



# ***Bringing European Democracy Back In Or how to read the German Constitutional Court's Lisbon Treaty ruling***

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## Abstract

This article critically examines the democratic theory that informs the German Federal Constitutional Court's Lisbon Treaty ruling. This is needed because the ruling is ambiguous with regard to what democracy for what Union. In order to analyse the ruling we establish three models of what European democracy possibly can amount to: Audit democracy based on the EU as a derivative of the member states, a multinational federal state, or a regional-cosmopolitan polity? The Court's depiction of the EU does not fit as well as we should expect with the label derivative entity due to the important legislative role of the European Parliament. EU's legal supranationalism points in the direction of a federation, but the Court's argumentation does not lend support to this notion. The Court models democracy on a rather specific set of institutional presuppositions that are derived from the parliamentary model of democracy associated with the sovereign nation state. At the same time, the Court operates with a conception of a changing state sovereignty that unfolds more in line with cosmopolitan than with classical Westphalian statist principles.

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## Introduction

The European integration process has been rightly cast as ‘integration through law’. Each major step of integration has been legally encoded, and legal interpretation and application have furthered the integration process. The process has many sources and drivers, national no less than European. European integration was authorised through special provisions in the initial founder states’ national constitutions.<sup>1</sup> European law’s legitimacy draws on the common constitutional traditions of the Member States, and the Member States still consider themselves as ‘masters of the treaties’. Court rulings, also national constitutional court rulings give a strong steer to the integration process. A national constitutional court may: (a) affirm the integration that has been wrought; (b) reject it; (c) set limits to further integration; or (d) direct it in a particular way. These considerations are relevant when considering the German Court’s Lisbon Treaty ruling because the treaty amends the basic legal framework and operating conditions for the Union. In this connection, it also matters that the Supreme Court in question was the German Federal Constitutional Court because Germany is such a central member of the EU.

The Federal German Constitutional Court (GCC) was asked to consider the effects of European integration on German constitutional democracy.<sup>2</sup> This was effectively also a question of European-level democracy. In order to settle the question of whether the emerging system of rule in Europe undermines German democracy, it was important to establish the democratic character and quality of the emerging European system. Thus, as the case was framed, the German Court would have to address the question of the democratic legitimacy of the integration process and of the EU. This entailed also taking a stance on the question of the type of polity that had emerged in Europe.

How well the German Court did is hotly disputed, and has also been profoundly criticised.<sup>3</sup> The GCC’s ruling is backed up by a comprehensive

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<sup>1</sup> F. Schorkopf (2009), refers in the article ‘The European Union as an Association of Sovereign States: Karlsruhe’s Ruling on the Treaty of Lisbon’, *German Law Journal*, 8: 1219, to the ‘German constitution, which from the beginning was distinguished by its “visionary openness towards Europe”[...]’.

<sup>2</sup> ‘The judgment focuses on the connection between the democratic system prescribed by the Basic Law on the level of the Federation and the level of independent rule which has been reached on the European level.’; see The Federal Constitutional Court’s Press office, Press release no. 72/2009 of 30 June 2009, available at: <<http://www.bundesverfassungsgericht.de/pressemittelungen/bvg09-072en.html>>.

<sup>3</sup> See the various contributions by C. Schönberger, F. Schorkopf, D. Halberstam and C. Möllers and M. Niedobitek in the Special Section on the Federal Constitutional Court’s

body of text to explain and justify it. The Court here also spells out in more detail its conception of the EU and what it considers as appropriate – and inappropriate – integration. The German Court underlines that the EU is in democratic terms a derivative of the Member States. The EU draws its democratic legitimacy from the representative-democratic systems in place in the Member States.<sup>4</sup> Further, the Court interprets the present status of integration as one that does not substantiate the notion of the EU as a federal state; neither does it contain the necessary democratic elements to justify federal statehood.

In this sense, the Court operates as a democratic theorist of sorts. It devises a normative conception of democracy (electoral democracy embedded in a unified people) that serves as the relevant standard for the assessment of the relationship between German democracy and the system of European rule. The Court applies its conception of democracy to how it understands the EU as a political entity and a system of rule. These are highly contested issues. Normative theorists do not agree on any one set of standards; analysts and policy makers disagree on the viability of democracy at the European level; and analysts, policy-makers, and citizens alike do not agree on the kind of polity the EU is. The Court has taken a stance in these debates.

The Court brings democracy to bear on the European integration process but what is the nature of the democratic theory of the Euro-polity that we can discern from the Court's ruling? Our concern in this article is to critically examine the democratic theory that informs the GCC's Lisbon Treaty ruling. This is important for several reasons. First, is that such an exercise in intellectual clarification is necessary because analysts have noted that the Court's line of argument is at odds with the actual outcome.<sup>5</sup> Thus, it is possible that the ruling draws on one conception of democracy, whereas the

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Lisbon case in *German Law Journal* (2009), 8: 1201-308. See also contributions by D. Chalmers and U. Liebert (2010) in A. Fischer-Lescano, C. Joerges and A. Wonka (eds), *The German Constitutional Court's Lisbon Ruling: Legal and Political Science Perspectives*, ZERP Discussion Paper 1/2010.

<sup>4</sup> The GCC notes that: '[a]s long as, consequently, no uniform European people, as the subject of legitimisation, can express its majority will in a politically effective manner that takes due account of equality in the context of the foundation of a European federal state, the peoples of the European Union, which are constituted in their Member States, remain the decisive holders of public authority, including Union authority.'; see The Federal Constitutional Court's Press office, Press release no. 72/2009 of 30 June 2009.

<sup>5</sup> 'There is probably no other judgement in the history of the Karlsruhe Court in which the argument is so much at odds with the actual result ... [t]he reader of the opinion is hardly able to find any reasons supporting the outcome of the case.'; see C. Schönberger, 'Lisbon in Karlsruhe: Maastricht's Epigones At Sea', in *op cit* note 3 *supra*, at p. 1201.

substance of the argument does not, and actually draws on a different one. This relates to a second reason that refers to the Court's influence on the integration process. The sheer weight of the Court suggests that its stance will in turn also contribute to *shape* the legal-institutional and constitutional conditions that subsequent debate over democracy in Europe will have to take into consideration. It thus matters to the Court's role, and to the overall character and quality of the integration process, whether the Court's ruling is informed by a democratic theory that is properly suitable for the Euro-polity. This bears on the third reason, namely the sheer range of democratic possibilities in Europe, which the comprehensive debate on the EU's democratic character has brought forth. It is thus important to clarify where the ruling and the substance of the Court's argument are situated within this debate. It is a debate that on the one hand is over the appropriate *level* for locating democracy in Europe, which revolves around whether the EU-level can sustain democracy, or whether democracy is still confined to the Member State level. It is also on the other hand a debate over the appropriate *form* of democracy. This is not merely over the form of representative democracy, but more profoundly, over the very salience of representative democracy, with the main contender being transnational deliberative democracy.<sup>6</sup> At stake here is whether EU democracy requires a new theory of democracy, or whether the challenge is that of adapting existing theory to the particular and distinctive character of the EU. Clarifying the Court's stance in relation to this broad debate is important also because the different positions are premised on very different conceptions of the EU *qua polity*. The conceptions range from seeing EU democracy as squarely located in the Member States, to seeing the EU as a fledgling federal democracy, and all the way to holding the EU up as a possible vanguard for, or experiment in, transnational or regional-cosmopolitan democracy.

This suggests that a proper assessment of the democratic theory that informs the Court ruling requires attention both to the Court's conception of democracy and how it conceives of the EU as a political system. There are thus two issues that require clarification: what kind of democratic theory for what kind of polity? Many of the critics argue that the GCC's ruling prematurely forecloses this debate. Chalmers for instance criticises the GCC for 'looking at the wrong equation: Europe v representative democracy. A better one might

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<sup>6</sup> J. Cohen and C. F. Sabel (1997) 'Directly-Deliberative Polyarchy', *European Law journal*, 4: 313-42; J. Cohen and C. F. Sabel (2003) 'Sovereignty and Solidarity: EU and US', in J. Zeitlin and D. M. Trubek (eds) *Governing Work and Welfare in the New Economy: European and American Experiences*, Oxford University Press; J. Bohman (2007) *Democracy Across Borders: From Dêmos to Dêmoi*, MIT Press.

have been representative democracy v other forms of democracy.<sup>7</sup> Schönberger criticises the GCC for idealizing state-based democracy.<sup>8</sup> At the same time, many of the critics highlight the discrepancy between the ruling and the justification; thus suggesting that the Court's position might be more ambiguous or that there might be several conceptions of European democracy in play. None of the critics however investigates how the ruling and the justification figure within the range of relevant democratic polity models (a democratic polity model offers a guide to how normative principles are understood to inform institutional and political reality within a given political setting). The point of this article is to clarify which democratic polity model(s) is in play in the Court's ruling and justification.

Starting from the Court's ruling, the first question takes as its point of departure the Court's conception of the EU as a democratically *derivative entity* and asks whether this can be reconciled with the current presence of the European Parliament (EP) and the Union's supranational character. We will argue that this would at least in principle have been possible if the Court had expanded the model of delegated democracy (with the EU referred to as a democratically derivative entity) to take heed of our notion of *audit democracy*. According to this notion the EU's democratic institutions would be confined to a mere supervisory role; to oversee that the supranational bodies operate in accordance with the instructions given them by the Member States. We spell out what such a system would look like. Further, we consider how proximate to this notion the substance of the German Court's ruling is. This assessment must take heed of the fact that the substance of the GCC's depiction of the EU does not fit as well as we should expect with the label derivative entity. The GCC ends up depicting the European Parliament as something more and different than a mere democratic auditor. Another point is the role of Member States within the EU's legal supranationalism. Does this leave the door open for federal democracy? Might the substance of the Court's argument take us closer to the complainants' position, namely that the EU is a fledgling state-based federation? This brings up the question of whether there is a model of federal democracy that is compatible with one of the core premises of the Court, namely that the EU is made up of a multitude of national communities. We argue that such a model – the multinational federation – exists, but the Court does not consider it, nor does the substance of the Court's argumentation lend support to the notion of a multinational federal European state. Instead, what becomes apparent from this examination is that the Court operates with a conception of a changing state sovereignty that unfolds more

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<sup>7</sup>D. Chalmers, 'A Few Thoughts of the Lisbon Judgment', in *op cit* note 3 *supra*.

<sup>8</sup>*op cit* note 5 *supra*, at p. 1213.

in line with cosmopolitan than with classical Westphalian statist principles. The Court notes that state sovereignty is undergoing important changes in today's world; thus throwing doubt on a core element of state-based democracy, namely Member State sovereignty. This raises the question of whether it might be possible to discern a *different* underlying conception of the EU and its democratic legitimacy from the Court's rulings. To that end, we outline a third model, that of European regional-cosmopolitan democracy.

In the following pages we first briefly summarise the Court ruling and outline the democratic polity model that best reflects its formally stated position: the model of *audit democracy*. Then we critically examine whether the substance of the Court's ruling is in line with this model, or whether the Court might instead be formally embracing one model but actually drawing on one/several other.

## Audit democracy

The Court envisages democracy as being first and foremost associated with the nation state. The Court's presumption is that it is only the nation state that can foster the type of trust and solidarity that is required to sustain a democratic polity. On the basis of a well-developed collective identity, the citizens can participate in opinion-forming processes and put the decision-makers to account at regular intervals. Critical here is the equal right to vote,<sup>9</sup> which is justified with reference to human dignity and anchored in the non-amendable provisions of the Basic Law<sup>10</sup>. This right is again further spelled out in specific institutional conditions pertaining to responsible parliamentary government, the majority principle, and the existence of a parliamentary opposition.<sup>11</sup> The Court notes that the Basic Law permits a

far-reaching transfer of sovereign powers to the European Union [...] [but] the powers are granted under the condition that the sovereign statehood of a constitutional state is maintained on the basis of an integration programme according to the principle of conferral and respecting the Member States' constitutional identity, and that at the

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<sup>9</sup> 'The citizens' right to determine, in equality and freedom, public authority with regard to persons and subject-matters through elections and other votes is the fundamental element of the principle of democracy.'; see The Federal Constitutional Court's judgement (GCC) (30 June 2009), 2 BvE 2/08 vom 30.6.2009, para 211, available at: <[http://www.bverfg.de/entscheidungen/es20090630\\_2bve000208en.html](http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html)>.

<sup>10</sup> *ibid*, Art 20.1, Art 20.2 and Art 79.3.

<sup>11</sup> *ibid*, para 213.

same time the Member States do not lose their ability to politically and socially shape the living conditions on their own responsibility.<sup>12</sup>

Hence *the principle of conferral* – the principle of limited competences, which the Treaty of Maastricht codified – applies.

When we relate this statement of the Court's position to the literature on EU democracy we find it to sit well with the delegated democracy model, which understands the EU as a composite of national democracies. The model posits that the emerging structure at the European level is a regulatory regime embedded in institutional arrangements of public (or semi-public) character.<sup>13</sup> The model presumes that the Member States delegate competence to the Union, a competence that can in principle be revoked.<sup>14</sup> Although this entails a form of self-binding on the part of the Member States, such delegation can come with a powerful set of controls imposed by the Member States, in order to safeguard that they remain the source of the EU's democratic legitimacy. The Member States both authorise EU action and confine and delimit the EU's range of operations through the provisions set out in the treaties, as well as through a set of institutions that permit each and every Member State to exercise the power of veto. The model can thus be understood as a way of addressing the democratic problems that complex state interdependence and globalisation bring forth, through establishing European institutions that are accountable to the national democratic systems. The Union's *own legitimacy* would be based on its ability to produce substantive outcomes in line with the principle of Pareto optimality, which states that only decisions that no one will find unprofitable and that will make at least one party better off, will be produced, and hence lend legitimacy to international negotiations.<sup>15</sup>

In accordance with the logic of democratic delegation, that is, which issues can be delegated without severe loss of democratic self-governing ability, the EU's conferred competences would foremost be in the operation of the Common Market. The scope for common action in other policy fields would be quite narrow, as would be the scope for redistribution. Further, the EU would have a very limited scope for foreign and security policy, and it would be entirely subject to member states' preferences. The EU's fiscal base would be limited; it

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<sup>12</sup> *ibid*, para 226.

<sup>13</sup> B. Eberlein and E. Grande (2005) 'Beyond Delegation: Transnational Regulatory Regimes and the EU Regulatory State', *Journal of European Public Policy* 1: 89, 97.

<sup>14</sup> Cp. M. A. Pollack (2003) *The Engines of European Integration: Delegation, Agency and Agenda Setting in the EU*, Oxford University Press.

<sup>15</sup> F. W. Scharpf (1999) *Governing in Europe: Effective and Democratic?*, Oxford University Press.



would be based on Member State contributions, not EU taxing powers. The EU-level would be based on a problem-solving strategy and a consequentialist notion of legitimacy.<sup>16</sup> A problem-solving, derivative entity (from the Member States) handles problems of a rather mundane, technical-economic nature and preferences that do not invoke moral claims or affect identities. Thus conceived, the EU would be a contractual order, an institutionally unique type of international organisation or regime, where the Member States are the contracting parties. The states not the citizens make up the 'constituencies', and are the sole sources of legitimacy. They act internationally, either on their own, or through their conferring powers on the Union through delegation. The 'constitutional arrangement' is a contract with the 'pouvoir constituant', structured as a juridical relationship among separate parties. It would be akin to a 'gentlemen's agreement', which presupposes individual membership and sovereignty. The signatories represent individual modalities of government, not a social pact among citizens. Contractually based orders do not put up normative criteria of political legitimacy.<sup>17</sup>

The standard model understands democratic authorisation by Member States to take the form of intergovernmental bodies in which the contracting partners strike bargains on behalf of nationally fixed preferences and interests.<sup>18</sup> This model is not without its own democratic challenges. One problem is the issue of *agency drift*: what assurances do Member States have that the Union – whose decision-makers need decisional freedom to solve problems rationally – operates in accordance with their interests? Another problem is integration-fostered technocracy and executive dominance, that is, the bypassing of democratic institutions at both the Union and the Member State level. Here many see the EU's attempt to combat executive dominance through developing and strengthening the European Parliament, as a part of the problem. They see it not only as unfit to curtail executive dominance and technocracy, but also to exacerbate these problems through furthering integration.

Is the development of the EP then simply an anomaly for the delegated democracy model? Or can we adapt the model to accommodate the present role of the EP? Our response is a qualified yes. We can extend the delegated democracy model in such a way as to include the EP, but with it serving a

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<sup>16</sup> E. O. Eriksen and J. E. Fossum (2004) 'Europe in Search of Legitimacy: Strategies of Legitimation Assessed', *International Political Science Review* 4: 435.

<sup>17</sup> G. Frankenberg (2003) 'The Return of the Contract: Problems and Pitfalls of European Constitutionalism', *European Law Journal* 3: 257, 260-61.

<sup>18</sup> A. Moravcsik (1998) *The Choice for Europe*, UCL Press.

more delimited function as an agent of audit democracy.<sup>19</sup> That entails that it would, together with supranational institutions (such as a court and an executive), help Member States – notably their parliaments – to supervise and control the Union’s actions through providing an added forum for bringing forth relevant information on the Union’s activities; launch Commissions of inquiry and include other bodies to undertake critical scrutiny of aspects of the Union’s activities; and engage civil society actors. These institutions would be specifically mandated to hold supranational decision-making bodies to account. They would be constitutionally barred from legitimising and authorising law-making, as well as from expanding Union competencies. In other words, this would be an EP that would be confined to a delimited audit function.

Within this model the EU-level structure would remain a *functional regime* set up to address problems that the Member States cannot resolve when acting independently. The ensuing model of the EU posits that the institutions at the Union level be mandated to act within a delimited range of fields. The relevant determinant for establishing which fields would reside in the EU’s ability to offload and compensate for the declining problem-solving ability of the nation state in a globalising context. This pertains, in particular, to the ability to handle cross-border issues (such as economic competition, environmental problems, migration, terrorism and cross-border crime, etc.). According to Giandomenico Majone, such a regulatory regime does not need popular legitimation proper, as politically independent institutions, such as specialist agencies, Central Banks, judicial review, and the delegation of policy-making powers to independent regulatory commissions, would provide the required legitimation of a unit constructed to resolve the perceived problems of the members.<sup>20</sup>

### **How well does the Court’s ruling reflect the audit democracy model?**

Does the Court understand the EP as an agent of audit democracy? The German Court is clearly aware of the anomalous position of the EP and underlines that it is not an ordinary legislature:

Measured against requirements in a constitutional state, the European Union lacks, even after the entry into force of the Treaty of Lisbon, a

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<sup>19</sup> See E.O. Eriksen and J.E. Fossum (2009) ‘Europe’s challenge – Reconstituting Europe or reconfiguring democracy?’, in E.O. Eriksen and J.E. Fossum (eds) *RECON- Theory in Practice*, RECON Report No 8/ARENA Report 2/09 at p. 7-41.

<sup>20</sup> G. Majone (1998) ‘Europe’s “Democratic Deficit”: The Question of Standards’, *European Law Journal*, 1: 5-28.

political decision-making body which has come into being by equal election of all citizens of the Union and which is able to uniformly represent the will of the people. What is also lacking in this connection is a system of organisation of political rule in which a will of the European majority carries the formation of the government in such a way that the will goes back to free and equal electoral decisions and a genuine competition between government and opposition which is transparent for citizens, can come about.<sup>21</sup>

Precisely because of this discrepancy from the state the EU is:

free to look for its own ways of democratic supplementation by means of additional, novel forms of transparent or participative political decision-making procedures. It is true that the merely deliberative participation of the citizens and of their societal organisations in the political rule – their direct involvement in the discussions of the institutions competent for the binding political decisions – cannot replace the legitimising connection which goes back to elections and other votes.<sup>22</sup>

Thus we see that the Court opens up for the European-level body's democratic purpose to be more delimited and to draw on alternative – albeit democratically inferior – modes. The Court is not explicit on what mode of democracy this could be, neither on the more specific institutional tasks of such a body in the EU. In our view, this statement by the Court nevertheless opens up space for conceiving of the EP as an agent of audit democracy. However, it can also, as we return to, speak to another model of democracy which we label as regional-cosmopolitan democracy (below) – a model of democracy that is foremost steeped in the theory of deliberation, not representation, and is based in a very different conception of the EU as a political system.

Thus, to get a clearer understanding of the Court's depiction of the EP it is useful to ask whether audit democracy is an adequate representation of today's institutional reality. We are particularly interested in getting a sense of the Court's reading of the contemporary situation because that helps to shed light on the alleged inconsistency between the Court ruling and the lengthy justification. The European Parliament started out as a body of national parliamentarians; hence it bore some initial semblance to a European-based agent of national audit democracy. But since the late 1970s the EP has

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<sup>21</sup> *op cit* note 9 *supra*, para 280.

<sup>22</sup> *ibid*, para 272.

gradually and through a number of steps clearly developed *beyond* audit democracy in orientation and in outlook. It has become a legislative body, whose authority to act is not bound up in and confined to acts of delegation by the Member States.<sup>23</sup> Hix et al.<sup>24</sup> conclude that 'In a rather short space of time, a matter of decades rather than centuries, the European Parliament has evolved from an unelected consultative body to one of the most powerful elected assemblies in the world.' It should be added that the supranational thrust is *confined* to the (greatly expanded) first pillar. Within what remains of pillars two and three, the EP's presence is too weak to qualify even as audit democracy. This does not fundamentally change with Lisbon. Present-day EP must be understood as a legislature. It sees itself and is understood as equipped with the vocation and the levers to make and effectuate legislation, as well as to hold the executive (Commission) to account. Thus, present-day EP has developed into something more than what was envisaged in the model of audit democracy.

The interesting point is that much of the Court's actual depiction of the EP *appears compatible with* the EP's present situation.<sup>25</sup> The Court acknowledges that the Lisbon Treaty strengthens the EP and that the EP is a law-making body. The Court nevertheless still ends up dismissing the role of the EP because it finds it to fail to comply with the democratic criteria it has set up. These are as listed above the equal right to vote which is further spelled out in specific institutional dimensions of responsible parliamentary government, the majority principle, and the existence of a parliamentary opposition.<sup>26</sup> This also implies that only some representative assemblies will pass the test, and the EP clearly will not. The upshot is that we can confirm that there is an

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<sup>23</sup> B. Rittberger (2005) *Building Europe's Parliament*, Oxford University Press, at p. 2.

<sup>24</sup> S. Hix, A. Noury and G. Roland (2007) *Democratic Politics in the European Parliament*, Cambridge University Press, at p. 3.

<sup>25</sup> Consider the GCC's depiction of the EU's historical development. As part of this it underlines direct elections to the EP, the increased role of co-decision, the EP's increased control of the Commission, and increased EP competencies. In paragraph 36d of the Constitutional Court's judgement (30 June 2009); it refers to the TEU Lisbon eg Article 10.1, which the GCC cites to the effect that 'the European Union shall be founded on representative democracy [...], complemented by elements of participative, associative and direct democracy, in particular by a citizens' initiative (Article 11 TEU Lisbon).' It is also notable that the EP is included in the following passage on the terms of conferral: 'As long as, and to the extent to which, the principle of conferral is adhered to in an association of sovereign states with marked traits of executive and governmental cooperation, the legitimization provided by national parliaments and governments, which is complemented and carried by the directly elected European Parliament is, in principle, sufficient.' (*op cit* note 9 *supra*, para 262).

<sup>26</sup> *op cit* note 9 *supra*, para 213.

inconsistency between on the one hand the Court ruling and on the other hand the lengthy justification. The Court acknowledges that the EP is something more and different from the type of body that we should associate with the model of national democracy that the Court professes allegiance to.

An interesting point is that the EP is indicted on the basis of democratic criteria that the present institutional structure could have been reformed to comply with, but the Court makes no such allowance, as it makes the institution of parliament conditional on a sovereign state-based *people*. Since the EU cannot be a state it cannot have a sovereign people; thus cannot be democratic. Without a state, no democracy!

The Court's *de facto* recognition that the EP is a legislature of sorts naturally brings up the question of the nature of the Union's relationship to the Member States *in general*. If the Court depicts the EP as having a more prominent role than what even an extended version of delegated democracy allows for (what we have labelled as audit democracy), what about the Court's reading of the relationship between present-day EU and the Member States – does the Court depict it as a derivative order? This refers on the one hand to the structure at the EU-level and on the other to the role of the Member States.

With regard to the structure set up at the EU-level, the Court acknowledges that the EC's legal structure is supranational and builds on the precepts of higher law-constitutionalism, through the combined doctrines of direct effect,<sup>27</sup> and supremacy of Union law.<sup>28</sup> The Court acts as a trustee of the Treaty, and not as an agent of the Member States. It should be readily apparent that the Court operates with an EU legal arrangement that is qualitatively different from how the national democracy model would understand the EU legal system.

With regard to the role of Member States under the model of delegated democracy the Court lists specific areas of legislative powers that must be reserved to the Member States.<sup>29</sup> These are criminal law, war and peace, public expenditures and taxation, welfare and culture and religion. Even this list is

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<sup>27</sup> Which affirms the full legal character, under certain conditions, of EC norms – first explicated in relation to Treaty provisions, later said to apply also to directives in the 1970s – and consequently imply that such norms might grant rights to European citizens *qua* Europeans.

<sup>28</sup> It was first explicated by the European Court of Justice in 1964, and stated that national norms must give way to Community ones if an irreducible conflict arises within *the scope of application of the Treaties*.

<sup>29</sup> *op cit* note 9 *supra*, para 252.

however too narrow to comply wholly with the model of delegated democracy. The list fails to include the power to coin currency; thus implying that a derivative entity could be equipped with one of the main traditional levers of state power. The real issue however is that there is no argument for this particular list of functions. Instead: 'The Court refers to its own imagination of past sovereignty ... [t]he theory of the Court is a *post-hoc* argument in support of a preordained result'.<sup>30</sup>

In sum, then, what is apparent is that the EU's legal-institutional developments have proceeded well beyond the model of delegated democracy. These developments, to be amplified through the Lisbon Treaty, have resulted in a polity with (a) an institutional arrangement with certain representative qualities; (b) a material constitution with basic rights protection; (c) transparency provisions and popular consultative mechanisms; and (d) some sort of an intermediary structure of civil and political organisations. Further, the functional scope of integration has expanded well beyond low-salience issues; reflecting the problem that many of the issues that nation-states cannot solve on their own cannot be delegated to supranational bodies without loss of democratic oversight and control. The interesting point is that these points are found in much of the substance of the Court's reasoning but the Court has devised a democratic yardstick that effectively rules them out from consideration. This leaves a great gap between the conclusion that the Court has reached on the status of EU democracy and its implications for Member States on the one hand, and the Court's actual depiction of the EU and its relationship to the Member States on the other. This gap stems from the Court's resolve to locate its position within the national democracy model, whilst simultaneously seeking to embrace the integration that the EU has wrought which clearly has unfolded under a different polity configuration and with a far more committing EU-level democracy as its result. In other words, the Court's ruling is pinned on a mistaken conception of the EU polity; it is also pinned on an overly narrow conception of democratic legitimacy. Might there then after all be a greater role for the federal model in the Court's convoluted argumentation, as the plaintiffs maintain?

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<sup>30</sup> According to D. Halberstam and C. Möllers, 'The German Constitutional Court says "Ja zu Deutschland!"', in *op cit* note 3 *supra*, at p. 1250.

## Federal multinational democracy

The Court cites the complainants to argue that:

the Treaty of Lisbon transgresses the boundary of what the principle of sovereign statehood permits as regards the transfer of sovereign powers. The complainant argues that the European Union becomes a subject of international law and can act like a state on the level of international law.<sup>31</sup>... Apart from state authority, the European Union is said to also have a state territory, namely the area of freedom, security and justice, and a state people.<sup>32</sup>... [t]he polity that has been created by the Treaty of Lisbon is factually not an association of sovereign national states (*Staatenverbund*) based on international agreement. Instead, it is said to be a “large federation with its own legal personality”, which acts like a state of its own, with its own legislative bodies, its own authorities and its own citizenship of the Union.<sup>33</sup>

Thus, the way the Court presents the complainants case, the Union has become a state-based federation.

In the following we shall briefly spell out the core features of this democratic polity model; thereafter consider whether it can be extended to take heed of the Court’s underlining that the Union is made up of a multitude of nationalities; and finally consider the credibility of the Court’s rebuttal.

The model of federal democracy is founded on the democratic credo that posits that all political authority emanates from the law laid down in the name of the people. The legitimacy of the law stems from the autonomy presumption that it is made by the people or their representatives – the *pouvoir constituant* – and is made binding on every part of the polity to the same degree and amount. This is so to say inherent in the legal medium itself, as it cannot be used at will, but has to comply with principles of due process and equal respect for all. A legally integrated community can only claim to be justified when the laws are enacted correctly, and the rights are allocated on an equal basis. The conventional shape of such a community is the democratic constitutional state, based on direct legitimation, and in possession of its own coercive means.

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<sup>31</sup> *op cit* note 9 *supra*, para 112.

<sup>32</sup> *ibid*, para 113.

<sup>33</sup> *ibid*, para 114.

A federal European state would be institutionally equipped to claim direct legitimation, and entrench this in legally binding form. It would also greatly reduce the incongruence that globalisation and complex interdependence produce. This model implies that the EU will be distinguished by a commitment to direct legitimacy founded on basic rights, representation and procedures for opinion and will-formation, including a European-wide discourse. The basic structural and substantive constitutional principles of Union law, as well as coercive measures required for efficient and consistent norm enforcement and policy implementation will be institutionalised at both core levels of government (Member State and European). The model presupposes establishment of schooling, symbolic measures and social redistributive means at both levels so as to render the process of socialising the people of Europe into 'Europeans', compatible with citizens retaining distinctive national identities. This includes the establishment of a set of clearly delineated criteria for who are Europeans and who are not. There will be onus on positively identifying Europe, and on distinguishing Europeans from others so as to make up the requisite social basis and 'we-feeling' for collective action – for regulatory and redistributive measures, and for a common European foreign and security policy. The EU will be legally recognised as *a state* with the right to police and military force for territorial control and protection of sovereignty.

A legally integrated state-based order is often seen as premised on the existence of a sense of common destiny, an 'imagined common fate' induced by common vulnerabilities, so as to turn people into compatriots willing to take on collective obligations to provide for each other's well-being.

In some contrast, the European Union is multinational; the Court underlines that there is no European people. To take heed of this objection we need to see if the federal model can be modified to accommodate to the fact that nation-building at the EU level would be taking place *together with* nation-building at the Member State (and partly even regional) level. Such a model can be devised; we may label it the *multinational federal European state* model. In its institutional design, such an entity would have to coordinate the self-government aspirations and the rival nation-building projects that would occur within the European space. In constitutional terms, a multinational federation presupposes that the principle of formal equality be supplemented with particular constitutional principles. These are intended to provide some form of 'recognitional parity', for national communities at different levels of governance (in the EU at Union and Member State levels). Wayne Norman cites seven such principles: (a) partnership; (b) collective assent; (c) commitment and loyalty; (d) anti-assimilationism; (e) territorial autonomy as



national self-determination; (f) equal right of nation-building; and (g) multiple and nested identities.<sup>34</sup>

The federal model is premised on the tenet that a uniform national identity is *not* a core precondition for the democratic constitutional state.<sup>35</sup> The multinational federal state nevertheless also requires citizens' allegiance in the form of a *constitutional patriotism*, which portrays loyalty in political terms; it hinges on the validity of legal norms, the justification of policies, and the wielding of power in the name of fairness.

### **How well does the Court's stance reflect the model of multinational federal democracy?**

The plaintiffs argue that the EU is well on the way to a federal state, the Court argues it is not even though it admits elements of supranational statehood: In underscoring the EU as a political union with authoritative decision making institutions – the Council's majority decision-making, a directly elected EP with co-decision making power, the EU's legal supranationalism, a union citizenship etc. – it draws on state symbols.<sup>36</sup> The Court underlines the EU's shortcomings as a federation:<sup>37</sup> it does not live up to the credentials of a democratic federation.

On balance, the weight of the evidence is on the side of the Court more than on the side of the plaintiffs. Present-day EU is not a full-fledged federation. For the EU to comply with this model, it requires *increased* competencies, but also institutional revamping, including the *establishment of direct, representative, links with the citizens in all relevant functional domains*. Thus, it has to be reconstituted. This could make for a European democracy that complies with democratic criteria (not necessarily those specific ones that the Court outlines), but the political support for this is low. Such a reconstitution also requires the *consent* of every Member State, which the recent treaty processes show is not easily forthcoming. Any further move in such a statist and national direction is likely to encounter strong resistance, as many are vehemently opposed to a federal 'super-state'. In today's Europe, the

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<sup>34</sup> W. Norman (2006) *Negotiating Nationalism: Nation-building, Federalism and Secession in the Multinational State*, Oxford University Press, at p. 163-69.

<sup>35</sup> J. Habermas (1998) *The Inclusion of the Other: Studies in Political Theory*, MIT Press; J. Habermas (2001) 'The Postnational Constellation and the Future of Democracy', in *The Postnational Constellation: Political Essays*, Polity Press, at p. 58.

<sup>36</sup> see *op cit* note 9 *supra*, para 248.

<sup>37</sup> U. Liebert, 'More Democracy in the European Union?! Mixed Messages from the German Lisbon Ruling', in *op cit* note 3 *supra*, at 75-7.

resources required for such an order, for forging a common identity and for making us all good Europeans are in short supply. The model presupposes increased congruence through lifting tasks to the European level. Insofar as this has occurred, it has been in an uneven rather than in a coherent manner; it has not been properly democratically authorised; and it has not been matched with adequate measures of democratic accountability.

When seeking to discern the democratic theory that informs the Court ruling, what matters most is not however whether the EU of today sits with this model but the terms on which the Court rejects it. It matters a lot whether the Court finds present-day EU simply to fall short, as opposed to be structurally or principally inadequate.

The Court operates with a very specific set of democratic representative-democratic requirements that deviate from aspects of the model of multinational federal democracy. Precisely to accommodate various forms of diversity, the federal multinational model will modify the principle of the equal worth of all citizens understood as equal voting rights, and offer special rights and privileges to minorities, interests and regions.<sup>38</sup>

The GCC argues that because there is no European people, there can be no proper European Parliament: 'The democratic fundamental rule of the equality of opportunities of success ("one man, one vote") only applies within a people, not in a supranational body of representation, which remains a representation of the peoples linked to each other by the Treaties, even if the citizenship of the Union is particularly emphasised now.'<sup>39</sup> It thus states that reforms to bring the EU up to the standards of such a model will nonetheless fail to qualify as properly democratic. The Court bases its ruling on the interpretation of Article 79 (3) of the German Basic Law's *eternity clause* which deems amendments that might negatively affect human dignity or the principle of democracy to be unconstitutional. Hence the Basic Law is seen not only to assume sovereign statehood but also to guarantee it.<sup>40</sup>

However, as we will see, the Court also subscribes to another, less substantive, concept of sovereignty. One may therefore question why the Court associates the eternity guarantee with the whole institutional democratic package of the

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<sup>38</sup> There is a broad international debate on the role and salience of group-based and collective rights. The main advocate of group-based rights is W. Kymlicka (1995), see e.g. *Multicultural Citizenship*, Oxford University Press.

<sup>39</sup> *op cit* note 9 *supra*, para 279.

<sup>40</sup> *ibid*, para 216.

sovereign modern nation state. This is a thick interpretation of human dignity which, in fact, must be understood as an *open-textured principle* and one which is more appropriately understood as an optimization requirement.<sup>41</sup> Also the principle of democracy is open-textured; it comes in many shapes and forms. The Court draws a close link between the right to vote and human dignity, and further notably pins this again to specific institutional conditions pertaining to responsible parliamentary government, the majority principle, and the existence of a parliamentary opposition. Why should principles embedded in the 'eternity clause' be pinned down to such specific institutional arrangements? It is not clear that a system of government is in breach with the eternity clause if it fails to comply with these specific institutional requirements. The GCC has adopted a very *institutionally specific* set of democratic conditions that many recognised democracies will not comply with (including for that matter Germany itself).<sup>42</sup> Thus, it is fair to say that the Court is not only oblivious to the possibility of a multinational democratic federation; it is according to Schönberger quite blind to 'the particularities of democratic legitimacy in *federal states*.'<sup>43</sup>

Another implication of the Court's particular use of the eternity clause is to effectively argue that the German Basic Law does not permit Germany's participation in the founding of a European federal state, which Schönberger finds to be 'an unprecedented arrogation of power by the Court.'<sup>44</sup> The Court flatly rejects the federal model but does not show 'which provision of the Basic Law is opposed to an integration of Germany into a federal state. The preamble of the Basic Law points in the opposite direction.'<sup>45</sup>

In sum, then, the Court's concern is to argue for the unsuitability of the federal model for the EU. This is grounded in a conception of democracy that is pinned down to a set of thick institutional requirements that help to sustain a more or less clearly articulated conception of democracy as ultimately founded in a unified people. The argument is very much pinned on the

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<sup>41</sup> R. Alexy (2002) *A Theory of Constitutional Rights*, Oxford University Press, at p. 63.

<sup>42</sup> They note that: 'According to the GCC's logic, a law-making procedure that requires the consent of *Bundestag* and *Bundesrat*, which is regularly the case, could even violate the democratic principle of the German Basic Law in Germany. That a German Court, operating in a system that is notorious for federal deadlock, so vigorously advocates a strict majoritarian conception of democracy must be one of the decision's biggest ironies.'; see *op cit* note 30 *supra*, at 1248.

<sup>43</sup> *op cit* note 5 *supra*, at p. 1215.

<sup>44</sup> *ibid*, at p. 1208.

<sup>45</sup> M. Niedobitek, 'The Lisbon Case of 30 June 2009 - A comment from the European Law Perspective', in *op cit* note 3 *supra*, at p. 1267-75.

eternity clause. This brings up the question of the relationship between the eternity clause and state sovereignty – indeed the entire question of sovereign statehood. Here it is important to recognise that the Court itself underlines the need to think of different alternatives to intergovernmentalism and state-based democracy in Europe. The Court notes that: ‘In contrast to *political Machiavellianism* and a “rigid concept of sovereignty”, the German Basic Law, “codifies the maintenance of peace and the overcoming of the destructive antagonism between the European states as outstanding political objectives of the Federal Republic of Germany”’.<sup>46</sup> Further: ‘The German constitution is oriented towards opening the state system of rule to the peaceful cooperation of the nations and towards European integration. Neither the integration *pari passu* into the European Union nor the integration into peacekeeping systems such as the United Nations is tantamount to submission to alien powers.’<sup>47</sup>

This suggests that we should also consider how the Court’s line of reasoning sits with models for democracy beyond the nation-state, which brings to the fore the question of *mode* of democracy: Is representative democracy adequate for such settings?

### **Democracy beyond the nation-state?**

Transnationalists such as Cohen and Sabel and Bohman argue on the one hand that the EU is a particularly promising experiment in deliberative democracy and on the other that representative democracy will be inadequate for the multilevel, large-scale and multi-perspectival EU polity.<sup>48</sup> Their claim is that transnational civil society, networks and committees, NGOs and public forums, all serve as arenas in which EU actors and EU citizens from different contexts – national, organizational and professional – come together to solve various types of issues and where different points of access and open deliberation ensure democratic legitimacy. Local problem-solving, the institutionalization of links between units, and agencies to monitor decision-making both within and between units make this structure conducive to democratic governance. The question they fail to answer adequately is: How can goals be realized and rights protected *without* the sanctioning capacity of the state? Would such a system be able to ‘deliver’; how can it bring about changes required by justice? Further, can it ensure equal access and public accountability in the complex multilevel constellation that makes up the EU?

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<sup>46</sup> See *op cit* note 9 *supra*, para 224.

<sup>47</sup> *ibid*, para 220.

<sup>48</sup> *op cit* note 6 *supra*.

To some extent then the democratic debate grapples with some of the conundrums that the Court is clearly faced with, the tricky issue of statehood as a condition for democracy. We have already seen that the Court underlines the importance of the state-based model of democracy. At the same time, the Court also underlines that in today's world, state sovereignty is changing and that 'The Basic Law abandons a high-handed concept of sovereign statehood that is sufficient unto itself.'<sup>49</sup>

The Court notes that the Basic Law's so-called eternity guarantee 'makes clear as well that the Constitution of the Germans, in correspondence with the international development which has taken place in particular since the existence of the United Nations, has a universal foundation which is not supposed to be amendable by positive law.'<sup>50</sup> This brings up the question of the character of the international legal foundation that will be consonant with the eternity clause. Will the law of peoples ensure the universal core? Or is the eternity clause ultimately anchored in cosmopolitan law? The Court notes that: 'The constitutional state commits itself to other states which are standing on the same foundation of values of freedom and equal rights and which, like itself, make human dignity and the principles of equal entitlement to personal freedom the focal point of their legal order.'<sup>51</sup> Thus, it should be readily apparent that the normative core of this legal order is individual not state sovereignty. The universal foundation is coupled with a set of values that speak to a cosmopolitan legal foundation. This is if anything amplified by the commitment to peace: 'The Basic Law wants European integration and an international peaceful order. Therefore not only the principle of openness towards international law, but also the principle of openness towards European law (*Europarechtsfreundlichkeit*) applies.'<sup>52</sup>

The Court and the transnationalists offer qualitatively different answers to the crucial question that both grapple with, namely: whether the state form and a state based collective identity are necessary preconditions for democracy to prevail, or whether a leaner structure made up of legal procedures and criss-crossing public discourse can ensure democratic legitimation? The question at the heart of the contemporary debate on democracy is: can democracy prevail without state and nation?

Our point of departure is that neither the Court nor the transnationals offer

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<sup>49</sup> *op cit* note 9 *supra*, para 223.

<sup>50</sup> *ibid*, para 218.

<sup>51</sup> *op cit* note 9 *supra*, para 221.

<sup>52</sup> *ibid*, para 225.

convincing answers. In the below we briefly sketch an alternative option. The interesting point is that there is some affinity between this model and important elements in the Court's line of reasoning.

## A Regional-European model of democracy

The EU is committed to universal principles and has a communal vocation that is broader and more universal than even that of the multi-national state. Can a move beyond Westphalia, towards cosmopolitanism offer a better, more suitable, version of democracy? Europe is held up as a particularly relevant site for the emergence of cosmopolitanism.<sup>53</sup> A multidisciplinary cast of scholars draws variously on transnationalism; on the notion of the EU as a new form of Community; and on the EU's global transformative potential through acting as a 'civilian power'.<sup>54</sup> Even though cosmopolitanism 'is not part of the self-identity of the EU',<sup>55</sup> scholars nevertheless recognise the EU as a part of, and as a vanguard for, an emerging democratic world order.

In order to establish what democracy beyond the nation state can mean we must employ a normative yardstick that is not confined to the nation-state template and its presuppositions of sovereignty, demos, territory, and nation. To do so we start from deliberative democracy which does not anchor democracy in a pre-political people but instead posits that democratic legitimacy derives from the public justification of the results to those affected. This constitutes the normative thrust of the democratic principles of *autonomy* and *accountability*. With autonomy we refer to the basic democratic principle that those affected by laws should also be authorised to make them. Accountability designates a relationship wherein obligatory questions are posed and qualified answers required, and where, in the last resort, it is possible, to *dismiss*, incompetent rulers.

Little systematic effort has however been put on specifying more precisely *how* a European Union imbued with cosmopolitan norms can comply with the core democratic principles of autonomy and accountability. Our point of departure is that the core tenets of autonomy and accountability presuppose congruence

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<sup>53</sup> D. Archibugi (1998) 'Principles of Cosmopolitan Democracy', in D. Archibugi, D. Held and M. Kohler (eds) *Re-imagining Political Community: Studies in Cosmopolitan Democracy*, Polity Press, at p. 198; U. Beck and E. Grande (2005) *Das Kosmopolitische Europa*, Suhrkamp; G. Delanty and C. Rumford (2005) *Rethinking Europe*, Routledge.

<sup>54</sup> C. Rumford (2005) 'Cosmopolitanism and Europe: Towards a new EU studies agenda?', *Innovation: The European Journal of Social Science Research*, 1: 1-9; I. Manners (2002) 'Normative Power Europe: A Contradiction in Terms?', *Journal of Common Market Studies*, 2: 235.

<sup>55</sup> C. Rumford, in *op cit* note 54 *supra*, at p. 5.

between political and social space, but need not sum up to *exclusive territorial control*. According to R. M. MacIver, we should 'distinguish between the government and the state and regard constitutional law as binding, not for the state, but the government. It binds the legislator in the making of law itself.'<sup>56</sup> *Government* refers to the political organisation of society and to the fact that a state is not merely a Hobbesian coercive order, but notably also an expression of the common will and public opinion.<sup>57</sup> The characteristic feature of governmental power is not coercion, but the ability to act in concert and to be recognised. Political power emanates from citizens coming together in public forums and reaching agreement on the rules for social coexistence and the collective goals they should realise. Power is collective, communicative and inter-subjective by nature; it is created in the interaction between agents; it is only in operation and is only strong so long as the people are assembled and agree.<sup>58</sup> Thus, it is also possible to understand modern constitutions as disconnected from the state form, from a coercive Leviathan – insofar as they remain linked in with the project of modernity, whose normative telos is to make the addressees of the law also their authors.<sup>59</sup> A true republic presupposes democracy, but democracy need not presuppose the state. A non-state entity can make up a system of government *insofar as it performs the functions of authorised jurisdictions*. By government we therefore refer to a system of authorised rule which depicts the political organisation of society, or construed in more narrow terms, as the institutional configuration of representative democracy and of the political unit.

From this we posit that whereas the Union can be set up as a *non-state entity*, it must nevertheless also retain some of the hierarchical attributes of government. This is also where our position comes closer to that of the Court than to the transnationalists. The idea is that since 'government' is not equivalent with 'state', it is possible to conceive of a non-state, democratic polity with explicit government functions. Such a government-type structure can accommodate a higher measure of territorial-functional differentiation than can a state-type entity, as it does not presuppose the kind of 'homogeneity' or collective identity that is needed for comprehensive resource

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<sup>56</sup> R. M. MacIver (1928) [reprint, 1964] *The Modern State*, Oxford University Press, at p. 277.

<sup>57</sup> G. W. F. Hegel (1821) [reprint, 1967] *Philosophy of Right*, Oxford University Press; R. M. MacIver, *op cit* note 56 *supra*; H. Arendt (1969) *On Violence*, Harcourt, Brace & World. See also A. Wendt (2003) 'Why a World State is Inevitable', *European Journal of International Relations* 4: 491.

<sup>58</sup> H. Arendt (1958) *The Human Condition*, University of Chicago Press, at p. 200; J. Habermas (1996) *Between Facts and Norms: Contributions to a Discourse Theory of Law*, MIT Press, at p. 149.

<sup>59</sup> G. Frankenberg (1996) *Die Verfassung der Republik – Autorität und Solidarität in der Zivilgesellschaft*, Nomos.

allocation and goal attainment. Such a governmental structure is based on a division of labour between the levels that relieves the central level of certain demanding decisions.

In this connection it is important to recall that the EU already has obtained competencies and capabilities that resemble those of an authoritative government. It embraces democracy as a founding norm, has representative institutions, and the parliamentary principle has become more strongly institutionalised. Its institutional setup is complex but 'still it legislates, administers and adjudicates. The legitimacy of these processes also has to be assessed according to the same standards that one would apply to any government.'<sup>60</sup>

When further entrenched in this direction, the EU can be a post-national government, a system whose internal standards are projected onto its external affairs; and further, that it will be a system of government that subjects its actions to higher-ranking principles – to 'the cosmopolitan law of the people'.

The problem (currently experienced by the EU) is how an entity with a nascent government-type order can be effective: implementing decisions against a dissenting minority, in the absence of state-type coercive measures. When it is the member states that keep the *monopoly of violence in reserve*, such an order can only be effective to the degree that actors comply on the basis of voluntary consent. But how to ensure compliance in a polity that lacks the enabling conditions of sovereignty that confer stability on social relations in the form of a 'centralized authority to determine the rules and a centralized monopoly of the power of enforcement'?<sup>61</sup> Proper procedures are imperative: When decisions are properly made, when they follow the authorised procedures of the constitutional state, the likelihood that they be respected is high.<sup>62</sup> This model therefore seeks to graft the authorised procedures of the constitutional state onto the European level but within a more limited remit of action than the sovereign state. Precisely because it does not regulate some of the core state functions, it can operate with a broad repository of mechanisms to ensure compliance and consent. These include 'soft' mechanisms, ranging from a moral consensus on the protection of human rights; via consultancy and

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<sup>60</sup> D. Chalmers, C. Hadjiemmanuil, G. Monti and A. Tomkins (2006) *European Union Law*, Cambridge University Press, at p. 87.

<sup>61</sup> T. Nagel (2005) 'The Problem of Global Justice', *Philosophy and Public Affairs*, 2: 113, 116.

<sup>62</sup> T. R. Tyler (1990) *Why People Obey the Law*, Yale University press. Cp E.O. Eriksen (2009) *The Unfinished Democratization of Europe*, Oxford: Oxford University Press.



deliberation in transnational structures of governance and their concomitant civil society mechanisms of shaming and blaming; to institutionalised procedures for *authoritative* decision-making in intergovernmental and supranational institutions, which come with direct sanctions. This finds some resonance as already noted in paragraph 272 of the Court ruling, where it points to the existence of 'novel forms of transparent or participative political decision-making procedures' in the multilevel constellation that makes up the EU but also rightly underlines that 'the merely deliberative participation' cannot replace electoral democracy. In other words, also a system of regional-cosmopolitan democracy must contain representative democratic procedures. But the model's core is deliberative-democratic, not representative. Theoretically speaking it takes proper heed of the tenet that the modern conception of representation is ultimately parasitic on deliberation, as no person can consider herself to be legitimately represented unless the mandate and accountability terms are spelled out, and the represented are offered acceptable justifications for decisions that affect them.

The model of European democracy that we can discern from these observations, seeks to reconcile transnational insights with institutional conditions, notably the need for a government-type organisational structure. The model, thus, posits that the European Union's democratic legitimacy can be based on the credentials of criss-crossing public debate, multilevel democratic decision-making and enforcement procedures and the protection of fundamental rights to ensure an 'autonomous' civil (transnational) society. This is the clearest manifestation thus far of democracy as a principle based on a post-conventional form of consciousness, one seen to have been generated by the struggles and processes that produced modern constitutions. Whereas such an entity holds traits that undermine the distinction between states and international organisations, it cannot do away with the modern legitimating principles that were established through democratic revolutions. The concept of government highlights the *moral authority* of the procedures entrenched in the democratic *Rechtsstaat* – as a legitimating, trust and compliance-generating mechanism.

Two implications follow from how we apply these insights to the EU: first, that it is possible to decouple *government* as the democratic form of rule, from the *state form* – as a coercive system of power relations that is sovereign due to the codes of international law. A regional-cosmopolitan EU would be based on non-violent settlement of disputes, the entrenchment of institutions, rights and legal principles that subject actors to the constraints of a higher-ranking law – the cosmopolitan law of the people – and that empowers the citizens to take part in law-making processes at different levels. Policy-making,

implementation and law enforcement would then take place through a variety of organisations, and the EU would be a sub-set of a cosmopolitan order that does not hold the means of legitimate violence in reserve, but is rather embedded in a system of multilevel commitments and constraints.

Second, the model posits that the borders of the Union are not drawn on essentialistic grounds. The EU can, therefore, only justify itself through drawing on the principles of human rights, democracy and rule-of-law – even when dealing with international affairs. The ensuing order would not aspire to become a world organisation, but would be cosmopolitan in the sense that its actions would be subjected to the constraints of a higher-ranking law and be committed to the fostering of similar regions in the rest of the world.

Regionally situated authoritative government within a cosmopolitan, non-state-based framework raises questions pertaining to institutional design and make-up. One particularly tricky issue is how to ensure democratic autonomy and accountability within such a system. The short answer is that this requires a polity with a *pyramidal* structure of autonomy and accountability, i.e., where the global level contains certain fundamental legal guarantees, the EU level handles a limited range of functions over which it has final authority, and the member states the rest. Autonomy has a different status in this model than in the previous ones, as it cannot simply refer back to a delimited democratic constituency but must always balance the requirements of a given constituency with the universal principles embedded in cosmopolitan law. The accountability issue is also very complicated here. The ‘many accounts’ that such a system necessarily fosters, presupposes a more central role for civil society and the public sphere in demanding and ensuring proper justificatory accounts; hence locates democracy more explicitly in civil society/public sphere than is the case in the previous two models.

## Conclusion

In this article we have sought to flesh out the democratic theory of the Euro-polity that underpins the German Constitutional Court’s Lisbon Treaty ruling and justification. There is a discrepancy between the Court’s ruling and the lengthy argumentation to justify this. To get at this, we presented and assessed the ruling and justification up against three democratic polity models: Audit democracy based on the EU as a derivative of the Member States; the EU as a multinational federal state; and the EU as a regional-cosmopolitan polity.

Audit democracy is a modified version of the model of delegated democracy

that seeks to take in the role of the EP. Can this model solve a problem in the Court's argumentation: namely on the one hand its support for delegated democracy and on the other its acknowledgement of the EP as a supranational democratic body? The analysis showed that the actual standing of the EP as a co-legislator is clearly more and different from an agent of audit democracy. Therefore, the Court cannot justifiably ground EU democracy in the audit democracy model. We thereafter considered the plaintiffs' argument to the effect that the EU is an emerging federation. For this claim to have any relevance it must take proper heed of the EU's multinational character. We accordingly established the concept of the democratic multinational federation, but found that the Court's argumentation did not lend support to this. Further, present-day EU falls well short of a state-based federation. But we also saw that the Court's reasons for rejecting a democratic federation were not very convincing. Finally, it was also clear that the Court operated with a conception of changing state sovereignty that unfolds more in line with cosmopolitan than with Westphalian statist principles; thus opening the door to a third democratic polity model, the regional-cosmopolitan one, which we have sketched out above.

We have found that the ruling and the justification are not only inconsistent but actually speak to several - distinctly different - models of democracy. The Court insists (in the ruling) on the one hand that the EU is a democratically speaking derivative of the Member States at the same time that it underscores in the justification the Basic Law's so-called eternity clause, which can only be properly grounded in a cosmopolitan legal system. In considering these different positions in relation to three distinctly different democratic polity models, our reading of the ruling and the justification is an attempt to bring democratic debate back in. It is then also a means of preventing a narrow interpretation of the Court ruling from foreclosing the debate on the EU democratic experiment, as the critics fear. A major problem with the ruling was that the Court modelled democracy on a set of very specific - peculiar - institutional presuppositions that are squarely located within a specific institutional configuration of the sovereign democratic nation state. To keep the debate open we need democratic criteria that extend beyond those institutionally thick and contested criteria that the Court devised. The Court has recognised that the global context is changing the operating conditions for democracy, but the only way to connect this properly to the European setting is to acknowledge that there is an important democratic experiment currently unfolding in Europe. This experiment is served by devising strict and demanding democratic requirements but they must be tailored to the relevant theory of democracy and its attendant polity configuration.