Treaty. For the Spanish CT the identity clause (formerly planned as Article I-5 of the Constitutional Treaty) is one of the key arguments to assume that an act of EU law which violated the fundamental principles of the Spanish constitution would automatically constitute an infringement of the TEU and would therefore be sanctioned already by EU law itself[200]. To frame it differently, the Spanish CT sees the identity-clause as one of several 'inbuilt breaks' of the treaty which ensure that the tribunal never gets in the position to declare an act of EU law inapplicable in Spain because the infringement has already been sanctioned on EU-level[201]. This is why the Spanish CT can refer its own review power into the realm of the hypothetical.

The identity-clause is also highlighted by the French ConC in its decision on the Constitutional Treaty. The ConC concluded from a combined reading of the (formerly planned) primacy-clause and the identity-clause that the principle of primacy is not only generally acknowledged, but also potentially limited. According to the ConC, the Constitutional Treaty,

> particularly the close proximity of Articles 1-5 and 1-6 thereof, show that it in no way modifies the nature of the European Union, nor the scope of the principle of the primacy of Union law as duly acknowledged by Article 88-1 of the Constitution, and confirmed by the Constitutional Council in its decisions[202].

---

196 See J-H Reestman, above n 30, 374 ff and A v Bogdandy, 'Europäische und nationale Identität: Integration durch Verfassungsrecht?' (2003) 62 VVDStRL 156, 164.

197 For the concept of universal terms in a judicial context see M Poiares Maduro, 'Contrapunctual Law' in N Walker (ed), *Sovereignty in Transition* (Oxford, Hart, 2003) 501, 527 f.

198 See also FC Mayer, above n 31, 36.

199 For the use of the term 'identity' within the context of constitutional core principles see already German FCC, case BvL 52/71 *Solange I*, order of 29 May 1974, BVerfGE 37, 271, 279 f and case 2 BvR 197/83 *Solange II*, order of 22 October 1986, BVerfGE 73, 339, 375 f with reference to the jurisprudence of the Italian CC (in particular Italian CC, case 183/73 *Frontini*, decision of 18 December 1973) which does not use the term, but follows a comparable approach in substance.

200 Spanish CT *Constitutional Treaty*, above n 8, point II-3. In this sense see the case note of F Castillo de la Torre, CMLR 42 (2005) 1169, 1195 f and AC Becker, 'Vorrang versus Vorherrschaft', EuR (2005) 353, 355.

201 cf F Castillo de la Torre (2005) 42 CMLR 1169, 1193 and 1201.

202 French ConC *Constitutional Treaty*, above n 12, para 13.

Among the jurisprudence referred to, a decision stands out in which the ConC had stated that the obligation to transpose a directive followed not only from EU law but also from French constitutional law (Article 88-1) and non-transposition would only be possible on the grounds of an expressly contrary provision of the French constitution[203]. This *constitutional* entrenchment of the obligation to transpose a directive allowed the ConC to protect the enforcement of EU law by means of French constitutional law and simultaneously *limits* this obligation by colliding constitutional provisions. In a decision of 2006 the ConC specified these potential limits when it, from now on, relied on the 'constitutional identity'. According to the ConC, 'the transposition of a Directive cannot run counter to a rule or principle inherent to the constitutional identity of France, except when the constituting power consents thereto[204]'.

While it is not clear what exactly falls under the 'constitutional identity' of France – one could argue that this concept covers only those principles specific to the French constitutional order, such as the principle of secularism[205] – it is definite that the constitutional identity in the sense of the French ConC does not constitute an inalienable limit to European integration. Instead, the final decision in this respect rests with the constituting power. There are several differences between the approach of the French ConC and the German FCC as regards the concept of constitutional identity[206]. But this is the most important. While in Germany the FCC grants the constitutional identity absolute protection under the eternity clause, in France the constituent authority maintains the right to adapt the French constitution. If the French ConC ever held that the implementation of a directive would infringe the constitutional identity of France, then the constitution could be revised.

In Germany, on the contrary, the notion of constitutional identity is bound to Article 79.3 of the Basic Law which shields the material core of the constitution even against a revision. On this basis the FCC claims to be competent to review whether an act of EU law infringes Germany's constitutional identity and is thus inapplicable within Germany. The court holds that otherwise

> the fundamental political and constitutional structures of sovereign Member States, which are recognised by Article 4.2 first sentence Lisbon TEU, cannot be safeguarded in any other way. In this respect, the guarantee of national constitutional identity under constitutional and under Union law *go hand in hand in the European legal area*. The identity review makes it possible to examine whether due to the action of European institutions, the principles … declared inviolable in Article 79.3 of the Basic Law, have been violated. This ensures that the primacy of application of Union law only applies by virtue and in the context of the constitutional empowerment that continues in effect[207].

The picture of 'hand in hand' is deceiving. It alludes to mutual loyalty which would indeed make sense as the new identity clause is placed directly alongside the principle of mutual loyalty enshrined in Article 4.3 TEU. However, as to the legal consequences of the FCC's approach, the metaphor of 'pulling and tearing' would be more adequate. The FCC construes the identity clause as a mere reflex or fingerprint of (national) sovereign statehood. In other words, Article 4.2 TEU is seen as a declarative affirmation of the FCC's alleged right to decide unilaterally on the inapplicability of EU law within Germany. Once the constitutional identity is touched, the game is over. Even if the German FCC underlines that the exercise of this review power must be

---

203 French ConC *E-Commerce*, above n 13, para 7. See also case no 2004-498 DC *Bioethics*, decision of 29 July 2004, para 4. This reasoning has been aptly described as a legal osmosis, cf F Chaltiel, 'Constitution française, constitution européenne, vers l'osmose des ordres juridiques?' (2005) 488 RMC 280 ff.

204 French ConC *Information Society*, above n 13, para 19.

205 cf in that sense the conclusions of the rapporteur public at the French *Conseil d'Etat* M Guyomar in case Arcelor (2007) RTDE 378, 385.

206 This cannot be dealt with in detail here. For details see the brilliant analysis of J-H Reestman, above n 29, 384 ff, particularly 388–390.

207 German FCC *Treaty of Lisbon*, above n 21, para 240 (emphasis added).

reconciled with the constitutional principle of 'friendliness towards European Law[208]' and seems to indicate in its Honeywell-decision that the restrictive procedural requirements set up for the ultra vires review might also apply for the identity review[209], one must strongly doubt that the FCC's approach corresponds to an adequate understanding of Article 4.2 TEU.

First, according to the FCC's conception, everything depends on the content or non-content of the term identity. Is it now possible to circumvent the Solange-II-decision and the Banana-decision[210] by claiming that the essential core of a fundamental right – protected as part of the constitutional identity – has been violated[211]? If so, the reference to the identity-clause might constitute opening Pandora's box[212].

Second, even if the German Lisbon-judgment does not re-open the Solange-saga[213], its approach remains, again, blind to the multi-levelled structure of European constitutionalism. If it is true that the identity-clause aims at the protection of specificities and core principles of national constitutions, then EU law cannot determine what 'constitutional identity' is. To that extent Article 4.2 TEU is open to varying evaluations of national authorities, including national courts.

But the question of *content* must be separated from the question of *normative relevance*. If it is also true that Article 4.2 TEU is an auto-limitative response of EU law to the claims of national jurisdictions that certain core principles of national constitutions are not subject to the principle of primacy, then the question of how far EU law limits its own claim of primacy still remains a question of EU law. This is a logical consequence of the formal separation of national and supranational law: The extent to which the identity-claim is normatively relevant within the realm of EU law is a question to be decided by EU law and thus by the ECJ. In other words, while national constitutional courts may decide on the content of constitutional identity, the ECJ decides if and in how far the identity-claim prevails over (hypothetically) conflicting principles of EU law.

Seen in this way, Article 4.2 appears as an *integration clause* on Union-level ensuring the legal *permeability* of EU law with regard to national constitutional law[214]. By means of the identity-clause EU law revokes to some extent – and not unlimited – its own claim of primacy within its scope of application. Hence, the task of protecting national constitutional identity is, under EU law, not a task reserved for national courts. It is instead distributed between supranational and national level.

In this respect it is important to note that Article 4.2 contains an obligation for the EU to respect the Member States' national identity, not to generally outweigh other principles of EU law against it. Otherwise, we would be back to Pandora's box[215]. The deliberations of the European Convention confirm the view that the identity-clause is not framed as a unilateral 'derogation clause' or a provision for the interpretation of which the ECJ

---

208 German FCC *Treaty of Lisbon*, above n 21, para 240.

209 German FCC *Honeywell*, above n 16, para 59: 'According to the legal system of the Federal Republic of Germany, the primacy of application of Union law is to be recognised and it is to be guaranteed that the control powers which are constitutionally reserved for the Federal Constitutional Court are only exercised in a manner that is reserved and open towards European law.'

210 German FCC, case 2 BvL 1/97 *Banana-Market*, order of 7 June 2000, BVerfGE 102, 147 ff.

211 In case 1 BvR 256/08 et al *Data retention*, judgment of 2 March 2010, para 218 the German FCC stated: 'It is part of the constitutional identity of the Federal Republic of Germany that the citizens' enjoyment of freedom may not be totally recorded and registered, and the Federal Republic must endeavour to preserve this in European and international connections.' The FCC here referred explicitly to the identity control under para 240 of the Lisbon-judgment.

212 See Mayer, above n 31, 39 f concluding that in some way any problem of protection of fundamental rights could thus be treated as a problem of constitutional identity too.

213 In this sense Thym, above n 38, 1807.

214 In legal terms, permeability can be defined as the capacity of a given legal order to limit its own claim of normative exclusivity in order to enable legal rules or principles which emanate from a formally separated legal order to integrate. See in detail Wendel, above n 3, chapter 1 and 13.

215 See also AG M Poiares Maduro, case C-213/07 *Michaniki*, opinion of 28 October 2008, para 32 f.

would still[216] not be competent[217]. The role of the ECJ as a 'first line of defence' seems to be presumed also by the Spanish CT in its declaration on the Constitutional Treaty as far as it assumes that a violation of the core principles of the Spanish constitution would not occur, because such a violation would simultaneously constitute an infringement of EU law sanctioned by the ECJ[218].

However, once the protection of constitutional identity has been identified as a genuine task of multi-level constitutionalism in which the preliminary reference procedure assures the necessary dialogue between the ECJ and the national courts, the question arises if the ECJ has taken up its mission so far. Is the ECJ really capable of a multi-level conception of the identity-clause? This premise would at least entail the ECJ handling the identity-clause as a justiciable provision of EU law, now that the ECJ is legally competent to interpret it[219]. However, even if the Advocates-General have brought up the question of constitutional identity regularly before the ECJ in recent times[220], the ECJ remains silent about the possible impact of Article 4.2 TEU and thus risks of handing over the reins to the national courts[221].

6. Conclusion: a new quality of comparative dialectics

To conclude, the Lisbon-decisions reveal significant differences not only in terms of procedure, but first and foremost in terms of substance. While the German FCC's Maastricht-decision became an often quoted leading-case in cross-border perspective, it is unlikely that the FCC's Lisbon-judgment will have a similar effect.

The comparative analysis reveals instead that the FCC is the only constitutional court in Europe which – based on a conception of democracy bound existentially to statehood – demands a prior constitutive assent of national parliament in all possible cases of so-called dynamic treaty provisions. The FCC is also the sole court which declares itself competent to spell out a constitutional eternity clause in a detailed (albeit apodictic) manner, enlisting whole areas within which the future conferral of competencies to the EU could bear a high risk of violating national constitutional identity.

But beyond the mere fact of apparent differences, the Lisbon judgments reveal a new quality of judicial dialogue and comparative exchange of national courts. Indeed, it is not a new phenomenon that national constitutional courts refer to each other[222]. But in the Lisbon-decisions the frequency of such cross-references is rather high. References can be found chronologically in the decisions of the Czech CC, the German FCC, the Hungarian CC and the Polish CT. Most of these references are punctual affirmations used to support a specific argument when a punctual congruence with the approach of another court exists. They are not to be

---

216 The ECJ was, under the former Article 46 of the TEU-Nice, not competent to interpret the identity-clause under the former Article 6.3 TEU-Nice.

217 CONV 375/1/02 REV 1, p 11: 'In the latter respect it was noted that the provision was not a derogation clause. The Member States will remain under a duty to respect the provisions of the Treaties. ... Were the Court of Justice to be given power with respect to such article in a future "basic treaty of constitutional significance", the Court could be the ultimate interpreter of the provision if the political institutions went beyond a reasonable margin of appreciation.'

218 See also F Castillo de la Torre (2005) 42 CMLR 1169, 1201.

219 cf above n 215.

220 See particularly the opinion of AG M Poiares Maduro in the case *Michaniki*, above n 213, para 32. For more examples see Wendel, above n 3, chapter 13 point II-2-a.

221 An example how the protection of constitutional identity might work in practice is the Omega-case, ECJ case C-36/02 *Omega*, judgment of 14 October 2004. However, the term 'identity' is not used within this decision.

222 cf above n 198.

confounded with a normative basis, but reflect merely a sort of comparative 'inspiration' as the Czech CC calls it. The possibility of being 'inspired' in this way is, without doubt, intensified by the fact that the supreme jurisdictions show more and more tendency to publish English translations[223].

However, particularly the Czech CC has shown that judicial dialogue on horizontal level can involve critical comparative reasoning. Its second Lisbon-decision is a clear signal that the interaction and mutual influence of national jurisprudence does not necessarily lead to the reception of a specific judgment in the jurisprudence of other courts, but may in fact evoke express rejection. By objecting openly to key arguments of its German counterpart, the Czech CC disproved not only the commonly expressed idea that constitutional courts of Eastern and Central European countries stick to the FCC as a sort of archetype of constitutional court. The Czech CC also demonstrated the dialectical prospects of comparative reasoning within the multi-levelled cooperation of European constitutional courts[224].

Does this contravene the idea of a common European constitutional law? No. On the contrary, the critical assessment and the new dialectics of comparative reasoning may even foster the debate. A specific field in which the productive results of critical comparative evaluation can be seen is the field of constitutional integration clauses. One of the best examples in this respect is the opinion rendered by the Spanish State Council in 2006 proposing the introduction of a new integration clause in the Spanish constitution on the basis of an in-depth comparative reasoning[225].

By the way, this opinion proposes the introduction of a Europe-clause which – inspired by Article 8.4 of the Portuguese constitution – principally states that EU law shall be applicable in Spain according to the principles of EU law itself. It seems that the idea of genuine multi-level-provisions has set a precedent.

---

223 The German FCC issued an English translation for the first time in the *European-Arrest-Warrant* case. In the *Lisbon*- and *Honeywell*-decisions a translation was already available the day the decision was published.

224 See A Voßkuhle, above n 35.

225 Spanish State Council, above n 7.

CEU

Instituto Universitario de Estudios Europeos

Universidad San Pablo

Boletín de Suscripción

Deseo recibir los próximos números de los Documentos de Trabajo de la Serie *"Unión Europea"* del Instituto Universitario de Estudios Europeos de la Universidad CEU San Pablo:

Nombre y Apellidos .....

.....

Dirección .....

Población ..... C.P. ..... País .....

Teléfono ..... Correo electrónico .....

Usted tiene derecho a acceder a la información que le concierne, recopilada en nuestro fichero de clientes, y cancelarla o rectificarla en el caso de ser errónea. A través del Instituto Universitario de Estudios Europeos podrá recibir información de su interés. Si no desea recibirla, le rogamos que nos lo haga saber mediante comunicación escrita con todos sus datos.

Si usted está interesado en adquirir ejemplares de alguno de los números ya publicados, sírvase ponerse en contacto con *CEU Ediciones*:
Teléfono: 91 514 05 73
E-mail: publicaciones@ceu.es

Instituto Universitario de Estudios Europeos
Universidad CEU San pablo
Avda. del Valle 21, 28003 Madrid
idee@ceu.es
Teléfono: 91 514 04 22 / Fax: 91 514 04 28
www.idee.ceu.es

Números Publicados

Serie Unión Europea

Nº 1 / 2000 "La política monetaria única de la Unión Europea"
Rafael Pampillón Olmedo

Nº 2 / 2000 "Nacionalismo e integración"
Leonardo Caruana de las Cagigas y Eduardo González Calleja

Nº 1 / 2001 "Standard and Harmonize: Tax Arbitrage"
Nohemi Boal Velasco y Mariano Gónzalez Sánchez

Nº 2 / 2001 "Alemania y la ampliación al este: convergencias y divergencias"
José María Beneyto Pérez

Nº 3 / 2001 "Towards a common European diplomacy? Analysis of the European Parliament resolution on establishing a common diplomacy (A5-0210/2000)"
Belén Becerril Atienza y Gerardo Galeote Quecedo

Nº 4 / 2001 "La Política de Inmigración en la Unión Europea"
Patricia Argerey Vilar

Nº 1 / 2002 "ALCA: Adiós al modelo de integración europea?"
Mario Jaramillo Contreras

Nº 2 / 2002 "La crisis de Oriente Medio: Palestina"
Leonardo Caruana de las Cagigas

Nº 3 / 2002 "El establecimiento de una delimitación más precisa de las competencias entre la Unión Europea y los Estados miembros"
José María Beneyto y Claus Giering

Nº 4 / 2002 "La sociedad anónima europea"
Manuel García Riestra

Nº 5 / 2002 "Jerarquía y tipología normativa, procesos legislativos y separación de poderes en la Unión Europea: hacia un modelo más claro y transparente"
Alberto Gil Ibáñez

Nº 6 / 2002 "Análisis de situación y opciones respecto a la posición de las Regiones en el ámbito de la UE. Especial atención al Comité de las Regiones"
Alberto Gil Ibáñez

Nº 7 / 2002 "Die Festlegung einer genaueren Abgrenzung der Kompetenzen zwischen der Europäischen Union und den Mitgliedstaaten"
José María Beneyto y Claus Giering

Nº 1 / 2003 "Un español en Europa. Una aproximación a Juan Luis Vives"
José Peña González

Nº 2 / 2003 "El mercado del arte y los obstáculos fiscales ¿Una asignatura pendiente en la Unión Europea?"
Pablo Siegrist Ridruejo

Nº 1 / 2004 "Evolución en el ámbito del pensamiento de las relaciones España-Europa"
José Peña González

Nº 2 / 2004 "La sociedad europea: un régimen fragmentario con intención armonizadora"
Alfonso Martínez Echevarría y García de Dueñas

Nº 3 / 2004 "Tres operaciones PESD: Bosnia i Herzegovina, Macedonia y República Democrática de Congo"
Berta Carrión Ramírez

Nº 4 / 2004 "Turquía: El largo camino hacia Europa"
Delia Contreras

Nº 5 / 2004 "En el horizonte de la tutela judicial efectiva, el TJCE supera la interpretación restrictiva de la legitimación activa mediante el uso de la cuestión prejudicial y la excepción de ilegalidad"
Alfonso Rincón García Loygorri

Nº 1 / 2005 "The Biret cases: what effects do WTO dispute settlement rulings have in EU law?"
Adrian Emch

Nº 2 / 2005 "Las ofertas públicas de adquisición de títulos desde la perspectiva comunitaria en el marco de la creación de un espacio financiero integrado"
José María Beneyto y José Puente

Nº 3 / 2005 "Las regiones ultraperiféricas de la UE: evolución de las mismas como consecuencia de las políticas específicas aplicadas. Canarias como ejemplo"
Carlota González Láynez

Nº 24 / 2006 "El Imperio Otomano: ¿por tercera vez a las puertas de Viena?"
Alejandra Arana

Nº 25 / 2006 "Bioterrorismo: la amenaza latente"
Ignacio Ibáñez Ferrándiz

Nº 26 / 2006 "Inmigración y redefinición de la identidad europea"
Diego Acosta Arcarazo

Nº 27 / 2007 "Procesos de integración en Sudamérica. Un proyecto más ambicioso: la comunidad sudamericana de naciones"
Raquel Turienzo Carracedo

Nº 28 / 2007 "El poder del derecho en el orden internacional. Estudio crítico de la aplicación de la norma democrática por el Consejo de Seguridad y la Unión Europea"
Gaspar Atienza Becerril

Nº 29 / 2008 "Iraqi Kurdistan: Past, Present and Future. A look at the history, the contemporary situation and the future for the Kurdish parts of Iraq"
Egil Thorsås

Nº 30 / 2008 "Los desafíos de la creciente presencia de China en el continente africano"·
Marisa Caroço Amaro

Nº 31 / 2009 "La cooperación al desarrollo: un traje a medida para cada contexto. Las prioridades para la promoción de la buena gobernanza en terceros países: la Unión Europea, los Estados Unidos y la Organización de las Naciones Unidas"
Anne Van Nistelrooij

Nº 32 / 2009 "Desafíos y oportunidades en las relaciones entre la Unión Europea y Turquía"
Manuela Gambino

Nº 33 / 2009 "Las relaciones transatlánticas tras la crisis financiera internacional: oportunidades para la Presidencia Española"
Román Escolano

Nº 34 / 2010 "Los derechos fundamentales en los tratados europeos. Evolución y situación actual"
Silvia Ortiz Herrera

Nº 35 / 2010 "La Unión Europea ante los retos de la democratización en Cuba"
Delia Contreras

Nº 36 / 2010 "La asociación estratégica UE- Brasil. Retórica y pragmatismo en las relaciones Euro-Brasileñas" (Vol 1 y 2)
Ana Isabel Rodríguez Iglesias

Nº 37 / 2011 "China's foreign policy: A European perspective"
Fernando Delage & Gracia Abad

Nº 38 / 2011 "China's Priorities and Strategy in China-EU Relations"
Chen Zhimin, Dai Bingran, Zhongqi Pan & Ding Chun

Nº 39 / 2011 "Motor or Brake for European Policies? Germany's new role in the EU after the Lisbon-Judgment of its Federal Constitutional Court"
Ingolf Pernice

Nº 40 / 2011 "Back to Square One - the Past, Present and Future of the Simmenthal Mandate"
Siniša Rodin

Serie Política de la Competencia

Nº 1 / 2001 "El control de concentraciones en España: un nuevo marco legislativo para las empresas"
José María Beneyto

Nº 2 / 2001 "Análisis de los efectos económicos y sobre la competencia de la concentración Endesa-Iberdrola"
Luis Atienza, Javier de Quinto y Richard Watt

Nº 3 / 2001 "Empresas en Participación concentrativas y artículo 81 del Tratado CE: Dos años de aplicación del artículo 2(4) del Reglamento CE de control de las operaciones de concentración"
Jerónimo Maíllo González-Orús

Nº 1 / 2002 "Cinco años de aplicación de la Comunicación de 1996 relativa a la no imposición de multas o a la reducción de su importe en los asuntos relacionados con los acuerdos entre empresas"
Miguel Ángel Peña Castellot

Nº 2 / 2002 "Leniency: la política de exoneración del pago de multas en derecho de la competencia"
Santiago Illundaín Fontoya

Nº 3 / 2002 "Dominancia vs. disminución sustancial de la competencia ¿cuál es el criterio más apropiado?: aspectos jurídicos"
Mercedes García Pérez

Nº 4 / 2002 "Test de dominancia vs. test de reducción de la competencia: aspectos económicos"
Juan Briones Alonso

Nº 5 / 2002 "Telecomunicaciones en España: situación actual y perspectivas"
Bernardo Pérez de León Ponce

Nº 6 / 2002 "El nuevo marco regulatorio europeo de las telecomunicaciones"
Jerónimo González González y Beatriz Sanz Fernández-Vega

Nº 1 / 2003 "Some Simple Graphical Interpretations of the Herfindahl-Hirshman Index and their Implications"
Richard Watt y Javier De Quinto

Nº 2 / 2003 "La Acción de Oro o las privatizaciones en un Mercado Único"
Pablo Siegrist Ridruejo, Jesús Lavalle Merchán, Emilia Gargallo González

Nº 3 / 2003 "El control comunitario de concentraciones de empresas y la invocación de intereses nacionales. Crítica del artículo 21.3 del Reglamento 4064/89"
Pablo Berenguer O´Shea y Vanessa Pérez Lamas

Nº 1 / 2004 "Los puntos de conexión en la Ley 1/2002 de 21 de febrero de coordinación de las competencias del Estado y las Comunidades Autónomas en materia de defensa de la competencia"
Lucana Estévez Mendoza

Nº 2 / 2004 "Los impuestos autonómicos sobre los grandes establecimientos comerciales como ayuda de Estado ilícita ex art. 87 TCE"
Francisco Marcos

Nº 1 / 2005 "Servicios de Interés General y Artículo 86 del Tratado CE: Una Visión Evolutiva"
Jerónimo Maillo González-Orús

Nº 2 / 2005 "La evaluación de los registros de morosos por el Tribunal de Defensa de la Competencia"
Alfonso Rincón García Loygorri

Nº 3 / 2005 "El código de conducta en materia de fiscalidad de las empresas y su relación con el régimen comunitario de ayudas de Estado"
Alfonso Lamadrid de Pablo

Nº 18 / 2006 "Régimen sancionador y clemencia: comentarios al título quinto del anteproyecto de la ley de defensa de la competencia"
Miguel Ángel Peña Castellot

Nº 19 / 2006 "Un nuevo marco institucional en la defensa de la competencia en España"
Carlos Padrós Reig

Nº 20 / 2006 "Las ayudas públicas y la actividad normativa de los poderes públicos en el anteproyecto de ley de defensa de la competencia de 2006"
Juan Arpio Santacruz

Nº 21 / 2006 "La intervención del Gobierno en el control de concentraciones económicas"
Albert Sánchez Graells

Nº 22 / 2006 "La descentralización administrativa de la aplicación del Derecho de la competencia en España"
José Antonio Rodríguez Miguez

Nº 23 / 2007 "Aplicación por los jueces nacionales de la legislación en materia de competencia en el Proyecto de Ley"
Juan Manuel Fernández López

Nº 24 / 2007 "El tratamiento de las restricciones públicas a la competencia"
Francisco Marcos Fernández

Nº 25 / 2008 "Merger Control in the Pharmaceutical Sector and the Innovation Market Assessment. European Analysis in Practice and differences with the American Approach"
Teresa Lorca Morales

Nº 26 / 2008 "Separación de actividades en el sector eléctrico"
Joaquín Mª Nebreda Pérez

Nº 27 / 2008 "Arbitraje y Defensa de la Competencia"
Antonio Creus Carreras y Josep Maria Julià Insenser

Nº 28 / 2008 "El procedimiento de control de concentraciones y la supervisión por organismos reguladores de las Ofertas Públicas de Adquisición"
Francisco Marcos Fernández

Nº 29 / 2009 "Intervención pública en momentos de crisis: el derecho de ayudas de Estado aplicado a la intervención pública directa en las empresas"
Pedro Callol y Jorge Manzarbeitia

Serie Economía Europea

Nº 1 / 2001 "Impacto económico de la inmigración de los Países de Europa Central y Oriental a la Unión Europa"
Mª del Mar Herrador Morales

Nº 1 / 2002 "Análisis de la financiación de los Fondos Estructurales en el ámbito de la política regional de la Unión Europea durante el período 1994-1999"
Cristina Isabel Dopacio

Nº 2 / 2002 "On capital structure in the small and medium enterprises: the spanish case"
Francisco Sogorb Mira

Nº 3 / 2002 "European Union foreign direct investment flows to Mercosur economies: an analysis of the country-of-origin determinants"
Martha Carro Fernández

Nº 1 / 2004 "¿Es necesario reformar el Pacto de Estabilidad y Crecimiento?"
Ana Cristina Mingorance

Nº 2 / 2004 "Perspectivas financieras 2007-2013: las nuevas prioridades de la Unión Europea y sus implicaciones en la política regional"
Cristina Serrano Leal, Begoña Montoro de Zulueta y Enrique Viguera Rubio

Nº 3 / 2004 "Stabilisation Policy in EMU: The Case for More Active Fiscal Policy"
María Jesús Arroyo Fernández y Jorge Uxó González

Nº 1 / 2005 "La negociación de las perspectivas financieras 2007-2013: Una historia de encuentros y desencuentros"
Cristina Serrano Leal

Nº 9 / 2006 "La cuestión agrícola en las negociaciones comerciales multilaterales"
Ana Fernández-Ardavín Martínez y Mª Ángeles Rodríguez Santos

Nº 10 / 2007 "El modelo de desarrollo finlandés y su posible adaptación a los países del Este"
Zane Butina

Nº 11 / 2008 "La estrategia de Lisboa como respuesta de la UE a los retos de la globalización y al envejecimiento de su población"
Miguel Moltó Calvo

Serie del Centro de Estudios de Cooperación al Desarrollo

Nº 1 / 2003 "Papel de la UE en las recientes cumbres internacionales"
Mónica Goded Salto

Nº 1 / 2004 "La asociación Euro-Mediterránea: Un instrumento al servicio de la paz y la prosperidad"
Jesús Antonio Núñez Villaverde

Nº 2 / 2004 "La retroalimentación en los sistemas de evaluación. Experiencias en la cooperación al desarrollo"
José María Larrú Ramos

Nº 3 / 2004 "Migraciones y desarrollo: propuestas institucionales y experiencias prácticas"
Carlos Giménez, Alberto Acosta, Jaime Atienza, Gemma Aubarell, Xabier Aragall

Nº 4 / 2004 "Responsabilidad social corporativa y PYMES"
Amparo Merino de Diego

Nº 1 / 2005 "La relación ONG-Empresa en el marco de la responsabilidad social de la empresa"
Carmen Valor y Amparo Merino

Nº 1 / 2008 "Dos modalidades de evaluación: evaluaciones de impacto aleatorias y evaluaciones participativas"
José María Larrú Ramos y Jorge Lugrís Llerandi

Nº 2 / 2008 "A system not fit for purpose?"
Sven Grimm

Nº 3 / 2008 "El fortalecimiento institucional de la sociedad civil: principal desafío de la cooperación internacional"
Ramón E. Daubón

Nº 4 / 2009 "La relación entre las instituciones y el desarrollo económico de las naciones"
Pablo Bandeira

Nº 5 / 2009 "El desarrollo institucional en el contexto de la ineficacia de la ayuda oficial: valoración crítica y propuestas de acción"
Pablo Bandeira

Nº 6 / 2009 "El fortalecimiento de capacidades y el apoyo al desarrollo desde las bases: la experiencia de la RedEAmérica"
Rodrigo Villar

Nº 7 / 2009 "Mind the gap: Addressing the "Delivery Challenge" in EC Development Cooperation"
Jean Bossuyt

Nº 8 / 2009 "De la reforma política en nuevas democracias: aspectos sistémicos e institucionales y calidad de la democracia"
Manuel Alcántara Sáez y Fátima García Díez

Nº 9 / 2009 "Algunas limitaciones metodológicas para analizar la gobernabilidad"
Miguel Fernández Trillo-Figueroa

Nº 10 / 2009 "Fortalecimiento de la sociedad civil para la acción pública y la gobernanza democrática en contextos de desarrollo"
Gonzalo Delamaza

Nº 11 / 2010 **"**La gestión de la información en organizaciones de desarrollo Vol. 1 y Vol. 2"
Rodríguez - Ariza Carlos

Nº 12 / 2010 **"¿** Más es mejor?"
Larru, José María

Nº 13 / 2010 "Civil society capacity building: An approach in Uganda"
Groenendijk, Kees

Serie Arbitraje Internacional y Resolución Alternativa de Controversias

Nº 1 / 2007 **"**Towards a new paradigm in international arbitration. The Town Elder model revisited"
David W. Rivkin

Nº 2 / 2008 **"**Los árbitros y el poder para dictar condenas no pecuniarias"
David Ramos Muñoz

Nº 3 / 2008 **"**La lucha contra las prerrogativas estatales en el arbitraje comercial internacional"
José Fernando Merino Merchán

Nº 4 / 2009 **"**Due process and public policy in the international enforcement of class arbitration awards"
Stacie I. Strong

Nº 5 / 2009 **"**The permanent court of arbitration and the uncitral arbitration rules: current interaction and future prospectives"
Sarah Grimmer

Resumen: Cuando "Lisboa" llegó a los tribunales lo hizo en un contexto de evolución dinámica del derecho constitucional europeo. Las jurisdicciones supremas de varios Estados miembros –antiguos y nuevos– tomaron Lisboa como una oportunidad de añadir más voces a su "coral" jurisprudencial.

Este documento analiza la "jurisprudencia-Lisboa" desde una perspectiva comparativa. El análisis comparativo revela diferencias significativas entre la jurisprudencia sobre Lisboa, no solamente en términos procesales, sino lo que es más importante, en términos substanciales. En particular la perspectiva tomada por el Tribunal Constitucional Federal alemán es bastante genuina, especialmente en lo relativo a su exigencia de una aprobación "a priori" con valor constitutivo del parlamento nacional y su interpretación de la cláusula constitucional de eternidad.

Es discutido entre la doctrina si más allá del mero hecho de las diferencias aparentes, las sentencias sobre Lisboa revelan una nueva cualidad de diálogo judicial e intercambio comparativo entre los tribunales nacionales. Las decisiones analizadas en este documento de trabajo demuestran que la interacción e influencia mutua entre las diferentes jurisprudencias nacionales no llevan necesariamente a la recepción de una sentencia específica como parte de la jurisprudencia de otro tribunal diferente al que la dictó, sin embargo puede conllevar un razonamiento comparativo importante de los tribunales nacionales.

Palabras clave: Decisiones de Lisboa de los tribunales constitucionales de Austria, República Checa, Francia, Alemania, Hungría, Letonia y Polonia desde una perspectiva comparativa; democracia, soberanía e identidad; permeabilidad del derecho nacional y supranacional; ratificación del Tratado de Lisboa y sus fundamentos constitucionales; fondo procesal y resultado legal de las decisiones de Lisboa; responsabilidad parlamentaria sobre la integración; aprobación parlamentaria a priori a la futura aplicación de los "artículos dinámicos del tratado"; conceptos diferentes de democracia nacional y multi-nivel; voto popular; límites constitucionales a la integración europea; límites que indican la necesidad de una revisión y límites que protegen el núcleo substancial inalienable del orden constitucional; el *Bundesverfassungsgericht* alemán; ultra vires; artículo 4.2 TUE ; dialéctica comparativa.

Abstract: When 'Lisbon' was brought before the courts, it was in the context of a highly dynamic evolution of European constitutional law, both on a textual and case law level. The supreme jurisdictions of several EU Member States –old and new– took Lisbon as an opportunity to add major voices to this jurisprudential choir.

This paper assesses "Lisbon case law" from a comparative perspective. The comparative analysis reveals significant differences between Lisbon decisions not just in terms of procedure, but first and foremost in terms of substance. In particular the approach taken by the German Federal Constitutional Court appears to be unique, especially with regard to the demand of the prior constitutive assent of a national parliament and the interpretation of the constitutional eternity clause.

It is argued that –beyond the mere fact of the apparent differences– Lisbon judgments reveal a new quality of judicial dialogue and comparative exchange of national courts. The decisions demonstrate that the interaction and mutual influence of national case law does not necessarily lead to the reception of a specific judgment in the case law of other courts, but may involve critical comparative reasoning as well.

Keywords: Lisbon decisions of the constitutional courts in Austria, the Czech Republic, France, Germany, Hungary, Latvia and Poland from a comparative perspective; democracy, sovereignty and identity; permeability of national and supranational law; ratification of the Lisbon Treaty and its constitutional foundations; procedural background and legal outcome of Lisbon decisions; parliamentary responsibility for integration; prior parliamentary assent to the future application of 'dynamic treaty provisions'; different conceptions of national and multi-levelled democracy; popular vote; constitutional limits to European integration; limits indicating the necessity of an amendment and limits protecting the inalienable substantial core of a constitutional order; German *Bundesverfassungsgericht*; ultra vires; Article 4.2 TEU; comparative dialectics.

Instituto Universitario de Estudios Europeos
Universidad CEU San Pablo
Avda. del Valle 21, 28003 Madrid
Teléfono: 91 514 04 22 | Fax: 91 514 04 28
idee@ceu.es, **www.idee.ceu.es**

ISBN: 978-84-92989-79-9