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“Rashomon in Karlsruhe”

Paper presented at the DFG-Graduiertenkolleg „Verfassung jenseits des Staates“

2 July 2009, Humboldt-University Berlin

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* I wish to thank Imke Stanik for her help in preparing an English version of this text.

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Japanese director Akira Kurosawa rose to fame with his movie *Rashomon* (1950). Seven individuals witness the same murder, which each one of them recounts in a different way. The movie *inter alia* deals with the question of the existence of an objective reality.¹

Outline of a script: A *Rashomon Gate*, the setting is the palace grounds (*Schlosspark*) in Karlsruhe, right next to the German Constitutional Court (*Bundesverfassungsgericht, BVerfG*) – fade in caption: “Karlsruhe, 21st century, evening of June 30th, 2009...”²

NARRATOR (voiceover):

“Eight persons,³ among them perhaps even current and former judges of the German Constitutional Court as well as claimants of the Lisbon Treaty action, reflect on the Lisbon judgment of the Constitutional Court of June 30th, 2009.”

JUSTUS LIPSIUS (agitated):

“Well, okay, at least the Treaty as such is not halted. Apart from that: what a ghastly judgment. Just take the admissibility of the constitutional complaints: the Article-38-*Grundgesetz* (GG, Basic Law) construct of a constitutional right to a parliamentary representative having a say, that is, the constitutional democracy complaint, has been expanded even further. And that was already an absurd construct in the 1993 Maastricht-decision of the German Constitutional Court, where it came up for the

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¹ For more detail see D Richie (ed), *Rashomon*, 1987.

² Cf opening credits, *Rashomon*.

³ These are fictional characters.

first time. The constitutional complaint was invented to protect fundamental rights. And now Article 38 GG allows for constitutional complaints concerning Germany's statehood, the German constitution's principle of social justice and the welfare state, probably all constitutional principles, if only one manages to somehow construct a link to democracy.⁴ A foreseeable surge of complaints.

It is an introvert, retrograde, and in a sense very German judgment: actually, it is all about *Volk* (people) within the member state.⁵ There is no room for the emergence of democracy on the European level. Even the Maastricht judgment at least left a perspective for such a European democracy sometime in the future. In a first step, the independence of supranational forms of democracy is emphasised,⁶ only to show in a second step that these do not meet the standards of national democracy.⁷ Outrageous.

The European Parliament is downright deconstructed. The past 30 years of its development are completely ignored. An especially absurd piece of reasoning in the judgment: should there ever be a genuine election of the Commission by the European Parliament, this would apparently violate the GG. The judges seem to think that democracy is preserved though the intergovernmental. At the hearing, the issue of the alleged democracy deficit within the structure of the European Parliament (due to its unequal composition (setting of national quotas)), was not even discussed in any considerable detail.

There is an exclusively binary way of thinking in that judgment - either state or non-state. And this leads to the assumption that European democracy could only exist within a European federal state. Such a state, however, is only available via Article 146 GG, a new German constitution - to read this in a Constitutional Court judgment is also something new. A scaling of democracy beyond the state remains impossible.

Speaking of democracy: according to the judgment, democracy is foreclosed from being balanced against other constitutional elements, inviolable.⁸ And what about the five percent hurdle for political parties who participate in elections to the German Parliament?

The judgment departs from a foundational consensus of the Federal Republic of Germany: the establishment of a European federal state would have been possible even under the current constitution, according to the previous way of reading it.

The judgment is first and foremost concerned with sovereign statehood, not with the previous notion of open (public international law friendly) statehood. It comes down to saying "We are someone - again", using the language of constitutional law. Sad enough, this is a step backwards. Emphasising sovereignty at a

⁴ Paras 178 *et seq.*, 181 *et seq.*

⁵ Paras 229, 270.

⁶ Paras 219 *et seq.*

⁷ Paras 231 *et seq.* and 280 *et seq.*/para 289.

⁸ Para 216.

time of globalisation is not only outdated but also counter productive for the largest EU member state, which does not really have a need for doing so. What are they actually afraid of? The German constitution, on that note, does not even contain any reference to sovereignty or statehood.

Moreover, the judgement's concept of sovereignty is ludicrous: sovereignty is basically presented as a licence to break the law, to violate public international law obligations.⁹ It is no surprise, therefore, that in this context a monograph dating 1888 must serve as a reference¹⁰ and that a view drawn from the local law of municipalities¹¹ is used to argue against the much more realistic concept of 'autonomy'. True, they speak a lot of *Volk* (people), but all of this is state-centred really, merely concealed by 'people'.

The 'dynamic integration provision' (currently Article 308 EC) is dead. If they have such a huge problem with Article 308 EC, the Constitutional Court should simply have said from the outset that the federal government must never participate in the use of Article 352 Treaty on the Functioning of the European Union. The procedures designated by the Court¹² are not going to work; this and the consequences of the ongoing destruction of Article 308 EC, is another issue which should have been discussed at the hearing. Annually, more than 30 legislative acts are based on Article 308 EC - and useful ones like ERASMUS or merger control. The provision is important. Thus, there will be a solution, such as an increased use of Article 95 EC, the common market provision.

Strengthening the *Bundestag* (Parliament) may appear to be well intended, but it happens at the expense of the European Parliament, and in the end the German *Länder*, via the *Bundesrat*, a sort of second chamber, probably are the real winners. And isn't that new concept of *Integrationsverantwortung*, the "parliamentary responsibility for European integration", just masking the fact that the judgement is all about confirming the Constitutional Court's grip on European integration, and the judges' final say on Germany's path in Europe?

It is a wary and hostile judgment, which uses so-far-and-no-further-blockades wherever possible and which wants to make sure that the Court has access to European law at all times. There is no more reference to the 'relationship of cooperation' with the European Court of Justice (ECJ), which the Maastricht judgement had mentioned. We will witness a blockade of the further development of European Union law, with the foreseeable effect of an increased use of the informal and the intergovernmental. In other words: even more open method of coordination, even more intransparent intergovernmentalism.

The arrogation of a unilateral ultimate decision-making power concerning European *ultra vires* acts (acts breaking out of the

⁹ Para 340.

¹⁰ Para 223.

¹¹ Para 231.

¹² Para 325 et seq.

boundaries of European powers, *ausbrechende Rechtsakte*) already laid down in the Maastricht judgment already by the Constitutional Court has never been reconcilable with Germany's legal obligations emanating from the European Treaties: it is unacceptable that the German Constitutional Court should declare European legislation - which is binding law for all 27 member states - inapplicable in Germany. The German court lacks the necessary European law expertise, to begin with. With the Lisbon judgment, the whole thing is expanded even further.¹³ In addition to controlling *ultra vires* acts, explicitly including ECJ judgments,¹⁴ the Constitutional Court now also intends to monitor EU acts for infringements of the national constitutional identity. This will probably put an end to the balance created by the '*Solange II*' jurisprudence as well as to the stability of the relationship between German constitutional law and European law in the realm of fundamental rights; fundamental rights problems are simply going to be declared identity problems.

In addition to all of this, the judgement demands that a new type of proceeding for the two types of control be established under German law - the Court, through this self-aggrandisement, contradicts its own emphasis of the significance of Parliament. The Constitutional Court as the chief watchdog in Europe, whom other Courts are soon going to emulate, with disastrous consequences. This is the spirit of discord for European integration.

It is unacceptable that eight quite indirectly democratically legitimated individuals, who happen to be members of the Constitutional Court, decide on the future of the European integration process. Before there is a *guerre de juges*, for which nobody within the EU has any use, there has to be a political decision. Parliament, the *Bundestag*, should finally put an end to the *gouvernement de juges* by statutory amendment or - if that is not possible - by establishing a third Constitutional Court Senate, in charge of public international and European law, composed of judges who know what they're doing. Perhaps these judges could then exercise the constitutional identity control after all, in a judicial conversation with the ECJ.

Finally, I wonder whether the approach of the Constitutional Court makes any sense at all: in the end, their concern is all about the inalterable core of the Constitution, Article 79 paragraph 3 GG as the ultimate stop sign to Germany's participation in European integration. The reasoning is that what is precluded from alteration by constitutional amendment is also 'integrationproof'. Yet wasn't Article 79 paragraph 3 GG primarily designed to protect the Germans from themselves, from a relapse into inhuman dictatorship, bondage and tyranny? Using this provision against Europe, where almost nothing else - at least from the point of view of our neighbours - has prevented more effectively the relapse of Germany into dictatorship, bondage, and tyranny than our participation in European integration, is - to say the least - remarkable."

¹³ Para 240.

¹⁴ Para 338.

OPTIMISTICA:

"It is a good judgement for Europe, not only because the Treaty of Lisbon is compatible with the GG, and not only because the *Bundestag* is finally strengthened vis-à-vis the government.

The *Bundestag* now has certain managerial prerogatives vis-à-vis government in European affairs, and government is constitutionally obliged to inform the *Bundestag* adequately, e.g. concerning WTO policy.¹⁵ This is new and significant.

The few changes to be made to the accompanying legislation actually carry no real weight, because the simplified treaty amendment and *passerelle* mechanisms are never going to be used anyway, which the failed attempts to activate their predecessors have clearly demonstrated in the past. However, for Parliament this is quite an opportunity.

It is necessary to read the details and between the lines, for the judgement goes beyond the Maastricht judgement and improves a number of things.

The ultimate goal of a federal European state is recognised for the first time. At the same time, the declarative statement that at the moment and with the Treaty of Lisbon there is no such European state yet, is helpful for ratification debates in the Czech Republic and elsewhere. Generally, the judgment insists very markedly on the advantages of European integration, that is, maintaining peace and strengthening the political scope for design through common action.¹⁶ The greatest successes of European integration are acknowledged as such.¹⁷

The judgment explicitly affirms that there is no choice when it comes to participating in European integration; in Germany, it is a constitutional obligation.¹⁸

The judgement emphasises several times that the principle of European law friendliness now forms part of Constitutional Court jurisprudence.¹⁹ Loyal cooperation is also mentioned. They even bring up the c-word: As a matter of course the judgement speaks of a functional Constitution on the European level.²⁰ The existence of an independent political decision-making process on the European level as well as the objective of a political union is also accepted. The judgement clearly gives up concepts of hierarchy in favour of a non-hierarchical system.²¹ The Maastricht judgement's fixation upon the *Staat*, the state, has disappeared, the individual takes centre stage. Carlo Schmid²² is cited, not Carl Schmitt. The judgement's clear statement that the EU does not have to be constituted the way states are constituted, i.e.

¹⁵ Para 375.

¹⁶ Paras 220 *et seq.*

¹⁷ Para 251.

¹⁸ Para 225.

¹⁹ Para 225.

²⁰ Para 231.

²¹ Para 340.

²² Para 231.

that the EU constitution is not necessarily a copy of nation state constitutions, is highly significant.

The judgement also clearly states that the *Grundgesetz*, which is open to European integration, by no means requires a determinable sum or specific types of sovereign rights to remain in the hands of the nation state.²³ Collectively exercised public power may very well extend to the traditional core of national competences - especially where transnational issues are concerned.²⁴ The 80 percent myth - supposedly, 80 percent of national legislation is Europeanised one way or another - is irrelevant, the judgement says.

The judgement also finally clarifies that a potential national reserve jurisdiction (action against *ultra vires* acts) rests solely with the Constitutional Court (monopoly), that this jurisdiction is highly restricted and will only be exercised exceptionally in evident cases.²⁵ This reserve jurisdiction is to engage only, verbatim: "if legal protection is unavailable on the Union level,"²⁶ that is, in plain language, if the ECJ has been consulted, and the judgement emphasises that the *Grundgesetz's* European law friendliness must be taken into account in this context.²⁷ Apparently, the Constitutional Court also has *Integrationsverantwortung*, a responsibility for European integration.²⁸ This is new and much better than in the Maastricht judgement. In general, the judgement finally gives reasons for a number of issues the Maastricht judgement left unsubstantiated.

The judgement's considerations - not demands: "conceivable" - on the introduction of one or two new types of proceedings for constitutional identity control and/or *ultra vires* control²⁹ open up an opportunity for the democratically legitimised, politically - including European policy - responsible German legislator to simply proscribe any jurisdiction of the Constitutional Court or to link it to an obligatory preliminary ruling of the ECJ on the matter. It is most likely going to be fairly simple to distinguish *ultra vires* control and constitutional identity control: European law by its very nature cannot determine national constitutional identity.

Primacy of European law is confirmed several times. Looking closer, one realises that the reach of primacy is conceptualised as ending at the limits of Article 79 paragraph 3 GG (the inalterable core of the Constitution, cf supra),³⁰ which seems to mean that primacy is accepted for the rest of the Constitution. Another new aspect is that the reasoning on constitutional identity control and *ultra vires* control is based not only on constitutional law, but also on European law.³¹

²³ Para 248.

²⁴ Para 248.

²⁵ Para 340.

²⁶ Para 240.

²⁷ Para 241.

²⁸ Paras 240 *et seq.*

²⁹ Para 241.

³⁰ Paras 240, 332.

³¹ Headnote 4 and para 240: reference to Article 4 II 1 EU Lisbon.

The judgement also clarifies that European Parliament and Council must not be looked at through national spectacles. It concedes that the Lisbon Treaty strengthens participatory democracy and that a European public is developing.³²

Moreover: the merits of the ECJ concerning the establishment of a social Europe are acknowledged."³³

BRUTUS:³⁴

"I am perfectly content - the Treaty is dead. Most crucial is the link and the conditionality established in the judgment between amending the accompanying German legislation and depositing the German ratification documents.³⁵ First, the legislation has to enter into force, then, Germany may deposit the ratification documents. This ensures that the Lisbon Treaty will never enter into force:

Surely the *Bundesrat* is finally going to intervene. If nothing else does, this is going to lead to long and complicated negotiations on the scope and content of the new accompanying legislation. Possibly, a constitutional amendment will be discussed, e.g. to establish the new proceedings for constitutional identity and *ultra vires* control provided for by the judgement.

Perhaps the government will even have to take the new accompanying legislation to the Constitutional Court for an abstract judicial review, in order to prevent excessive restrictions of its rights. In any case, one of the Lisbon Treaty action claimants is surely going to file proceedings with the Constitutional Court again; the new legislation will not enter into force, another judgment will be necessary before Germany can ratify. Germany is not going to be able to ratify the Treaty before 2010, and until then the UK is going to have a new government, which will withdraw British ratification. Then, the Lisbon Treaty is finished - fortunately."

BRUTALUS (MACHIAVELUS), laconically:

"It is all about power in Europe. One must run rings around the EU, and especially the ECJ. We are a sovereign state and will only take part in matters on the European and international level that are within our interests. The Maastricht judgement had already established the foundation for this, through the concept of controlling *ultra vires* acts of the EU. Unfortunately, this control has never been activated. Yet things are

³² Para 251.

³³ Para 398.

³⁴ Cf The Anti-Federalist, 1787/88.

³⁵ Cf para 128.

going to change now. Control of European acts, naturally first and foremost those of the ECJ, will become tangible. The possibilities for control are even expanded to include a constitutional identity control. The judgement even suggests establishing a new type of proceedings for this control, which would require a constitutional amendment of Article 93 GG, the list of Constitutional Court proceedings. It is possible that this may cause trouble, but a decision finally needs to be made about power in Europe.

The ECJ's time as the 'engine' of European integration is over. The data retention issue and the post-Mangold case Honeywell are proceedings pending in Karlsruhe that provide an opportunity for the Constitutional Court to actually control the ECJ, which it will undoubtedly use. The only question is which one of the Court's two Senates is faster.

And let's be frank: Politics actually likes this. Isn't it conceivable that negotiations in Brussels become much easier from a German point of view if one hints at the German Constitutional Court's reserve jurisdiction at the right time?"

DEMOCRATICUS (with a very traditional understanding of democracy):

"All state authority is derived from the people. There is no way around it. Democracy is based on the people of a state, in this case the member state; there is just no other way to conceive democracy.

Therefore, the European Parliament cannot possibly convey democracy.³⁶ This is never going to change. On the European level, they may name themselves as they please, but they are not a real representation of the people, due to their unequal composition.³⁷ A representation of the peoples, not a representation of the people. Calling the European Parliament a representation of EU citizens is really only a ploy,³⁸ for the EU citizen is not a suitable subject of democratic attribution on the European level.³⁹ The population, which includes all residents, likewise is an unsuitable subject of attribution, because what matters is the act of election with a view to an equal participation in the exercise of public powers.⁴⁰ This may sound somewhat simplistic, but the Constitutional Court simply cannot disregard its entire prior case-law on democracy and demos, in particular the decision on voting rights for foreigners.

What's important, therefore, is the *Bundestag*, as it is the constitutional entity that is constituted directly according to the principles of free and equal elections - not so much the *Bundes-*

³⁶ Paras 271, 276 et seq, 295.

³⁷ Para 284.

³⁸ Para 280.

³⁹ Paras 347 et seq.

⁴⁰ Para 292.

rat, where the *Länder* are represented. Perhaps I've got a misty-eyed, romantic idea of the national Parliament. Yet only the *Bundestag* is capable of democratically justifying the European construct.

All of this also justifies that violations of the democratic principle can be reprimanded via Article 38 paragraph 1 GG by means of the constitutional complaint, that normally allows to invoke fundamental rights only;⁴¹ the judgement does not change the fact that any constitutional complaint based on Article 38 GG must establish a link to the principle of democracy.

The judgement actually creates a unique experimental design for this summer under optimal, almost laboratory conditions: when re-writing the legislation that accompanies the Treaty of Lisbon in Germany, Members of Parliament (of the *Bundestag*) act in conditions of insecurity, in a way under a veil of ignorance, because they cannot predict whether they will be members of government or opposition after the elections. They are pushed for time, due to the British situation. And: due to the circumstances, the executive (ministerial bureaucracy) is neutralised, incapable of wielding the pen for Parliament this time.

If not now, when will the *Bundestag* codify its rights?

Of course, one must not get carried away and disturb the balance between the legislative and the executive branch: the judgement also clearly states that all German constitutional institutions have a lasting responsibility for European integration.⁴²

The Lisbon judgement is not really about the state - that is the Maastricht judgement's thinking, old thinking. It is essentially about the individual, although not to the extent of allowing for an individualised understanding of democracy. It is also about sovereignty,⁴³ the question of the right measure of freedom and obligation. Even the constitutional state does not allow for reckless self-importance and unbound individualism. Just as the individual is bound e.g. by marriage, the state is bound by international law. Sovereign statehood means to be able to break these bounds by breaking the law. This is where the analogy to the freedom and bonds of marriage must fail, for naturally there is no licence to commit adultery."

PAULUS:⁴⁴

"Open statehood, the German constitution's self-perception as being open for the international, was never more than the description of a problem. Sovereign statehood is the sovereign an-

⁴¹ Paras 173-177.

⁴² Para 245.

⁴³ Para 220.

⁴⁴ A type of Günter Netzer (a German football hero who has become the standard TV expert of the national football team's games) of German constitutional law doctrine; his signature feature are constitutional law comments from the sideline.

swer of the state to this problem. The Lisbon judgement seamlessly continues where the Maastricht judgement left off. The concept of *Staatenverbund* (compound of states, between federation and confederation), introduced by the Maastricht decision, is asserted. It emphasises the *sui generis* nature of the European. The Lisbon judgement defines the *Staatenverbund* and uses the concept. The citizen's freedom conceptually unfolds within the *Staatenverbund*, and within it alone. The citizen commits himself within the state and through the state. Therefore, the judgement is a judgement for the citizen, but also for the state.

The Court says literally:⁴⁵ the concept of *Verbund*, compound, implies a close, durable connection of sovereign states, which exercises public powers on a contractual basis, whose basic structure remains solely at the disposal of the member states and in which the peoples of the member states - that is, the member states' nationals - remain the subjects of democratic legitimisation. - The Maastricht judgement is alive, and it is all about the state after all. Solely about the state."

NATIONALUS:

"It is the entire direction of European integration that I don't like. And I am not the only one. What matters is preserving the national, that's where there is cohesion. The European is subordinate; it is a political sphere of secondary importance, perhaps only a passing phenomenon. That is why the judgement is right in emphasising the protection of national identity and in asserting a possibility for constitutional control in this context.

At last, the judgment establishes an enumeration of what must remain at the national level, the indispensable minimum, which has to do with preconceptions or where political discourse and public opinion are essential.

These are,⁴⁶ inter alia, citizenship, the state's civil and military monopoly on the use of force, fiscal decisions on revenue and expenditure, including government borrowing. There can be no question of introducing a European tax: according to the judgement, the sum of encumbrances on the individual must be determined on the national level. The same applies to those intrusions which are relevant for the realisation of fundamental rights, especially intensive intrusions such as imprisonment as a criminal justice measure or committals. Today, it is no longer merely a question of the free movement of goods and e.g. mushroom preserves, as it had been in 1974 (in the *Solange I* case). Today, we are concerned with *habeas corpus* questions. The judgement states that anything pertaining to criminal justice must be interpreted restrictively on the European level. Cultural ques-

⁴⁵ Para 229.

⁴⁶ Paras 249, 252, 256-260.

tions, such as language or family and educational affairs, are also among those subject matters that must not be transferred to the European level. A harmonisation of school curricula on the European level is therefore proscribed.

The regulation of the freedom of opinion, press and assembly, the treatment of religious and ideological creeds as well as basic decisions on welfare policy are also on the list.

All of this happens to correspond to those policy areas which have not yet been Europeanised. True, since Bodin, currency is among the "*marques de souveraineté*." However, we've already given up our monetary sovereignty. This far and no further."

PUBLIUS (a true⁴⁷ federalist):

"*Bundesrat* and the *Länder* were not intensively involved with the proceedings. Therefore, I have had little interest in it so far. However, the rewriting of the accompanying legislation now is an opportunity for the *Länder* to assert long-standing interests vis-à-vis the federal state. After all, the *Länder* need to give their consent to the legislation in order for it to pass. Admittedly, very much like the EP, the *Bundesrat* is also unequally composed if one applies the Constitutional Court's strict democracy standards. Yet the Constitutional Court has its difficulties anyway with classifying second chambers, which the misclassification of the US Senate as 'no representation of the people' proves.⁴⁸ Moreover, the touching up of the accompanying legislation admittedly is actually about democracy, not about federalism, so that the *Länder* really should only play a minor part in its drafting.

But perhaps nobody will notice, if they do otherwise - in any case: there is a long list of wishes of the *Länder* when it comes to having a say in European affairs, which have been disregarded thus far. The most important issue: In matters that are *Länder* competence, federal government must be obliged to represent the *Länder's* position in Brussels as it is prescribed by them, and not just 'essentially consider' it. The government's capacity to act is really only a spurious counter-argument here.

Apart from Brussels: one must improve the shining hour and secure positions and approval requirements, which can then be used to the advantage of the *Länder* in future negotiations and package deals between *Länder* and the federal level: the consent of the *Bundesrat*, where it is required by the numerous new Article 23 GG requirements introduced with the Lisbon Treaty, will not be handed to the federal government and the *Bundestag* on a silver platter."

⁴⁷ Dissenting: Publius, in: The Federalist [Papers], 1788.

⁴⁸ Para 286.

NARRATOR (voiceover):

A long-standing practitioner of the "reality of the political power play"⁴⁹ in Bonn/Berlin, Brussels and Luxembourg observed everything. He turns away and shakes his head.

Rain.

---THE END---

⁴⁹ Para 205.