Kaleidoscope

Germany in the European Union – The *Maastricht* Decision of the *Bundesverfassungsgericht*

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I. Background of the Decision

The *Maastricht* decision of the *Bundesverfassungsgericht*, the Federal Constitutional Court,[1] opens the way not only for Germany's membership in the European Union, but also for its participation in further steps in the Union's development. This could not have been taken for granted before the decision. Although the *Bundestag*, the German Parliament, had approved the Treaty of Maastricht in December 1992 with a majority of 543 out of 562, and the *Bundesrat*, the representative body for the *Länder*, had voted unanimously in favour of ratification, the position of the Court was not really clear.

Several negative indications were discernable in legal circles. Professor Paul Kirchhof, the judge-rapporteur in the case before the Constitutional Court, had just published an article stressing the importance of States in the process of European integration, and which interpreted the European Union as a *Staatenverbund* (association of States) that cannot fulfil essential tasks of States concerning foreign, security or defence policy. He therefore concluded that the Union could not become a State itself. On the whole, Kirchhof emphasized the constitutional limitations rather than the legal possibilities of the Union.[2] This emphasis reflected a change of opinion among several German professors of public law. These scholars, along with part of the general public and some politicians, are having second thoughts about the future of Europe. For more than 40 years the cornerstone of foreign policy of all relevant political parties in West Germany had been the unification of Europe as a European Federal State. Due to the division of Germany into two States and the traumatic experience of National Socialism, there was no basis for strong *national* feelings among the Germans. Adenauer saw membership in the European

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1 Decision from 12 October 1993, 2 BvR L 134/92 and 2159/92, *NJW* (1993) 3047.

2 P. Kirchhof, § 183 of P. Kirchhof, J. Isensee (ed.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, Vol. VII (1993) 855.

5 EJIL (1994) 259-266

Communities as a possibility to bring Germany back into the club of leading Western States. In Germany the concept of a United Europe took the place that nationalism held in other States.

Accordingly, the original preamble of the *Grundgesetz*, the Constitution of the Federal Republic of Germany, had expressed the resolve of the German People to preserve their national and political unity and to serve the peace of the world as an equal partner in a united Europe.[3] When, against all expectation, the unification of Germany suddenly became possible in 1990, the general attitude began to change. Should the unity of Germany (so precious because it was obtained after long years of painful separation) be traded in for membership in a united Europe which was ruled by bureaucrats, and which brought heavy financial burdens and endangered the value of the German *Mark*? To the general public, the *Mark* is a foundation of the Republic which is perhaps more important than the Constitution itself.

When Parliament approved the Treaty of Maastricht and amended the Constitution to legalize Germany's membership in the European Union (Article 23) as well as to install a European Monetary Union (Article 88), recourse to the *Bundesverfassungsgericht* seemed to be the only remedy for opposing forces. Four German members of the European Parliament, belonging to the political party *Die Grünen* (The Green Party), and Manfred Brunner, a former high ranking official of the European Commission, lodged complaints of unconstitutionality with the Federal Constitutional Court. They faced severe procedural problems, as they had to convince the Court to grant them standing, and prove that the amended parts of the Constitution were unconstitutional in themselves. The complaint of unconstitutionality requires the applicants to prove that one of their basic rights or one of their rights under Articles 20(4), 33, 38, 101, 103 and 104 of the Basic Law have been violated.

The complainants claimed that the amendments to the Basic Law and the law transforming the Treaty of Maastricht into national law violated the following: (i) the right to human dignity; (ii) the right to free development of personality; (iii) the right to form associations and societies; (iv) the right to freely establish political parties; (v) the right to freely choose a trade, occupation or profession; (vi) the right to property; (vii) the right to elect deputies of the German *Bundestag;* (viii) the right to constrain any person seeking to abolish the constitutional order of Germany.[4]

3 The present preamble still contains the reference to a united Europe.

4 Arts. 1(1), 2(1), 5(1), 9(1) and 21(1, 2), 12(1), 14(1), 38(1), 20(4) and 93(1) No. 4a Basic Law; cf. Schachtschneider *et. al.*, 'Der Vertrag über die Europäische Union und das Grundgesetz', *Juristenzeitung* (1993) 751, and Murswiek, 'Maastricht und der Pouvoir Constituant', 32 *Der Staat* (1993) 161; Schachtschneider was counsel to the complainant Brunner, Murswiek wrote an expert opinion for the four Members of the European Parliament.

II. Problems of Standing and Jurisdiction

The Federal Constitutional Court dismissed the complaint of the four Members of the European Parliament. It held that the right to constrain those seeking to destroy the Constitution was not affected by German membership in the European Union, and a right to a plebiscite the complainants had claimed referring to Article 38(1) of the Basic Law was not guaranteed by the Constitution. All but one of the claims of Manfred Brunner were dismissed as well. The Court found that the law approving the Treaty of Maastricht might possibly violate a right of the complainant founded on Article 38(1) of the Basic Law that the *Bundestag* as Parliament retain as much right and power as the principle of democracy (Article 20(1) and (2) of the Basic Law) requires. This right might be violated, since not even amendments to the Constitution may affect this principle (Article 79(3) of the Basic Law). Even this principle is not relevant in its entirety, but is only seen as a right of the complainant to elect the members of the *Bundestag*. For the first time the Federal Constitutional Court construed this right not only as the right to vote, but also as a right to elect a Parliament having the power to decide all questions of importance for the State. This interpretation clears the way for judicial review of the Union Treaty. It is interesting to note that the Court restricted the scope of this right to questions concerning Article 23 of the Basic Law, i.e. to questions pertaining to the European Union. Otherwise every complainant might initiate judicial review of acts of German public authorities with respect to their democratic legitimation, thus bringing substantially more proceedings to the Federal Constitutional Court and increasing the already heavy workload of the judges.

According to the decision, an effective protection of the complainant's basic rights is guaranteed by the Federal Constitutional Court in cooperation with the European Court of Justice. The European Court of Justice enforces basic rights in every single case, the Federal Constitutional Court safeguards the general standard of basic rights in the Union. With this dictum the Federal Constitutional Court repeats its famous *Solange II* decision of 1986.[5] In this context the Constitutional Court claimed jurisdiction for the protection of human rights in Germany, not only against German, but also against European acts of public authority; in so far as it explicitly gives up its former position[6] and challenges the authority of the European Court of Justice. Given this, the Constitutional Court had some difficulties with Article L of the Treaty on European Union. Having discussed in great detail the meaning of the Treaty, the Court reached the conclusion that the provisions of the Treaty which according to Article L are beyond the jurisdiction of the European Court do not authorize the Union to interfere with the freedom of European citizens. In this part of the decision the Federal Constitutional Court for the first time used its authority to interpret European law with respect to the protection of German basic

5 BVerfGE 73, 339 (387).
6 Cf. BVerfGE 58, 1 (27).

rights to which it now lays claim. If the European Union should interfere with the freedom of a German citizen on the basis of a provision of the Treaty not falling within the jurisdiction of the European Courtof Justice,[7] the question of an efficient judicial remedy will arise. Since for the time being the Federal Constitutional Court does not detect such an interference, it provides no solution.

III. Merits of the Complaint

A. Loyalty to the European Union

The Federal Constitutional Court discusses the merits of Brunner's complaint in the context of Article 38(1) of the Basic Law, as only this provision gives him standing. This procedural situation restricts the range of arguments the Court can consider. The most important question to be answered was: What does the right to a Parliament with powers in accordance with the democratic principle consist of? The decision describes the loss of powers the *Bundestag* suffers due to the fact that Germany is a member of the European Union, which has its own legislation. But that loss is compensated by Germany's participation in the process of European legislation. Though decisions of the Union will often be taken by a majority – that is sometimes without the consent of Germany – their democratic legitimation is guaranteed by the *Bundestag's* approval of the Maastricht Treaty. In this context the Court mentions limitations on the majority principle with respect to the constitutions and fundamental interests of Member States, a reference to the so-called Luxembourg compromise of 1966.[8] The Federal Constitutional Court attempted to find a legal foundation for this compromise in the principle of loyalty to the community (*Gemeinschaftstreue*). This principle necessarily requires that the interests of other Member States are taken into account (*Gebot gegenseitiger Rücksichtnahme*). One might doubt if this principle gives Germany the legal – not political – possibility to obstruct majority decisions founded in the Treaty.

B. Democratic Legitimation of the Union

The decision states a second condition for Germany's membership in the Union. The people must democratically legitimate the actions of the Union. The Union's public authority is mainly derived from the people of the Member States through the national Parliaments. As the development of the Union progresses, democratic legitimation through the European Parliament is becoming increasingly important. According to the decision, the concept of Union citizenship is the legal expression of the essential connection among citizens of all Member States. At the same time,

7 Cf. Art. 2 Treaty on European Union.
8 Cf. *Europarecht* (1966) 79.

the Court stressed the extra-legal conditions for democracy: a common European public opinion, the transparency of the political aims of the Union and – somewhat surprisingly – the possibility of every citizen of the Union to communicate in his native tongue with any public authority to which he is subject. These conditions could be fulfilled in the future and thus the European Parliament might confer more and more democratic legitimation to the Union. Presently the Parliament's democratic function could be strengthened by uniform election laws in all Member States.[9] At the moment the indirect democratic legitimation derived from national parliaments restricts the powers of the European Union, with the consequence that substantial powers must be retained by the *Bundestag*.

The rationale of this conclusion is not completely clear. If national parliaments are able to legitimate public authority exercised by the Union, any division of powers between Member States and Union should be compatible with the principle of democracy. The reason for keeping substantial powers in the hands of the *Bundestag* might rather be found in the remaining 'State-quality' of the Federal Republic of Germany. But this reason could not be mentioned by the Court because of the procedural restraints pointed out above. What powers are considered substantial remains to be seen. If, for example, the powers of the parliaments of the *Länder* are substantial in this sense, the European Union might still diminish the powers of the *Bundestag*, much more than it does presently.

C. *Bundesverfassungsgericht* and European Court of Justice

Probably the most important influence on the European Union will come from the constitutional requirement that the *Bundestag* decide on all relevant steps of integration. Any step to a further integrated Europe lacking the express consent of the *Bundestag* will not be binding for German authorities. The European Union and its institutions, such as the Council, the Commission, the Parliament, and the Court of Justice, may exercise only those powers expressly transferred to them by the *Bundestag*. Otherwise they act *ultra vires*. Not the European Court of Justice but the German Federal Constitutional Court will ultimately decide which powers the *Bundestag* has transferred. German citizens may challenge any act of the Union which they claim to be *ultra vires*, and which therefore violates their right under Article 38(1) of the Basic Law. The Court emphasizes the sovereignty of Germany and qualified all authority of the Union as derived from the Member States. They remain 'masters of the Treaties', being able to terminate membership in the Union by an *actus contrarius*, although the European Treaties do not mention a right to withdraw from the Union. The Court solved possible conflicts of law between the German and the European legal systems in favour of the Member States. The States and their powers prevail and are the sources of all law, be it national or European. The danger of different interpretations of the law of the Union, and the duty of the

9 Cf. Art. 138(3) of the EEC Treaty.

European Court of Justice to ensure that, in the interpretation and application of the Treaty, the law is observed,[10] was not taken into consideration by the Federal Constitutional Court.

This emphasis on the power of the Federal Constitutional Court, and the disregard for the European Court of Justice, could be explained in part by the natural rivalry of two courts of last instance. But it might also be a reaction to the judicial activism of the European Court of Justice which has been criticized by quite a few – not only German – lawyers.[11] The *Bundesverfassungsgericht* cites in this context the German Justice of the European Court, Professor Zuleeg,[12] though Zuleeg does not mention the issue of activism and has rightly protested.[13] The Constitutional Court could have quoted other critics of judicial activism, but they may have considered reference to a member of the European Court more convincing. Apart from this the *Bundesverfassungsgericht* correctly points out the difference between interpretation of and amendments to the European Treaties. This emphasis is to be understood as a warning to the European Court to consider the legal limits of its jurisdiction.

Having underlined German sovereignty, the powers of the Federal Constitutional Court, the limits of the powers of the European Union and especially the European Court of Justice, the *Bundesverfassungsgericht* dismissed the claimed violations of the complainant's rights under Article 38(1) of the Basic Law. It was held that the Union Treaty respects the sovereignty of Member States, that it does not create a European State, and is specific enough to allow the *Bundestag* an approval without violating the principle of democracy. Especially Article F(3) of the Union Treaty does not confer unlimited powers to the Union, but only expresses its political intentions.

D. Monetary Union

According to the decision, monetary union policies of the Community are required to ensure that price stability is maintained. Article 109(j)(4) of the EEC Treaty surprisingly does not set a date for the implementation of monetary union. Therefore, the *Bundestag* will have to consent to the third step of the monetary union. As Article 109(j) expressly states that the third stage can be approved by a qualified majority of the Council, one may doubt if this interpretation of the Union Treaty, which is not required by German constitutional law, will prevail. Whether the *Bundestag* will have the power to decide on the third step of the monetary union will probably be a political and not a legal question determined by the Constitutional

10 Cf. Art. 164 of the EEC Treaty.

11 Cf. e.g. the profound study of H. Rasmussen, *On Law and Policy in the European Court of Justice* (1986).

12 H. von der Groeben, J. Thiesing, C. Ehlermann, *EWG-Vertrag* (4th ed., 1991) note 3 to Art. 2.

13 Cf. Zuleeg's note, *NJW* (1993) Heft 47, 3058, the Court could have cited Oppermann, *Europarecht: Ein Studienbuch* (1991) 170 instead of Zuleeg.

Court. Apparently the Court aims at strengthening the position of the German Parliament in future European negotiations and policy discussions.

IV. Future of the European Union

The Federal Constitutional Court concluded its decision with *obiter dicta* on the future of the European Union. This final part of the judgment is especially remarkable as it can be interpreted as an indication of the general attitude the Court takes towards further integration. It refers to the fifth deliberation of the preamble to the Treaty of Maastricht, expressing the intention to strengthen democracy and efficiency in the institutions of the Union. In addition the decision mentions respect for the national integrity of the Member States, whose governments are based on democratic principles.[14] As a conclusion the Court stresses that both the Treaty and the Basic Law require the development of democratic foundations; they must keep up with the further integration of the Union. At the same time democracy must thrive in the Member States. The final sentence suggests that the Federal Constitutional Court interprets German Constitutional law as not inhibiting the process of European integration, as long as the members of the Union remain States and do not become administrative districts of a European State.

It was not decided if a federal European State with national Member States is contrary to the German Basic Law. But the Court made it absolutely clear that the European Union requires more democracy, a democracy based on national parliaments as well as on the European Parliament. In emphasizing the current and possible future importance of the European Parliament, the Court paved the way for further steps of integration. Should the European Union strengthen its democratic foundation, cooperation between the *Bundesverfassungsgericht* and the European Court of Justice might be facilitated. This reminds one of the fact that although the *Bundesverfassungsgericht* demanded the protection of human rights in its 1975 '*Solange I*' decision, it never declared an act based on European law to be unconstitutional. More democracy in the Union as well as less activism on the part of the European Court probably will help to avoid conflicts between both eminent bodies.

Referring to the long German experience with the federal organization of States, the former Justice of the Federal Constitutional Court, Professor Helmut Steinberger, who acted as reporting judge in the proceedings leading to the 1986 '*Solange II*' decision, advised that the question of the sovereignty of the national States or of the Union should be left open. This solution could encourage Member States and the Union, as well as national courts and the European Court of Justice to

14 Cf. Art. F(1).

find compromises.[15] Pursuing this idea Professor Peter Lerche developed the concept that the way to a European State should be taken step by step in order to be compatible with the Basic Law, whereas the foundation of that State in one step might be contrary to the German Constitution.[16] Likewise, the constitutional monarchy in 19th century Germany left undecided who was the owner of the *pouvoir constituant*, the king or the people, thus making a smooth transition possible.[17]

Seen as a whole the *Maastricht* decision of the Federal Constitutional Court shows the way to a further integrated Europe, without answering all theoretical questions; that makes it a wise judgment acceptable to the complainants, the government, and the European Union.

15 Cf. Steinberger, 'Entwicklungslinien in der neuen Rechtsprechung des Bundesverfassungsgerichts zu völkerrechtlichen Fragen', 48 *ZaöRV* (1988) 1 (11).

16 Lerche, 'Europäische Staatlichkeit und die Identität des Grundgesetzes', in *Festschrift für Konrad Redeker zum 70. Geburtstag* (1993) 131 (142).

17 Cf. Böckenförde, 'Der deutsche Typ der konstitutionellen Monarchie im 19. Jahrhundert', in W. Conze (ed.), *Beiträge zur deutschen und belgischen Verfassungsgeschichte im 19. Jahrhundert* (1967) 70 et seq.