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The Spanish Constitutional Court, European Law and the Constitutional Traditions Common to the Member States (Art. 6.3 TUE). Lisbon and Beyond

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Antonio López – Pina

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The Spanish Constitutional Court, the European Law and the constitutional traditions common to the Member States (art. 6.3 TEU). Lisbon and beyond

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Regarding the subject of the *Constitutional Courts' case law* for this meeting in my opinion firstly, the relationship between Spanish constitutional jurisprudence and Community Law (I); and secondly, the *constitutional traditions common to the Member States* as a limit to the European Law (II) are worthy of particular attention. Finally, I will make some comments on the Lisbon Treaty (III).

1. Spanish constitutional jurisprudence and European Law

On this matter, I will make a brief statement on (1.1.) constitutional limitations to the process of European integration, (1.2.) the relationship between primary European Law and the Spanish Constitution and (1.3.) the fundamental rights of Community Law.

1.1. Constitutional limitations to the process of European integration

On two occasions – July, 1992 and December, 2004 – the Constitutional Court has pronounced in monographic form on the relationship between original European Law and the Spanish Constitution. In the first case the comment was made that previous control over international treaties 'is explained by the need to satisfy a dual requirement: on the one hand, that of safeguarding the supremacy of the Constitution and, on the other preventing a situation of a state suffering international legal sanction for not meeting its international commitments, due to domestic constitutional demands'. As for the depth of the question, that is non-conformity with the Constitution of art. 19 of the European Community Treaty, the Declaration of July 1, 1992 ended by demanding, in order to ratify the Treaty of Maastricht, prior reform of art .13.2 of the Spanish Constitution. It was thus restricted to ordering 'add the subsection' and passive 'to the qualification of the possible right of foreigners to vote in municipal elections'.

The Spanish Court recognised the binding force of both primary and secondary Union Law for Spain, which through the application of art. 93 SC (Spanish Constitution) constitutes in itself a legal order and prevails over the judicial bodies of Member States. In subsequent judgements the Constitutional Tribunal reiterated 'recognition of the primacy of Community, primary and secondary Law over national legislation, and its direct effect for citizens', assuming the character that the Court of Justice of the European Union (CJEU) had granted to such primacy and efficacy in its judgements *van Gend & Loos* (1963) and *Costa* / E.N.E.L. (1964).

1.2. Relationship between primary European Law and the Spanish Constitution

Finally, the Constitutional Court has considered the relationship between the Spanish Constitution and Community Law in terms of the primacy of Community Law and supremacy of the Constitution (Declaration TC 1/2004). The proclamation of the primacy of Union Law by art. 1-6 CTfE of the Treaty (abolished in the Treaty of Lisbon) does not contradict, in the judgement of the Constitutional Court the supremacy of the Constitution. From the date of entry, the Kingdom of Spain is bound to the Law of the European Communities, primary and secondary, which constitutes their own legal order, integrated in the legal system of the Member States and which takes precedence over its own judicial bodies. Such a binding force does not mean that, 'because of art. 93 SC, the regulations of European Community Law have been vouchsafed the constitutional range and force of constitutional Law, nor does it mean that any possible infringement of those regulations by a Spanish ruling is perforce a violation of art. 93 of the Constitution. On the basis of the disposition of art. 93 SC, … the Court sees no contradiction between art. 1-6 CTfE (abolished in the Treaty of Lisbon) and art. 9.1 SC'.

In the wake of the Italian and German constitutional courts, the Spanish Tribunal played safe by defining material limits: 'In the hard to imagine case that in the subsequent dynamic of European Union Law, this Law were to become irreconcilable with the Spanish Constitution, without the hypothetical excesses of European Law with regard to the European Constitution itself being remedied by means of the normal channels laid down in it, in the final instance preserving the sovereignty of Spaniards and the supremacy of the Constitution, as granted by the latter, might lead the Tribunal to tackle the problems that would arise in such a situation, ones which, from the present standpoint would be considered as non-existent, by means of the relevant constitutional procedures'.

In the Court's opinion, 'art. 93 SC in its present version is sufficient for the integration of a Treaty such as the one being analysed by it'. In the Declaration 1/2004, the Court concludes that 'an assumption of the need for constitutional reform is lacking, since no contradiction is apparent between the precepts of the Treaty and the Spanish Constitution'.

1.3. The fundamental rights of Community Law

On the subject we are concerned with, the claims reaching the Spanish Constitutional Court cite particularly the fundamental rights of Community Law. The interpretative value that the Charter will possess in questions of fundamental rights will not give rise in our legal order to any greater difficulties than those which the Treaty of Rome produces at the present time. Simply, this is because both our constitutional doctrine (on art. 10.2 SC) and the selfsame art.52 CFR operate with a set of references to the European Convention which end up raising the jurisprudence of the Strasbourg Court as an obligatory code for the establishing of common minimum elements of interpretation.

That reduction of the complexity inherent in the concurrent combination of criteria for interpretation 'means, quite simply, that the Treaty assumes as its own the jurisprudence of a Court, whose doctrine is integrated via art. 10.2 SC in our legal order'. So, as the Tribunal argues, there are 'no new or greater difficulties to prevent the articulation of our system of law'.

As for the rest, art. 53 CFR lays down that none of the regulations of the Charter 'shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms, in their respective fields of application, by Union Law and international Law and by international agreements to which the Union or all Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions'.

The Tribunal concluded thus, in 2004, that 'no contradiction exists between the Spanish Constitution and arts. II-111 and II- 112 of the Union Treaty'.

2. The constitutional traditions common to the Member States as a limit to European Law

In accordance with the Union Treaties in force, any dogmatic consideration of Community Law is excluded outside the *constitutional traditions of Member States*, specifically, the *Spanish constitutional tradition*. This makes it a particularly opportune moment to return, to some cases where the Kingdom of Spain has been a party.

Recent decisions from the Court of Justice call attention, above all, to the by no means negligible consequences of the string of privatisations in the last two decades arising from the liberalisation of public utilities, as a result of Community Law, the time has come, therefore, as we go deeper into the matter, to think aloud about another burning question: for example, the steady breaking up and red-blooded privatisation of public services. Is this not a case of following the path to destroy basic macroequilibria not just for relationships between private enterprise, the growing commercialisation of wide areas of our existence and the state-guaranteed general interests but also for protecting citizens' rights?

The liberalisation of the electrical sector has opened up the market of the big business operators. But the act of going private in which energy firms are involved clashes strongly with the public service tradition and consequent administrative protection which characterises the electrical sector. The privatisation process has given rise to an electricity market in which bids for the sale and purchase of energy are the determinants of price. This has brought about supply shortages and behaviour contrary to the rules of free competition: a market which favours free competition may, as a result of the anti-competitive behaviour of operators with power in the market, turn against consumers. That is why the tensions between free competition and public service cannot be overlooked. What is more to what extreme does a no-holds-barred privatisation in Spain, which has left France, Italy and Germany behind with regard to the shape of the electrical sector, not convert our society into a mere tool of financial capitalism?

In this sense, I shall review recent jurisprudence concerning the relationship between the free movement of capital and the national public service of electrical energy (2.1.). And I shall point out all in all, the very own limits of Community Law and the *constitutional traditions of Member States*, in matters of public service, as barriers to the free flow of capital and the principle of free competition (2.2.).

In the importance of *constitutional traditions* there is an abundance of signals that taking care of rights in the Charter has as its aim, not so much to end cases of violation of rights but, rather, the harmonising of the fundamental rights of the Member States themselves, as evidenced from the State constitutions, the documents of international Law and the most advanced pronouncements of doctrine and jurisprudence. In

the Preamble itself, the Charter recognises that it has not sprung from nowhere but as one more link in a chain, in which the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms – and the case-law of the Court of Justice of the European Union and of the European Court of Human Rights have preceded it; even more, the Charter recognises that its final purpose is to express in more visible form the common values which the Union is there to serve and develop.

The regulatory strength of the Charter thus has as its origin to express systematically a corpus of principles deducible from the constitutional Law of the Member States, that is, from the *traditions*, which constitute the common constitutional heritage that the Union has made its own, and which has entered to become part and parcel of Union Law. As a result, the binding force of the Charter cannot be considered on the margins of the other founts of Law with which it coexists and cooperates – State constitutions, Community Law, International Law, etc. – rather the Charter's compelling strength is a result of its interpretative function of giving unity, and specifying and developing the principles common to European diversity.

That means for those putting law into practice that the central problem is going to consist of connecting the Charter with the *constitutional traditions of Member States*. Once in force, any question regarding the safeguarding of basic rights in the European area will have to be dealt with in the way laid down in art. 6.3 TEU. This rule implies that rights will have to be recognised and defined by the case-law of the Court of Justice, which will base its rulings inspired by the *constitutional traditions of Member States* and the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The limits of Community Law in itself. The constitutional traditions of Member States as the final touches of the guarantee of universal access to the public service of electrical energy

The cases mentioned here are of particular interest, since they oblige the analyst on the one hand, to disassociate the material law from free movement of capital and the principle of free competition of the administrative law in procedure and the observing of the principle of proportionality; and, on the other, to weight the different legal goods which are colliding. Consequently, these pages have as their aim that of underlying the existence of material limits to free movement of capital and to the principle of free competition, not sufficiently taken into account by the Court of Justice. Despite these same limits, the fact that Spanish authorities have not observed the due guarantees of procedure, or the principle of proportionality, has weighed in favour of the Commission's claim and, formally, it could justify the sentence. Now, the same claim does not affect the dogmatic inconsistency of Luxembourg jurisprudence. Consequently, in my analysis I shall distinguish (A) the limits to free circulation of capital and the principle of free competition, and (B) the transgression by Spanish authorities of procedural guarantees and the principle of proportionality.

I am not so sure as the Court of Justice either that in questions of public services or services of general interest, free flow of capital and the principle of free competition are the supreme good, aside from the general interests behind public service, or that in the clash between different legal goods the Court of Justice has respected its dogmatic obligation to weight the validity of both as painstakingly as possible (*Prinzip der schonendsten Interpretation*[1]) - and as far as possible to refrain from imposing the prevalence of either one of them.

[1] S P. Lerche, *Übermaßverbot und Verfassungsrecht. Zur Bindung des Gesetzgebers an die Grundsätze der Verhältnismäßigkeit und der Erforderlichkeit* (Gladbach, Keip Verlag, 1961); B. Schlink, *Abwägung im Verfassungsrecht* (Berlin, Duncker & Humblot, 1976).

There is no shortage of reasons. From the sentence it can be inferred that when unanimity exists in the doctrine about the singular nature of electricity as a commodity, the parameters regarding the free movement of goods can only be applied in an approximate manner and with considerable nuances. However, when we are dealing with the free movement of capital, all such caution regarding ownership and management of firms must vanish.

How can doubt be cast on the legitimacy of the Spanish government to protect the general interest in the energy sector and, especially, the guarantee of adequate maintenance of the aims of sectoral policies! Precisely the contrary, with, what is more, the correct precedent of the sentence to lead us Sentence C-503/99 *Comission versus Kingdom of Belgium*[2].

In the case of Spain not only are the two decisions inconsistent with their jurisprudence precedent laid down in the case of the Kingdom of Belgium, but also biased, since they do not take into account the consequences for our public services: They are also disproportionate, insofar as the Court of Justice assumes with no further extra weighting the claims of the European Commission. In the first place, (i) by the Treaties Law. In second place, (ii) by the role primary European Law grants to the *constitutional traditions of Member States*, as I shall expound below.

2.1. Limitations in the Treaties Law

In the cases of the controversial Spanish Law, the correct procedure, according to the Court of Justice, was to verify (1) whether the controversial norm allowed the Member State involved, in case of a threat, to guarantee a minimum energy supply and (2) whether it went further than what was strictly necessary to achieve this aim.

Subject to litigation is a right of veto of the Spanish government, which is the control the relevant minister may exercise in any particular case, depending on an initiative of the government authorities. Given that the system is limited to certain decisions affecting strategic assets of the above-mentioned firms, particularly the energy grids, as well as specific management decisions concerning these assets, which can be questioned in particular, the Court of Justice should have stated, similarly to the *C-503/99 Commission versus the Kingdom of Belgium*, that the controversial regulation is justified by the aim, which is to guarantee the security of energy supplies in times of crisis.

Art. 65 (1) b) TFEU contemplates a justification based on public security. According to this, even assuming the possibility that a Member State opposes the ceding, pawning or change of destination of certain assets of an existing firm or certain management decisions made by the firm may constitute a restriction on freedom to establish them, such *a restriction would be justified by the reasons expressed in the sentence*.

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2 Case C-503/99 *Commission versus Kingdom of Belgium* [2000] ECR I-4809:

'43... it is not possible to ignore the concerns which may... justify Member States in preserving certain influence on firms which are initially public but which may subsequently be privatised, when such firms act in the area of strategic services of general interest.

45 The free movement of capital... can only be limited by means of a national regulation justified on the grounds contemplated-in art. 73D.1 TCE or overriding reasons of general interest.

46 It cannot be denied that the aim pursued ....namely, guaranteeing the security of energy supply in the event of crisis is a response to a legitimate public interest.... the Court of Justice has recognised, among public security reasons which may justify an obstacle to free movement of goods, the aim which consists of guaranteeing at all times a minimum supply of oil products....The same reasoning can be applied to obstacles to the free movement of capital, insofar as public security figures equally among the justifications enumerated in art. 73 D 1, letter b) TCE' (own translation from the Spanish version).

The Court of Justice itself has not shown a univocal position regarding the margins of discretion to be used by States when guaranteeing universal access to energy. At some time, the Court of Justice has not thought it adequate to ignore the worries which may, depending upon the circumstances, justify Member States preserving certain influence in firms which are initially public and later privatised, when such firms may act in the area of strategic or general interest services.

According to the Court of Justice, free movement of capital as a basic principle of the Treaty, may, in fact, be limited by national regulation justified by reasons set down in art. 58 (1)b) TCE (now art. 65 (1) b) TFEU) – the guarantee of a minimum supply of oil products and electricity – or for overriding reasons of general interest applied to any person or firm carrying out an activity in the territory of a Member State receiving it. Thus far, Spanish legislation appears legally correct.

The Court of Justice accepts that the aim pursued by the controversial regulation, namely, guaranteeing energy supply in the event of crisis is a response to a legitimate public interest. In fact, the Court has recognised, among reasons of public security which may justify putting an obstacle in the way of free movement of goods, the aim of guaranteeing at all times a minimum supply of oil-based goods. The same argument can be applied to obstacles to free movement of capital, insofar as public security figures in an equal way among the justifications enumerated in art. 58 (1). b) EC (now art. 65 (1) b) TFEU).

Nonetheless, the Court has also declared that the demands imposed by public security must, especially because it constitutes an exception to the basic principle of the free movement of capital, be interpreted in the strict sense, so that each Member State cannot, free of any control by Community institutions, unilaterally determine its reach. In this sense, public security can only be invoked in the event of there existing a real threat and one serious enough to affect a fundamental interest of society.

A matter which is not a material question but one of administrative and procedural law, in the jurisprudence of the Court, is that, however much a) public security is invoked when a genuine threat is present, one which is serious enough to possibly affect a fundamental interest of society; b) it must be adequate to guarantee the achievement of the aim being pursued and not exceed what is needed for this purpose; all in all, c) the measures adopted to protect the interest of public security have to be subject to an effective jurisdictional control.

2.2. The place of the principle of free competition and the role granted by the Treaties to the constitutional traditions of Member States

The pronouncements of the Court against the Kingdom of Spain are the consequence of a biased interpretation of the principle of free competition and the role that the Treaty recognises to *the constitutional traditions of Member States*. It is all very well for judges randomly to regard as sacred the free movement of capital and the principle of free competition; what happens is that not only does a systematic interpretation of the arts. 3, 43, 56, 58 (1) b) and 81 - 89 EC not allow us logically to reach the conclusions of recent jurisprudence, but rather such an entrenchment of free competition is the objective of the Court, ominously overlooking the *constitutional traditions of Member States* as recognised in the Treaty itself (art. 6.2 TEU; now art. 6.3 TEU).

In the doctrine, Christian Tomuschat[3] has wondered whether the principle of free competition may be the foundation on which a *soziales Gemeinwesen* can be erected. According to the prestigious publicist lawyer, in Western States the principle of free competition does not belong to the columns of constitutional construction. Everything else can be inferred from basic rights such as freedom of economic enterprise, the postulate of professional and labour freedom. The fact that general interests do not stem from autonomous or combined action of economic factors is a basic assumption, all too heavily documented of modern constitutional States. The welfare of the Community is based on a heritage of cultural values in which individual freedom and the right to self-determination occupy first place, in harmony with the motto of the French Revolution, *Liberté, Égalité, Fraternité!* In this sense, for Tomuschat, it is clear that, merely as a consequence of European historical evolution, the principle of free competition cannot occupy the central position it once held, from the Treaty of Rome (1957) and the Single European Act (1986) to the treaties of Maastricht (1993), Amsterdam (1947) and Nice (2000) in the Community.

Thus, the principle of free competition cannot be made the absolute parameter, on the margins of general interests, in terms of public security and the guarantee of energy supplies. With even greater certainty, the Court itself has recognised the protection of fundamental rights, the *constitutional traditions of Member States* (6.2 TEU; now art. 6.3 TEU) and the proportionality principle (art. 5 EC; now art. 5 TEU) as *general principles of Law*.

Much more than the mandate for a unified application of Community Law, the demand for effective protection of individual rights founded in Community Law serves Community justice to justify its juridical pronouncements. The Court characterises the guarantee of effective judicial protection as a general principle of law which serves as a basis for the *constitutional traditions of Member States*, and which has found expression in arts. 6 and 13 of the European Convention for the Protection of Human Rights and Basic Freedoms and which has to be applied in Community Law.

As underlined in the Courts' case law, the Treaties contain a complete system for protection of rights. The existing gaps in judicial protection have been covered by the Court of Justice by means of a complementary interpretation of the precepts in question. With this, the bases were established for the dogmas of fundamental rights in force at the present time, which have discovered their legal - positive foundation in the art. 6.2 TEU, now art. 6.3 TEU.

The Court itself has called attention to the need, when applying European Law, to bear in mind the interpretation in accordance with fundamental rights. In the interpretation of pressing needs of public good, the Court made its own the fundamental rights as limitations immanent to the basic rights of free circulation of capital and establishment; according to the Courts jurisprudence, consent to the law of limitations to fundamental rights will depend upon their corresponding to the public weal and that they do not go against the essential content of a fundamental right. Points of contact for its materialisation are particularly the *constitutional traditions of Member States*; thus, measures, which are incompatible with such traditions can never be recognised as conforming to law[4].

Any question relating to the safeguarding of fundamental rights in the European area will have to be dealt with in the way stipulated in art. 6.2 TEU, now art. 6.3 TEU ToL. This precept means that laws will have to be

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3 See C. Tomuschat, 'Daseinsvorsorge und Wettbewerbsprinzip in der Europäischen Union', in H Tomann (ed), *Die Rolle der europäischen Institutionen in der Wirtschaftspolitik* (Baden-Baden, Nomos, 2006).

4 S. Case 4/73 *Nold KG v Commission* [1974] ECR 491, para 13; Opinion 2/94, [1996], ECR I – 1759, para 33; Case C–299/95 *Kremzow* [1997] ECR I–2629, para 14.

recognised and specified by the Court's jurisprudence, which will base its findings on the *constitutional traditions of Member States* and the European Convention for the Protection of Human Rights and Basic Freedoms.

Community rights require interpreting on the basis of a pre-understanding (*Vorverständnis*), which brings together historical experience, doctrinal traditions and evaluation of the present. Against the principle of free competition and circulation of capital limits there arises, in Spain, a limitation in the shape of the rights of our *constitutional tradition* in their objective aspect as principles of the legal order and expression of the general interests. These must be compatible with the same freedom for all Spaniards and non-Spaniards resident in Spain. According to the conception of our Constitutional Court, art. 9.2 SC commits the action of public powers, in such a way that essential equality between individuals can be achieved regardless of their social status. All in all, subordination of wealth to the general interest, the social function of capital and essential services as limitations of private autonomy endow capital in Spain with a public statute which reduces its protection to a mere institutional guarantee.

In our *constitutional tradition* such pre-understanding appeals to a socially determined idea of freedom. Thus, may liberty, understood as equal freedom for all, in the sense of condensation of the *constitutional traditions of Member States*, serve as a reference for the federation of European States in the making. In the sixties and seventies of the XXth century the idea that the organisation of Mankind must tend towards a rebalancing of economic and social differences in the sense of ensuring certain minimum levels of public services, assistance and benefits has arrived at the stage of forming part of European consensus. To this end, constitutional traditions of particular weight, such as the German, French and Italian ones, have steered the rights of the European Union of States towards liberty, understood as the *equal liberty for everyone*.

This principle of the *equal liberty* for everyone of the *European constitutional tradition* which nowadays gravitates on the interpretation of laws must be understood as a counterpoint to the economistic concept of freedom underlying the economic freedoms of the Treaties - freedom of capital movements (arts. 56-59 TFEU), services (arts. 49-55 TFEU), freedom of establishment (art. 43-48 to TFEU), free competition (arts. 3.3 TEU; arts. 81-93 TFEU).

For the neoliberal doctrinairism permeating the Single Act and the Maastricht, Amsterdam, Nice and Lisbon Treaties, freedom shrinks to subjective rights against public power and freedom of economic initiative in particular. What occurs is that the right to economic entrepreneurship and economic freedom to compete cannot be legitimately used to reduce to inane levels the real liberties of others, or to impose despotic domination on labour and on the building of others' awareness – a right to freedom never involves domain over other free humans (Kirchhof)[5]. Real freedom for everyone demands not only subjective rights of defence against the State and Public Administration: it also requires citizens to be emancipated from the power which private capital exercises over social and political life. Faced with such an economic idea of freedom, we Europeans could also have an equalitarian idea of liberty, which would take into account the needs of human beings, which have to be guaranteed. In this way, it would be possible to collaborate with a sense of solidarity and, through public assistance create material life conditions, which, above and beyond the principle of free competition in the market, would make a cohesive territory and society.

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5 See P. Kirchhof, 'Fuerza normativa e interpretación de los derechos fundamentales. Efectividad de los derechos fundamentales – en particular, en relación con el ejercicio del poder legislativo' in A López Pina (ed): *La garantía constitucional de los derechos fundamentales. Alemania, España, Francia e Italia,* (Madrid, Civitas, 1991)

Consequently, it should not be a matter of indifference as to whether the Court of Justice observes or rather is insensitive to the *constitutional traditions of Member States*. Judging by both the limits of the Treaties and the *constitutional traditions of Member States* (art. 6.3 TEU), in solving the conflict between the various legal goods referred to, the Court of Justice would have had need not of an unconditional prevalence of the free movement of capital, but rather, the weighting between that and the guarantee of a an essential public service by means of the most careful statement of the opposing interests in litigation (*Prinzip der schonendsten Interpretation*).

2.3. Limits to the Government action

Moving on to something else, for nothing is lost by being polite, a different question is, that, whenever, in order to guarantee that public service obligations are complied with, the Spanish legislator may permit the State to intervene on the grounds that energy policy aims are in danger, at the same time, it should be imposed on the Government that their interventions should be for objective criteria and should be ex post, thus making them liable to an effective judicial control. In such a policy, the Government, moreover, will have to show evidence of scrupulous respect for the principle of proportionality when making interventions to achieve the proposed aim. Regardless of any reservations that are aroused by the free movement of capital and the principle of free competition when they affect the public service guarantee, which I have hitherto alluded to, the Spanish government, of whatever colour, has been ignoring in the Real Decreto – Ley of Fiscal, Administrative and Social Measures (Ley de Medidas Fiscales, Administrativas, y del Orden Social) and the Real Decreto – Ley 4 / 2006, the formal procedural conditions which, relevantly, are considered by the Court of Justice to be unavoidable for conformity with Community Law.

The Court of Justice and the Spanish legislator have not been, in the above-mentioned cases, up to their tasks. The break up of monopolies and privatisations of the last decades constitute a retreat by public services as a material basis for the general interests, where States have given up ground. On a day-by-day basis we shall have occasion to appreciate how difficult it is going to be to recover it. As long as Europe does not decide to fix some common norms in matters of energy and the Court does not carry out the function of guardian of citizens' rights, we are going to be open to the jungle of the Stock Market, which reduces our societies to nothing more than satellites of the diktat of capital to the greater glory of short term profit maximisation.

It would more behove the Spanish government to agree, within the Union framework, with the rest of member States, a common energy policy and drive the Community legislator to develop art. 14 TFEU, in terms of guaranteeing services of general economic interest while limiting the free movement of capital. A staunchly national energy policy is doomed to impotence and, in the case under scrutiny, has proved to be judicially extremely vulnerable to dogmatic inconsistencies in the Court of Justice.

3. Lisbon and beyond: a sober look at the Treaty of Lisbon and the *Lissabon-Urteil* of the German constitutional court

This is not the moment for a celebration or for *wishful thinking*. At the present time in Europe, for once we lawyers, without leaving doctrinal comments and jurisprudence to one side, at the same time, have to turn ourselves into civil petitioners, and borrow from Helmut Schmidt's *pragmatism with moral ends*.

3.1. A Europe fit for the challenging times

In domestic politics or international relations problems and challenges are formidable. Our present economic model and our way of life are not *sustainable* – the present crisis casts doubt not only on the financial stability but also on the whole economic growth model and our Western *way of life*. Our needs for energy, environment, immigration, taxation, competitiveness and a common economic policy geared to growth and employment – not to mention the autonomy of the European Central Bank to limit inflation –, all told, foreign policy and common security, ... cannot be delayed. Nor can we go on ignoring some structural questions: public debt and the European social model of sociocultural integration kicked into the long grass by racist governments or councils in Italy, the Netherlands and Spain, to go no further.

If we move on from domestic politics to international relationships, recently in Copenhagen (December, 2009) we saw the attempt, which ended in failure, to establish a fair global distribution of carbon emissions, based upon an equitable shareout of efforts between advanced and developing countries; the pact mentions the commitment to limit rises in temperature to two degrees, but does not give emission figures for 2020 and 2050. Is a process going to be set in motion leading to the main polluters of the planet adopting coherent policies? This has been left so confused in the non-binding document of agreement to act against global warming that, if we were consistent, Europe should not have signed it.

Europe is less united, its national and community leaders are run-of-the-mill, its diplomacy in the hands of a national novice of a country opposed to any common European foreign policy. When in 2009 we have lived through the Czech presidency of the Union, the boycott of the Irish, the Poles and Vaclav Klaus of the ratification of the Treaty, the failure of the Copenhagen summit and the *Alleingang* of Merkel, Sarkozy and Brown, why should we any longer keep alive the dream of Europe being an essential spokesman in international relations? Faced with the challenges of globalisation and China's emergence as a great world power, we hardly need anything else to certify the decline of our continent.

The reasons why the Treaty of Lisbon, instead of being of use to us, is a barrier to public action in dealing with our problems.

If we look at it properly, and compare the state of perplexity shown by our governments when contemplating the result of the French and Dutch referenda and the ratification and coming into force of the Treaty of Lisbon then it is indeed a diplomatic success. In any case, it ought to lead us to feel anything but self-satisfaction.

From the reform of the Treaty of Nice the European Union promised itself a) to recover minimum levels of capacity for action that had been cast into doubt by the expansion to 27 states and b) guarantee the *Charter of Rights* with binding force. Originally, the Constitution (2004) proposed setting the conditions for a change in the way in which policy was made in the pre-Nice Union (2000) and for a decision on the definitive shape of the European Union. The Treaty of Lisbon is not going to help us specifically in managing such conditions.

3.2. The form of government, the distribution of competences, territorial limits and democratic legitimising of the Union

In Lisbon there has been a failure of the political aim which the European Constitution (2004) was designed to serve; the transformation to new political modes functioning *close to the citizenry* of the conventional usages of our rulers was to manage conditions in order to decide on the political goal of integration – the political statute for citizens and the way law is produced as a proof, to go no further.

Government silence on the future of Europe conceals the profound conflict on final aims, which has paralysed the Union to such an extent. For the s*oi-diçant Lords of the Treaties* it is clear that the disagreement between *integrationists* and *eurosceptics* is about either which powers for common policies have to be transferred to the latter, or on the external frontiers of the Union.

For *integrationists* what is important is not so much making Europe into a federal union but rather to achieve institutions and procedures which, democratically, will make it possible to harmonise fiscal and economic policies and approximate social policies as well as define and carry out a common foreign and security policy. Domestically a functional political framework for the guaranteeing of rights should establish the coordinates to increase, on the one hand, European decision-making capacity and, on the other, politically control the rigid monetarism of the Central Bank – in similar fashion to the example in the United States of the relationship between the Federal Reserve and Congress. Outwardly, a decidedly majority - based foreign and security policy would make it possible for the asymmetry between our economic weight and the slight power of Europe in international relations to diminish.

The conflict on the future of Europe is a ticking time bomb. The preference of the United Kingdom – standing shoulder to shoulder with the Stock Exchange of London and Wall Street – to make Europe a *free exchange area* needs no further explanation. Poland is, moreover, an example of excess zeal in guarding the national sovereignty of new entrant countries. Those who advocate maintaining the *status quo* question whether, once the Lisbon Treaty is in force, the democratic deficit will be a cause for concern. Those satisfied with established power relationships state, rather, that the alleged democratic deficit is only viewed as such from mistaken regulatory parameters, taken from the States' constitutional law. Habermas[6] points out that, for conservatives, criticising the supposed Union democratic deficit collapses under its own weight, as soon as we distinguish between *technical matters*, extracted as such to any need for democratic legitimisation, and *strictly political matters*, which, in daily life have a direct effect on people and have to be democratically decided. Given that the Commission, the Court of Justice and the European Central Bank are particularly involved in *merely technical* questions of institutionalisation and in watching over the stability of the euro, such tasks may be entrusted to the experts, they claim. Citizens are more interested in taxes, jobs, pensions and healthcare, matters which are the competence of the Member States. They decide democratically on this question, it is affirmed. When Union

6 See J. Habermas, *Ach, Europa*, (Frankfurt am Main, Suhrkamp, 2008).

institutions begin to function, such functional legitimisation, in connection with the States' role will suffice to meet all democratic claims. Thus there will be no vacuum, they conclude, between the indirect legitimisation of Council members and the direct legitimisation of parliaments attending legislation.

In this type of argument, those interested in maintaining the status quo gloss over the fact that the distribution of powers between the European and national plane is merely a matter of a political question to be decided by the citizens, as Habermas underlines. The alleged *technical decisions* have a somewhat more political nature in the sense that they restrict the scope for action of national States and of their citizens to foot the bill for the external costs of merchant traffic, which is unloaded on the national plane. However, citizens would recover on the European plane their full political emancipation once fiscal and economic policies were harmonised, the social assistance systems were brought into line and the European Parliament had political control, as the United States does, with the Federal Reserve Bank, over the Central Bank.

The Treaty of Lisbon instead of the above casts in stone the breach existing between governors and citizens and does not open up any path to a political decision on the future shape of Europe. As a result, either European governments will continue with their policy of blocking and paralysis and will fall more and more into the power games of national powers, well known since the Congress of Vienna, and at present playing in London, Paris and Berlin, or they will only desist after two decades have gone to waste, as suggested by Jürgen Habermas, and be obliged to summon citizens to vote.

3.3. The definition of the end of the Union: the effectiveness of fundamental rights as a political aim of the European Union

3.3.1. The aims of our political Union

Amidst the fervour of debate the central question tends to be forgotten: What must the Union be used for? In the ceremony of confusion orchestrated by our Heads of State and government, the media and certain doctrinal circles and sectors of public opinion have been able to think that the aim of the Treaties has merely been to make possible the integration of Eastern Europe and the consecration of the established power relationships. With that, the Treaties would have achieved their aim.

Well, nothing is further from the truth. The classic constitutional theory tells us that, since the French Revolution, *the object of any political association is to carry out the natural, imprescriptible rights of man* (art. 2 Declaration of the Rights of Man and Citizens, 1789). But, what happens with the Treaty of Lisbon when it is analysed from such a viewpoint? Among the main constitutional principles, the Treaty also includes respect for basic rights; even more, with the *Charter of Rights* the Union has explicitly incorporated into European Law respect for fundamental rights. The *Charter* reinforces the rights stemming particularly from *constitutional traditions common to Member States* as well as the case-law of the Court of Justice and the European Court of Human Rights and Fundamental Freedoms (*Preamble*).

And in art 51.1 CFR it is said:

> The provisions of the Charter are addressed to the institutions, bodies, offices and agencies of the Union … and to the Member States when they are implementing Union Law. According to the Charter, they shall respect the rights,

observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.

In recent decades the Court of Justice has developed the guarantee of some rights under wraps for their functioning for the common market. With the proclamation in Nice 2000 of the *Charter of Rights* and their coming into force last December a significant change took place. The *Charter*, in addition to exercising an important codifying and hermeneutic function, has the strength of a norm: and one can only hail with pleasure the step from case-by-case recognition to the systematic recognition of rights. In any case, regarding the objective side of social, civil and political rights, the Treaties, the *Charter* and Community politics leave rather a lot to be desired.

In order to visualise it, a brief comment is called for regarding the objective meaning of fundamental rights and their connection with public duties. It is worth noting that in the Treaty of Lisbon Title IX on employment (arts. 145-150 TFEU) and Title X social policy (arts. 151 – 161 TFEU) have been incorporated. Moreover, the Treaty suggests that the Community and Member States – in the wake of the social rights of the European Social Charter signed on October 8, 1961, and the Community Charter of 1989 - pursue certain *goals*; and 'shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion' (art. 151 TFEU).

Certainly, these are programmatic regulations lacking any financial backing or legal guarantee. But the idea is not only consistent with recognition of *services of general economic interest* within Union values (art. 14 TFEU)[7], it is also strengthened by it. Regarding employment policy, art. 14 TFEU confirms positive-legal recognition of welfare as a public duty. That the Heads of State have at the same time agreed on a series of limitations, does not detract from the high value of the incorporation of services of *general economic interest*.

The fact that social legislation – which has to serve in materialising fundamental rights – needs to be financed, leads us inevitably in the globalisation context to the European attempt to attain competitiveness as a public duty[8]. In this sense, one has to take into account, on the one hand, the market and on the other, monetary and economic policy. The formula appearing time and time again in the Community Treaty is: an *open market economy with free competition* (art. 119.1; 127 TFEU). Art 151 TFEU specifies that convergence of social policies is limited by *the need to maintain competitiveness in the Union economy and that it should be a result particularly of the working of the internal market*.

Under the Treaty of Lisbon, will we progress towards a common economic policy for the eurozone countries? Exclusive competence of the European Union lies in matters of monetary policy. The main aim of monetary policy is to maintain price stability (arts. 3; 127-133 TFEU). This is the remit of the European Central Bank, and any attempt by national governments and European institutions to influence Central Bank policy is banned (art. 130 TFEU). Other aspects of economic policy are the object of mere coordination (arts. 5; 119

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7 See C. Tomuschat, 'La Déclaration de Berlin' (2007) 508 *Revue du Marché commun et de l'Union européenne*; ibid., 'Ungereimtes / Zum Urteil des Bundesverfassungsgerichts vom 18. Juli 2005 über den Europäischen Haftbefehl' (2005) *Europäisches Grundrechte Zeitschrift*, 17-18; ibid, 'Die internationale Gemeinschaft' (1995) AVR, 33; ibid, 'Die Europäische Union unter der Aufsicht des Bundesverfassungsgerichts' (1993) 20 *Europäische Grundrechte Zeitschrift* 489; ibid., 'Die staatsrechtliche Entscheidung für die internationale Offenheit' in J. Isensee and P Kirchhof (eds), *Handbuch des Staatsrechts*, Bd. VII, Heidelberg, C.F. Müller, 1992); ibid, 'Der Verfassungsstaat im Geflecht der internationalen Beziehungen', VVSDtRl, 36 (1978); L. Mª Díez-Picazo, *Constitucionalismo de la Unión Europea* (Madrid, Civitas, 2002).

8 See B. Jessop, 'Veränderte Staatlichkeit. Veränderungen von Staatlichkeit und Staatsprojekten; Politik in der Ära Thatcher: Die defekte Wirtschaft und der schwache Staat' in D. Grimm (ed) *Staatsaufgaben*, (Baden-Baden, Nomos, 1994).

TFEU) - and from this it is clear not only that it does not work, but has hitherto hindered anybody in taking responsibility for a European growth and employment policy. The Greek crisis has shown nude the flawed construct of the euro. Europe, which weathered the first phase of the financial crisis relatively well, makes now a bad figure: if budget deficits are essential for countercyclical policies in times of deflation, our governments feel compelled to reduce them under pressure from the financial markets. Our problems have to do just with the architecture of our common currency: the euro boasts a common Central Bank but it lacks a common fiscal policy and a common treasure. It is exactly that sovereign backing that financial markets are now questioning and that is missing from the design. That is why the euro has become the focal point of the current crisis[9].

Concern over the guarantee of fundamental rights was explained in recent decades by its subordination to the principle of free competition and private economic powers[10]. But the risks for basic rights protected in Community Law do not stop there. As far as civil rights are concerned, rights which were recognised as functional assumptions of the common market by the Court of Justice are now sidelined by the present disproportionate concern for collective security: Recent norms in the development of *Area of Freedom, Security and Justice* (Title V on police and judicial cooperation on penal matters, arts. 82-89 TFEU), the framework decisions on Orders for detention and handovers in Europe and the European regulation on Obtaining Proof and other measures put rights to freedom in jeopardy. And thus, through specific interventions of law deriving in rights the shortcomings of the Treaty and the *Charter of Rights* (arts. 51.2, 52.2, 52.3, 53 CFR) regarding their effectiveness become clear.

As far as the application of fundamental rights is concerned, we have, on the one hand, the case law of the Court of Justice; on the other, that of the *Charter of Rights*. Neither is devoid of contradictions: both jurisprudence and the *Charter* leave scope for antinomic interpretations. The sentence of the Court of Justice that 'fundamental rights in Community Law must be guaranteed in their functioning for the common market' means that fundamental rights lose the determining value which for actions of public powers, the make up of society and relations between private individuals they must have – in the German Basic Law and the Spanish Constitution, to mention but two. One similar consideration of fundamental rights as subordinated to the principle of free competition is seen in arts. 51-2. and 52.2 CFR. On the basis of the comment from the Convention Table on the future interpretation of common good the aims and interests of the Union will have to be borne in mind.

Hesitation on the part of doctrinal sectors to accept with no more qualms this devaluation of rights in the framework of the Union finds support in the limitation made regarding arts. 52-3 and 53 CFR in connection with art. 6-3 TEU; art. 53 CFR lays down as a rule of interpretation that the general restriction of art. 52-3 and 52.4 CFR can never give rise to a lower standard of guarantee than that of the European Human Rights Court or that of Member States' constitutions[11].

So it will be necessary to verify the suitability and proportionality of human rights interventions, invoked by art. 52-1 CFR, as to whether they infringe objective protection of rights and therefore go against general interests. Some decisions of the Court of Justice give credence to such an approach. Thus, it has been occasionally underlined that the guarantee of the main rights under law must stem from the *constitutional*

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9 See G. Soros, *The Soros Lectures at the Central European University*, (USA, Publicaffairs, 2010); ibid, 'The Euro & the Crisis' (2010) The New York Review of Books, August 19-September 29.

10 See Tomuschat, above n 3.

11 See B. Beutler, 'Art. 6 EUV', in H. von der Groeben and J. Schwarze (eds), *Kommentar zum Vertrag über die Europäische Union und zur Gründung der Europäischen Gemeinschaft*, 6th edn, (Baden-Baden, Nomos, 2003); ibid, 'Offene Staatlichkeit und europäische Integration', in R. Grawert, B. Schlink, R. Wahl and J. Wieland (eds), *Festschrift für E-W Böckenförde* (Berlin, Duncker & Humblot, 1995).

traditions of Member States[12] and that measures, which are incompatible with these traditions cannot be recognised as conforming to law. Judge Pescatore made the point that a common tradition among member States compels the ECJ to a corresponding guarantee[13]. Not so far back in time are other sentences from the Court, which interpreted basic needs of common good as immanent to economic freedoms[14].

But, in general, treaties only guarantee economic freedoms and non-discrimination. Other recognised rights are essentially limited in their scope and not taken seriously as a public duty by European bodies. Such an assumption proves that the *Charter* has as little to do with the concept of fundamental rights in our *constitutional traditions* (in France, Germany, Italy and Spain, to go no further), as the natural justice of the Treaty is comparable to a constitution. It is not a matter of genuine basic rights nor do our Heads of State believe that making rights work is a public task for the Union. All in all, it simply appears that our governors had expressed the greatest interest in neutralizing the leap forward, which the Charter would have represented[15].

In this manner, it is made clear that, even in the most ambitious institutional or procedural reforms subjective and objective guarantees for citizens' rights are not going to be in the forefront of the building up of European integration. The only chance of restoring this central position is to be found in democratisation of the institutions. However, we are still a long way away, as is shown by the status of the rights of citizens' participation. In this way, we come to political rights, the limitation of which is one of the additional shortcomings of the *Charter*. The new procedures should encourage government willingness to commit to making the Union more efficient. However, the Treaty of Lisbon has not considered the notion of putting the final touches to full citizen participation. Political Union has come into view as a project of Heads of State and government over the heads of the citizens and at the present time works by showing in broad daylight the democratic deficits of intergovernmental cooperation and the limitation of powers of the European Parliament. With the exclusion of universal and equal suffrage in European elections, our Heads of State and government have blocked the path of citizens' self-determination.

It is true that the *Charter* could be a spur to legislative development of rights. But this is not going to happen, given that our Heads of State and government have raised all sorts of barriers: In its present version, the *Charter* does not create fresh competences and new duties for the Community and the Union, nor does it change the powers and duties as anchored in the Treaties. And if in itself it is quite contradictory that rights do not spread outwards towards Community and Union policies, it is even more serious that exercising one's rights may take place only within the framework of conditions and limitations laid down in the Treaty on the Functioning of the European Union (TFEU).

In order to give an adequate translation of the concept of basic rights expressed in the right of citizens to equal freedom of action (Rousseau, Kant), we must go back to the classic rule, of the inner connection between human rights and popular sovereignty, which fifteen years ago Habermas referred to. Both jurisprudence and doctrine have scorned for too long this inner connection between the Rule of Law (*Rechtsstaat*) and democracy. Whereas legislative policy is content to guarantee the autonomy of private economic enterprise, it will continue on its doddery course with regard to guaranteeing rights. Citizens are never going to be placed

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12 S. Case 4/73 *Nold KG v Commission* [1974] ECR 491, para 13; Opinion 2/94, [1996], ECR I – 1759, para 33; Case C–299/95 *Kremzow* [1997] ECR I–2629, para 14.

13 See P. Pescatore, 'Le recours, Dans la jurisprudente de la Cour de Justice des Communautés européennes, à des norms déduites de la comparaison des droits des Etats membres' (1980) 32 RIDC 337.

14 Case C-368/95 *Vereinigte Familiapress / Bauer* [1997] ECR I-3689, C – 368 / 95 – Slg. 1997, I – 3689.

15 See P. Cruz Villalón, *La Constitución inédita. Estudios sobre la constitucionalización de Europa* (Madrid, Trotta, 2004).

in a position of enjoying the equal freedom, whilst they cannot, on the one hand, hold a debate in a European public forum on the question of interests and corresponding measures and, on the other, they cannot adopt by majority vote in a Parliament elected by equal suffrage measures and establish solidaric criteria, in accordance with which the equal are treated equally and the unequal unequally.

To sum up, if we desire to prevent the European policy of basic rights either suffering a sad techno-bureaucratic existence under a *supranational federalism* as a form of government, or exhausting itself in rhetorical-idealist formulas[16], we shall have to take as our starting point the *inner link between the Rule of Law and democracy*[17].

3.3.2. The Lissabon-Urteil, June 30, 2009 of the German Constitutional Court

Just when problems which the Treaty of Lisbon will be of no help in solving are raised most acutely, the German Constitutional Court proposes with its sentence by the transfer of sovereign competences to the Union taking the final step to European integration. Certainly, it has declared that the Treaty of Lisbon conforms with the Basic Law; but not without setting severe conditions. Such an *opinionated* sentence could not help unleashing an intense debate. By way of an example, three positions: conservative, Dieter Grimm, progressive, Christian Tomuschat, and of those opting to maintaining a discreet distance from each, the ECJ and the German Constitutional Tribunal, Rainer Wahl. They give an idea not only of the debate but to what extent Germany obstructs an open future for European integration.

Dieter Grimm[18] identifies himself, in general, with the *Urteil*. He lists the limits to European integration and fixes margins (the constitutional core of the German legal order) which, in the case of future structural changes or extension of powers in European integration, the German Parliament will not permit to exceed: the postulate of the social state of law, the intangibility clause, German sovereignty, the democratic power of configuration, the present set of powers of the German Republic and the principle of conferral of powers (*Prinzip der begrenzten Einzelermächtigung, principe des competences d'attribution*), derailing legal acts (*ausbrechender Rechtsakt*). It similarly lays down the participation of the German Parliament in the assumptions for the extension of powers; so, it restates the limits to the pre-eminence of Community Law in Germany as well as claiming the very same faculty of control whether European bodies have respected the barriers of conferred powers.

For the Judge emeritus of Berlin the core of the sentence consists in maintaining the basic structure and legal order of the European Union founded in the States and avoiding the conversion of Europe into a State: sovereignty, 'power over treaties', public power of the Union deriving from the States (principle of conferral of powers/*principe des competences d'attribution*), State mandate for applying Union Law, power over competition, democratic legitimisation, Parliament's reservation about German acceptance of Council

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16 See European Commission (ed), *Expertengruppe Grundrechte*, Bericht *Die Grundrechte in der Europäischen Union verbürgen. Zeit zum Handeln*, (Brussels, 1999).

17 See J. Habermas, 'Über den internen Zusammenhang von Rechtsstaat und Demokratie', in U. K. Preuß (ed) Zum Begriff der Verfassung (Frankfurt a.M., Fischer, 1994),; ibid, 'Warum Braucht Europa eine Verfassung? Nur als politisches Gemeinwesen kann der Kontinent seine in Gefahr geratene Kultur und Lebensform verteidigen', (2001) Die Zeit, 28. Juni; ibid 'Braucht Europa eine Verfassung? Eine Bemerkung zu Dieter Grimm', in J. Habermas (ed) Die Einbeziehung des Anderen, (Frankfurt am Main, Suhrkamp, 1996); ibid. 'Zur Legitimation durch Menschenrechte', in J. Habermas (ed) Die postnationale Konstellation, (Frankfurt am Main, Suhrkamp, 1998); ibid. 'Faktizität und Geltung', (Frankfurt am Main, Suhrkamp, 1992); See E. Denninger, 'Menschenrechte und Staatsaufgaben – ein europäisches Thema', (1996) Juristen-Zeitung, 51; ibid, 'Anmerkungen zur Diskussion um europäische Grundrechte' (2000) Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft, 83; ibid, *Recht in globaler Unordnung* (Berlin, Berliner Wissenschaftsverlag, 2005).

18 See D. Grimm, 'Das Grundgesetz als Riegel vor einer Verstaatlichung der Europäischen Union. Zum Lissabon – Urteil des Bundesverfassungsgerichts' (2009) 48 Der Staat, 4.

resolutions and the Court's power to verify compatibility with the Basic Law of Community Law, all in all, constitutional identity, not just with regard to the Treaty of Lisbon but also as far as possible future developments may be concerned .

Grimm enumerates a whole series of reservations, a) either European Law, b) or some *obiter dicta* of the German Tribunal: a) the European tendency towards the predominance of economic laws over fundamental rights, the final nature of Community-derived Law, indeed, the excess weight of the Court of Justice; b) the list of legislative competences of the Bundestag untouchable for Community institutions, the Tribunal's prohibiting the German state bodies from taking part in European evolution towards a federal State. According to Grimm, only those who consider a European federal state to be the goal of integration can infer that the German sentence is the final point in European integration.

Christian Tomuschat[19] criticises the Tribunal for making 'loss of the essence of a State' one of the parameters for judging constitutionality, as well as considering European integration as a steady progress in eroding national sovereignty. Certainly, there are passages in the sentence where mention is made of the will of the *fathers* of the Fundamental Law to lead the German Federal Republic to a peaceful international and European order. The reader finds himself obliged to conclude that the German Court has seen its duty to be to enumerate a series of deficits, wondering whether the burdens borne over a period of almost sixty years are not unreasonable ones. This is a *fundamental gap* in a declaration, which does not restrict itself to applying the Basic Law, but one that provides the citizens of twenty-seven countries with its own Praetorian view of Europe.

The sentence can hardly do justice to the grand project which had the *founding fathers* so enthused not only in 1949, but similarly in 1992 when constitutional reform inserted the new article 23 BL, regulating German integration in the Union. Unlike the critique of German nationalism by the *founding fathers*, the Constitutional Court considers German state sovereignty as the ultimate guarantee of peace, security and welfare, ignoring the historical fact that the re-emergence of Germany from the ashes of the II World War was precisely the consequence of having been inserted into a European alliance of only a few States.

The sentence 'betrays the deliberate intention of the Court to stay within the limits of a traditional doctrine which is unaware of developments in the modern world in which national sovereignty, in order to survive, cannot avoid uniting its interests with other national sovereignties, to be able to deal with the multiple tasks that societies have before them at this moment'.

In margin number 264, the Court describes a fatal scenario in which because of Union action, German government institutions would to such an extent lose real power over its own country that Germany would be obliged to leave the Union. In any case, the Tribunal gives rise to the assumption that, in their judgement, 'the Treaty of Lisbon marks the outer limit of European integration within the margins of art. 23 BL'.

By requiring, in the change from unanimity to majority voting and in the recourse to the flexibility clause, a strengthening of the *Bundestag* and *Bundesrat* in the amendment stages, the Court has underlined the weight of the constitutional powers with the expression of 'institutional responsibility for integration'.

Given that the Court disqualifies the European Parliament as a democratic institution, it sees no greater importance in taking note of the considerable increase of the legislative power of Parliament under the Treaty

19 See C. Tomuschat, 'Lissabon – Terminal of the European Integration Process?' (2010) ZaöRV 251.

of Lisbon. 'From the time when the Treaty comes into force, the European Parliament will be on a par with the Council in nearly all fields of legislative competence in the Union. The general rule will be the ordinary legislation procedure. Therefore, the European Parliament becomes a decisive actor in the European decision-making process. Foolishly, the Court scorns such a line of argument thus reducing the institutional worth of the European Parliament'.

Faced with polarisation in doctrine and jurisprudence being provoked by the *Lissabon-Entscheidung* of the constitutional tribunal, Rainer Wahl[20] would rather take notice of the heart of the sentence and the *precomprehensions* (*Vorverständnisse*) of those that are brought about by the present intense debate. For the public lawyers it is of particular interest that Wahl verifies the non-existence of a theory to overcome the frontal theses of constitutionalists and specialists in European Community Law: He describes the relationship between the European Union and member states as an indefined *transitory situation* (*Schwebelage*), only partly regulated and able to be regulated by law.

Behind the versions on competence of Community Law, either as autonomous law, or as law deriving from the will of the States, there are different positions on the judicial status of the Union and of the States and their reciprocal relationship. Both conceptions have inherent shortfalls and neither of the two does justice to the mixed architecture of the Union and the States.

If neither the European Union nor the States are hierarchically supraorganised between themselves, the outlook will have to be changed. In Wahl's view, regarding the relationship between the Union and the States, there exists a *transitory situation awaiting solution*. With the *constitutional traditions common to all States* we have a foundation for all the States which is comprehensible as a function of homogeneity in the Union. At the present time, '*Fallkonstellationen*' which involves sovereignty problems are functionalised in self-interpretations of the relevant courts on their own competence and on the scope of their faculty of control. What happens is that, in the absence of an agreement on particular cases between courts, when it comes to breaking down limits of powers decisive questions remain unanswered.

Wahl laments the judicial activism, which is slightly disproportionate, which may bring into the limelight the functional interrelationship between the Union and member States. Precisely, when sovereignty of Member States is so strongly stressed, the German Constitutional Court has polarised the relationships with the Court of Justice. Nor does the German Tribunal appear very convincing to Wahl in its analysis of the democratic principle or in its forecasts for the future.

I am not aware that, hitherto, Ingolf Pernice[21] has entered the lists in the debate unleashed by the *Lissabon-Urteil*. I can, however, testify to his support for the development of the co-decision of the European Parliament. By minting the category of *European constitutional Union* (*Europäischer Verfassungsverbund*) he has given a considerable turn to doctrine.

Pernice states that we already have a European constitution. By this Pernice understands 'the rebinding of national and European constitutional planes. European constitutional Law and national constitutional Law form two levels of a judicial system – with the material, functional and institutional aspects assembled in unison'. In the face of the Europeanisation and the challenges of globalisation the present *post-national constellation* (Habermas), Pernice proposes 'drawing up a post-national constitutional order, to overcome

[20] See R. Wahl, 'Die Schwebelage im Verhältnis von Europäischer Union und Mitgliedstaaten' (2009) 48 Der Staat, 4.

[21] I. Pernice, 'The Treaty of Lisbon: Multilevel constitutionalism in Action' (2009) 15 The Columbia Journal of European Law, 3.

the statist narrowness and include both national constitutional Law and European constitutional Law. ...That the European Union is not a State, nor has a people, does not affect its capacity as a Constitution. European treaties carry out essential functions, which correspond to a constitution: they constitute, legitimise, organise and limit public power in the relationships between each of them and of bodies with citizens. The European Union is, like the State, a functional organisation, both are complementary (self)-steering political instruments of European society in its formative stage. The judicial-constitutional construction corresponds to this complementary nature'.

According to Pernice, two essential traits differentiate the *constitutional Union* from a federal order: 1) the lack of coercive physical power and 2) the non-existence of a regulatory hierarchy between both judicial planes. The unifier, that is, the generating element of the constitutional Union, is founded on the fact that 'each constitutional reform on the European plane depends upon agreement among all Member States formalised in a treaty, and it is ratified by the very same representatives in accordance with their own constitutional rules'.

The regulatory contents and the potential for development of this concept of the *European constitutional Union* is shown in particular when dealing with matters of material law, that is, when this framework concept is materially enriched. This is Pernice's aim in his WIH-Paper *Europäische Justizpolitik in der Perspektive der Verfassung für Europa* (2005). Here, it is especially a question of guaranteeing fundamental rights of citizens by means of European legislation in connection with harmonisation of Member States' penal and procedural laws. This is explained by Pernice, 'given that framework decisions on European detention orders and the European Regulation on providing proof are judicial acts to develop the *Area for Freedom, Security and Justice*, and in such a condition serve the general aim of freedom. But the same things oblige each Member State to execute detention and provision of proof orders from other Member States and to hand over the person in question or gather and collate proof, without being able to verify the mandate received in each case – when it is a question of one of the thirty two related offences. Mandates for detention and provision of proof are linked to the rights of the person accused; detention, confiscation of objects, house searches and intervention in informative self-determination.

For Pernice the fact that for the present development of the '*Stärkung des Rechts*[22]' the Court of Justice has the power to make judgements in matters of interpretation and validity of framework decisions according to art. 35-1, is comforting: the Court of Justice decides in the course of the prejudgement question on the validity and interpretation of the framework decisions and decisions... and on the validity and interpretation of the corresponding execution measures. For the purposes of controlling judicial acts in accordance with the Treaty of the Union the same parameter of fundamental rights is valid as for the linking of community and Member State bodies, according to apds. -1.and -2. of art 6 TEU.

The judicial evolution described has as a result the fact that 'the European Union becomes a political Union in a new sense: that of judicial link and execution by Member States of decisions from beyond their borders to common groups for preliminary investigation of cases and a European police force for border protection'.

Of particular significance for the matter we are dealing with is the fact that experience with the European detention order for the collection and provision of proof and the series of measures approved and programmed for carrying out the *Area for Freedom, Security and Justice* leaves European Union citizens in a

22 See Com (2005) 184, [of 10 May 2005] *Haager Programm zur Stärkung von Freiheit, Sicherheit und Recht in der Europäischen Union*.

new phase of our fundamental rights and in our relationship with European public powers: 'When operationally trans-frontier faculties are established for action as noted in the case of common groups for preliminary investigation of cases, a new dimension of European politics moves into the limelight. Reserves of sovereignty (*Souveränitätsvorbehalte*) of certain States or institutions – a concept which for the first time uses the *Bundesverfassungsgericht* in the *Görgülu* case – do not fit in the *European Union project*'. Expressed another way, 'in this horizontal dimension, the European constitutional Union becomes thicker. Interventions in individual rights become incomparably more direct and that is felt by the citizen'.

In such a sense, 'with every judicial act of the Union referring to penal law and national procedure, the area of application of fundamental European rights becomes wider: such judicial acts link every Member State, to the extent that its activity – as occurs in the European mandate for detention – may be considered as execution of Union Law'.

What happens is that even the best European jurisprudence is not enough to guarantee citizens' rights: 'the legislator has to help in approving the most precise norms on the law of criminal judgement, and possibly on penal execution'.

Likewise, it must be stated, that 'European norms concerning detention Orders and the European regulation on collecting and providing proof, which are going to be executed are not submitted to parliamentary control'. For Pernice, there are a large number of questions in need of judicial-material clarification: Are judicial guarantees enough for executing a detention order issued in another Union Member State? Are the fundamental rights of individuals affected in a way not in accordance with Law (the handing over of the Syrian-German Darkanzali via a European detention order of the Spanish *Audiencia Nacional* (Special Court). Reciprocal recognition of State decisions in the particularly sensitive area of penal law is acceptable under strict observance of the fundamental rights of individuals and in accordance with the postulate of the Rule of Law in the procedures.

Thus, Pernice thinks that democratic control is essential. 'Wherever the European Union intervenes to regulate, precisely in matters of penal and procedural law, it is not sufficient for a right of appeal to exist. What could be marginal in an Economic Community becomes a *conditio sine qua non* for a political Union as a *Community of Law* a solid common basis for guaranteeing the postulate of the Rule of Law, of democracy and, especially, of respect for fundamental rights'. Given that the European Union depends upon democratic structures and guarantees of the Rule of Law, observance of these must be viewed as functional conditions of the Union. The horizontal European dimension of national judicial acts, as has been made possible by means of the new Justice policy in the European Union, makes clear the degree of urgency required for taking judicial cooperation in penal questions and police cooperation in the intergovernmental form of decision to the procedure of European Parliament co-decision, something which cannot be further delayed. That will have the advantage that 'to a greater extent than hitherto a European political discourse will depend on penal law, on the guarantees corresponding to the Rule of Law and protection of fundamental rights'.

From this concept of the *European constitutional Union*, Pernice entrusts to national Parliaments co-operation of courts and the co-decision of the European Parliament in the *Area for Freedom, Security and Justice* the development of protection for rights. Pernice's intellectual evolution justifies our awaiting with interest what will be his next step forward.

3.4. Final comments

The gap between the positions of Christian Tomuschat and Dieter Grimm shows the polarisation of the German *Staatsrechtslehre* to which the polemical sentence of the Constitutional Court has been taken. Rainer Wahl adopts an otherwise competent, wise position of exquisite distancing with regard to the actors in jurisprudence and doctrine. The Freiburg professor lights up the scene in a way that I can aver no-one has done up till now. Even more, *en passan*t he names the *common constitutional traditions of Member States* as an alternative. When he speaks in such terms, with the obligatory modesty occasioned by my unequal intellectual relationship with the German *Staatsrechtslehrer*, it brings to my mind that I have made of the *common constitutional traditions of Member States* the nucleus of my work on relations between the Spanish Constitution and Community Law[23].

The fact is that even if in itself the Treaty of Lisbon did not mean a *commitment-postponing formula,* Germany announced through the mouthpiece of its Constitutional Court its aim to finish with European integration in its present stage. Any further project for Europe in the direction of the *federation of nation-States*, of Jacques Delors, geared to guaranteeing basic rights and providing us with a common security and foreign policy will first of all have to overcome both obstacles.

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[23] See A. López-Pina, 'Hacia la determinación constitucional del Derecho europeo', in J. M. González, J. Camarena, A. Cabanillas and F. Pantaleón (eds), *Libro – Homenaje a D. Luis Díez-Picazo*, (Madrid, Civitas, 2002); ibid, 'Zur verfassungsrechtlichen Bestimmung des Europarechts', in P. Häberle, M. Morlock and V. Skouris (eds) Festschrift für Dimitris Tsatsos, (Baden-Baden, Nomos, 2003); ibid, 'Toward the constitutional determination of the European Law', in R. Miccú, I. Pernice (eds), *The European Constitution in the Making* (Baden-Baden, Nomos, 2004); A. López-Pina and I. Gutiérrez, *Elementos de Derecho público* (Madrid, Marcial Pons Ediciones Jurídicas, 2002); ibid, 'On the improbable future of intergovernmental Europe', in J. M. Beneyto and I. Pernice (eds), *The Government of Europe: Which institutional Design for the European Union*? (Baden-Baden, Nomos, 2004; ibid, 'Sobre el porvenir improbable de la Europa intergubernamental', in J. M. Beneyto (ed), *The Government of Europe – Institutional design for the European Union* (Madrid, Dykinson, 2003); ibid, 'Europa, un proyecto irrenunciable. La Constitución para Europa desde la teoría constitucional' (Madrid, Dykinson, 2004); ibid, 'Die verstärkte Zusammenarbeit als europäische Regierungsform', in A. Blankennagel, I. Pernice and H. Schulze-Fielitz (eds) *Verfassung im Diskurs der Welt Liber Amicorum für Peter Häberle zum siebzigsten Geburtstag* (Tübingen, Mohr Siebeck, 2004); ibid, 'Enhanced Cooperation as a European Form of Government', in I. Pernice and M. P. Maduro (eds), *A Constitution for the European Union: First Comments on the 2003 – Draft of the European Convention* (Baden-Baden, Nomos, 2004); ibid, 'EU – Recht und verfassungsrechtlicher Gleichheitssatz. Der europäische Verfassungsvertrag auf dem Prüfstand der gemeinsamen Verfassungstraditionen' in U Schödlbauer (ed), *Übersprungene Identität. Von Proto-Nationen und Post-Existenzen, Jahrbuch Iablis* (Heidelberg, Mauntius Verlag, 2005); ibid, 'Derecho europeo y principio constitucional de igualdad. El Tratado de la Unión ante la prueba de las tradiciones constitucionales' (2005) Revista de Derecho Constitucional Europeo 4; ibid, 'La cooperazione rafforzata come forma europea di governo. Verso un diritto costituzionale asimmétrico?' in V. Atripaldi, R. Miccú and I. Pernice (eds), *Quale Costituzione per l'Europa. Consolidamento e innovazione costituzionale nel secondo Trattato di Roma* (Roma, Diritto e Cultura Edizioni Scientifiche Italiane, 2006); ibid, *Los Tratados de la Unión Europea, edición y Estudio Preliminar* (Madrid, Marcial Pons Ediciones Jurídicas, 2007); ibid., 'Einführung: Verfassungselemente in der supranationalen Ordnung der Europäischen Union', in D. Tsatsos (ed) *Handbuch zur Europäischen Verfassung* (Berlin: Berliner Wissenschaftsverlag, 2010); ibid, *El servicio público de energía eléctrica y la libertad de circulación de capitales: la aplicación del Derecho comunitario en España y las tradiciones constitucionales de los Estados miembros. Cuestiones actuales de la Jurisdicción en España* (Madrid, Real Academia de Jurisprudencia y Legislación, 2010).

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Resumen: En el ámbito de la jurisprudencia de los tribunales constitucionales merece especial atención en primer lugar la relación entre la jurisprudencia constitucional española y el Derecho comunitario (1.): a) límites constitucionales al proceso de integración europea b) la relación entre el derecho primario europeo y la Constitución española y c) los derechos fundamentales del Derecho comunitario.

En segundo lugar, la manera en que las tradiciones constitucionales comunes de los Estados miembros actúan como límite al derecho de la UE merece también un examen especial.

Finalmente algunos comentarios sobre el Tratado de Lisboa: cuando aparecen problemas que el Tratado de Lisboa no puede resolver con eficacia, el Tribunal Constitucional alemán –*Lissabon-Urteil*, 30 de junio de 2009– propone a través de esta sentencia la transferencia de competencias soberanas a la Unión, tomando así el último paso hacia la integración europea. Este tribunal declaró que el Tratado de Lisboa es compatible con la Ley Fundamental; pero no sin condiciones. Tal controvertida sentencia ha desatado un debate intenso. Tres son las principales posturas en torno a esta cuestión: conservadora, Dieter Grimm, progresista, Christian Tomuschat, y la de aquellos que optan por mantener una discreta distancia con respecto al TJUE y al Tribunal Constitucional alemán respectivamente, Rainer Wahl. Esta diversidad de posturas da una idea no sólo de la amplitud del debate sino de hasta qué punto Alemania constituye un impedimento para un futuro abierto a la integración europea.

Áreas clave de reflexión: • Límites constitucionales al proceso de integración europea.
• relación entre Derecho europeo primario y Constitución española.
• los derechos fundamentales en el Derecho comunitario.
• jurisprudencia constitucional española y Derecho comunitario.
• las tradiciones constitucionales comunes de los Estados miembros como límite del Derecho de la UE: la sentencia del Tribunal Constitucional alemán, Lissabon-Urteil, de 30 de junio de 2009.

Abstract: In relation to the case law of the Constitutional Courts, particularly noteworthy is, firstly, the relationship between Spanish constitutional case law and Community law (1.): a) constitutional limitations to the process of European integration, b) the relationship between primary European law and the Spanish Constitution, and c) the fundamental rights of Community law.

Secondly, the extent to which the constitutional traditions common to the Member States act as a limit to European law (2.) deserves special examination.

Finally, some comments on the Lisbon Treaty (3.): just when problems for which the Treaty of Lisbon will be of no help in solving are raised most acutely, the German Constitutional Court the Lissabon-Urteil, on June 30, 2009 proposes in its judgment the transfer of sovereign competences to the Union, taking the final step towards European integration. Certainly, it has declared that the Treaty of Lisbon conforms with the Basic Law; but not without setting severe conditions. Such an opinionated sentence could not help but unleash an intense debate. By way of example, three positions: conservative, Dieter Grimm, progressive, Christian Tomuschat, and that of those opting to maintaining a discreet distance from each, the CJEU and the German Constitutional Tribunal, Rainer Wahl. This gives an idea not only of the debate but to what extent Germany represents an impediment to an open future for European integration.

Key analytical areas for reflection: • Constitutional limitations to the process of European integration.
• the relationship between primary European Law and the Spanish Constitution.
• the fundamental rights of Community law.
• Spanish constitutional case law and Community law.
• the constitutional traditions common to the Member States as a limit to European law,
the Lissabon-Urteil judgment of June 30, 2009, of the German Constitutional Court.

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