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Sovereignty Lost, Sovereignty Regained? Some Reflections on the Bundesverfassungsgericht's Bananas Judgment

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Abstract

The purpose of this article is to evaluate the role of the German Federal Constitutional Court (BVerfG) 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 BVerfG 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.

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I. INTRODUCTION

Law is a normative order that is customarily understood in terms of a hierarchy.¹
In the German legal system, for example, the hierarchy consists of the Basic Law, Federal

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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 growing number of substantive EC law subject matters, which traditionally resided within the exclusive competence of the member states, but which now have been pooled through *Europeanization*. Immigration law³ and policy,⁴ is a case in point; the single currency is another.⁵ In effect, member states no longer have absolute sovereignty over these issues in the sense envisaged by the Treaty of Westphalia.⁶ The constitutional courts of the respective member states, however, are still in the process of coming to terms with this decline in sovereignty.⁷ Indeed, the constitutional courts as influential actors in the integration process have, in their own way, contributed to the politicization of the sovereignty debate and have helped to perpetuate the view of the age of absolute sovereignty as 'paradise lost'.⁸

¹ Through, for example, the doctrine of precedent housed in the English legal system or the *Anwendungsvorrang* in German law. See Hans Kelsen, *Pure Theory of Law* (Max Knight, trans., 1967) (1960).

² *Costa v. ENEL*, Case 6/64, 1964 E.C.R. 585. However, this principle has been qualified by the *Maastricht* judgement of the German Constitutional Court. See *Entscheidungen des Bundesverfassungsgerichts* [BverfGE] 89, 155.

³ See generally Jörg Monar, *Justice and Home Affairs in the Treaty of Amsterdam: Reform at the Price of Fragmentation* 23 *E. L. Rev.* 320 (1998). Bernd Marschang, *Mißtrauen, Abschottung, Eigensinn - Entwicklungslinien der europäischen Asylrechts » harmonisierung « bis zum Amsterdamer Vertrag*, *Kritische Justiz* 69 (1998). Ralph Göbel-Zimmermann & Thorsten Masuch, *Regelungsbedarf für eine Einwanderungsgesetzgebung ?*, 31 *Zeitschrift für Rechtspolitik* 435 (1998). Andreas Zimmermann, *Der Vertrag von Amsterdam und das deutsche Asylrecht*, 17 *Neue Zeitschrift für Verwaltungsrecht* 450 (1998). Kay Hailbronner & Claus Thiery, *Amsterdam - Vergemeinschaftung der Sachbereiche Freier Personenverkehr, Asylrecht und Einwanderung sowie Überführung des Schengen-Besitzstands auf EU-Ebene*, 5 *Europarecht* 583 (1998).

⁴ See *Challenges to the Nation-State: Immigration in Western Europe and North America* (Christian Joppke ed., 1998). See also Gallya Lahav, *Immigration and the State: the Devolution and Privatisation of Immigration Control in the EU*, 24 *J. Ethnic and Migration Stud.* 675 (1998).

⁵ See *Legal Framework of the Single European Currency* (Paul Beaumont and Neil Walker eds., 1999).

⁶ Arising from the *Treaties of Westphalia* (1648). See Andrew Linklater, *The Transformation of Political Community: Ethical Foundations of the Post-Westphalian Era* (1998).

⁷ See for example the French *Conseil Constitutionnel's* decisions concerning the *Maastricht Treaty* and the *Treaty of Amsterdam*: 'Maastricht I' decision from April 9, 1992, Nr. 92 - 308 DC, and also Decision Nr. 97 - 394 DC, *Journal officiel de la République Française* from January 3, 1998, 165 et seq. (AJDA, 186 et seq., 1998). See generally Susan Millns, *The Treaty of Amsterdam and Constitutional Revision in France*, 5 *EPL* 61 (1999) and also Anne Bonnie, *The Constitutionality of Transfers of Sovereignty: the French Approach*, 4 *EPL* 517 (1999).

⁸ See John Milton, *Complete Poems and Major Prose* (Merritt Y. Hughes ed., 1957).

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.⁹ With regard to sovereignty and the EU, loss has also been instrumentalized 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’.¹⁰ In the light of European integration and the increasing interdependence between states,¹¹ others take a more pragmatic view of the sovereignty of the nation-state as being ‘pooled’¹² at the supra-national level.¹³

Law has played a part in both scenarios; it has been instrumentalized to reflect both views of the role of the nation-state in European Integration. Indeed, the concept of the nation-state is a vital premise of the legal reasoning that forms the basis of the incorporation of EC law into the jurisdictions of the member states. The underlying tension is as follows: either a state’s membership in 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 to set the supremacy doctrine aside in certain situations. Thus, even if a member state accepts that its sovereignty is qualified by its membership in the EU, it is by no means an unconditional qualification. These two positions represent two versions 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 community,¹⁴ which, in contrast to the academic communities of other member states of

⁹ See, e.g., Saskia Sassen, *Losing Control? Sovereignty in an Age of Globalization* (1996).

¹⁰ Thus, for example, the sovereignty debate in the United Kingdom resolved ostensibly by the *Factortame* decision (See *Regina v. Secretary of State for Transport, Ex Parte Factortame Ltd.* [1990] 2 A.C. 85. See also *Regina v. Secretary of State for Transport, Ex Parte Factortame Ltd. (No2)* [1991] A.C. 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.

¹¹ See, e.g., the concept of interdependence sovereignty espoused in Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* (1999).

¹² Neil MacCormick, *The Maastricht-Urteil: Sovereignty Now*, 1 *Eur. Law J.* 259 (1995). See also Neil MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (1999).

¹³ See Jürgen Schwarze, *Concept and Perspectives of European Community Law*, 5 *EPL* . 227, at 236 (1999) and also Dieter Grimm, *Die Zukunft der Verfassung in Zum Begriff der Verfassung: Die Ordnung des Politischen*, at 279 (Ulrich K. Preuss ed., 1994).

¹⁴ Kokott refers to this as *La Doctrine* which, in her opinion, is composed of professors of public, European, and international law including former and future justices. See Juliane Kokott, *Report on Germany, in The European Courts and National Courts: Doctrine and Jurisprudence* 77, 79 (Anne-Marie Slaughter et al. eds., 1998).

the EU, acts as a source of influence on the jurisprudence of the *Bundesverfassungsgericht* or German Federal Constitutional Court (“BVerfG”),¹⁵ which in turn has considerable influence on the European integration process. On the one hand, the role of the court should not be overstated, particularly given the institutional constraints placed on judges. On the other, it is the role of the national constitutional courts of the member states of the EU to articulate the relationship between EC law and national law in an ongoing debate, characterized by shifting normative relationships that are predicated on the issue of the fundamental legitimacy of political power.

II. SOVEREIGNTY AND THE FEDERAL REPUBLIC OF GERMANY POST-1945

Germany had a unique status under public international law after the Second World War.¹⁶ Subsequent to the German capitulation on May 8, 1945, the Four Powers (France, the Soviet Union, the United Kingdom and the United States) assumed the supreme authority in Germany as provided by the Allied Declaration of June 5, 1945.¹⁷ In effect, the military commanders of the four Allies administered their respective zones independently, but acted jointly through the Inter-Allied Control Council with regard to all matters that related to the country as a whole.¹⁸ The “Settlement Convention”¹⁹ was

¹⁵ 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. See *id.* at 79. Historically, universities have 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 Corp. v. Cansulex Ltd.* [1987] A.C. 460, 488 notwithstanding. 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.

¹⁶ See case of Prince Hans-Adam II of Liechtenstein v. Germany (European Court of Human Rights, Application no. 42527/98), Judgment of July 12, 2001 at <http://hudoc.echr.coe.int/Hudoc1doc2\HEJUD\200108\hans-adam%20ii%20%2042527jnv.gc%2012072001e.doc> (last visited 10/8/02), in which Germany’s position under public international law is outlined. This section draws from M Aziz, ‘Sovereignty über Alles : (Re)Configuring the German Legal Order’ in Neil Walker (ed) *Sovereignty in Transition*, Hart Publishing 2002 (Forthcoming).

¹⁷ Declaration regarding the defeat of Germany and the assumption of supreme authority in Germany and the assumption of supreme authority with respect to Germany by the Governments of the United States of America, the Union of Soviet Socialist Republics, the United Kingdom and the Provisional Government of the French Republic, June 5, 1945, 68 U.N.T.S. 190.

¹⁸ Such as military matters, transport, finance, economic affairs, reparations, justice, prisoners of war, communications, law and order as well as political affairs.

designed to end the Occupation Regime.²⁰ Article 1 of Schedule I of the Settlement Convention provides that the Federal Republic of Germany is accorded “the full authority of a sovereign State over its internal and external affairs”.²¹ However, Article 2 provides that the Three Powers retain their rights “relating to Berlin and to Germany as a whole, including the reunification of Germany and a peace settlement.”²²

The Settlement Convention had a considerable impact on the administration of justice. For example, whereas the Federal and the Land authorities were given powers to repeal or amend legislation enacted by the Occupation Authorities, rights and obligations created or established under legislative, administrative or judicial action of the Occupation Authorities remained valid for all purposes under German law.²³ Furthermore, German courts were barred from prosecuting individuals who sympathized with or aided the Three Powers or their Allies. This limitation on German jurisdiction was intended to ensure that acts undertaken by the Allies during the German occupation were not questioned retroactively.²⁴ In order to regain the full status of a sovereign state, Germany had to accept such restrictions on the jurisdiction of its courts both in 1954 and in 1990. To quote a decision of the European Court of Human Rights in July of this year,²⁵ Germany had “no choice.” Indeed, the limitation of Germany’s jurisdiction was absolute and a *force majeure*.²⁶

¹⁹ The Convention on the Settlement of Matters Arising out of the War and the Occupation (hereinafter the Settlement Convention), which was one of the “Bonn Conventions” signed by France, the United States of America, the United Kingdom and the Federal Republic of Germany at Bonn on May 26, 1952. See Convention on the Settlement of Matters Arising out of the War and the Occupation, May 26, 1952, 6 U.S.T. 4411 and Bundesgesetzblatt, Teil II (BGBl. II), v. 31.3.1955 at 405 et seq.

²⁰ The Bonn Conventions did not enter into force but were amended in accordance with the five Schedules to the Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany which was one of the “Paris Agreements” which were signed in Paris on October 23, 1954. See Protocol to the North Atlantic Treaty on the Accession of the Federal Republic of Germany, October 23, 1954, 6 U.S.T. 5707.

²¹ See the Settlement Convention, supra note 19.

²² See the Settlement convention, supra note 19.

²³ The same applied to rights and obligations arising under treaties or international agreements which had been concluded on behalf of the three Western Zones of Occupation by the Occupation Authorities or by the Governments of the Three Powers. See the Settlement Convention, art. II, § 2.

²⁴ This exclusion was maintained in the Exchange of notes constituting an agreement concerning the Convention on relations between the Three Powers and the Federal Republic of Germany of 26 May 1952 and the Convention on the settlement of matters arising out of the war and the occupation of 26 May 1952 [Agreement of September 27/28], September 27 & 28, 1990, 1656 U.N.T.S. 30, following the Treaty on Final Settlement with Respect to Germany [Two-Plus-Four-Treaty], Sept. 12, 1990, 1696 U.N.T.S. and Bundesgesetzblatt, Teil I (BGBl. I), v. 9.13.1990 at 1308 et seq.

²⁵ See the concurring opinion of Judge Ress and Judge Zupancic in *Prince Hans-Adam II*, supra note 16.

²⁶ *Id.*

One of the basic principles of medieval theories of sovereignty is *par in parem imperium non habet* (an equal cannot exercise power and jurisdiction over an equal),²⁷ which refers to the authority of a ruler to change, promulgate, or abolish law in the jurisprudence of the *Ius commune*.²⁸ This principle was reformulated in the 19th Century during the period of state formation when the power of the state to regulate all its matters was considered paramount.²⁹ The sovereign power to administer justice remains a central concern in German administrative law, just as the emphasis placed by some German constitutional lawyers on the unity of the state³⁰ has been transposed from constitutional law into the debates concerning German administrative law.

In 1990 the Four Powers negotiated to end the reserved rights of the Four Powers in Berlin and Germany as a whole. The Treaty on the Final Settlement with respect to Germany (the so-called “Two-Plus-Four Treaty”) signed in Moscow on September 12, 1990 confirmed the borders of the united Germany (Article 1), ended the rights and responsibilities of the Four Powers relating to Berlin and to Germany (Article 7) and in effect gave Germany full sovereignty over its internal and external affairs.³¹ The shift from Germany having what was referred to in 1955 as the “rights inherent in a sovereign state” to Germany being referred to as a “sovereign state” gave rise to a distinction between *de facto* and *de jure* sovereignty.³² Calhoun draws a parallel distinction between sovereignty and the exercise of sovereign rights, which he bases on the divisibility of sovereign rights.³³ Calhoun recognizes that a division of powers is not necessarily sovereignty’s undoing; he does, however, expressly refute the notion of a divided sovereignty.³⁴ Sovereignty was noticeably linked to state building in Germany, but the 19th century approach of tying sovereignty to the state was reversed in the 20th century. Thus, the sovereign powers ordinarily accorded to a state were not accorded to Germany

²⁷ See Guido’s second part of his Gloss in which he commentates Justinian’s Digest.

²⁸ Note that *Nec magistratibus* and *Tempestivum* were two of the *loci classici* where the jurists discussed this doctrine of legislative sovereignty.

²⁹ See Oliver Lepsius, *Steuerungsdiskussion, Systemtheorie und Parlamentarismuskritik*, at 17 et seq (1999).

³⁰ See Joseph Isensee, *Staat und Verfassung* in Joseph Isensee & Paul Kirchhof, *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, § 13 (Heidelberg, 1987). [hereinafter *Handbuch des Staatsrechts*]

³¹ See Two-Plus-Four-Treaty, supra note 24. The Treaty entered into force on March 15, 1991.

³² Which is referred to in German as *faktische* or *rechtliche Souveränität*.

³³ This is not to be confused with divided sovereignty. See Franz C. Mayer, *Kompetenzüberschreitung und Letztentscheidung*, at 286 et seq. (2000).

after 1945. Several observations can be made: the more “independent” Germany became from the Allies, the more sovereignty it regained; the more important sovereignty became to the community of German jurists, the more a tension became visible in the legal debate on the effects of European integration. Furthermore, sovereignty was not vested in the state, but as Article 20(2) of the Basic Law provides, in the people.³⁵ The main characteristics of a sovereign state have customarily been held to be its territory, its people and its government.³⁶ The German example is interesting because the territory was contested (particularly with regard to the existence of the German Democratic Republic), and the powers of the German Government were constrained by the Allies. In contrast, the sovereign right to define the German people remained untouched. As the discussions concerning dual citizenship have shown, the fact that citizenship was one area over which the Federal Republic was accorded sovereignty is one reason why citizenship is considered so important in Germany.

Sovereignty has never been taken for granted in Germany, on the contrary, it has always been questioned and contested.³⁷ Sovereignty has always been desired in Germany because it is seen as unattainable. If one can legitimately speak of ‘desiring sovereignty’ in the German context, then it makes sense to distinguish two forms of desire. Either one desires something that one once had but has lost, or one desires something that one never possessed; both forms of desire are predicated on aspiration. In the case of Germany, reclaiming or claiming sovereignty³⁸ – whichever way one chooses to look at it – has traditionally been aspired to by German constitutional lawyers who view it as an essential pre-requisite to state formation.

The consequences of Germany’s desire for sovereignty have been mainly two-fold. First, much significance has been attached to internal sovereignty, or in other words,

³⁴ John C. Calhoun, *A Disquisition on Government and a Discourse on the Constitution and Government of the United States* (Richard K. Cralle ed., 1851), at 146.

³⁵ Which provides that “All public authority emanates from the people. It shall be exercised by the people through elections and referendums and by specific legislative, executive and judicial bodies.” All translations of the German Basic Law are taken from *Basic Law for the Federal Republic of Germany, Official Translation* (Press and Information Office, 1995).

³⁶ Julie Marie Bunck & Michael Ross Fowler, *Law, Power and the Sovereign State: The Evolution and Application of the Concept of Sovereignty* (1995), at 33.

³⁷ *Supra* note 16.

³⁸ The distinction being made here is that the *Kaiserreich* and the Third Reich were sovereign states. By contrast, the Federal Republic of Germany was never a fully sovereign state.

the state's power to regulate its own affairs. Second, external sovereignty, or the state's ability to act in the world arena, has been viewed as paramount. The word paramount is used intentionally to denote the *sui generis* nature of the German example because it is other states recognition of Germany as a sovereign state that has both formed and informed the German juridical debate over sovereignty. It is notable that prior to (re)unification, both West Germany and the German Democratic Republic (GDR) responded to the constraints enforced by limited sovereignty (West Germany to the Four Powers, the GDR to the Soviet Union) in a similar manner, albeit in different contexts and within different structural parameters.³⁹ External recognition of statehood was of paramount importance to each state. Social, cultural, political and historical factors have each contributed to what must be regarded as part of an evolution. In Germany, it is not conceptions of sovereignty that have changed, but the parameters. Thus, in 1990, when Germany was (re)unified, and the reserved rights of the Four Powers (France, the United Kingdom, the Soviet Union and the United States) were relinquished, German jurists, depending on their perspective, either felt that Germany had regained its sovereignty or that it had become sovereign for the first time.

Ironically, this (re)assumption of sovereignty took place against the backdrop of European Monetary Union, which obligated some EU member states to cede sovereignty over their respective currencies, and, more generally speaking, globalization, where international obligations were increasingly placing limitations on the sovereignty of states. A further irony is that as state sovereignty has evolved into a relative concept; a significant portion of the German juridical debate has responded by over-emphasizing the sovereignty of the German state, placing it over and above Germany's European and international commitments as part of a crusade against the 'withering away' of the state. The issue of loss informs much of the debate concerning the effects of European integration on sovereignty, a trend that goes hand in hand with the debate concerning the effects of globalization on the sovereign state.⁴⁰ What is significant in the German example is the obsession by German jurists with the issue of the ultimate arbiter in relation to the impact of European law on German law. Indeed, the very wording, *the impact of European law on German law* could be attributed to those jurists who regard

³⁹ Supra note 16.

⁴⁰ See, e.g., Sassen, supra note 9.

EU law and German law as representing two separate legal orders. Those jurists who regard European integration as giving rise to one legal order represent a minority in a debate that, as I have noted elsewhere, is extremely divisive.⁴¹ Indeed, the pragmatic view of ‘pooled’ sovereignty⁴² in light of the increasing interdependence between states⁴³ at the supra-national level represents a conceptualization of sovereignty that is underrepresented in the German legal debate.⁴⁴

The absence of pragmatism can be partially explained by the historical context. For instance, the Treaty of Versailles (1919) was regarded as a provocation by even the most levelheaded German jurists because it severely constrained Germany’s powers. Herman Heller, for example, claimed the Treaty left the German people ‘defenseless and plundered,’⁴⁵ and fuelled appeals for a strong version of German nationalism, upon which Hitler was only too willing to capitalize.

The purpose of this paper is to evaluate a relatively recent decision of the German Federal Constitutional Court, the so-called ‘Bananas Judgment’, in order to assess the concept of sovereignty in the German juridical debate concerning the European integration project.

A. Etatism vs Post-Etatism

The German debate over the need for a European constitution is a good illustration of the extent to which two 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 because it is not a state.⁴⁶ According to this view

⁴¹ Miriam Aziz, *Sovereignty Lost, Sovereignty Regained? The European Integration Project and the Bundesverfassungsgericht*, RSC Working Paper No. 2001/31 (2001).

⁴² See supra note 12, MacCormick, *The Maastricht-Urteil and MacCormick, Questioning Sovereignty*.

⁴³ See, e.g., the concept of interdependence sovereignty espoused by Krasner, supra note 11.

⁴⁴ See Schwarze, *Concept and Perspectives* and Grimm, *Die Zukunft der Verfassung*, supra note 13 at 279.

⁴⁵ See Peter C. Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law. The Theory and Practice of Weimar Constitutionalism*, at 128 (Duke University Press, 1997), who refers to Heller’s critique of Versailles. See Meyer, *Die politischen Ideenkrise der Gegenwart* (1926) in Hermann Heller, *Gesammelte Schriften I*: 359 (1926).

⁴⁶ See Dieter Grimm, *Does Europe need a constitution?*, ELJ 282 (1995).

the state is both the object and the prerequisite of a constitution.⁴⁷ Moreover, there must be people who are state bearers of authority (*Staatsvolk*) to reflect upon a constitution. The EU lacks the *pouvoir constituant* because there is no a European *Staatsvolk*. The second school of thought, which I have elected to entitle ‘post-etatistic,’ supports the view that the existence of a political community is a prerequisite for a constitution. Thus, the state is shaped by the constitution, which is defined as the basic legal order of a political system.⁴⁸

The two 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 intergovernmental⁴⁹ 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.⁵⁰ The second view is arguably tantamount to a cosmopolitan position given that 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 that is transnational or ‘trans’ state-like and that is focused on the interpretation and elaboration of these fundamental principles.

The debate over the ultimate arbiter in Germany is underpinned by a tension between these two versions of events, which are retold in what *Ladeur* has referred to as a, “traditionally state-determined discourse.”⁵¹ Thus, in the ‘etatist’ view, although EC law prevails over national law, there are exceptions. The ‘post-etatist’ view categorically accepts the order of precedence of EC law. Academic opinion amongst jurists in Germany is divided between these two positions with little, if any, consensus, conceptually

⁴⁷ See Isensee, *Staat und Verfassung in Handbuch des Staatsrechts*, supra note 30 at § 13, par 1. See also Christoph Dorau and Philipp Jacobi, *The Debate over a ‘European Constitution’: Is it Solely a German Concern?* 6 EPL 413, 416 (2000).

⁴⁸ See Konrad Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland*, § 1 para. 17 (1993).

⁴⁹ See, for example, Matthias Pechstein and Christian Koenig who do not regard the European Union as an international organisation in the proper sense of the word but merely a loose framework within which states make international agreements. See *Die Europäische Union. Die Verträge von Maastricht und Amsterdam*, at 275 (2000).

⁵⁰ See below.

⁵¹ Karl-Heinz Ladeur, *Towards a Legal Theory of Supranationality – The Viability of the Network Concept*, 3 ELJ 33, 34 (1997).

speaking.⁵² Indeed, each position represents a competing school of thought in a debate that is highly vitriolic, defensive, confrontational and rhetorical, the staples of a legal debate, one might say. However, *the way in which* the main protagonists of each school of thought claim to possess the ultimate truth does little to foster open debate and even less to discount the accusation that the protagonists are in fact polemicists disguised as legal scholars.

This issue is particularly problematic because it is difficult to ascertain the extent to which the legal reasoning of the debate is informed by the backgrounds, or socialization of its protagonists. For instance, it comes as no surprise that former judges of the European Court of Justice (“ECJ”)⁵³ and former officials of the European Commission⁵⁴ or the European Parliament⁵⁵ are at loggerheads with former judges of the BVerfG⁵⁶ over the interpretation of the effect of European integration on the German legal order. This division among former judges of the various judicial bodies contributes to the perception that participants in the German juridical debate are either ‘*pro*’ or ‘*contra*’ European integration and draws attention to the politicization of the debate, but does little to dispel doubts about its ideological foundations. The distinction between an ‘etatist’ and a ‘post-etatist’ model should not be equated with the distinction between ‘*pro*’ the European Union and ‘*contra*’ the European Union. The ‘*pro*’ or ‘*contra*’ terminology is inherently ideological and therefore has no place in a legal academic discussion of the project of European integration. The purpose of the 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 that is instrumental in the German debate over European integration.

B. A Brief Overview of the Jurisprudence of the Bundesverfassungsgericht Concerning European Integration

⁵² *Pro* the BVerfG being the ultimate arbiter Rupert Scholz, *Europäische Union und Verfassungsreform*, 46 *Neue Juristische Wochenschrift* 1690 (1993) and *Contra* Günter Hirsch, 27-51 *Neue Juristische Wochenschrift* 2457 (1996). See also an article by the latter, a former judge at the ECJ: Günter Hirsch in the *Frankfurter Allgemeine Zeitung*, 9.10.1996, at p. 15.

⁵³ Such as Günter Hirsch and Manfred Zuleeg.

⁵⁴ Ingolf Pernice.

⁵⁵ Roland Bieber.

⁵⁶ Such as Paul Kirchhof and Dieter Grimm.

The jurisprudence of the *Bundesverfassungsgericht* on European integration is prolific; a detailed appraisal of its decisions would not only be impossible for reasons of economy but also would have little relevance to the discussion at hand. It suffices to say that the cases referred to below must be viewed in relation to the arguments advanced in this article and not as an exhaustive evaluation of the BVerfG's jurisprudence regarding European integration.⁵⁷

In its *Solange I* decision,⁵⁸ the court held that until the EC has proven its capacity to provide adequate protection of basic rights, the Federal Constitutional Court would remain the ultimate arbiter concerning issues of human rights and would assess the level of protection afforded to human rights in *specific* cases.⁵⁹ In *Solange II*,⁶⁰ the Court held that the EC had established a level of protection of human rights that was commensurate with the fundamental rights enshrined in the German Basic Law, which meant that the BVerfG relaxed its jurisdictional monopoly over questions of basic rights. As long as the general level of protection was secured by the ECJ, the BVerfG would not review the level in specific cases. The fundamental rights issue was not directly relevant for the *Maastricht* judgement.⁶¹ 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 case⁶² is that the BVerfG reaffirmed the position it adopted in *Solange II*, that is to say that the BVerfG would only look at general cases in the event of a decrease in the general level of human rights protection. It was this interpretation of the *Maastricht* decision⁶³ that was of

⁵⁷ See, however Kokott, *supra* note 14 at 77 – 131 and also recent decisions of the Bundesverfassungsgericht in which it has 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 judgments of the Bundesverfassungsgericht of July 6, 2000 in 53 Neue Juristische Wochenschrift 3124 (2000) and of September 1, 2001 in 12 Europäische Zeitschrift für Wirtschaftsrecht [EuZW] 255 (2001).

⁵⁸ Decision of May 29, 1974, BVerfGE 37, 271.

⁵⁹ Author's own emphasis.

⁶⁰ Decision of October 22, 1986, BVerfGE 73, 339.

⁶¹ Decision of October 12, 1993, BVerfGE 89, 155 or *Brunner v. European Union Treaty*, 1 Common. ML. Rev. 57 (1994). 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.

⁶² Indeed, several readings of the case exist. For example, Manfred Zuleeg, *The European Constitution under Constitutional Constraints: The German Scenario*, 22 EL. Rev. 19 (1997); Paul Kirchhof, *Die Gewaltenbalance zwischen staatlichen und europäischen Organen*, 20 JZ 965 (1998), translated in Paul Kirchhof, *The Balance of Powers Between National and European Institutions*, 5 ELJ 225 (1999).

⁶³ A plethora of interpretations of the effect of the *Maastricht* decision were offered as regards the human rights issue. See Zuleeg, *id.*, for some of them.

particular significance to the BVerfG's most recent jurisprudence on European integration, namely, the Banana case.⁶⁴

The purpose of this article is to examine the German Federal Constitutional Court's Banana judgement in the context 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 legal academic debate. References to previous BVerfG cases concerning European Integration shall be made for the purpose of the discussion only.

III. THE BANANA JUDGMENT

A. The Common Organization for the market in Bananas

The amount of judicial attention that has been designated to the importation of bananas verges on the extraordinary.⁶⁵ Indeed, the importation of bananas into the EU has been examined under national,⁶⁶ European,⁶⁷ and international law,⁶⁸ has secured a place on the judicial agenda for almost ten years, and shows no signs of disappearing. The issues raised by the regulation such as protectionism – legitimate or otherwise⁶⁹ – are

⁶⁴ Decision of June 7, 2000, 2 BvL 1/97 or 53 Neue Juristische Wochenschrift 3124 (2000).

⁶⁵ See, for example, Joel P. Trachtman, Bananas, Direct Effect and Compliance, 10 EJIL 655 (1999). See also Christoph U. Schmid, A Disappointing Retreat?, 1 ELJ 95 (2001).

⁶⁶ 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., 8 Eu.Z.W. 182 (1997).

⁶⁷ See Case C-280/93, 1994 E.C.R. I-4973; Atlanta, Case C-466/93, 1995 E.C.R. I-3799; T-Port III, Case C-364/95, Case C-365/95; T-Port GmbH & Co. K.G. v. Bundesanstalt für Landwirtschaft und Ernährung, Case C-68/95, 1996 E.C.R. I-6065.

⁶⁸ 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 (22 May 1997). Moreover, on April 12, 1999 a WTO dispute settlement panel issued a series of decisions in which it attempted to resolve the conflict successfully: European Communities – Regime for the Importation, Sale and Distribution of Bananas-Recourse to Art. 21.5 by Ecuador WT/DS27/RW/ECU (12 April 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 (12 April 1999). For the reports see generally <http://www.wto.org>.

⁶⁹ 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

outside the scope of this article given that they are essentially trade issues.⁷⁰ 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.⁷¹ This required replacing four types of national trade regimes: those of banana producers that effectively excluded all imports; those that protected imports from former colonies;⁷² those that imported ‘dollar’ bananas subject to a tariff; and Germany’s trade regime that imported 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”)⁷³ bananas and a tariff-quota for ‘dollar’ bananas.⁷⁴ 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 EU member state. This was the reason why the German government opposed the protectionist line on ‘dollar’ bananas and voted against the Regulation.⁷⁵

The issue that the second senate of the BVerfG was asked to adjudicate by a Frankfurt Administrative Court (*Verwaltungsgericht* or “VG”) was whether the

the prices, which are artificially high. See Brent Borrell, EU Bananarama III, Policy Research Working Paper No. 1386 (1994).

⁷⁰ See generally Ulrich Everling, Will Europe Slip on Bananas? The Bananas Judgement of the Court of Justice and National Courts, 33 CMLRev 401 (1996) and also Par Paul Cassia & Emmanuelle Saulnier, *L’imbroglio de la banane*, 411 RMCUE 527 (1997).

⁷¹ I would like to thank Alasdair Young for his comments regarding this section.

⁷² Or a combination with the first group.

⁷³ 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 O.J. L229 and 1998 O.J. L156, at Protocol 5 for the rules governing bananas. See Fiona Smith, Renegotiating Lomé: the impact of the World Trade Organization on the European Community’s development policy after the Banana’s conflict, 25 E.L.Rev. 247 (2000).

⁷⁴ One fixed-value tariff is equivalent to approximately 20% for imports within the quota and one fixed value tariff of about 200% for imports beyond the quota.

⁷⁵ See Franz Mayer, Grundrechtsschutz gegen europäische Rechtsakte durch das BVerfG: Zur Verfassungsmäßigkeit der Bananenmarktordnung, 22 Eu.Z.W. 685 (2000).

application of the European Regulation⁷⁶ could be reconciled with the German Basic Law.⁷⁷

B. The Banana Case: An Overview

The case at hand involved a challenge by a group of third-country banana importers⁷⁸ before a Frankfurt Administrative Court over the constitutionality of the conditions on trade imposed on third countries by the Regulation. Prior to the enactment of the Regulation, the majority of bananas on the market in Germany originated from third countries.

The VG first referred the case first to the ECJ, asking it to ascertain the validity of the Regulation under EC law. The ECJ upheld the validity of the Regulation.⁷⁹

The VG then referred the case to the BVerfG, asking it to consider whether the Regulation violates provisions contained in the German Basic Law. In particular, it was argued that the Regulation infringes upon the importing firms' right to property (Article 14 (1) of the Basic Law),⁸⁰ the free exercise of a profession (Article 12 (1) of the Basic Law)⁸¹ and the equality provision (Article 3 (1) of the Basic Law).⁸² 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

⁷⁶ Council Regulation 404/93/EEC of 13 February 1993, 1993 O.J.E.C. L.47 (pp. 1-11) (on the common organization of the market in bananas); Council Regulation 1442/93/EEC of 10 June 1993, 1993 O.J.E.C. L.142.

⁷⁷ See 2 BvL 1/97, *supra* note 64.

⁷⁸ Referred to as the Atlanta Group.

⁷⁹ *Atlanta*, *supra* note 67.

⁸⁰ Article 14 (1) expressly provides that "Property and the right of inheritance are guaranteed. Their content and limits are determined by the laws." See Basic Law, *supra* note 30. See generally Sabine Michalowski & Lorna Woods, *German Constitutional Law: The Protection of Civil Liberties* 299 – 312 (1999).

⁸¹ Article 12 (1) expressly provides that "All Germans have the right freely to choose their trade, occupation, or profession, their place of work, and their place of training. The practice of trades, occupations and professions may be regulated by or pursuant to a law." See Basic Law, *supra* note 30. See Michalowski & Woods, *id.*, at 299-312.

⁸² Article 3 (1) expressly provides that "All persons shall be equal before the law." Basic Law, *id.*

of an interim regulation (*Übergangsregelung*), which should have been enacted according to the principle of proportionality.⁸³

The basis of the VG's application to the BVerfG 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, that the conduct of the European legislature was outside the ambit of provisions contained in the EC Treaty, which raises the issue concerning boundaries of the order of precedence (*Anwendungsvorrang*) inherent to EC law.⁸⁴ In the VG's opinion, a consequence of the *Maastricht* decision was that the BVerfG secured evaluative jurisdiction (*Prüfungskompetenz*) and the 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.

⁸⁵

During the course of the somewhat lengthy proceedings,⁸⁶ the BVerfG drew the VG's attention⁸⁷ 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*).⁸⁸ The BVerfG held that had the VG assessed the effect of the *T-Port* decision correctly, it would have withdrawn its reference to the BVerfG on the grounds of inadmissibility, particularly as the decision involved a thorough evaluation of fundamental rights in the EU.⁸⁹ Needless to say, this human rights audit culminated in a finding that fundamental rights were sufficiently protected by the EU.

In refusing to withdraw its application, the President of the VG replied to the BVerfG's letter by stating that Article 30 of the Regulation did not offer any relief of the violation of human rights. The sanctions offered by the decision of the ECJ were not

⁸³ See para 40 of the decision, supra note 64, in which the court refers to a previous decision of the BVerfG: BVerfGE 58, 300 (351).

⁸⁴ See para 30 of the decision, supra note 64.

⁸⁵ See supra note 60.

⁸⁶ 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. See Mayer, supra note 75, at 686.

⁸⁷ In a letter dated March 26, 1997.

⁸⁸ As provided by Council Regulation of 13 February 1993, supra note 76, at Article 30.

⁸⁹ See supra note 64, para 49 of the decision.

specific but general in nature.⁹⁰ It is interesting to note, that the President of the VG not only incorrectly interpreted the *T-Port* decision, but that he also elected to reply to the BVerfG's letter without consulting the rest of the Chamber. The procedural rules provide that the entire chamber should have replied to the BVerfG's letter. The failure of the President to consult the Chamber contributed to the finding that the application was inadmissible on formal, procedural grounds.⁹¹

According to the BVerfG, fundamental rights in the European Communities, as the ECJ's decisions indicate, are sufficiently protected.⁹² 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 BVerfG 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 instruments⁹³ that derive their legitimacy from the EC Treaty⁹⁴ but that are separate, secondary forms of law.⁹⁵ The BVerfG shall therefore not review secondary EC law⁹⁶ unless the ECJ fails to protect fundamental rights to the degree envisaged in *Solange II*.⁹⁷

It is important to draw attention to the fact that the BVerfG's judgment was consistent with an amendment to the Basic Law (Article 23 (1) Sentence 1),⁹⁸ which was enacted prior to both the *Maastricht* decision and the ratification of the Maastricht Treaty and which provides constitutional limits to European integration. Thus, the EC Treaties and

⁹⁰ See supra note 64, paras 50 and 51 of the decision.

⁹¹ See supra note 64, para 67 of the decision.

⁹² The BVerfG thereby reaffirmed its *Solange II* decision. See supra note 59 at 378-381.

⁹³ That is to say, regulations, directives and decisions.

⁹⁴ See Article 249 (ex Article 189) of the EC Treaty [TEC], consolidated version, 1997 O.J.C 340/173.

⁹⁵ See generally Paul P. Craig and Gráinne De Búrca, *EU Law* (3rd ed., 2002).

⁹⁶ Or "Solange [dies so ist...] wird das Bundesverfassungsgericht seine Gerichtsbarkeit über die Anwendbarkeit von abgeleitetem Gemeinschaftsrecht [...] nicht mehr ausüben [...] Vorlagen (von Normen des sekundären Gemeinschaftsrechts an das Bundesverfassungsgericht) [...] sind deshalb unzulässig." See supra note 64, para 59 of the decision. Here the court cross referred to its *Solange II* decision. See supra note 59.

⁹⁷ See supra note 64, para 60 of the decision.

⁹⁸ As amended on 21 December 1992. Article 23 (1) of the Basic Law expressly 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) and (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." Basic Law, supra note 30.

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’,⁹⁹ which contains a reference to human dignity and the value of human life¹⁰⁰ as well as to the federal, democratic and social principles upon which the Federal Republic of Germany is founded.¹⁰¹ The eternity clause provides that these principles may not be set aside by the legislature.¹⁰²

In order for a challenge to succeed before the BVerfG, a court must prove that interpretation of European law, which includes the decisions of the ECJ taken after the *Solange II* decision, has evolved in such a way that the necessary level of protection for basic rights is not being met.¹⁰³ This necessitates reconciling basic rights protection at the national level with the European level according to the method envisaged by the BVerfG in *Solange II*. The BVerfG 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.¹⁰⁴ The court further held that the VG had misinterpreted the *Maastricht* decision.¹⁰⁵

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 the 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. Although these issues are substantively different, they both raise the question of the ultimate arbiter.

IV. THE IMPLICATIONS OF THE BANANA CASE

⁹⁹ Article 79 (3) of the Basic Law. Id.

¹⁰⁰ Article 1 of the Basic Law. Id.

¹⁰¹ See Article 20 of the Basic Law. Id.

¹⁰² In the event of conflict, the competing constitutional principles must be balanced in accordance with the principle of maximum effectiveness or ‘practical concordance’. See Hesse, *supra* note 48, §1 para. 28 and §2 para. 72. For a succinct yet informative outline of the applicability of Article 23 of the Basic Law, see Christoph U. Schmid, *From Pont d’Avignon to Ponte Vecchio: The Resolution of Constitutional Conflicts between the European Union and the Member States through Principles of Public International Law* in 18 Yearbook of European Law 415, 418 – 419 (Piet Eeckhout and Takis Tridimas, eds., 1998).

¹⁰³ See *supra* note 64, para 62 of the decision.

¹⁰⁴ 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 *supra* note 64, para 58 of the decision.

It interesting to note that the ease with which the BVerfG 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 that is, in contrast to the *Maastricht* decision, inherently positive. This would undoubtedly be explained by the absence of the infamous architect of the *Maastricht* judgment, Paul Kirchhof¹⁰⁶ who retired from the BVerfG prior to the judgment and whose particular understanding of the German state informed much of the BVerfG's case law regarding European integration. Kirchhof is all too often demonized in the general legal debate concerning European integration.¹⁰⁷ Indeed, 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 over European integration within which Kirchhof enjoys considerable standing. Indeed, his theory of the state exerts considerable influence over German constitutional theory and German constitutional lawyers.¹⁰⁸ To demonize him or dismiss him as anachronistic is to underestimate the weight of a particular strand of German state theory that 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 BVerfG was able to be under the circumstances, it was not necessarily because Kirchhof retired before the judgment was reached. First, it is likely that in reaching its decision, the BVerfG was all too aware that the Regulation would eventually have to be amended in light of the rulings of the World Trade Organization (WTO) that consistently uphold US challenges.¹⁰⁹ Secondly, the optimism which the 'pro' EU position vis à vis the Banana decision may - or may not - engender must, however, be viewed in light of certain qualifications that the BVerfG elected to attach to its 'pro' EU stance by way of

¹⁰⁵ See supra note 64, para 64 of the decision.

¹⁰⁶ In the sense that he was the reporting judge.

¹⁰⁷ That is to say both within and outside of Germany.

¹⁰⁸ Indeed, his commentary on state theory and practice. See Isensee and Kirchhof, *Handbuch des Staatsrechts*, supra note 30, one of the leading, if not *the* authority on German Public Law.

procedure, the co-operation relationship with the ECJ¹¹⁰ and its particular interpretation of human rights.

A. 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.¹¹¹ 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.¹¹² The Federal Constitutional court has the exclusive competence to adjudicate on the constitutionality of national laws.¹¹³ 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)¹¹⁴ and that it would be preferable to have a *separate* legal provision that would enable courts to consider the reviewability of secondary EC law. In the case at hand, the VG was, however, willing to apply Article 100 (1) in order to fill the gap.¹¹⁵ The BVerfG's response was that applications under Article 100 (1) are inadmissible unless the level of the protection of fundamental rights protection generally sinks.¹¹⁶ The BVerfG thereby rejected the VG's argument in favor of establishing a separate legal procedure to review secondary EC legislation.

¹⁰⁹ 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 1.

¹¹⁰ Which it first referred to in its *Maastricht* decision.

¹¹¹ Which expressly 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." Basic Law, *supra* note 30.

¹¹² See *supra* note 64, para 30 of the judgement.

¹¹³ 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 Ingo von Münch and Philip Kunig, *Grundgesetz Kommentar*, Article 100 (1) at Rdnrs 2 and 3 (1996).

¹¹⁴ See *supra* note 64, para 30 of the decision.

¹¹⁵ See *supra* note 64, para 31 of the judgement.

¹¹⁶ A position which is supported by legal academic opinion. See, Münch and Kunig, *supra* note 113, at Rdnr 13.

The BVerfG's response left little doubt about its interpretation of the application of Article 100 (1) in that it reinforced the position it adopted in the *Maastricht* case,¹¹⁷ that is to say that it regards those acts of the Community that have been transposed into German law as reviewable. Significantly, the BVerfG effectively avoided moving towards a realization of the vision that it initially outlined in the *Maastricht* case, the so-called 'co-operation relationship' which, according to the BVerfG, constitutes the supervisory jurisdiction concerning the protection of fundamental rights that it exercises in co-operation with the ECJ.¹¹⁸

B. The Co-operation Relationship between the BVerfG and the ECJ

It is arguable that the co-operation relationship between the BVerfG and the ECJ has remained only a vision given the absence of guidelines or a consensus as to how it ought to function.¹¹⁹ The relationship is, however, not as nebulous as it appears because it is the BVerfG that decides how and when the co-operative relationship ought to be exercised. It is here where what appears to be a matter of mere procedure in effect gives support to an interpretation of the co-operation relationship that favors the German Federal Constitutional Court. Thus, while it appears to be inclusive, it is effectually exclusive.

This is particularly apposite given the court's interpretation of Article 100 (1) of the Basic Law.¹²⁰ The Court could, after all, have elected to address the VG's argument in favor 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 to the language.¹²¹ One potential explanation is 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 BVerfG and the ECJ can most effectively take place, namely, the preliminary reference procedure whereby any national

¹¹⁷ See supra note 60, at 175.

¹¹⁸ Id.

¹¹⁹ See supra note 33.

¹²⁰ See supra note 117.

¹²¹ 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. See Mayer, supra note 75, at 687.

court may refer a question to the ECJ concerning the interpretation of the EC Treaty and legislation arising from it (Article 234 EC Treaty).¹²²

Indeed, it is of interest to note that the BVerfG has never addressed Article 234 EC in the context of the co-operation relationship,¹²³ probably because to accept Article 234 EC as underpinning the co-operative relationship would represent a concession to the view that the ECJ is the ultimate arbiter to the extent that an issue is based on the EC Treaty as opposed to the German Basic law.

In the Banana judgment, the BVerfG in effect reserves the ultimate right to 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 BVerfG's standard with regard to the level of human rights protection that prevails¹²⁴ - a form of 'constitutional patriotism,' in the sense that, with regard to human rights, there is 'no place like home.'¹²⁵

The absence of a Charter of Fundamental Rights for the EU which is legally binding arguably justifies the move by a member state's constitutional court to scrutinize human rights in the EU until, to paraphrase the *Solange* decision, they are adequately safeguarded at the EU level.¹²⁶ What seems clear from the German Constitutional court decisions is that the constitutional courts of the member states remain the ultimate arbiters of the 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

¹²² Formerly Article 177 of the TEC. See David W. K. Anderson, *References to the European Court* (2nd ed, 2002).

¹²³ As has been suggested by Everling, who interprets TEC Article 234 as the correct understanding of the co-operation relationship. See Ulrich Everling's editorial in 8 *EuZW* 225 (1999).

¹²⁴ See supra note 64, 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."

¹²⁵ See below.

¹²⁶ Constitutional courts in other member states have also adjudicated on the issue of the most appropriate level of human rights protection. For example, the Italian *Corte Costituzionale*, Decision of April 13, 1989, 232/89 *Foro Italiano* [*Foro It. I*] 1990, I, 1, 1855; and Zerini decision from 1994 (117/94 *Raccolta ufficiale delle sentenze e ordinanze delle Corte costituzionale* [*Racc. uff. corte cost.*] 1994, 785); also, the Spanish *Tribunal Constitucional*, Decision 28/1991 from Feb. 14, 1991 (28 *Repertorio Aranzadi del Tribunal Constitucional* [*R.T.C.*] 306), as well as *Verfassungsgericht Madrid Erklärung* 108/1992 from July 1, 1992, 11-12 *Europäische Grundrechte-Zeitschrift* [*EuGRZ*] 285 (1993) (German translation); and, the Danish *Højesteret*, *Oberster Gerichtshof Kopenhagen Urteil* from April 6, 1998, 1-4 *EuGRZ* 49 (1999) (German translation).

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

With respect to the co-operative relationship, the two 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 BVerfG. The BVerfG, however, reserves the right to argue that the ECJ is not safeguarding fundamental rights sufficiently,¹²⁷ a position which is consistent with its *Solange II* and its *Maastricht* decisions. The ‘post-etatistic’ view provides a contrary interpretation by characterizing the ECJ’s position as weak and claiming that it does not, as yet, have an appropriate legal basis for such ‘cosmopolitan’ legal reasoning, something that the European Charter of Fundamental Rights may remedy.¹²⁸ The two schools of thought are based on separate premises and therefore reach different conclusions, which is not an uncommon phenomenon in academic debates. The juridical debate in Germany over the impact of European integration is, however, polarized 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 conceptually irreconcilable.

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.

C. A Human Rights Audit of the EU

The human rights issues that arise as part of the Banana case are mainly two-fold. First, the appropriate human rights audit envisaged by the BVerfG must satisfy an evidentiary burden which may, in effect, be difficult, if not impossible for certain national courts to discharge,¹²⁹ given that it must include a detailed evaluation of the ECJ’s case law since 1986. It is questionable whether lower courts would have the resources to

¹²⁷ Or, applied, as the *Maastricht* judgment provides, the BVerfG reserves the right to argue that the ECJ has exceeded its competence.

¹²⁸ See below.

¹²⁹ See below.

undertake an audit such as that envisaged by the BVerfG. In effect, the BVerfG thereby sends a message to the lower courts not to refer cases based on fundamental rights. This does not, however, prevent courts from referring cases based on questions of competence. The main issues raised in the *Maastricht* decision are left open. Indeed, the BVerfG omitted to address the distinction between *Maastricht* and the Banana case, thereby neatly sidestepping the issue of competence altogether.

Secondly, the BVerfG 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, not 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.¹³⁰ Be that as it may, the BVerfG'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 that the tenor of the Banana judgment does little to underscore. Indeed, in *Solange I*, the BVerfG neglected to refer to the *Nold* decision of the ECJ that had been decided two weeks earlier and 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.¹³¹ One wonders to what extent a re-affirmation by the BVerfG of the line it took in *Solange II*, is part of a principled approach, and if so, what are the principles that permit the BVerfG to vest its trust in the ECJ vis à vis human rights in some of its judgments but not in others? The difficulty of ascertaining the nature of the principles upon which the BVerfG considers the decisions of other institutional actors in the European integration process is further illustrated by the BVerfG's failure to address the human rights record of the other EC institutions in the Banana case.

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,

¹³⁰ See generally *The EU and Human Rights* (Philip Alston ed., 1999).

¹³¹ *Nold v. Commission*, Case C-4/73, 1974 E.C.R. 491.

something that 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, 1978.¹³² It is of further interest to note that the BVerfG also failed to refer to the decision-making process of the European Charter of Fundamental Rights¹³³ signed in December at the Nice Summit,¹³⁴ which is questionable because a human rights audit ought to be prospective as well as retrospective.¹³⁵

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 emphasizes the distinctiveness of the state that it perceives as being based on a *Staatsvolk*¹³⁶ and a culture, defined in terms of language, religion, art and history.¹³⁷ This distinctiveness is, however, instrumentalized in order to draw boundaries that 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*) while, at the same time, ensuring that the state does not ‘dissolve,’¹³⁸ a phenomenon that is referred to by some as *Entstaatlichung*, which clearly illustrates the defensive tenor of the ‘etatist’ position¹³⁹ despite appearances to the contrary. Thus, while appeals for the

¹³² Supra note 60.

¹³³ See An E.U. Charter of fundamental rights (Analysis) PL 178 et seq. (2000); 2000 O.J. (C 364) 1.

¹³⁴ Nor of the decision-making process leading up to the enactment of a Charter of Rights for the EU which include, inter alia, the three invaluable reports by independent committees: For a Europe of Civic and Social Rights, Report by the Comité des Sages (1996); Leading by Example: A Human Rights Agenda for the EU for the Year 2000, Agenda of the Comité des Sages and Final Project Report (1998); Affirming Fundamental Rights in the EU, Report of the Expert Group on Fundamental Rights (1999).

¹³⁵ 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. See Udo DiFabio, 15/16 JZ 737 (2000).

¹³⁶ That is to say, people who are related by birth and origin.

¹³⁷ Paul Kirchhof, Europäische Einigung und der Verfassungsstaat der Bundesrepublik Deutschland *in* Europa als politische Idee und als rechtliche Form 63, 79 (Josef Isensee ed., 2d ed., 1994) [hereinafter Europa als politische Idee].

¹³⁸ Id. at 64.

¹³⁹ Kirchhof uses the term *Entstaatlichung* (which may be translated as destatification) as a section heading. The section begins with the following sentence: “Die Staatlichkeit Deutschlands steht im Rahmen

competence of constitutional courts to listen to, question, and understand the debate over the European integration project¹⁴⁰ are articulated - thereby appearing to be inclusive – the position is, in effect, exclusive as it is precisely language and culture that are instrumentalized in order to demarcate boundaries and to erect borders.¹⁴¹

Aside from cultural influences, and the different historical processes that 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,¹⁴² which is a consequence of the dialectical development of Spirit. There are the *Völkergeister*,¹⁴³ a term which denotes 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’ which plays a role on the stage of world history.¹⁴⁴

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 there is a correlation between the concept of a unitary, homogenous state and the juridical debate over European integration, which its proponents seek to ensure is also unitary and homogenous as opposed to accommodating a plurality of views.

der europäische Einigung nicht zur Disposition” [Germany’s sovereignty is not at the disposal of European unification]. Id. at 95.

¹⁴⁰ See Paul Kirchhof, *Der Weg Europas ist der Dialog*, 12 *EuZW* 353 (1999).

¹⁴¹ This is not uncommon practice in German discussions concerning integration as a whole. A central element of the debate concerning Germany’s *Leitkultur* (leading culture) 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 Georg Paul Hefty, *Die Union im Strom des Zeitgeistes*, *Frankfurter Allgemeine Zeitung*, Oct. 30, 2000, at 1.

¹⁴² Georg Wilhelm Friedrich Hegel, *Grundlinien der Philosophie des Rechts* § 344 (Suhrkamp 1970).

¹⁴³ Id. at § 352.

¹⁴⁴ Thus, in Hegel’s terms, unfolding the full world of the Spirit. See id. at § 274 regarding the nature of the constitution and the special nature of people.

IV. THE GERMAN JURIDICAL DEBATE CONCERNING EUROPEAN INTEGRATION

The judicial and extra-judicial debate in Germany over European integration has traditionally focused on the ultimate arbiter issue, as the BVerfG's *Solange I* and *II* decisions illustrate. The juridical debate over normative clashes 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 – informed about the matter and otherwise – in national newspapers long before the decision was reached,¹⁴⁵ which lead 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 BVerfG 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 two-fold.

First, the position in Germany is that although judges of the BVerfG are permitted to make statements as academics,¹⁴⁶ they may not comment on cases that their chamber is adjudicating in a private capacity.¹⁴⁷ Indeed, it is difficult to interpret comments made by Kirchhof in an interview in light of his *Professorial* capacity,¹⁴⁸ an issue which has been noted by other commentators¹⁴⁹ and which was fiercely rebutted by Kirchhof.¹⁵⁰ Indeed, this *Contretemps* 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

¹⁴⁵ See *Wer ist die letzte Instanz?*, Capital Ost, May 1, 1998, at 176. Indeed, the Banana case was at one stage even perceived as a threat to the Euro. See, e.g., *Kontrolleur auf der Brücke*, Spiegel, Nov. 4, 1996, at 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.

¹⁴⁶ See Bundesverfassungsgerichtsgesetz [Federal Constitutional Court Law] § 18(3)2 (3rd ed. 1973).

¹⁴⁷ Indeed, this issue has been raised before regarding Kirchhof. See Miriam Aziz, *The Federal Constitutional Court Decision Concerning Financial Equalization Between the States of the Federal Republic of Germany: The Länderausgleich Judgment*, 6 EPL. 217, 227 (2000).

¹⁴⁸ See *Sprengkraft der Banane*, Focus, Feb. 13, 1999, at 11.

¹⁴⁹ See Everling, *supra* note 68.

¹⁵⁰ Kirchhof, *supra* note 140, at 353.

limited extent, political, leading one to consider to what extent doubts raised as to the independence of the judiciary in relation to the BVerfG are founded. For reasons of economy, it is impossible to conduct a detailed discussion concerning the issue of judicial bias and the BVerfG as a whole. However, the issue in itself draws attention to the extent of the politicization of the judiciary that is undoubtedly connected to the particular notion of the *Rechtsstaat* in which courts, rather than politicians, make important choices regarding European integration.¹⁵¹ This is particularly apposite in respect to the German Federal Constitutional court, whose role as an institutional actor has been the focus of considerable attention both within¹⁵² and outside of academic circles.¹⁵³ The question concerning the extent to which 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.¹⁵⁴ 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.¹⁵⁵ 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.

Whether they are former judges of the ECJ,¹⁵⁶ former officials of the European Commission¹⁵⁷ and the European Parliament,¹⁵⁸ or former judges of the BVerfG,¹⁵⁹ the respective backgrounds of the protagonists of the schools of thought are, to a certain

¹⁵¹ See Kokott, *supra* note 14, at 92.

¹⁵² See Karl-Heinz Ladeur, *Das Bundesverfassungsgericht als “Bürgergericht”*. *Rechtstheoretische Überlegungen zur Einzelfallorientierung der Entscheidungspraxis des Bundesverfassungsgerichts*, 31 *Rechtstheorie* 67 (2000).

¹⁵³ Rüdiger Zuck, *Der unkontrollierte Kontrolleur*, *Frankfurter Allgemeine Zeitung*, Aug. 24, 1999, at 3.

¹⁵⁴ “Democracy does not insist on judges having the last word, but it does not insist that they must not have it.” Ronald Dworkin, *Freedom’s Law: The Moral Reading of the American Constitution* 7 (1996).

¹⁵⁵ See Alec Stone Sweet, *Governing with Judges* 50 et seq. (2000).

¹⁵⁶ Such as Günter Hirsch and Manfred Zuleeg.

¹⁵⁷ Ingolf Pernice.

¹⁵⁸ Roland Bieber.

¹⁵⁹ Such as Paul Kirchhof and Dieter Grimm.

extent, relevant. The debate over the effect of European integration on the German legal order is, however, not exclusively a product of the protagonists' conditioning. 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 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.¹⁶⁰ 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.’¹⁶¹ There is, however, a basis of preference,¹⁶² 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 quotation marks 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.¹⁶³

¹⁶⁰ See Peter Medawar *The Limits of Science* 3 (1984).

¹⁶¹ Or alternatively speaking, the preference of deduction over induction.

¹⁶² 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”. See Isaiah Berlin, *Concepts and Categories: Philosophical Essays* 57 (1980).

¹⁶³ A matter which is addressed by Alec Stone Sweet in relation to constitutional courts as a whole which, “...portray their decision-making as if it were a pure exercise in logic.” See Stone Sweet, *supra* note 155, at 143.

This undoubtedly contributes to erosion of the 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, instrumentalized 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 that 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 to the discussion at hand as it underscores 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 BVerfG, but also in the academic sovereignty debate as a whole. The terminology of the sovereignty debate, namely, whether pooled, shared, split or partial does 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.¹⁶⁴ We cannot 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 are based in Germany, namely, whether they are ‘distinct.’ In other words: EC law and national law – one legal order or two? With regard to its corollary: one system of values or two? With regard to the EU, this formulation ought to 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 no doubt dismiss this as a reformulation of the age-old debate over 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, identity politics.

¹⁶⁴ Whether it is by allusion to what social scientists sometimes refer to as the ‘Other’ or otherwise.

The etatist state is delineated as the ‘ultimate boundary’ which refers to a state that may be open to the extent that international obligations must be honored but that is ultimately predicated on the consensus of all bodies of the state concerning the overall unity, dare one say, supremacy, of the state.¹⁶⁵ One is reminded of the writings of Carl Schmitt¹⁶⁶ that have arguably informed many of the BVerfG’s decisions,¹⁶⁷ including the *Maastricht* decision.¹⁶⁸ 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 BVerfG and indeed on German state theory as a whole¹⁶⁹ must not, however, be over-estimated or indeed exaggerated. The initial premise of the ‘etatist’ school, namely, that the legal strength of Europe lies in its states¹⁷⁰ 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.¹⁷¹ Accordingly, whereas it is accepted that the state is not ‘an island,’¹⁷² the ground of applicability¹⁷³ regarding European Community law remains the German constitution. Indeed, for Kirchhof, the ultimate authority rests with what he refers to as

¹⁶⁵ See Josef Isensee, *Europa – die politische Erfindung eines Erdteils*, in *Europa als politische Idee*, supra note 137, at 122.

¹⁶⁶ See Carl Schmitt, *Verfassungslehre* (1928).

¹⁶⁷ For example, the voting rights for foreigners cases. BverfGE 83, 37; BverfGE 83, 60.

¹⁶⁸ See Zuleeg, supra note 63, and Joseph Weiler, *Does Europe Need a Constitution? Reflections on Demos, Telos and the German Maastricht Decision*, 1 *ELJ*. 219 (1995).

¹⁶⁹ See generally Ulrich K. Preuss, *Vater der Verfassungsvaeter? Carl Schmitts Verfassungslehre und die verfassungspolitische Diskussion der Gegenwart*, in *Politisches Denken Jahrbuch 1993* (Volker Gerhardt, Henning Ottmann, Martyn Thompson, eds., 1993); Bernhard Schlink, *Why Carl Schmitt?*, 10 *Rechtshistorisches Journal* 160 (1991); and also Ingeborg Maus, *Buergliche Rechtstheorie und Faschismus* (1976).

¹⁷⁰ This author has chosen to translate the sentence “*Die Bundesrepublik Deutschland ist ein Staat und soll ein Staat bleiben; die EWG ist eine Staatengemeinschaft und soll kein Staat werden*” (emphasis in the original) as “the Federal Republic of Germany is a state and shall remain a state; the EEC is a community of states and shall never become a state.” Please note that this author has elected to translate the word *soll* as ‘shall’ as opposed to ‘ought’. See Paul Kirchhof, *Deutsches Verfassungsrecht und Europäisches Gemeinschaftsrecht*, *Europarecht* 12 (spec. ed., 1991).

¹⁷¹ See Paul Kirchhof, *Europäische Einigung und der Verfassungsstaat der Bundesrepublik Deutschland in Europa als politische Idee*, supra note 137, at 63.

¹⁷² See Kirchhof, supra note 137, at 100.

¹⁷³ Referred to as the respective bases of “Geltung” (validity) and “Anwendung” (application) regarding European Community Law.

‘homogenous constitutions.’¹⁷⁴ Alternately put, this is tantamount to the view of the EU as a ‘union of sovereign states’ or the *societas* of states,¹⁷⁵ a view that rests on the prevailing view of the EU as a supra-national organization that 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,¹⁷⁶ a view which is reminiscent of the classical ‘law without a state’ controversy of *inter alia* Weimar days¹⁷⁷ in which law was also viewed as being capable of existing both within and outside the state.¹⁷⁸ 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.¹⁷⁹ This contrasting theory of the state is predicated on the view of the state as porous, of being able to transcend its boundaries to the extent that it is not hermetically sealed, not fully independent, having endowed the EU with its sovereign authority, possibly pointing towards an emergent *universitas*.¹⁸⁰

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. Instead, presenting them aids in distinguishing the two theories of the state outlined above on the basis of what one considers to be 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

¹⁷⁴ “So wird ein europäischer und ein universaler Staatenverbund entstehen, der von dem Geltungsanspruch homogäner Staatsverfassungen geprägt ist und diesem Anspruch zunehmend auch tatsächlich genügen wird” Kirchhof, *supra* note 137, at 101.

¹⁷⁵ See Robert Jackson, *Sovereignty in World Politics: a Glance at the Conceptual and Historical Landscaper*, 47 *Political Studies* 431, 449 et seq. (1999).

¹⁷⁶ 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 and Kirchhof, *Handbuch des Staatsrechts*, *supra* note 30, § 19, Rdnr 7-11.

¹⁷⁷ See Kelsen’s review of Eugen Ehrlich’s book, *Grundlegung der Soziologie des Rechts* ([1913] 4th edn, 1989) in 39 *Archiv für Sozial Wissenschaft und Sozial Politik* 839 et seq. (1915). 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, Gunther Teubner, ‘Global Bukowina’: Legal Pluralism in the World Society in *Global Law without a State* (Gunther Teubner ed., 1997).

¹⁷⁸ See Ingolf Pernice, 53 *NJW* 866 (2000).

¹⁷⁹ See MacCormick, *Questioning Sovereignty*, *supra* note 12.

¹⁸⁰ See Jackson, *supra* note 175 at 451.

taken up more recently by the legal pluralists.¹⁸¹ 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.'¹⁸² There is a tendency, however, for the analyses that underpin legal pluralist accounts of law to underestimate the influence of the state on legal reasoning, which arguably derives from the unifying role that 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.

A. *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.¹⁸³ 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 Organization.¹⁸⁴ Turning our attention to comparative lawyers,¹⁸⁵ 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

¹⁸¹ See Teubner, *supra* note 177.

¹⁸² See Gunther Teubner, *The Two Faces of Janus: Rethinking Legal Pluralism*, 13 *Cardozo L. Rev.* 1443, 1451 (1992).

¹⁸³ One 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 Mary Douglas, *How Institutions Think* 12 et seq. (1987).

¹⁸⁴ 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 the safeguarding of their rights.

¹⁸⁵ "...by the international exchanges which it requires, comparative law procures the gradual approximation of viewpoints, the abandonment of deadly complacency, and the relaxation of fixed dogma. It affords us a glimpse into the form and formation of legal institutions which develop in parallel, possibly in accordance with laws yet to be determined, and permits us to catch sight, through the differences in detail, of the grand similarities and so to deepen our belief in the existence of a unitary sense of justice." Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law* 3 (Tony Weir, trans., 2nd rev. edn, 1992).

departure of this form of legal analysis that encourages a compartmentalized 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*.¹⁸⁶ The common language was of course Latin, and the common heritage was Roman law,¹⁸⁷ which arguably constituted a unified, European culture.¹⁸⁸ 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.

B. *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 discipline¹⁸⁹ 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 that we would now term as being a quest for universals.¹⁹⁰

During the nineteenth century, German legal scholars studied Roman law and canon law and not local customary law, primarily due to the influence of the church.¹⁹¹ Lawyers who had completed their legal training in one country could occupy a chair in

¹⁸⁶ See Reinhard Zimmermann, *Das römisch-kanonische ius commune als Grundlage europäischer Rechtseinheit*, 1 JZ 8, 10 (1992) and also Reinhard Zimmermann, *Savigny's Legacy: Legal History, Comparative Law, and the Emergence of a European Legal Science*, 112 LQR 576 (1996).

¹⁸⁷ Edwoud Hondius, *Towards a European Civil Code*, in *Towards a European Civil Code* 8 (Arthur Hartkamp et al. eds., 2nd edn, 1998).

¹⁸⁸ See Reinhard Zimmermann, *Civil Code and Civil Law: The 'Europeanization' of Private Law within the European Community and the Re-emergence of a European Legal Science*, 1 Colum. J. Eur. L. 82 (1994).

¹⁸⁹ See Uwe Wesel, *Juristische Weltkunde: eine Einführung in das Recht*, 64 – 65 (1984). 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, at 311-312.

¹⁹⁰ Albeit universals which are predominantly in the Western tradition.

¹⁹¹ See Nigel G. Foster, *German Law and Legal System* 14 – 15 (1993). Indeed, in 1200, one thousand law students were registered at the University of Bologna, half of whom were not of Italian nationality. Many of these scholars came from Germany. See Uwe Wesel, *Geschichte des Rechts: Von den Frühformen bis zum Vertrag von Maastricht* 312 and 360 (1997).

another.¹⁹² The German example is partly explained by the fact that there was no single, unified 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 1871.¹⁹³ 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 relates 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 rigor of legal reasoning which was not dependent on a local context¹⁹⁴ but on methodical, disciplined scientific reasoning.¹⁹⁵ To conclude: a common European legal culture which centered around a common legal science did once exist,¹⁹⁶ an issue which is overlooked by those jurists who, like Kirchhof, continue to argue in favor 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 perception of the nation-state defined by territorial, *a priori* elements prevailed. The instrumentalization of law for the purpose of state building is still very much part of the heritage of legal science. It is a heritage that 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 globalization. A challenge could arguably draw on a number of sources. For instance, it could draw from Kant's concept of the *Weltbürger*¹⁹⁷ 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.¹⁹⁸ Thus, this is not an ethical principle but a legal principle. Moreover, Kant maintains that if sovereign states

¹⁹² See Reinhard Zimmermann, Roman Law and European Legal Unity *in* Hartkamp, Towards a European Civil Code, supra note 187, at 27.

¹⁹³ See Wesel, supra note 189, at 66.

¹⁹⁴ *Id.*

¹⁹⁵ 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 Friedrich Engels' letter to Karl Kautsky and Max Weber, Economy and Society (1925), cited in Wesel, supra note 189, at 68-69.

¹⁹⁶ See Zimmermann, supra note 192.

¹⁹⁷ Immanuel Kant, Die Metaphysik der Sitten, Rechtslehre (Volume VIII) § 62 (1977); or see Immanuel Kant, Political Writings 172 – 173 (§ 62, Section III: Cosmopolitan Right) (1991).

could agree on certain legal principles embodied in a binding international agreement, a new and just legal order for all mankind could develop.¹⁹⁹ This position is not dissimilar to the arguments taken up as part of the debate over cosmopolitan citizenship, which is based on a rejection of the Westphalian system of governance,²⁰⁰ which recognizes the absolute sovereignty of states,²⁰¹ and which was qualified by *inter alia* the Universal Declaration on Human Rights that accords inalienable rights to people irrespective of membership of a state. Thus, cosmopolitan citizenship recognizes trans- or post-national agents.²⁰² With regard to legal theory, one is again reminded of 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,²⁰³ which can be contrasted with Kelsen, for instance, who believed that law could only be realized within the hierarchical structures of the state.²⁰⁴ This tension underpins the current convergence debate in which the substantial degree of convergence between the legal systems of the member states,²⁰⁵ not to mention mergers between those who serve them,²⁰⁶ is assessed. The purpose of this article is not to evaluate the arguments for and against the convergence thesis, particularly given that its applicability is limited with respect to EU law. 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

¹⁹⁸ Id.

¹⁹⁹ See Immanuel Kant, *Zum ewigen Frieden: Ein philosophischer Entwurf* (Nicholovius ed., 1795) and also Ulrich Vosgerau, *Der Begriff des Rechts bei Kant*, 30 *Archiv der Rechtstheorie* 277 (1999).

²⁰⁰ Arising from the Treaty of Osnabrück (1648). See Linklater *supra* note 6.

²⁰¹ Thus, according to the *ius territoriale* principle, no state could interfere in the affairs of another state.

²⁰² See Daniele Archibugi and David Held, *Cosmopolitan Democracy: An Agenda for a New World Order* (1995) and also Daniele Archibugi, David Held and Martin Köhler, *Re-imagining Political Community: Studies in Cosmopolitan Democracy* (1998).

²⁰³ See Eugen Ehrlich, *Fundamental Principles of the Sociology of Law* (1975).

²⁰⁴ See Kelsen, *supra* note 1.

²⁰⁵ See John W. F. Allison, *Transplantation and Cross-fertilisation in New Directions in European Public Law* 169 (Jack Beatson and Takis Tridimas eds., 1998). See also B. S. Markesinis, *The Gradual Convergence: Foreign Influences and English Law on the Eve of the 21st Century* (1994); B. S. Markesinis, *Judge, Jurist and the Study and Use of Foreign Law*, 109 *LQR* 622 (1993). But see Pierre Legrand, *European Legal Systems are not converging*, 45 *ICLQ* 52 (1996). See Konrad Zweigert, *Der Einfluß des Europäischen Gemeinschaftsrechts auf die Rechtsordnungen der Mitgliedstaaten*, 28 *RebelsZ* 601 at 611 (1964), Jürgen Schwarze, *Die europäische Dimension des Verfassungsrechts in Verfassungsrecht und Verfassungsgerichtsbarkeit im Zeichen Europas* (Jürgen Schwarze ed., 1998) and also Christian Joerges, *The Europeanization of Private Law as a Rationalisation Process and as a Contest of Legal Disciplines - an Analysis of the Directive on Unfair Terms in Consumer Contracts*, 3 *European Review of Private Law* 175 (1995).

²⁰⁶ See David M. Trubek, et al., *Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transnational Arenas*, 44 *Case W. Res. Law Rev.* 407 (1994).

premised on the law of obligations and the law of contract and ignores other aspects of private law,²⁰⁷ most realms of public law,²⁰⁸ and omits to address the EU dynamic as a whole. The foregoing discussion of the *ius commune* serves a particular purpose and is *not* intended to be evidence of any future trend. Rather, it is designed to illustrate the link between law and the nation-state that is regarded as intrinsic, particularly with respect to the German debate over European integration. In effect, this restricts the debate in such a way that alternative conceptions of law have no standing. For example, there is no room in the debate for a pluralist position in which agreements that extend the understanding of key concepts, such as fundamental rights, beyond national perceptions can be reached.²⁰⁹ The German debate is structured in such a way that these kinds of considerations are noticeably absent. This phenomenon is partly explained by the loyalty to the nation-state or what I have referred to elsewhere as *Rechtspatriotismus*,²¹⁰ which is encouraged by the method of legal education that constrains the study of law to the boundaries of the state.

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The BVerfG Banana decision is a case in point. Although the BVerfG referred to the GATT in its judgment, it omitted to address the WTO, which is questionable, particularly given that the WTO has adjudicated on the banana regulation.²¹² This is not mitigated by the fact that the VG did not refer to the WTO in its reference to the BVerfG, because the BVerfG has the discretion to consider any issue it regards as relevant to the adjudication of the reference made to it. One response to this argument would be to argue that making decisions about legal questions beyond its boundaries would extend beyond the court's remit if not its competence. Indeed, why would the WTO be relevant to a case based on fundamental rights? It is not the role of the WTO to assess the compatibility of EC law with WTO law. As far as the WTO was concerned, the importation of bananas was a trade issue. Nevertheless, it is of interest to speculate to what extent the same

²⁰⁷ Such as family law, for example.

²⁰⁸ Such as constitutional and administrative law, and human rights.

²⁰⁹ Taking into account the fact that this may be a similar starting point and that different national values may continue to influence their interpretation.

²¹⁰ See Miriam Aziz, review of Takis Tridimas, *The General Principles of EC Law* (1999) in MLR 473-474 (May 2000).

²¹¹ 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 socialization of the individual. See Francisco O. Ramirez and John Boli, *The political construction of mass schooling: European origins and worldwide institutionalization*, 60 *Sociology of Education* 2 (1987).

question would be decided differently ten years from now given the increasing evolution of what I term ‘multi-jurisdictionality.’²¹³ This appears to be a minor point, but serves to draw attention to the socialization of jurists. It may well be that, in the future, jurists will be encouraged to look beyond their domestic legal systems. Indeed this issue has already been addressed in the context of the use of comparative judicial decisions in human rights cases in jurisdictions, such as the case of the United Kingdom,²¹⁴ which have relatively recently incorporated human rights provisions that are significantly enforced. This would undoubtedly concur with the legal pluralist model, which accepts the position of the nation-state amongst other jurisdictions and, in fact, encourages taking decisions of other judicial bodies taking the same matter into account.

VI. CONCLUSION

German lawyers have coveted sovereignty, because they see it as the essential characteristic of state formation and as key part of the difficult struggle they have faced in reconciling territory with identity. This struggle to reconcile territory and identity is particularly complicated given the existence of the two German states prior to reunification,²¹⁵ which were regarded as comprising two states in one nation.²¹⁶

As a consequence of the Banana judgment, the BVerfG has sent a message to the lower courts 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 BVerfG does, however, outline its understanding of the co-operation relationship with the ECJ which it first referred to in *Maastricht*. Thus, the BVerfG reserves the right to assess the commensurability of fundamental rights protected in the EU with those enshrined in

²¹² See above.

²¹³ See M Aziz, *European Union Fundamental Rights Policies: Access to Justice and the Construction of Europeaness* (Hart Publishing, forthcoming 2003).

²¹⁴ See Christopher McCrudden, *A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights*, 4 *OxJLS* 499 (2000).

²¹⁵ Although some would no doubt dispute the reference to the former German Democratic Republic as a ‘German’ state. See below and also generally Antonia Grunenberg, *Zwei Deutschlands – zwei Identitäten? in Die DDR in der Ära Honecker 94 – 107* (Gert-Joachim Glaeßner ed., 1988).

²¹⁶ See Sigrid Meuschel, *Zur Konzeption der Nation und Nationalgeschichte in Die DDR*, id., at 79.

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 over the European integration project that is underpinned by conflicts about the interpretation of 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 with respect to the process of European integration as a whole. Indeed, the German example can be extrapolated to the debates both within and outside the member states of the EU, albeit within different parameters and contexts. The importance of comparative work, particularly with respect to constitutional courts that 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 summarized as follows: the challenge is to what extent the juridical debate may be structured in such a way that it can accommodate a variety of views while at the same time acknowledging the controversial nature and the contestability of the European integration project.

Indeed, the issue that the German juridical debate ought to address is the extent to which it can accommodate alternative positions such as a pragmatic legal pluralist position that regards sovereignty as shared and that 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* of the German juridical debate is, however, that it is confrontational enough that it inhibits a plurality of views, which detracts from the quality of the debate and makes it appear anachronistic, not only to Germany’s European counterparts but also to its own politicians.²¹⁷ Thus, while German jurists bicker about the terms of reference for the debate, politicians have seized the initiative in formulating a vision of Europe that represents a clear signal that the moment has come to move beyond classical conceptions of constitutionalism that are umbilically linked to the state.²¹⁸ This may serve as a

²¹⁷ See Herta Däubler-Gmelin, *Schwerpunkte der Rechtspolitik der neuen Legislaturperiode*, 32 *Zeitschrift für Rechtspolitik* 81, 84 (1999).

²¹⁸ 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 15 May 2000 at 15 and also of 28 June 2000 at 1. See Symposium: Responses to Joschka Fischer, *What Kind of Constitution for What*

reminder that the contribution of constitutional judges to the debate over the European integration process may, in effect, be more modest than is sometimes assumed.