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Sovereignty Lost, Sovereignty Regained? The European
Integration Project and the *Bundesverfassungsgericht*

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Abstract

The purpose of this article is to evaluate the role of the German Federal Constitutional Court (FCC) as an institutional actor which has been instrumental in the German debate concerning European integration and the doctrine of sovereignty in the light of one case in particular, namely, the so-called *Banana Case*. The analytical framework within which the role and the position of the state in the process of European Integration is customarily interpreted by the main protagonists of the German academic debate will be assessed. References to the previous cases concerning European Integration decided by the FCC shall be made for the purposes of the discussion only. In particular, it will be examined to what extent, if at all, there is a corollary between the concept of a unitary, homogenous state and a juridical debate concerning European integration which its proponents seek to ensure is also unitary and homogenous as opposed to being able to accommodate a plurality of views.

1. INTRODUCTION*

Law is a normative order which is customarily understood in terms of a hierarchy.¹ In the German case, for example, the prevailing hierarchy is constituted by the Basic Law, Federal Law and State Law. European Community (EC) law may also be understood according to a hierarchical model to the extent that, as the catechism provides, it prevails over national law² and consists of primary and secondary sources of law arranged according to a hierarchy of precedence or *Anwendungsvorrang*. The implications for state sovereignty are considerable, particularly given the increasing growth of substantive EC law subject matters which have traditionally resided within the exclusive competence of the member states but the responsibility for which has been pooled through *Europeanisation*. Immigration law (Monar 1998) (Hailbronner & Theyry 1998) and policies (Joppke 1998) is a case in point; the single currency yet another (Beaumont & Walker 1999). In effect, member states no longer have absolute sovereignty over such issues in the sense envisaged by the Treaty of Westphalia,³ a matter with which the constitutional courts of the respective member states are in the process of coming to terms with.⁴ Indeed, the constitutional courts belong to the influential actors in the integration process and have, in their own way, contributed to the politicisation of the sovereignty debate and have helped to perpetuate the view of the age of absolute sovereignty as, to draw from Milton, ‘paradise lost’.⁵

The issue of loss informs much of the debate concerning the project of European integration and sovereignty, which at the micro-level represents an illustration of the effects of the macro-level of globalization (Sassen 1996). As regards sovereignty and the EU, loss has also been instrumentalised by some who seek to initiate what in law is sometimes referred to as a ‘claw back’ process or, to draw from Milton yet again, to regain that which has been ‘lost’.⁶ Others, however, take a more pragmatic view, adopting instead a view of the sovereignty of the nation-state in the face of European integration as being ‘pooled’ (MacCormick 1995 and 1999) in the light of the increasing interdependence between states (Krasner 1999, 3) and the supra-national level (Grimm 1994, 279).

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Law has played a part in both scenarios, that is to say, that it has been instrumentalised to reflect both versions of the events of the story of European Integration, the key-concept, or chapter, so to speak, being the role of the nation-state. Indeed, it is the nation-state which is a vital premise of the legal reasoning upon which the reception of EC law into the jurisdictions of the member states is based. The underlying tension is as follows: either a state's membership of the EU entails categorical acceptance of the supremacy doctrine, which is in itself, an endorsement of the hierarchical model of law. Or the state retains the right, in certain cases, to set the supremacy doctrine aside. Thus, even if it is accepted that the sovereignty of a member state has been qualified by its membership to the EU, it is a form of qualification which is by no means unconditional. These two positions represent two versions of events of the relationship between EC law and national law and, in the context of Germany, two competing schools of thought in the juridical debate concerning European integration. The term 'German juridical debate' is used to denote the legal academic community⁷ which acts, in contrast to other member states of the EU, as a source of influence on the jurisprudence of the *Bundesverfassungsgericht* or German Federal Constitutional Court ("FCC")⁸ which is, in itself, an actor in the European integration process of considerable influence. To a certain extent, the role of the court should not be overestimated, particularly given the institutional constraints within which judges are obliged to operate. However, it is the national constitutional courts of the member states of the EU which are having to articulate the rapport between EC and national law in an ongoing debate which is characterised by changing normative relationships predicated on the issue of the fundamental legitimacy of political power.

1.1. Etatism vs Post-Etatism

The German debate concerning the need for a European constitution is a good illustration of the extent to which the schools of thought both form and inform the discussion concerning the European integration project. The first school of thought provides that the European Union is unable to have a constitution in view of it not being a state (Grimm 1995). The state is thereby viewed as being both the object and the prerequisite of a constitution (Isensee 1987) (Dorau & Jacobi 2000). Moreover, a constitution must be reflected upon by the state bearers of authority, the people (*Staatsvolk*). The *pouvoir constituant* is viewed as being absent in relation to the EU in view of the lack of a European *Staatsvolk*. The second school of thought, which I have elected to entitle 'post-etatistic', provides that a prerequisite for a constitution is the existence of a political community (Häberle, 1999, 65).⁹ Thus, the state is shaped by the constitution, which is defined as the basic legal order of a political system¹⁰ The schools of thought also have different interpretations of the concept of sovereignty.

According to the first view, legal sovereignty is linked to the nation-state. The EU is viewed as ‘supra-national’ or even intergovernmental (Pechstein and Koenig 1998, 275) and only legitimate to the extent that it provides a mechanism for furthering the interests of the nation-state, including those associated with fundamental rights.¹¹ The second view is arguably tantamount to a cosmopolitan position given it is intrinsically a ‘post-sovereignty’ position. Accordingly, rights are not tied to culture or territory; thus, it is perfectly possible to have a legal system which is transnational or ‘trans’ state-like which is focussed on the interpretation and elaboration of these fundamental principles.

The ultimate arbiter debate in Germany is underpinned by a tension between these two version of events which are retold in what *Ladeur* has referred to as a, “traditionally state-determined discourse” (Ladeur 1997, 34). Thus, the ‘etatist’ view provides that EC law prevails over national law; there are, however, exceptions. The ‘post-etatist’ view categorically accepts the order of precedence of EC law. Academic opinion in Germany amongst jurists falls into precisely these two positions.¹² Both positions represent competing schools of thought in a debate which is highly vitriolic, defensive, confrontational and rhetorical – in effect, the staples of legal debate. However, the way in which the main protagonists of each school of thought claim to have the ultimate truth does little to foster open debate and even less to discount the accusation that amongst the protagonists are in effect polemicists disguised as legal scholars.

This issue is particularly problematic given that it is difficult to ascertain the extent to which the respective backgrounds or socialisation of the main protagonists inform their legal reasoning. To this extent, it comes as no surprise that former judges of the European Court of Justice (“ECJ”)¹³ and former officials of the European Commission¹⁴ or the European Parliament¹⁵ are at loggerheads with former judges of the FCC¹⁶ concerning the interpretation of the effect of European integration on the German legal order. This leads *inter alia* to the participants of the German juridical debate as being perceived as being either ‘*pro*’ or ‘*contra*’ European integration which does much to draw attention to the extent to which the debate is politicized but does little to dispel doubts concerning the ideological nature of the debate. Indeed, this author expressly rejects equating the distinction between an ‘etatist’ or a ‘post-etatist’ model in terms of ‘*pro*’ or ‘*contra*’ the European Union given that it is terminology which is inherently ideological and therefore has no place in a legal academic discussion concerning the project of European integration. The purpose of this next section is *not* to present decisions of the German Federal Constitutional Court concerning European integration in terms of decisions ‘for’ or ‘against’ the EU but to evaluate the Constitutional Court as an institutional actor which is instrumental in the German debate concerning European integration.

1.2. A Brief Overview of the Jurisprudence of the *Bundesverfassungsgericht* Concerning European Integration

The jurisprudence of the *Bundesverfassungsgericht* concerning European integration is prolific; a detailed appraisal of its decisions would be not only impossible for reasons of space but would detract from the relevancy of the discussion at hand. Suffice to say that the cases referred to below must be viewed in terms of the arguments advanced in this article and not as an exhaustive evaluation of the FCC's jurisprudence regarding European integration.¹⁷

In its *Solange I* decision¹⁸, the court held that until (“*solange*”) the EC has proved itself to provide adequate protection of basic rights, the Federal Constitutional Court remains the ultimate arbiter concerning issues of human rights and would assess the level of protection afforded to human rights in *specific*¹⁹ cases. In *Solange II*,²⁰ the Court held that the EC now had a level of protection of human rights which was commensurate with the fundamental rights enshrined in the German Basic Law which meant that the FCC relaxed its jurisdictional hold over questions of basic rights. As long as the general level of protection was secured by the ECJ, the FCC would not review the level in specific cases. The fundamental rights issue was not directly relevant for the *Maastricht*²¹ judgement.²² Prior to the Banana case, one could only speculate as to the effect of the judgment on the human rights issue. One reading of the case²³ is that the FCC reaffirmed the position it adopted in *Solange II*, that is to say that the FCC would only look at general cases in the event of a decrease in the general level of human rights protection. It was this interpretation²⁴ of the *Maastricht* decision which was of particular significance regarding the FCC's most recent installment in its jurisprudence concerning European integration, namely, the Banana case.²⁵

The purpose of this article is to examine the German Federal Constitutional Court's Banana judgement in the light of the analytical framework within which the role and the position of the state in the process of European Integration is customarily interpreted by the main protagonists of the German academic debate. References to the previous cases concerning European Integration decided by the FCC shall be made for the purposes of the discussion only.

2. THE BANANA JUDGMENT

Prior to embarking on a discussion of the Banana case, it is essential to outline the background upon which the facts of the case were founded.

2.1. The Common Organisation for the market in Bananas

The judicial attention designated to the importation of bananas verges on the extra-ordinary (Trachtman 1999) (Schmid 2001). Indeed, their importation into the EU has been assessed under national,²⁶ European²⁷ and international law²⁸ thereby securing a place on the judicial agenda for almost ten years, a phenomenon which shows no signs of abating. The issues which are raised by the regulation such as protectionism – legitimate or otherwise²⁹ – are outside the remit of this article given that they are essentially trade issues.³⁰ A brief exposition of the trade nexus of the case is, however, necessary.

The German case arose as a consequence of EC Regulation 442/93 (hereinafter referred to as the “Regulation”), the objective of which was to create a single market in bananas.³¹ This required replacing four types of national trade regimes: regimes of banana producers which effectively excluded all imports, those who protected imports from former colonies³², those that imported ‘dollar’ bananas subject to tariff and lastly Germany’s trade regime which was based on the importation of bananas without a tariff. In short, the Regulation provides for price supports for EU bananas under the Common Agricultural Policy (“CAP”), duty-free access for African Caribbean and Pacific (“ACP”)³³ bananas and a tariff-quota for ‘dollar’ bananas.³⁴ Licenses are required to import both ACP and ‘dollar’ bananas and some ‘dollar’ banana licenses were reserved for ACP importers. In view of the fact that ‘dollar’ bananas are much cheaper to produce, only the 200% tariff is prohibitive. Germany was particularly affected by the Regulation because it had no producers or colonies to protect and because the price increase was greatest not to mention the fact that more bananas per capita are consumed in Germany than in any other member state. This was the reason why the German government opposed the protectionist line on ‘dollar’ bananas and voted against the regulation (Mayer, 2000, 685).

The issue which the second senate of the FCC was asked to adjudicate by a Frankfurt Administrative Court (*Verwaltungsgericht* or “VG”), concerned whether the application of the Regulation³⁵ was reconcilable with the German Basic Law.³⁶

2.2. The Banana Case: An Overview

The case at hand involved a challenge made by a group of third country banana importers³⁷ before a Frankfurt Administrative Court regarding the constitutionality of the conditions of trade for third countries imposed by virtue of the Regulation. In Germany, prior to the enactment of the regulation, the majority of the bananas on the market emanated from third countries.

The VG referred the case first to the ECJ which was asked to ascertain to what extent, if at all, the Regulation was valid as a matter of EC law. The ECJ upheld the validity of the Regulation.³⁸

The VG then referred the case to the FCC which was asked to consider whether the Regulation violates provisions contained in the German Basic Law. In particular, it was argued that the Regulation infringes the importing firms' right to property (Article 14 (1) of the Basic Law),³⁹ the free exercise of a profession (Article 12 (1) of the Basic Law)⁴⁰ and the equality provision (Article 3 (1) of the Basic Law).⁴¹ As a result of the Regulation, the plaintiffs could, as of July 1, 1993, only import 50 % of the original amount they had imported into Germany. This violated their rights because of the absence of an interim regulation (*Übergangsregelung*) which ought to have been enacted according to the principle of proportionality.⁴²

The basis of the VG's application to the FCC was that – and indeed this was the crux of the plaintiffs' argument – the ECJ did not sufficiently or adequately protect human rights and the public international law obligations arising out of GATT or, in the alternative, the conduct of the European legislature was outside the ambit or breaches provisions contained in the EC Treaty, which raises the issue concerning boundaries of the order of precedence (*Anwendungsvorrang*) inherent to EC law.⁴³ In the VG's opinion, a consequence of the *Maastricht* decision⁴⁴ is that the FCC secured its evaluative jurisdiction (*Prüfungskompetenz*) and its competence to set aside or nullify (*Verwerfungskompetenz*) European legal instruments on the grounds of unconstitutionality which it exercises in co-operation with the European Court of Justice.

During the course of the somewhat lengthy proceedings,⁴⁵ the FCC drew the VG's⁴⁶ attention to a decision reached by the ECJ on November 26, 1996, in which it upheld an obligation by the Commission to enact interim measures (*Übergangsmaßnahmen*).⁴⁷ The FCC held that had the VG assessed the effect of the *T-Port* decision correctly,⁴⁸ it would have withdrawn its reference to the FCC on the grounds of inadmissibility, particularly as the decision involved a thorough evaluation of fundamental rights in the EU. Needless to say, this

human rights audit culminated in a finding that fundamental rights were sufficiently protected in the EU.

In refusing to withdraw its application, the President of the VG replied to the FCC's letter by stating that article 30 of the Regulation did not offer any relief to the violation of human rights. The sanctions offered by the decision of the ECJ were not specific but general in nature.⁴⁹ It is of interest to note that not only was it the President of the VG's undoing that he failed to interpret the *T-Port* decision correctly but he also elected to reply to the FCC's letter without consulting the rest of the Chamber. The procedural rules provide that the entire chamber ought to have replied to the FCC's letter. This also contributed to the finding of inadmissibility as regards the application on formal, procedural grounds.⁵⁰

According to the FCC, fundamental rights in the European Communities, as the ECJ's decisions indicate, are sufficiently protected.⁵¹ Moreover, this protection is commensurate with the protection guaranteed by the provisions of the German Basic Law. As long as this continues to be the case, the FCC shall not exercise its jurisdiction concerning the applicability of secondary EC law. Briefly stated, the term secondary EC law is used to denote those legal instruments⁵² which derive their legitimacy from the EC Treaty⁵³ but which are separate, secondary forms of law. The FCC shall therefore not review secondary EC law⁵⁴ unless the ECJ fails to protect fundamental rights to the degree envisaged in *Solange II*.⁵⁵

It is important to draw attention to the fact that the FCC's judgment was consistent with the provisions of the Basic Law. An amendment to the Basic Law (Article 23 (1) Sentence 1),⁵⁶ which was enacted prior to both the *Maastricht* decision and the ratification of the Maastricht Treaty, provides constitutional limits to European integration. Thus, the EC Treaties and any secondary legislation arising therefrom should be read in the light of other provisions of the Basic Law, such as the provisions falling under the so-called 'eternity clause'⁵⁷ which contains a reference to human dignity and the value of human life⁵⁸ as well as to the federal, democratic and social principles upon which the Federal Republic of Germany is founded.⁵⁹ The eternity clause provides that these principles may not be set aside by the legislature.⁶⁰

In order for a challenge to succeed before the FCC, a court must prove that the European legal development, which includes the decisions of the ECJ taken after the *Solange II* decision, has sunk below the necessary level of basic rights protection.⁶¹ This necessitates reconciling basic rights protection at the national level with the European level according to the method envisaged by the FCC in *Solange II*. The FCC held that not only had the VG failed to undertake

such an assessment but also the ECJ's case law illustrated that basic rights are sufficiently protected at the level of the EU.⁶² The court further held that the VG had misinterpreted the *Maastricht* decision.⁶³

The questions addressed in the *Maastricht* decision do, to some extent, overlap with those raised in the Banana case. The judgements are, however, by no means interchangeable. *Maastricht* concerned the issue of competence of the German state, under its constitution to ratify the Maastricht Treaty. By contrast, the Banana case was based on the issue of fundamental rights. Whereas these issues are substantively different, they both raise the question of the ultimate arbiter.

3. THE IMPLICATIONS OF THE BANANA CASE

It is of interest to note that the ease with which the FCC dealt with the human rights issue in a case which was essentially based on competence - albeit *obiter dicta* - was noticeably absent in the Banana case. That is to say, that it elected not to address the issue of competence by way of *obiter dicta* in a case based on fundamental rights, a move which would have been in line with the tactics it adopted in its *Maastricht* decision. It is arguable that this was a deliberate move on behalf of the court to signal a stance vis à vis European integration which is, in contrast to the *Maastricht* decision, inherently positive, undoubtedly explained by *inter alia* the absence of the infamous architect of the *Maastricht* judgment, *Paul Kirchhof*⁶⁴ who retired from the FCC prior to the judgment being reached and whose particular understanding of the German state informed much of the FCC's case law regarding European integration. *Kirchhof* is all too often demonised in the general legal debate concerning European integration.⁶⁵ In Germany, this is accentuated by the polarity of the juridical debate where he is regarded as either a friend or foe.⁶⁶ References to *Kirchhof* in this article are not designed to perpetuate this practice. They are made to outline the analytical context of the German juridical debate concerning European integration within which he enjoys considerable standing. Indeed, his theory of the state exerts considerable influence over German constitutional theory and German constitutional lawyers.⁶⁷ To demonise him or to dismiss him as anachronistic is to underestimate the weight of a particular strand of German state theory which continues to inform the German legal response to the challenge of European integration. Be that as it may, if, as has been suggested by some, the Banana decision is to be regarded as being as 'pro' EU as the FCC was able to be under the circumstances, it was not necessarily because *Kirchhof* retired before the judgement was reached. First, it is likely that in reaching its decision, the FCC was all too aware that the Regulation will eventually have to be amended anyway in view of the consistent rulings by the World Trade Organisation (WTO) in which US challenges have repeatedly been upheld.⁶⁸ Secondly, the

optimism which the ‘*pro*’ EU position vis à vis the Banana decision may - or may not - engender must, however, be viewed in the light of certain qualifications which the FCC elected to attach to its ‘*pro*’ EU stance by way of procedure, the co-operation relationship with the ECJ⁶⁹ and its particular interpretation of human rights.

3.1. Review and Article 100 (1) of the Basic Law

In essence, the court held in the Banana case that secondary European Community legislation is a matter for the ECJ and does not constitute an appropriate basis for review under article 100 (1) of the Basic Law.⁷⁰ Ordinarily speaking, applications under article 100 (1) relate to the formal legislation arising out of the constitution both at the level of the Federation and of the individual *Länder* or States.⁷¹ The Federal Constitutional court has the exclusive competence to adjudicate on the constitutionality of national laws.⁷² An issue of central importance in the case concerned the appropriateness of the application of article 100 (1) vis à vis secondary EC legislation.

The VG’s position was that such measures do not fall under article 100 (1)⁷³ and that it would be preferable to have a *separate* legal provision which would enable courts to consider the reviewability of secondary EC law. Regarding the case at hand, it was, however, willing to apply article 100 (1) in order to fill the gap.⁷⁴ The FCC’s response was that applications under article 100 (1) are inadmissible unless the level of the protection of fundamental rights protection generally sinks⁷⁵ thereby rejecting the VG’s argument in favour of a separate legal procedure concerning the reviewability of secondary EC legislation.

The FCC’s response left little doubt concerning its interpretation of the application of article 100 (1) in that it reinforced the position it adopted in the *Maastricht* case⁷⁶, that is to say that it regards those acts of the Community which have been transposed into German law as reviewable. It is significant to note that the FCC in effect avoided further developing a mechanism according to which it could realise a vision which it initially outlined in the *Maastricht* case, the so-called ‘co-operation relationship’ which, according to the FCC, constitutes the supervisory jurisdiction concerning the protection of fundamental rights⁷⁷ which it exercises in co-operation with the ECJ.

3.2. The Co-operation Relationship between the FCC and the ECJ

It is arguable that the co-operation relationship between the FCC and the ECJ has remained a vision given the absence of both guidelines and consensus as to how it ought to function.⁷⁸ The relationship is, however, not as nebulous as

appears to be the case as it is the FCC which decides as to how and when the co-operation relationship ought to be exercised. It is here that a point of what appears to be mere procedure in effect underlines an interpretation of the co-operation relationship which undoubtedly favours the German Federal Constitutional Court. Thus, whilst appearing to be inclusive, it is in effect exclusive.

This is particularly apposite given the court's interpretation of article 100 (1) of the Basic Law.⁷⁹ It could, after all, have elected to address the VG's argument in favour of a separate legal procedure governing the reviewability of secondary EC legislation and thereby develop the co-operation relationship further instead of restricting itself to making a minor amendment as to language.⁸⁰ One explanation may be that had the court addressed the issue of a separate procedure, it may have been forced to take into account a provision of the EC Treaty which is arguably the blue-print for a legal framework within which the co-operation between the FCC and the ECJ can most effectively take place, namely, the preliminary reference procedure whereby any national court may refer a question to the ECJ concerning the interpretation of the EC Treaty and legislation arising therefrom (article 234 EC Treaty).⁸¹

Indeed, it is of interest to note that the FCC has never addressed article 234 EC in the light of its concept of the co-operation relationship (Everling, 1999, 225) probably because to accept article 234 EC as underpinning the co-operation relationship would represent a concession by way of an acceptance of a legal framework in which the ECJ is the ultimate arbiter to the extent that it is based on the EC Treaty as opposed to the German Basic law.

In the *Banana* judgement, the FCC in effect reserves the right to ultimately decide whether human rights at the level of the European Union are commensurate with the human rights standards provided for by the German Basic Law. Moreover, it is the FCC's standard as regards the level of human rights protection which prevails⁸² - a form of 'constitutional patriotism' if you will in the sense that as regards human rights, there is 'no place like home'.⁸³

The absence of a Charter of Human Rights in the EU which is legally binding arguably justifies the move by a member state's constitutional court to scrutinise human rights in the EU until, to paraphrase the *Solange* decision, they are adequately safeguarded at the level of the EU.⁸⁴ What seems clear from the German Constitutional court decisions is that it is the constitutional courts of the member states who remain the ultimate arbiters regarding this issue. This gives rise to the following question: to what extent, if at all, is this view premised on the view held by the judges that their legal systems are fundamentally and essentially distinct and must therefore remain 'intact' and 'untouched' against

outside influence, a notion which is reminiscent of the debates concerning the politics of identity and controversies governing models of integration. It is this tension which lies at the heart of the tension between the two competing schools of thought concerning European integration, namely, the ‘etatistic’ school vs. the ‘post-etatistic’ school.

As regards the co-operation relationship, the schools of thought may be contrasted as follows: according to the first view, the ECJ is granted a sense of delegated power in the mechanism for furthering the interests of the German state in co-operation with the FCC. The FCC, however, reserves the right to argue that the ECJ is not safeguarding fundamental rights sufficiently,⁸⁵ a position which is consistent with its *Solange II* and its *Maastricht* decision. The ‘post-etatistic’ view provides to the contrary, and is characterised by a weakness in the ECJ’s position that it does not, as yet, have an appropriate legal basis for such ‘cosmopolitan’ legal reasoning, something which the European Charter of Fundamental Rights may remedy.⁸⁶ Be that as it may, both schools of thought are based on separate premises and thereby reach different conclusions, which is in itself, not uncommon in academic debates. The juridical debate in Germany as regards the effect of European integration is, however, polarised to such an extent that it militates against an open discussion based on an exchange of ideas primarily because the positions taken are adopted in such a way as to render them irreconcilable, conceptually speaking.

Fundamental rights are a good illustration of the tension between the two schools of thought. The purpose of the next section is to assess the human rights nexus of the Banana case.

3.3. A Human Rights Audit of the EU

The human rights issues which arise as part of the Banana case are mainly two-fold. First, the appropriate human rights audit envisaged by the FCC must satisfy an evidentiary burden which may, in effect, be difficult, if not impossible for certain national courts to discharge⁸⁷ given that it must *inter alia* include a detailed evaluation of the ECJ’s case law since 1986. It is questionable whether lower courts would have the resources to undertake an audit such as that envisaged by the FCC. In effect, the FCC thereby sends a message to the lower courts for them not to refer cases based on fundamental rights. This does not, however, prevent courts referring cases based on questions of competence. The main issues raised in the *Maastricht* decision are left open. Indeed, the FCC omitted to address the distinction between *Maastricht* and the Banana case thereby sidestepping the issue of competence altogether.

Secondly, the FCC only refers to decisions of the ECJ case law since 1986. This is questionable for a number of reasons. First, whereas the decisions of the ECJ since 1986 illustrate the increasing nexus of human rights in the EU, and by no means indicate a substantive inadequacy of the rights adjudicated upon, the rights jurisprudence of the ECJ is selective, and is by no means comprehensive. Indeed, the court has had very little to go on until now concerning human rights notwithstanding the fact that the EC Treaty does contain some basic rights.⁸⁸ Be that as it may, the FCC's reference to the case law of the ECJ as an indicator of the level of the protection of fundamental rights in the EU is by no means consistent with its previous practice, a matter which the tenor of the Banana judgement does little to underline. Indeed, in *Solange I*, the FCC omitted to refer to the *Nold* decision of the ECJ which had been decided two weeks prior to the FCC's decision in which the ECJ explicitly underlined that fundamental rights belong to the general principles of EC law and that it would draw on the common constitutional traditions of the member states as a source of inspiration.⁸⁹ One wonders to what extent a re-affirmation by the FCC of the line it took in *Solange II*, is part of a principled approach, and if so, what are the principles which permit the FCC to vest its trust in the ECJ vis à vis human rights in some of its judgements but not in others? The difficulty in gauging the nature of the principles upon which the FCC includes the decisions of other institutional actors in the European integration process is further illustrated by the FCC's omission in the Banana case to address the human rights record of the other EC institutions.

It is arguable that a human rights audit ought to include an assessment of legislative acts that have been passed by all EC institutions, that is to say, it ought to look beyond the jurisprudence of the ECJ. It is submitted that a thorough human rights audit of the EU would necessitate a panoramic audit of the EC institutions as regards basic rights, something which it had in fact undertaken in its previous decision in the *Solange II* case in which it not only referred to the fundamental rights jurisprudence of the ECJ but also drew attention to the Common Declaration of the European Parliament, the Council and the Commission of the European Communities of April 5 1977 regarding fundamental rights and the Declaration of the European Council on Democracy of April 7 and 8 1978.⁹⁰ It is of further interest to note that the FCC also failed to refer to the decision-making process of the European Charter of Fundamental Rights⁹¹ signed in December at the Nice Summit which is questionable because a human rights audit ought to be prospective as well as retrospective.⁹²

Be that as it may, fundamental rights provide a useful illustration of the tension between the two schools of thought given that their protection is viewed by some as being the role of 'homogenous constitutions', that is to say, the constitutions of the member states. To what extent, however, is this premised on

an essentialist conception of human rights? The ‘etatist’ view emphasises the distinctiveness of a state which is perceived as being based on a *Staatsvolk*⁹³ as well as culture, which is defined in terms of language, religion, art and history (Kirchhof 1993, 79). This distinctiveness is, however, instrumentalised in order to draw boundaries which must be protected in the face of European integration. Indeed, law is viewed as pivotal in enabling the state to maintain an openness towards the European ideal (*Europaoffenheit*) whilst, at the same time, ensuring that the state does not ‘dissolve’ (Kirchhof 1993, 64) a phenomenon which is referred to be some as *Enstaatlichung* (Kirchhof 1993, 95), which clearly illustrates the defensive tenor of the ‘etatist’ position⁹⁴ despite appearances to the contrary. Thus, whilst appeals for the ability of constitutional courts to listen, to question and to understand regarding the debate concerning the European integration project (Kirchhof 1999, 353) are articulated - thereby appearing to be inclusive – the position is, in effect, exclusive as it is precisely language and culture which is instrumentalised in order to demarcate boundaries and to erect borders.⁹⁵

Aside from cultural influences, and the different historical processes which led to the drafting of the respective constitutions, the assumption which prevails is that the conceptions contained therein are so distinct or ‘essential’ that they merit vigorous protection, a position which is supported by certain strands of state theory. Thus, Hegel writes of the special historical role of people in history (Hegel 1983, § 344) which is a consequence of the dialectical development of Spirit. There are the *Völkergeister* (Hegel 1983, § 352) which denote the special differentiated modes of the existence of people, that is to say, there is such a thing as the ‘Germanness’ of Germans, the ‘Englishness of the English’ and so on which play their role on the stage of world history (Hegel 1983, § 274).

To allow for ‘outside’ influences would further contribute to the ‘withering away’ of the state’s sovereignty. This is not a rejection of the universality of human rights but is premised on the position that some states protect human rights more vigorously than others. Moreover, - so the argument continues – some states have protected certain rights which are, as in the case of the protection of economic rights in the German Basic Law, for example, not to be found in the constitutions of other states, a position which must, in order to be understood more fully, be viewed in relation to the context of the German juridical debate concerning European integration. The purpose of the next section is to assess to what extent, if at all, there is a corollary between the concept of a unitary, homogenous state and a juridical debate concerning European integration which its proponents seek to ensure is also unitary and homogenous as opposed to being able to accommodate a plurality of views.

4. SITUATING THE GERMAN JURIDICAL DEBATE CONCERNING EUROPEAN INTEGRATION

The judicial and extra-judicial debate in Germany concerning European integration has traditionally focussed on the ultimate arbiter issue, as the FCC's *Solange I* and *II* decisions illustrate. The juridical debate concerning normative collisions between European and national law in Germany has also secured a place in the public sphere. Indeed, the issues surrounding the Banana case were indirectly being discussed by judges - seized of the matter and otherwise - in national newspapers long before the decision was reached⁹⁶ leading some commentators to cast doubt as to the independence of one judge in particular, *Paul Kirchhof*, who, though not directly involved in the preparation of the Banana case, made it clear to the media which line the FCC would adopt regarding its adjudication. Questions concerning the independence of the judiciary undoubtedly arise and are, in this context, legitimate. The observations made in respect of this issue are mainly two-fold.

First, the position in Germany is that whereas judges of the FCC are permitted to make statements as academics⁹⁷ they may not comment on cases which their chamber is adjudicating on in a private capacity.⁹⁸ Indeed, it is difficult to interpret comments made by *Kirchhof* in an interview in the light of his *Professorial* capacity,⁹⁹ an issue which was commented upon by other commentators (Everling 1999, 225) and which was fiercely rebutted by *Kirchhof* (Kirchhof 1999, 353). Indeed, this *Contretemp* is a good illustration of how a conflict between the two schools of thought concerning the role of the German state in the European integration project can spill over into the personal sphere, that is to say that the border between remarks made *ad rem* and remarks made *ad personam* becomes easily blurred. Thus, the personal is, to a limited extent, political, leading one to consider to what extent doubts raised as to the independence of the judiciary in relation to the FCC are founded. For reasons of space, it is impossible to conduct a detailed discussion concerning the issue of judicial bias and the FCC as a whole. However, the issue in itself draws attention to the extent to the politicisation of the judiciary which is undoubtedly connected to the particular notion of the *Rechtsstaat* in which courts rather than politicians make important choices regarding European integration (Kokott 1998, 92). This is particularly apposite concerning the German Federal Constitutional court, whose role as an institutional actor has been the focus of considerable attention both within (Ladeur 2000) and outwith academic circles.¹⁰⁰ The question concerning to what extent the influence of the judiciary is inordinate is poised at the axis of the relationship between judges and democracy. There is no doubt that judges with dominant personalities can and have influenced the debate concerning European integration in Germany - and they may well continue to do so.¹⁰¹ This statement is very much in line with

the concept of new constitutionalism which provides for a model of ‘checks and balances’ by constitutional courts regarding acts of parliaments and the notion of constitutional review as a method according to which parliamentary sovereignty is qualified (Stone Sweet 2000, 50). This does, however, bring with it concomitant problems of democratic legitimacy if one accepts that judges and lawyers alike are supposed to be beneath the law and not, as the juridical debate concerning the project of European integration in Germany testifies, above it. It is arguable that the influence judges in Germany exert over the European integration debate is disproportionate.

The respective backgrounds of the protagonists of the schools of thought are, to a certain extent, relevant whether they are former judges of the ECJ¹⁰² or former officials of the European Commission¹⁰³ and the European Parliament¹⁰⁴ or former judges of the FCC.¹⁰⁵ The debate concerning the effect of European integration on the German legal order is, however, not exclusively a product of the protagonists’ conditioning. Be that as it may, it is submitted that the protagonists should not be discounted or discredited by virtue of their professional backgrounds; if anything, their experience provides an essential source of information for the debate. Moreover, the juridical debate concerning European integration ought to be structured in such a way as to facilitate open debate and the exchange of ideas and where dissent can be accommodated.

The difficulty in the German context is mainly two-fold. First, the debate is inherently confrontational. A model based on mediation would arguably be preferable. This would, however, involve challenging the terms of reference of the German debate as a whole, namely, law as a science or *Rechtswissenschaft*. This is the second point. Thus, definitions used regarding the academic discipline of law in Germany are derived from the terminology used in standard scientific enquiry inherent to the natural sciences. Scientific reasoning has traditionally been defined as being based on ordered, deductive thought as opposed to inductive knowledge acquired through belief or hearsay (Medawer 1984, 3). The implication is that scientists deal with the hard currency of facts as opposed to the loose change of opinions. The true scientist seeks truth – we might, however, reiterate Pontius Pilate in asking ‘what is truth’. The ‘legal scientist’ would answer: ‘that which is shown to be true by way of scientific reasoning.’¹⁰⁶ There is, however, a basis of preference,¹⁰⁷ namely, the ‘etatist’ or the ‘post-etatist’ basis which creates a tension by way of a continuous fight for ‘core rationality’ of the ‘scientific’ enterprise concerning European integration. The word scientific appears in brackets as an acknowledgement of an integral element inherent to legal reasoning, namely, that of rhetoric. Legal argument is after all, designed to persuade. As regards the matter at hand, a debate which is underpinned by ideological differences concerning statehood is presented as a

debate based on ‘scientific’ argument or in other words, on legal positivist argument (Stone Sweet 2000, 143)

This undoubtedly contributes to eroding a positivist view of legal reasoning which is not in itself surprising, particularly given that the stakes in a debate about sovereignty are high. Thus, legal reasoning is, to some extent, instrumentalised in positing differing accounts of the fundamental legitimacy of political authority. Thus, for example, the ‘etatist’ school regards each constitutional court as having a particular notion of human rights which must be viewed in the ‘cultural context’ of its state. It goes one step further, however, to the extent that it uses the context argument to adopt what can only be described as a protectionist view not only of rights but also of values as a cultural heritage which may not be relinquished in spite of transfers of sovereignty to the supra-national level of the EU. This issue is pivotal as regards the discussion at hand as it underlines the ‘identity politics’ nexus of the sovereignty debate. Accordingly, the values which underpin human rights are regarded as being an intrinsic element of the state’s identity and it is this which is both articulated not only in decisions of constitutional courts, such as the FCC, but also in the academic sovereignty debate as a whole. The terminology of the sovereignty debate, namely, whether pooled, shared, split or partial do little to draw attention to the fact that what is being fought over is the identity of the nation state. In other words: we (the nation-state) are who WE say we are and WE reserve the ability to define who WE are.¹⁰⁸ Further, we can not permit others to define who we are as defining our identity is our sovereign right. It is this tension upon which the two opposing perceptions of the relationship between EC law and national law is based in Germany, namely, whether they are ‘distinct’. In other words: EC law and national law – one legal order or two? And as regards its corollary: one system of values or two? As regards the EU, this formulation ought arguably be extended by substituting certain elements. Thus, one legal order or 16? The same applies to values: one system of values or 16? Philosophers would not doubt dismiss this as a reformulation of the age old debate concerning universalism and relativism. For lawyers, the age old debate has concrete implications, particularly given the fact that they are now faced with a Charter of Fundamental Rights post-Nice. The comments being made have been extended to the legal debate concerning European integration as a whole and are not limited to the German context. The German context is instructive, however, to the extent that it illustrates the underlying tension of the sovereignty debate as a whole, namely, that of identity politics.

The etatist state is delineated the ‘ultimate boundary’ which refers to a state which may be open to the extent that international obligations must be honoured but which is ultimately predicated on the consensus of all bodies of the state concerning the overall unity, dare one say, supremacy, of the state

(Isensee 1993, 122). One is reminded of the writings of *Carl Schmitt* (Schmitt 1928) which have arguably informed many of the FCC's decisions (Weiler 1995) including the *Maastricht* decision. This is perhaps explained by the fact that the reporting judge in the latter case has a particularly impressive reputation as a *Schmitt* scholar. The influence of *Schmitt* on the jurisprudence of the FCC and indeed on German state theory as a whole (Preuss 1993) must not, however, be over-estimated or indeed exaggerated. The initial premise of the 'etatist' school, namely, the legal strength of Europe lies in its states (Kirchhof 1991, 12) is not a direct legacy of *Schmitt*. Be that as it may, the original basis and dependable guarantee of human rights of freedom secured by the rule of law, democratic legitimacy and the social equalization are the constitutional states which have bound their sovereignty in a constitutional law manner and have also laid it open to the influence of public international law (Kirchhof 1993, 63). Accordingly, whereas it is accepted that the state is not 'an island', the ground of applicability¹⁰⁹ regarding European Community law remains the German constitution. Indeed, for *Kirchhof*, the ultimate authority rests with what he refers to as 'homogenous constitutions'. Alternatively put, this is tantamount to the view of the EU as a 'union of sovereign states' or the *societas* of states (Jackson 1999, 449) a view which rests on the prevailing view of the EU as a supra-national organization which is very much in line with the 'etatist' school of thought. Accordingly, a constitution may not exist without a state. The EU is not a state therefore it does not have a constitution. Law is thereby intrinsically linked to the state,¹¹⁰ a view which is reminiscent of the classical 'law without a state' controversy of *inter alia* Weimar days¹¹¹ in which law was also viewed as being capable of existing both within and outwith the state (Pernice 2000). This is not to say that the state is viewed as anachronistic but that obligations arising as a consequence of the EU for instance qualify or to draw from *MacCormick*, 'go beyond' the state (MacCormick, 1995). This contrasting theory of the state is predicated on the view of the state being porous, of being able to transcend the boundary to the extent that it is not hermetically sealed, not fully independent, having endowed the EU with their sovereign authority, possibly pointing towards an emergent *universitas* (Jackson 1999, 451).

The reference made to the controversy of the *Weimar* days must be qualified to the extent that it is not made in order to portray *Kelsen* as a nationalist just as it is not aimed at portraying *Egon Ehrlich* as an internationalist. Rather, presenting them aids distinguishing both theories of the state outlined above on the basis of what one considers as law. Thus, for *Kelsen*, the legal positivist stance provides that the law is constituted by the laws – for *Ehrlich*, this definition is too narrow and he elects to tease out a definition which includes other forms of social control, a stance which has been taken up by more recently by the legal pluralists (Teubner 1992, 1443). Both views of law, however, are based on a theory of the state. For *Kelsen*, who adopts the

hierarchical model for law inspired by his infamous *Grundnorm*, the state is not as impermeable or porous as it is in *Ehrlich's* vision. Indeed, a hierarchical model for legal reasoning is rendered impossible by a legal pluralist perspective which instead adopts a 'heterarchy of diverse legal discourses' (Teubner 1992, 1451). There is a tendency, however, for the analyses which underpin legal pluralist accounts of law to underestimate the influence of the state on legal reasoning, which arguably derives from the unifying role which law played in state formation during the 19th century. This role, however, was a relatively recent phenomenon as law originally transcended the boundary of the state.

4.1. The Role of the Nation-State in Legal Reasoning

Lawyers tend to think of law in terms of the nation-state. Indeed, the nation-state lies at the apex of legal reasoning.¹¹² Few legal disciplines encourage the legal profession to think beyond the limits of their national legal training, a notable exception being the discipline of public international law and comparative law not to mention the recent development of supra-national legal bodies such as the arbitration authority established by the World Trade Organisation.¹¹³ Turning our attention to comparative lawyers - there is no doubt that comparative law fosters the pursuit of ideas. The *ratio* of this discipline, however, remains the domestic legal system which is first and foremost the point of departure of this form of legal analysis which encourages a compartmentalised view of law along the lines of the nation-state. Jurists in the 17th and 18th centuries made use of the same legal grammar as part of the *ius commune* (Zimmermann 1996, 576). The common language was of course latin, and the common heritage was Roman law (Hondius 1998, 8) which arguably constituted a unified, European culture (Zimmermann 1994, 82). The purpose of this next section is to evaluate the link between law and the nation-state and the concomitant effect on legal reasoning as a whole.

4.2. Cosmopolitan Legal Reasoning?

Justinian's *corpus iuris civilis* and the first European university at Bologna, the so-called *universitas magistrorum et scholarium*, were pivotal in the gestation of law as a discipline (Wesel 1984, 64-65).¹¹⁴ which was based on Roman and Canon law. Thus, law or legal reasoning was rooted in the notion that it was an application of legal principles instead of being territorially based within a context constituted by customary law, a project which we would now term as being a quest for universals.¹¹⁵

During the nineteenth century, German legal scholars were trained in roman law and canon law and not in local customary law, regardless of where they came from in Germany primarily due to the influence of the church and

Roman law.¹¹⁶ Lawyers who had completed their legal training in one country could occupy a chair in another (Zimmermann 1998, 27). The German case is partly explained because there was no single Germanic law or people at this time. Indeed, the German state as a single entity, namely, the German Reich, was only founded as late as 1871 (Wesel 1984, 66). Thus, in 1495 when the *Reichskammergericht* was established the judges had to swear that they would uphold the common law of the *Reich* thereby acknowledging its primacy over the individual laws of the German territories. The reason for this is not exclusively to do with geography but also refers to the evolution of law as a science, namely, the implementation of rational, supra-regional, and neutral laws. The German jurists who had studied in Italy excelled in the formal rigour of legal reasoning which was not dependent on a local context but on methodical, disciplined scientific reasoning.¹¹⁷ To conclude: a common European legal culture which centered around a common legal science did once exist (Zimmermann 1998, 27), an issue which is overlooked by those jurists who, like *Kirchhof*, continue to argue in favour of the distinctiveness of their respective legal systems on the basis of cultural arguments.

Legal reasoning according to principles was, however, reversed at the turn of the nineteenth century for it was at this time that the nation-state as defined by territorial, essential, *a priori* elements prevailed. The instrumentalisation of law for the purpose of state-building are still very much part of the heritage of legal science. It is a heritage which must, however, not only be challenged, but must also be qualified in the face of the increasing inter-dependency of states in the light of globalisation. A challenge could arguably draw on a number of sources. Thus, for instance, it could draw from Kant's concept of the *Weltbürger* (Kant 1991, 172-173) in order to assess to what extent it gives rise to a possible corollary of a *Weltjurist*. According to Kant, the rationality behind an international community is based on a principle of right as opposed to a philanthropic principle. Thus, this is not an ethical principle but a legal principle. Moreover, Kant maintains that if sovereign states could agree in certain legal principles embodied in an international binding agreement, a new and just legal order for all mankind could develop (Kant 1795). This position is not dissimilar to the arguments taken up as part of the debate concerning cosmopolitan citizenship which is based on a rejection of the Westphalian system of governance (Linklater 1998) which recognises the sovereignty of states as being absolute¹¹⁸ which was qualified by *inter alia* the Universal Declaration on Human Rights which accords inalienable rights to people irrespective of membership of a state. Thus, cosmopolitan citizenship recognises trans- or post-national agents (Archibugi & Held 1995). As regards legal theory, one is again reminded of *Eugen Ehrlich's* emphasis on the independence of law from the nation-state, that is to say, law exists independently from the framework of the nation-state (Ehrlich 1975) which can be contrasted to *Kelsen*,

for instance, who believed that law may only be realised within the hierarchical structures of the state (Kelsen 1967). This tension underpins the current convergence debate in which the substantial degree of convergence between the legal systems of the member states (Beatson & Trimidas 1998, 169) (Markesinis 1994) not to mention mergers between those who serve them (Trubeck, Dezalay, Buchanan and Davis 1994) is assessed. The purpose of this article is not to evaluate the arguments for and against the convergence thesis, particularly given that its applicability as regards EU law are limited. The terms of reference of the convergence debate are very narrow and are difficult to extend to the framework of the EU, particularly as the debate centers on the quest for a European Civil Code which is premised on the law of obligations and the law of contract which ignores other aspects of private law¹¹⁹ and also ignores most realms of public law¹²⁰ and omits to address the EU dynamic as a whole. The discussion of the *ius commune* conducted above serves a particular purpose and is *not* being used as an example or as evidence of a future trend. Rather, it is designed to illustrate the link between law and the nation-state which, particularly as regards the German debate concerning European integration, is regarded as being intrinsic. In effect, this restricts the debate in such a way that alternative conceptions of law have no standing such as a pluralist position, for example, in which agreement can be reached regarding the similarity of key concepts such as fundamental rights, namely, which go beyond national perceptions of these concepts.¹²¹ The German debate is structured in such a way so that such considerations are noticeably absent which is partly explained by the loyalty to the nation-state or *Rechtspatriotismus* (Aziz 2000, 473) which legal education fosters by providing access to knowledge and the opportunity to be educated within the constraints of the state, which arguably explains why lawyers primarily identify with institutions of the nation-state (Ramirez & Boli 1987, 2).¹²²

The FCC Banana decision is a case in point. Whereas the FCC referred to the GATT in its judgement, it omitted to address the WTO which is questionable particularly given that the WTO has adjudicated on the banana regulation.¹²³ This is not mitigated by the fact that the VG did not refer to the WTO in its reference to the FCC as the FCC is not bound by the reference made to it and has the discretion to consider any such issue it regards relevant for the adjudication of the reference made to it. One response to this argument would no doubt question the necessity of a national constitutional court whose role it is to adjudicate on the constitution of the state in which it is based and would perhaps even go as far as to argue that taking decisions by legal instances beyond its boundaries would be beyond both the court's remit if not its competence. Indeed, why would the WTO be relevant in a case which was based on fundamental rights? It is not the role of the WTO to assess the compatibility of EC law with WTO law. The importation of bananas, as far as the WTO was

concerned, was a trade issue. Be that as it may, it is of interest to speculate to what extent, if at all, the same decision would be taken differently in 10 years time. This appears to be a minor point but draws on the socialisation of jurists. It may well be the case in the future, jurists will be encouraged to look beyond their domestic legal system, an issue which has been addressed in the context of the use of comparative judicial decisions in human rights cases in jurisdictions that have relatively recently incorporated human rights provisions that are significantly enforced, such as the case of the United Kingdom (McCrudden 2000, 499). This would undoubtedly concur with the legal pluralist model which would accept the position of the nation-state amongst other jurisdictions and would in fact encourage taking decisions of other legal instances seized of the same matter into account.

CONCLUSION

As a consequence of the Banana judgement, the FCC sends a message to the lower courts for them not to refer cases based on fundamental rights. This does not, however, prevent courts from referring cases based on questions of competence. Thus, the main issues raised by the *Maastricht* decision are left open. In reaffirming its *Solange II* decision, the FCC does, however, outline its understanding of the co-operation relationship with the ECJ which it first referred to in *Maastricht*. Thus, the FCC reserves the right to assess the commensurability between fundamental rights protected in the EU with those enshrined in the German Basic Law, which illustrates that it has a particular interpretation of the notion of co-operation. This interpretation of the relationship is, as this article has shown, a product of a German juridical debate concerning the European integration project which is underpinned by conflicts as to the interpretation concerning the role of the state. Both the 'etatist' and the 'post-etatist' schools of thought outlined in this article are underpinned by the tension between a conception of sovereignty as 'lost' or 'regained', a binary combination which is inappropriate as regards the process of European integration as a whole. Indeed, the German example can be extrapolated to the debates both within and outwith the member states of the EU, albeit within different parameters and contexts. The importance of comparative work, particularly as regards constitutional courts which belong to the dominant institutional actors in the project of European integration is hereby acknowledged. The lesson to be learned from the German example may be summarised thus: that the challenge is to what extent the juridical debate may be structured in such a way so that it can accommodate a variety of views whilst at the same time acknowledging the controversial nature and the contestability of the European integration project.

Indeed, the issue which the German juridical debate ought to address is to what extent, if at all, it can accommodate alternative positions such as, for example, a pragmatic legal pluralist position which regards sovereignty as being shared and which upholds the necessity for jurisdictional dialogue and for some debate over the interpretation / specification of rights within specific contexts. This context would, however, be a German – European context in which German interests are *also* defined by Germany and not simply vice-versa. The *status quo* as regards the German juridical debate is, however, that it is confrontational to such an extent that it inhibits a plurality of views, which detracts from the quality of the debate that it is liable to be regarded as anachronistic, not only by their other European counterparts but also by their own politicians (Däubler-Gmelin 1999, 84). Thus, whilst German jurists bicker about the terms of reference for the debate, politicians have seized the initiative in formulating a vision of Europe which represents a clear signal that the moment has come to move beyond classical conceptions of constitutionalism which are umbilically linked to the state.¹²⁴

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ENDNOTES

¹Through, for example, the doctrine of precedent housed in the English legal system or the *Anwendungsvorrang* in German law. See Kelsen (1967).

²C 6 / 64 *Costa v. ENEL* [1964] ECR 585. However, this principle has been qualified by the *Maastricht* judgement of the German Constitutional Court. See 89 BVerfGE 155. See below.

³ Arising from the Treaty of Osnabrück (1648). See generally Linklater (1998).

⁴ See for example the decisions of the French *Conseil Constitutionnelle*'s decisions concerning the Maastricht Treaty and the Treaty of Amsterdam: 'Maastricht I' decision from 9.4.1992 - Nr. 92 - 308 DC, Rec 55 and also Decision Nr. 97 - 394 DC, Journal officiel de la République Française from 3.1.1998, p. 165 et seq. (AJDA 1998, 186 et seq). See generally Millns (1999) and Bonnie (1999).

⁵ See Milton (1957).

⁶ Thus, for example, the sovereignty debate in the United Kingdom resolved ostensibly by the *Factortame* decision (See *Factortame Ltd v. Secretary of State for Transport* [1990] 2AC 85 and also *Factortame Ltd v. Secretary of State for Transport (No2)* [1991] 1 AC 603 which must, however, be qualified by the ultimate reservation that the UK can still 'reclaim' sovereignty by a repeal of the European Communities Act 1972.

⁷ Which Kokott refers to as *La Doctrine* which, in her opinion, is composed of professors of public, European and international law including former and future justices. The fact that Kokott does not include academics from the lower ranks of academia says much about the hierarchical structure within which German academia is entrenched. See Kokott (1998, 79).

⁸ Indeed, the extent of the influence exercised by German legal academia on judicial decisions may be regarded as surprising by common law lawyers. It is often the case in Germany that judges are also academics. Historically, universities played an important role in the development and the systemisation of German law. Academic opinion, outlined in periodicals and commentaries (*Kommentare*) is regarded as persuasive authority. This is in direct contrast to the position in common law jurisdictions, Lord Goff's *dicta* in *Spiliarda Maritime v. Consulex Ltd* [1987] 1 AC 460 at 488. The position in Scotland can be distinguished on the grounds that it is more common to cite opinions of academics, which may influence the outcome of litigation.

⁹ Note that this concept has also been referred to as 'cosmopolitan metaconstitutionalism'. See Walker (2000, 399).

¹⁰ See Hesse (1995, para 17).

¹¹ See below.

¹² See G. Hirsch in the *Frankfurter Allgemeine Zeitung* on 9.10.1996 at p. 15.

¹³ Such as Günter Hirsch and Manfred Zuleeg.

¹⁴ Ingolf Pernice.

¹⁵ Roland Bieber.

¹⁶ Such as Paul Kirchhof and Dieter Grimm.

¹⁷ See, however, Kokott (1998, 77 – 131) and also recent decisions of the FCC in which upheld its prerogative to apply the German standards in extreme cases; after the most recent decisions, however, it appears that this claim is of a rather theoretical nature; see BVerfG NJW 2000, 3124 and BVerfG EuZW 2001, 255.

¹⁸ BVerfGE 37, 271.

¹⁹ Author's own emphasis.

²⁰ BVerfGE 73, 339.

²¹ BVerfGE 89, 155 or *Brunner v. European Union Treaty* [1994] 1 CMLR 57.

²² It is important to point out that the *Maastricht* decision was based on arguments concerning democratic legitimacy and competence-competence. The human rights nexus of the case is *obiter dicta* only.

²³ Indeed, there are several. See, for example, Zuleeg (1997) and Kirchhof (1999).

²⁴ A plethora of interpretations of the effect of the *Maastricht* decision were offered as regards the human rights issue.

²⁵ Decision of June 7, 2000 – 2 BvL 1/97.

²⁶ As the case at hand illustrates. For a summary of the original application of the Frankfurt Administrative Court to the German Constitutional Court, see *VG Frankfurt a. M.*, EuZW 1997, 182.

²⁷ See case C-280/93, ECR [1994] 688; Case-466/93 *Atlanta*, ECR [1995] 836; Case C-364 and 365/95 *T-Port III*. See C-68/95 *T-Port GmbH & Co. KG v.. Bundesanstalt für Landwirtschaft und Ernährung* ECR (1996) I-6065.

²⁸ At the level of the World Trade Organisation (WTO), a dispute settlement procedure initiated by some Latin American States and the United States in 1996 was resolved by a decision by the WTO Dispute Settlement Body of 25.9.1997 which held that the Regulation breached several articles of the General Agreement on Tariffs and Trade (1994) (GATT) and the General Agreement on Trade in Services (GATS). See *inter alia European Communities-Regime for the Importation, Sale and Distribution of Bananas-Complaint by the United States* WT/DS27/R/USA, May 22, 1997. For a summary see <http://www.wto.org/wto/dispute/Bulletin.htm> at no.7. Moreover, on April 12, 1999 a WTO dispute settlement panel issued a series of decisions in which it attempted to resolve successfully the conflict: *European Communities – Regime for the Importation, Sale and Distribution of Bananas-Recourse to Art. 21.5 by Ecuador* WT/DS27/RW/ECU, April 12, 1999; *European Communities-Regime for the Importation, Sale and Distribution of Bananas-Recourse to Article 21.5 by the European Communities* WT/DS27/RW/EEC, April 12, 1999. For the reports see generally <http://www.wto.org>.

²⁹ Independent studies by the World Bank have, for example, concluded that the restrictions concerning importation of bananas into the EU costs the consumer approximately 2,3 Billion Dollars a year by virtue of the prices which are artificially high. See Borrell (1994).

³⁰ See generally Everling (1996).

³¹ I would like to thank Alasdair Young for his comments regarding this section.

³² Or a combination with the first group.

³³ As provided for under the Lomé Convention which provides special concessions to African, Caribbean and Pacific States (ACP). The current Convention is Lomé IV [1991] OJ L229 & [1998] OJ L156. See Protocol 5 for the rules governing bananas. See Smith (2000).

³⁴ One fixed-value tariff equivalent to approximately 20% for imports within the quota and one fixed value tariff of about 200% for imports beyond the quota.

³⁵ Council Regulation (EEC) 404/93 of 13 February 1993 on the common organisation of the market in bananas, OJEC 1993 No. L 47, p.1-11 and also Regulation 1442/93.

³⁶ BVerfG, 2 BvL 1/97 vom 7 June 2000, Absatz-Nr. (1-69), <http://www.berfg.de/>.

³⁷ Referred to as the Atlanta Group.

³⁸ Case C-466/93 *Atlanta* EuZW 1995, 836.

³⁹ Article 14 (1) provides that, “Property and the right of inheritance are guaranteed. Their content and limits are determined by statute.” All translations of the German Basic Law are taken from the version reproduced at www.uni-wuerzburg.de/law/gm00000.html. See generally Michalowski & Woods (1999, 299 – 312).

⁴⁰ Article 12 (1) provides that, “All Germans have the right to freely choose their occupation, their place of work, and their place of study or training. The practice of an occupation can be regulated by or pursuant to a statute.” See also Michalowski & Woods (1999, 319 – 332).

⁴¹ Article 3 (1) provides that, “All humans are equal before the law.”

⁴² See para 40 of the decision in which the court refers to a previous decision of the FCC: BVerfGE 58, 300 (351).

⁴³ See para 30 of the decision.

⁴⁴ See fn 32 above.

⁴⁵ Which lasted almost four years, which has been interpreted by some commentators as stalling tactics in view of the possible reticence of some judges to avoid dealing with a politically sensitive issue. (Mayer 2000, 686).

⁴⁶ In a letter dated March 26, 1997.

⁴⁷ As provided by article 30 of Regulation 404/93.

⁴⁸ See para 49 of the decision.

⁴⁹ See paras 50 and 51 of the decision.

⁵⁰ See para 67 of the decision.

⁵¹ The FCC was thereby reaffirmed its *Solange II* decision. See BVerfGE 73, 378-381.

⁵² That is to say, regulations, directives and decisions.

⁵³ See article 189 of the EC Treaty.

⁵⁴ Or “Solange dies so ist, wird das BVerfG seine Gerichtsbarkeit über die Anwendbarkeit von abgeleitetem Gemeinschaftsrecht nicht mehr ausüben. Vorlagen von Normen des sekundären Gemeinschaftsrechts an das BVerfG sind deshalb unzulässig.” Here the court cross referred to its *Solange II* decision. See BVerfGE 73, 339.

⁵⁵ See para 60 of the decision.

⁵⁶ As amended on 21 December 1992. Article 23 (1) of the Basic Law provides that, “(1) To realize a unified Europe, Germany participates in the development of the European Union which is bound to democratic, rule of law, social, and federal principles as well as the principle of subsidiarity and provides a protection of fundamental rights essentially equivalent to that of this Constitution. The federation can, for this purpose and with the consent of the Senate, delegate sovereign powers. Article 79 (2) & (3) is applicable for the foundation of the European Union as well as for changes in its contractual bases and comparable regulations by which the content of this Constitution is changed or amended or by which such changes or amendments are authorized.”

⁵⁷ Article 79 (III) of the Basic Law.

⁵⁸ Article 1 of the Basic Law.

⁵⁹ See Article 20 of the Basic Law.

⁶⁰ In the event of conflict, the competing constitutional principles must be balanced in accordance with the principle of maximum effectiveness or ‘practical concordance’. (Hesse, 1995, 28 and 72). For a succinct yet informative outline of the applicability of article 23 of the Basic Law, see Schmidt (1999, 418, 419).

⁶¹ See para 62 of the decision.

⁶² Such as the right to property, the right to economic activity, the freedom of association, the right to equality and the prohibition against arbitrary conduct, the freedom of faith, the protection of the family and the principle of proportionality. See para 58 of the decision.

⁶³ See para 64 of the decision.

⁶⁴ In the sense that he was the reporting judge.

⁶⁵ That is to say both within and outwith Germany.

⁶⁶ Or *Freund* or *Feind*, to draw from the writings of Carl Schmitt (Schmitt 1928, 226) with which Kirchhof is particularly well acquainted.

⁶⁷ Indeed, his commentary on state theory and practice See Isensee/Kirchhof, *Handbuch des Staatsrechts I. Grundlagen von Staat und Verfassung* (1995) is one of the leading, if not *the* authority on German Public Law.

⁶⁸ Rulings with which the EU has, as yet, failed to comply. See ‘US warns of sanctions over EU’s banana import plans’ *Financial Times* February 23, 2001 at p. 1.

⁶⁹ Which it first referred to in its *Maastricht* decision.

⁷⁰ Which provides that, “Where a court considers that a statute on whose validity the court's decision depends is unconstitutional, the proceedings have to be stayed, and a decision has to be obtained from the State court with jurisdiction over constitutional disputes where the constitution of a State is held to be violated, or from the Federal Constitutional Court where this Constitution is held to be violated. This also applies where this Constitution is held to be violated by State law or where a State statute is held to be incompatible with a federal statute.”

⁷¹ See para 30 of the judgement.

⁷² Indeed, the competence to set aside a law which is held not to conform with the Basic Law – in itself a form of ‘checks and balances’ - is regarded as being part and parcel of the *Rechtsstaat* principle. See von Münch / Kunig, Article 100 (1) at Rdnrs 2 and 3.

⁷³ See para 30 of the decision.

⁷⁴ See para 31 of the judgement.

⁷⁵ A position which is supported by legal academic opinion. See, for example, von Münch / Kunig, Article 100 (1) at Rdnr 13.

⁷⁶ BVerfGE 89, 155 (175).

⁷⁷ See BVerfGE 89, 155 at 175.

⁷⁸ See generally Mayer (2000).

⁷⁹ See above.

⁸⁰ Thus, in the *Maastricht* decision the court refers to a co-operation relationship *to* (or “*zum*”) the ECJ which it amends to *with* (or ‘*mit*’) the ECJ. (Mayer 2001, 687).

⁸¹ Formerly article 177 EC Treaty.

⁸² See para 31 of the decision and also para 60, line 13 where the court states that, “Das Bundesverfassungsgericht werde erst und nur dann im Rahmen seiner Gerichtsbarkeit wieder tätig, wenn der Europäische Gerichtshof den Grundrechtsstandard verlassen sollte, den der Senat in BVerfGE 73, 339 (378 bis 381) festgestellt hat.”

⁸³ See below.

⁸⁴ Constitutional courts in other member states have also adjudicated on the issue concerning the most appropriate level of human rights protection such as the decisions of the Italian *Corte Costituzionale* the Spanish *Tribunal Constitucional* and the Danish *Højesteret* illustrate. See the decision of 1989, 232/89 *Foro italiano* 1990, 1855 and *Zerini* from 1994 (117/94 *Raccolta Ufficiale* 1994, 785. See also Decision of 28/1991 from 14.2.1991 – European Parliament Elections, *Boletín Oficial del Estado* from 15.3.1991 as well as Declaration 108/1992 – *Maastricht*, EuGRZ 1993, 285 (in German translation). Further: Decision from 6.4.1998, *Carlsen et al./Rasmussen*, EuGRZ 1999, 49 (German translation).

⁸⁵ Or, applied, as the *Maastricht* judgment provides, the FCC reserves the right to argue that the ECJ has exceeded its competence.

⁸⁶ See below.

⁸⁷ See below.

⁸⁸ See generally Alston (1999).

⁸⁹ C 4/73 *Nold v. Commission* [1974] ECR 491.

⁹⁰ BVerfGE 73, 339 at 389.

⁹¹ OJ 2000, C 364/1.

⁹² This is also odd as one of the judges who was seized of the matter, Di Fabio had only relatively recently published an article on the Charter. (Di Fabio 1999, 737).

⁹³ That is to say, people who are related by birth and origin.

⁹⁴ Indeed, *Kirchhof* uses the term as a heading for a section which begins with the following: “Die Staatlichkeit Deutschlands steht im Rahmen der europäische Einigung nicht zur Disposition”. See Kirchhof 1993, 95).

⁹⁵ This is not uncommon practice in German discussions concerning integration as a whole. A central element of a debate concerning Germany’s ‘leading culture’ or *Leitkultur* which occurred in the autumn of 2000, was the way in which the elements which were reputed to make up this culture were used as criteria for exclusion. See *Frankfurter Allgemeine Zeitung* from October 30, 2000 at p.1.

⁹⁶ See ‘Wer ist die letzte Instanz?’ in *Capital Ost* on 01.05.1998 at p. 176. Indeed, the Banana case was even at one stage perceived as a threat to the EURO as an article in the *Spiegel* illustrates. See the edition of 04.11.1996 at p. 22. I would like to thank Matthias Geis from *Die Zeit* for providing me with a survey of the response to the project of European integration in the German press from the Maastricht Trial to the present day.

⁹⁷ See article 18 of the *Bundesverfassungsgerichtsgesetz* (the Federal Constitutional Court Law).

⁹⁸ Indeed, this is an issue which has been raised before in connection with *Kirchhof*. See Aziz (2000, 227).

⁹⁹ See *Focus* from 13.2.1999 at p. 11.

¹⁰⁰ R. Zuck, ‘Der unkontrollierte Kontrolleur’ *Frankfurter Allgemeine Zeitung* August 24, 1999 at p. 3.

¹⁰¹ “Democracy does not insist on judges having the last word, but it does not insist that they must not have it.” (Dworkin 1996, 7).

¹⁰² Such as Günter Hirsch and Manfred Zuleeg.

¹⁰³ Ingolf Pernice.

¹⁰⁴ Roland Bieber.

¹⁰⁵ Such as Paul Kirchhof and Dieter Grimm.

¹⁰⁶ Or alternatively speaking, the preference of deduction over induction.

¹⁰⁷ Berlin has written in relation to schools of philosophical thought that, “All these schools of thought, differing and indeed sharply opposed as they may be on many other crucial issues of principle, have at least one thing in common: they clearly favour one type of proposition or statement before all others; they treat it as possessing a virtue which other types conspicuously lack”. (Berlin 1980, 57).

¹⁰⁸ Whether it is by allusion to what social scientists sometimes refer to as the ‘Other’ or otherwise.

¹⁰⁹ Referred to as the respective bases of “Geltung” and “Anwendung” regarding European Community Law.

¹¹⁰ As the opening words of his leading commentary on German Public Law illustrate: “Dem folgt die deutsche Staatsrechtslehre. Sie deutet das Wort der Verfassung, auf das der Bestand des Staates gegründet ist.” See Isensee/Kirchhof, *Handbuch des Staatsrechts I. Grundlagen von Staat und Verfassung*, § 19, Rdnr 7-11,

¹¹¹ See Kelsen’s review (1915) of Eugen Ehrlich’s book *Grundlegung der Soziologie des Rechts* ([1913]) Thus, for Kelsen, law was intrinsically linked to the state. For his opponent, *Eugen Ehrlich*, however, law or what he termed the ‘living law’ could exist without a state, an issue which has been developed further by systems theorists. See, for example, Teubner (1997).

¹¹²One is reminded of the social anthropologist Mary Douglas who describes a professional collective as one which ‘leads perception and trains it and produces a stock of knowledge’. This includes drawing up and maintaining criteria as regards what constitutes a reasonable question and a true or false answer. In short, it provides the context and sets the limits for any evaluative judgment about what is objective. See Douglas (1987, 12).

¹¹³ The role of the state is, however, not obsolete as the rules regarding standing provide: States and not individuals have standing as parties to the proceedings. Individuals are still dependent on institutions of the state for the implementation and safeguard of their rights.

¹¹⁴ It was at this time, namely during the 11th century, that Irnerius, a teacher of rhetoric who neglected his studies in grammar in favour of teaching Roman law, managed to obtain a copy of a transcribed version of Justinian's Digest (transcribed in the so-called writing F) which had been copied directly from the digest in the 6th century. The digest had disappeared from Italian legal practice only to reemerge in Constantinople in the Byzantine empire, where it prevailed over the legal system until the fall of the empire in the 15th century. Prior to the re-discovery of the digest, its principles had only existed as (*vulgarrecht*) in Italy and other areas of the former Western Roman Empire. After the 11th century, however, the digest was the foundation of legal education at Bologna and other Italian universities. See Wesel (1997, 311-312).

¹¹⁵ Albeit universals which are predominantly in the Western tradition.

¹¹⁶ Indeed, in 1200, one thousand law students were registered at the University of Bologna, half of which were not of Italian nationality. Many of these scholars came from Germany. See Wesel (1997, 312 and 360).

¹¹⁷ It is arguable that the laws were not as neutral as they appeared to be as the legal reasoning inherent to Roman law was underpinned by economic objectives, namely, the safeguard of the production of goods which was at the apex of civilised society (*Bürgerliche Gesellschaft*). See F. Engels' letter to Karl Kautsky and Max Weber *Economy and Society* (1925) cited in Wesel (1984, 68-69).

¹¹⁸ Thus, according to the *ius territoriale* principle, no state could interfere in the affairs of another state.

¹¹⁹ Such as Family law, for example.

¹²⁰ Such as constitutional and administrative law and human rights.

¹²¹ Taking into account the fact that this may be a similar starting point and that different national values may continue to influence their interpretation.

¹²² This is the general notion espoused by two sociologists, Ramirez and Boli who write about mass education (they do not confine their findings to any particular branch of education) as the primary source of formal socialisation if the individual.

¹²³ See above.

¹²⁴ See Joschka Fischer's speech at the Humboldt University in Berlin on 12 May 2000 and Jacques Chirac's speech before the German *Bundestag* on 27 June 2000 in which both argue in favour of the drawing up of a European Constitution. See *Frankfurter Allgemeine Zeitung* of both the 15 of May 2000 and of the 28 June, 2000. The speech is reproduced at http://www.auswaertiges-amt.de/6_archiv/2/r/r000512b. See also Joerges, Mény and Weiler (2000).