Irish arguments
against the Treaty of Lisbon

from

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Contents:

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1. Repetition of the referendum on the same treaty

a) Rejection of the Treaty by the Irish

The Lisbon Treaty of December 13th 2007 replaced the Treaty on a Constitution for Europe of October 29th 2004 which was rejected by plebiscites in France and the Netherlands. The President of the State of France and the Government of the Netherlands did not provide for a plebiscite on the Lisbon Treaty and disregard the fact that their peoples had said NO in referenda. The Lisbon Treaty is only marginally different from the Constitution Treaty. It changes the Treaty on the European Union (TEU) and the Treaty on the Foundation of the European Community which shall now be called Treaty on the Functioning of the European Union (TFEU)[2]. The Lisbon Treaty does no longer speak of a "Constitution for Europe", although it remains such a constitution, it no longer ordains symbols of the Union like the Hymn, the Flag, the Euro, although these symbols are being practised, and it conceals the overruling of the Law of the Union over the Law of the member states in the 17th Declaration, although this overruling is permanent usage of decision making in the European Court of Justice.

The Lisbon Treaty has been ratified by 22 member states. The people of Ireland rejected this treaty in the referendum of June 12th 2008. This means the treaty is a failure. Still the process of ratification is being continued in the effort to move the Irish people to accept it nevertheless. In Germany foregoing ratification the Federal Constitutional Court had to decide on constitutional law suits by myself and others. It accepted approval of the Lisbon Treaty by the German parliament ("Bundestag" and

[1] Zum Ganzen *K. A. Schachtschneider*, Verfassungsbeschwerde vom 25. Mai 2008 gegen das Zustimmungsgesetz des Deutschen Bundestages und des Bundesrates vom 24. April und 23. Mai 2008 zum Vertrag von Lissabon; Homepage: www.KASchachtschneider.de.

[2] EUV und AEUV werden aus der nicht amtlichen, aber konsolidierten Fassung der Kommission der Europäischen Union zitiert.

"Bundesrat") only "in consideration of the principles" as stated in the decision of the Court issued on June 30th 2009. Due to the reservations in the Court decision the Treaty has been changed essentially. Therefore another Treaty will be valid in Germany as in all other member states including Ireland, if the Treaty will come into force at all.

On October 2nd the Irish people are asked a second time if they wish to integrate the Lisbon Treaty in their national constitution or not. This request is illegal, because a plebiscite, a referendum must not be repeated only because the government does not accept the result – or, more precisely, because the parties of the Treaty (the EU heads of state or government) do not accept the refusal of the Treaty by the people of the member state of Ireland. The people have to remain the sovereign, not the government, not the parliament. These are bodies of the state and have the obligation to fulfil the intentions of the people. All people in Europe thinking in terms of freedom and justice are enraged that Ireland is forced to repeat its referendum. For this fact alone all Irish people should vote NO.

b) Concessions to Ireland (?)

The Conclusion of the heads of state or government of June 18/19th 2009 contains certain concessions to Ireland. However, it does not change the Lisbon Treaty in any way neither formally nor materially. Even if the so-called concessions should be ratified in a protocol, it remains the Treaty which the Irish had rejected. Only the intention that every member state should keep its own commissioner including Ireland is a move away from the plan to reduce the commission for better functioning (rotation procedure). This does not change the Treaty.

Section A of the Conclusion states that "neither the provisions of the Treaty of Lisbon which give legal status to the Charter of Fundamental Rights of the European Union nor the provisions of this Treaty in the area of Freedom, Security and Justice affect in any way the scope and applicability of the protection of the rights to life, protection of the

family and of the protection of the rights in respect rights of education providing by the Constitution of Ireland." This Conclusion does not grant anything which is not valid anyway. The validity of the national constitutions and laws is not affected by the laws of the Union. The laws of the Union are valid in addition to the national laws. But the laws of the Union have primacy in application. In case national laws remain applicable because for a given matter there are no Union rules the national constitutions and their fundamental rights are still authoritative. According to article 51 of the EU Charter of Fundamental Rights there is no competition in application of national of Union fundamental rights. The Conclusion under section A as quoted does not alter anything in the rejected Lisbon Treaty. The Irish people are being deceived if something else is pretended. The terms which are decisive are "validity" and "applicability". These are legal terms which cannot be fully understood by all people. It means the Irish protection of fundamental rights opposed to the laws of the Union will be lost despite this Conclusion.

According to section B of the Conclusion of June 18/19th 2009 "nothing in the Treaty of Lisbon makes any change of any way kind, for any Member State, to the extent or operation of the competence of the Eurepean Union in relation to taxation". If the Lisbon Treaty does not change the tax authority, as the Conclusion maintains, then the Conclusion does not mean anything at all. It does not change the Treaty in any way. One has to study treaties between nations, conclusions and declarations precisely in order to discover the deeper meaning which is often hidden. Once again the Irish are told that their sovereignty will be respected although in fact nothing is being concessed or altered. By the way, the Treaty clearly rules in article 311 paragraph 3 sentence 2 (TFEU) that the EU Council may decide unanimously on "new categories of EU financing". This means taxes in the first place. Thereby the tax authorities in the member states are not affected, but it paves the way for additional taxation by the European Union as soon as this should be decided on by the EU Council who – however – can only take into force the "system of self-controlled EU-financing" unanimously. Incidentally, this "self-controlled financing" has been possible for the EU

Council already according to article 269 paragraph 2 (TEC). It required in the past, in present or future the agreement and consent of the member states in compliance with their constitutional requirements. The wording of the Conclusion B is again refined, but does not change the rejected Treaty at all.

Section C of the Conclusion refers to "security and defence". Also section C does not change the Lisbon Treaty and does not justify a new referendum in Ireland. It states: "The Treaty of Lisbon does not affect or prejudice Ireland's traditional policy of military neutrality". The section of the Treaty regarding the common security and defence policy states in article 42 paragraph 2 subparagraph 2 sentence 1 TEU that it "shall not prejudice the specific character of the security and defence policy of certain Member States". Thus Ireland's neutrality is respected. This is repeated in paragraph 7 sentence 2 of this provision ruling the obligation for assistance if an armed attack strikes the sovereign territory of a member state. The decision on the transition to common defence according to art. 42 par. 2 sentence 2 TEU must be taken unanimously by the European Council. It requires consent of the member states in harmony with their constitutional provisions. With such a decision individual defence souvereignity (which by membership in the NATO is nearly abolished anyway) and defence capability of the member states taking part are completely ended, as is an essential part of their existential statehood. Ireland may in fact refuse common defence, but is then incapable of military defence, also against the military united member states of the Union. This aspect of sovereignity must not be ignored for the future. The other member states may establish a "permanent structured cooperation" according to art. 42 par. 6 TEU in conjunction with art. 46 TEU which may lead also to a common defence of the member states taking part. The security and defence policy reservations are all valid in Germany, too, because otherwise the Lisbon Treaty would infringe the limits drawn by the German Basic Law.[3]

[3] BVerfGE 90, 286 (381 ff.); 104, 151 (205); Lissabon-Urteil vom 30. 06. 09, Rdn. 382 ff.

But what does the neutrality reservation mean in reality?

The Constitution Treaty does not only transfer the defence souvereignty of the member states to a large extent to the European Union, but establishes a military Union power which to develop and strengthen becomes an obligation of the member states (art. 42 par. 3 TEU). "Member States shall undertake progressively to improve their military capabilities" (Subpar. 2 s. 1). For this purpose there is the European Defence Agency (Subpar 2 s. 2). This also applies to Ireland.

Part of the Common Security and Defence Policies are "the missions outside of the Union for Peace-keeping, conflict-prevention and strengthening of international security in accordance with the principles of the United Nations Charter " (art. 42 par. 1 TEU). Moreover, the Union empowers itself for "the fight against terrorism" also in third countries (art. 43 par. 1 s. 2 TEU). The term "terrorism" is nowhere defined and unclear. By way of assumption of terrorism marching into a third country and occupation of a third country may be justified. These are regarded as "Combatting Operations within the tasks of combat forces in management crises including peace-making and post conflict stabilisation" (art. 43 par. 1 s. 1 TEU). This is, e.g., the argumentation of the German Federal Defence Minister when criticised for Germany being in war with Afghanistan. With the authorization for missions the Union gives itself the right for making wars of aggression which cannot be justified with the purposes as stated here. The prohibition of the usage of force is a foundation pillar of modern international law (art. 2 par. 1 UN-Charter). Interventions are prohibited, also the humane intervention[4]. Members of the United Nations have the right for defence, also for defence in alliance (art. 51 UN-Charter). Any military mission which does not serve defence purposes is regarded as war of aggression violating international law and constitution and is liable to punishment. World peace only justifies the use of military forces in case this is resolved by the UN Security Council (art. 42 UN-Charter). Such missions do not at all affect the

[4] Dazu *Ch. Hillgruber*, Humanitäre Intervention, Großmachtpolitik und Völkerrecht, Der Staat 40 (2001), S. 165 ff.; *A. Emmerich-Fritsche*, Vom Völkerrecht zum Weltrecht, 2007, S. 935 ff.

principle of neutrality, because they are no wars between states according to the traditions of international law, in particular international law of war. The so-called Irish clause does not apply. Nevertheless they are wars, modern or non-symmetrical wars. In any case they provocate acts of terrorism in the countries participating in these missions and possibly also in member states of the Union which are not taking part. According to German constitutional law the parliament has to decide on the use of military forces. The same is true for Ireland already now according to art. 44 TEU as Conclusion C finally says. In the wars (missions) the Union is making within the frame of the UN or without it all member states get involved inevitably only for their mutual economic bonds, even if neutrality in its strictly military sense is still existing. Who can rely on the respectation of international law in the militarized world of today void of peace? This is being done neither by the NATO nor the USA or Germany, much less other states. The European Union of the Lisbon Treaty is arming (mobilizing?) for war. It is anything else but a project aiming at peace. Ireland will not be able to withdraw from the wars. On the contrary, defence and (so-called) peace politics are conducted "in the spirit of loyalty and mutual solidarity" which shall determine Common Foreign and Security Politics of the member states (art. 24 par. 3 TEU). Thus individual, in case pacifistic peace politics cannot be carried on sustainably in the long run.

The ongoing further militarization of the Union in any case puts an end to the peace policy of Germany as ordered by the Basic Law which had established the "Bundeswehr" (the federal defence army) for defence purposes (art. 87a par. 1 s.1 Basic Law) [5] apart from limited domestic tasks and competences. By means of the Security and Defence Policy according to the Lisbon Treaty the European Union is about to establish itself as global or great power beside the United States of America. Thus the obligation for peace ("Friedensparadigma") which is being spread everywhere as the most important justification of EU integration is abandoned.

[5] Zur Erweiterung der Nato-Doktrin BVerfGE 90, 286 (344 ff., 355 ff., 381 ff.); 104, 151 (199 ff., insb. 203 ff., 205).

For all these reasons one has to reject the Treaty of Lisbon.

2. Existential Loss of State

By means of the Lisbon Treaty the political situation in all member states will be turned over, mainly because the individual/formerly independent states become only member states in the Union state, the European Federal State. The existential state tasks and competences will be (much more than now already according to the Treaty on the European Union and the Treaty on the European Community) dictated by this Union State. The big step to such a Union state can only be realized if the constitutions of the peoples – also those of Ireland – would permit to transfer to such an extent their quality as an existential state to the Union State as is stated in the Treaty. The most important limit of integration is the fact that in Ireland the complete power of the state emerges form the people (i.e. the Irish people) according to art. 6 of the constitution. This means the permanent democratic legitimation of all rights of sovereignty which are exercised in Ireland by the Irish people. This can only be guaranteed if by the transition of sovereignty rights to the Union for common using the principle of limited empowerment is observed.[6] Only by this politics of the bodies of the Union are foreseeable and accountable by the national[7] parliaments thereby ensuring democratic legitimation. However, the tasks and competencies transferred to by the Lisbon Treaty are wide and open. In particular the Union is being put into the position of (autonomous) self-determination for reaching its goals (competence-competencies). The empowerments enable the bodies of the Union to carry out a policy which may overthrow everything, cannot be anticipated or give people any chance of preparation at all and has therefore no democratic legitimation. The Union is able to push through all its far-reaching goals without having to ask the peoples and their bodies of representation once more.

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[6] Aber auch das Subsidiaritätsprinzip, Art. 23 Abs. 1 S. 2 GG, dazu 11.

[7] Für Deutschland BVerfGE 89, 155 (181, 187, 191 ff.); Lissabon-Urteil vom 30. 06. 09, Rdn. 226, 234 ff., 262, 265, 272, 275, 298 ff., 300 ff., 326.

3. European Union as Federal State without Legitimation

The state is republican, i.e. conceived as free, as the "union of a group of people under the rule of law"[8]. Statehood is the authority of the state, i.e. the sovereignty, which consists of a variety of sovereign rights on the grounds of the constitutional tasks and competences. The existential state is the people that is constituted as a community of fate, and existential statehood are the essential sovereign rights of a people, which it must exercise/use for the sake of its freedom and its property either directly or indirectly, mediated by its representatives.[9]

a) State quality and statehood of the Union

The Constitution of Ireland does not know a general principle of integration. It is open for the development of the integration which the Irish people have agreed upon by referendums. This is shown by the amendments to the constitution in Article. 29, Paragraph 4, which integrated the treaties of the Communities respectively the Union into the Irish legislation. These treaties (primary law) and the legal acts of the Communities and the Union on the grounds of the treaties (secondary law) were given primacy to the Irish law, the constitutional law included. Accordingly the Treaty of Lisbon has to be accepted by referendum as well, in accordance with Article 47 of the Irish Constitution. Ireland however is not open for each and every development of its Constitution which is achieved by this procedure of constitutional amendment. The elementary principles of the Constitution that man is virtually born with, - the dignity of man and therefore his or her freedom and equality - are not at the disposal of any politics. That follows from the preamble of the Irish Constitution and from Article … . The same is true for all peoples. In its Lisbon Treaty judgement the German Federal

[8] *Kant*¸ Metaphysik der Sitten, ed. Weischedel, Bd. 7, S. 431.

[9] *K. A. Schachtschneider*, Prinzipien des Rechtsstaates, 2006, S. 58 ff.

Constitutional Court made this the foundation of its decision (Rdn 208, 210 f.). Therefore the people is the subject of state authority (governmental power or sovereignty), as it is made plain in Article 6 of the Irish Constitution. It is the people that has the right "to decide on all issues of national politics in accordance with the necessities of the common good", this article says, the contents of which follow necessarily from the dignity of man, that is from the equal political freedom of man. As long as no other, new people, comes into existence, a people of Union citizens that possesses original sovereignty, there can be no Irish politics that is not ultimately decided by the Irish people. Otherwise the Irish people would deprive themselves of their own power, more exactly speaking they would take away their freedom and dignity. The Treaty of Lisbon, however, largely denationalizes Ireland as well as the other member states and thus is incompatible with the constitution of humaneness of man. The Irish people cannot approve of such a treaty as long as it is a people. The legal principle by which Ireland is bound (art. 12 par. 8, art. 15 par. 4, art. 26 par 1 s.1 and the preambel) would prohibit this. The fact that there is no Union people is the reason why the German Federal Constitutional Court took the stand until today that the European Union is neither a state nor a federal state.[10]

For this doctrine however the highest German Court did not develop a definition of the state or the federal state and it didn't even check, whether the European Union is a state or a federal state. In the 1993 Maastricht decision, the Court ruled that the representative authority of the German Bundestag has not yet been voided in such a way that "the democratic principle, as far as it is declared to be inalienable, was violated", but it did not discuss the tasks and competences of the Union and the Communities in detail and in general.[11] The factual and legal situation is a different one: The European Union is not an existential state and will not become an existential state by the Treaty of Lisbon, because only a people that has been constituted to be a state, a state, in which by the

[10] BVerfGE 22, 293 (296); 37, 271 (278); 75, 223 (242); 89, 155 (188); Lissabon-Urteil vom 30. 06. 09, Rdn. 228 ff., 296, 344 ff.

[11] BVerfGE 89, 155 (181)

state constitution the original sovereignty, that is the power (possibilities to act) of the whole people is constituted to be the state power. This original sovereignty stays with the peoples of the Member States that constituted themselves to be existential states. This sovereignty is – in a sense as the reality of freedom – in-transferable, it cannot be transferred. The Union acts on the grounds of the transferred (better: assigned) sovereign rights[12] which the Member States transferred to it for the purpose of the joint exercise of these rights. This transferal can be withdrawn. The treaty of Lisbon neither constitutes a people, although it speaks of "citizens", who were directly represented in the European Parliament on Union level (Article 10, par.2 TEU), but also of "Union citizens" the representatives of which composed the European Parliament (art.14, par. 2, TEU page 2). Such texts, however, do not establish an original sovereignty and do not constitute an existential state. They are unlawful, because they are not in accordance with constitutional law. Original sovereignty requires a constitution that is decided upon by a people, in this case by a Union people. Such a step, however, presupposes that the united peoples are ready/willing to restrict or even give up their existential stately quality or their existential statehood. No European people wants that, and much less the Irish.

But even today tasks and competences of existential statehood have been transferred as sovereign rights to the Union for the purpose of a joint exercise, which actually have to remain with the peoples as existential states for the sake of their democratic legitimization because otherwise the fundamental principle would be violated: All state or governmental power proceeds from the people. The existential state, i.e. the constituted people, may and can transfer sovereign rights to a "supranational" organization, the Union for the purpose of united exercise, only if these transferrals lead to a foreseeable and thus for the peoples' representatives accountable politics of the Union because of the democratic transparency (principle of restricted empowerness/

[12] BVerfGE 89, 155 (188 f.).

transferral).[13] Actually, the transferred sovereign rights do not empower the Union for a restricted and determined purpose but they are wide and open. At best they set the Union a very vague orientation program, of the sort that is usually to be found in constitutions, which however does not allow parliamentary accountability of the Member States for these politics. The peoples of the Union and their representatives cannot foresee and account for the politics of the Union. The basis of legitimacy between the peoples and the European Union is torn. Also in the Lisbon Treaty the "principle of restricted empowerness/ transferral" is nothing but the almost limitless wide "competences", which are transferred to the European Union by the member states for the purpose of the realization of the Union's goals (Art. 5, par.2, TEU). The Union can only have derivative competences and authorities and they are always somehow restricted, due to the lack of original sovereignty. The indispensable democratic substance of foreseeability and responsibility has been completely lost by this Treaty if not even explicitly negated.

b) No independent democratic legitimation of the Union

The Union does not have an independent democratic legitimation because it lacks a Union people with an original sovereignty. Such sovereignty would require a Union constitution which generates a Union people. The European Parliament is an organ of the association of states[14] and will stay so without a constituted Union people. It will not be (in contrast to the quoted texts) a representative organ of a Union people. In order to be that a constitutional enactment would be necessary for the above mentioned opening of the member states' constitutions for an existential Union (federal) state. Apart from that the European Parliament is not elected equally and thus is unable to constitute democratic legitimation; at best it can "complement and strengthen" it.[15] So it factually

[13] BVerfGE 89, 155 (181, 191 ff .; Lissabon-Urteil vom 30. 06. 09, Rdn, 226, 234 ff., 262, 265, 272, 275, 298 ff., 300 ff., 326; dazu *K. A. Schachtschneider*, Prinzipien des Rechtsstaates, 2006, S. 71 ff.

[14] BVerfGE 89, 155 (184, 186, 188 ff.).

[15] BVerfG Lissabon-Urteil vom 30. 06. 09, Rdn. 262, 271.

remains an “assembly of the representatives of the peoples” (Art.189, par.1 TEC, valid version), but not representing a Union people with original sovereignty. If the democratic legitimization would proceed from the European Parliament or would essentially be supported by it, the fundamental principle of freedom, that is the equality of all human beings and citizens in that freedom, would be grossly violated, indeed.

c) European Union as a genuine federal state

aa) Already today, and even more so after the Treaty of Lisbon, the European Union is a genuine federal state[16], genuine, because it collectively exercises sovereign rights which were transferred to it by the member states due to a treaty among them. It also is a state institutionally, although not an existential state since it lacks a state people. And it has tasks and competences of a state, thus statehood, even existential statehood, however unjustified. Typical of a genuine federal state is the right of withdrawal (art. 50 TEU). The Union is no federal state modeled on the non-genuine federal state, which Germany and also Austria are examples of. The non-genuine federal state does not have as its basis a treaty of the member states (Länder/provinces), but is based on a constitutional law that comprehensively regulates the whole state in the sense of a federal state. The functional and institutional statehood of the sovereign authority of the Union is based on certain sovereign rights of the member states which these states transferred to the Union by treaties, and it serves to the joint/collective exercise of these sovereign rights; that means it is the exercise of the federal state authority, of a genuine federal state.[17] It is not this quality of the Union as a genuine federal state which violates the constitution. It is indeed compatible with the constitutional term of a “united Europe” (preamble, art. 23, par. 1, p.1). Incompatible is the equipment of the Union with tasks and competences of existential statehood, without democratic legitimation.

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[16] Dazu *K. A. Schachtschneider*, Deutschland nach dem Konventsentwurf einer „Verfassung für Europa“, in: W. Hankel, K. A. Schachtschneider, J. Starbatty (Hrsg.), Der Ökonom als Politiker – Europa, Geld und die soziale Frage, FS W. Nölling 2003, S. 279 ff.

[17] Vgl. die Begriffskritik des Verfassungsgerichts der Republik Polen, Urteil vom 11.05.2005, EuR 2006, S. 236 (241 ff.).

bb) The new division of authority/ competences in the Treaty of Lisbon excludes the dogmatics of the association of states. The dogmatic of the federal state is inevitable. The Treaty on the Functioning of the European Union (TFEU) distinguishes between “exclusive competences” and “shared competences” (art.2, par.1 and 2), apart from the competences of coordination, as they are determined in art. 5 and 6. In the field of exclusive competences it is “only the Union may legislate and adopt legelly binding akts”. The member states may only take action in such a case, if they are empowered to it by the Union or for the implementation of Union akts (art.2, par.1 TFEU). According to this unambiguous wording the member states lose – in the realm of the Union’s exclusive competences – their legislative sovereignty, which they transfer to the European Union by the Lisbon Treaty. This establishes in any case – over and above the integration up to now –a federal state. The member states lose part of their sovereignty, that means they can exercise their stately power only in so far as it has remained with them, as it is common in a genuine and even more so in a non-genuine federal state, in which the exercise of the stately power is divided between the federation, i.e. the central state and the member states, the Länder (provinces). The law does not any longer totally proceed from the people, but from the Union in the field to which they transferred part of their rights to the exclusive competence of the Union. This corresponds with the “autonomous” legal order of the Community, on which the European Court of Justice based its judicature from the very beginning, which, however, has no fundament, because of the lacking original sovereignty. The fundamental principle of democracy is thus being restricted – in the realm of exclusive competences of the Union, but also in the field of shares competences of the Union, according to art.2, par.2, (TFEU), at least in so far as the Union has exercised these divided competences. If the member states became legislatively active in the realm of exclusive competences of the Union or even only in the field of the divided competences of the Union, these laws would be null and void because of the lacking authority and not only because of the priority of the Union law. They could not be enforced.

cc) The member states can preserve their independence/autonomy and their sovereignty only by the right to withdraw from the Union according to art.50, TEU. This possibility does not change the fact, however, that the member states – as long as they are members of the European Union, member states of a federal state, - have only a small part of their sovereignty at their disposal. Nobody can agree to that, nobody who is committed to democracy, as the Irish are according to article 5 of their constitution. Therefore: No!!

4. Neoliberal economic and monetary union

a) Economic constitution of the social principle

The economic and monetary union has already, and definitely after the Treaty of Lisbon (Art. 3 paragraph 4 TEU, Art. 119 ff. TFEU), given over to the Union economic and monetary sovereignty, without which the Member States are unable to fufill their existential tasks, particularly not the social tasks. Through Art. 45 of its constitution, the Republic of Ireland is bound by the social principle[18]. "Justice and charity" shall "inform all the institutions of the national life" (paragraph 1). The social principle is a fundamental principle of the Republic. Being the principle of charity or brotherliness, it is associated inseparably with the principles of freedom and equality. Its law is the categorical imperative, the moral law, which at the same time determines the fundamental freedom duty of every person (Art. 1 Universal Declaration of Human Rights; Art. 2 paragraph 1 German Constitution)[19]. Ireland's economic constitution is accordingly, like that of Germany, that of the social market economy[20]. This term expresses the exclusive competence of the existential state for the welfare of all its citizens, as Art. 45 of Ireland's constitution makes clear. This is why the state is bound to a policy which allows all people civil independence. This demands above all a policy

[18] Für Deutschland *K. A. Schachtschneider*, Freiheit in der Republik, 2007, S. 553 ff., 566 ff., 583 ff., 636 ff. u.ö.

[19] *K. A. Schachtschneider*, Freiheit in der Republik, S. 34 ff., 256 ff., 420 ff., 458 ff.

[20] Für Deutschland *K. A. Schachtschneider*, Marktliche Sozialwirtschaft, in: K. Farmer/W. Harbrecht (Hrsg.), Theorie der Wirtschaftspolitik, Entwicklungspolitik und Wirtschaftsethik, FS W. Lachmann, 2006, S. 41 ff.; *ders*., Verfassungsrecht der EU, Teil 2, Wirtschaftsverfassung, i.E., § 1.

which provides all citizens with employment in the sense of a right to work (Art. 45 paragraph 2 i Irish Constitution)[21].

b) Neoliberal economic constitution of the Union

The economic and monetary union of the European Union is, by contrast, bound to "the principle of an open market economy with free competition" (Art. 119 TFEU). The "internal market" with "sustainable development of Europe based on balanced economic growth and price stability, "highly competitive social market economy, aiming at full employment and social progress", and so on, which the Treaty of Lisbon sets as its objectives in Art. 3 paragraph 2 and 3 TEU, is countered by the market and competition principle, as global as it is neoliberal, of the Treaty (Art. 3 paragraph 3 and 5 TEU), by the monetary union bound preferentially by price stability (Art. 127 paragraph 1 TFEU), in particular, however, by the subordination of the social objective. The market principle is justified by the basic freedoms (free movement of goods, freedom of establishment, freedom to provide services, free movement of workers and above all, free movement of capital) which constitute the internal market (Art. 26 ff., 45 ff. TFEU). These basic freedoms are the core of the Union and are asserted by the bodies within the Union, particularly by its Court of Justice, with full force. They allow no opportunity for realising the social principle within the Member States. The primacy of price stability within monetary policy is also to the detriment of the employment policy. The principle of economic stability demanded by the social principle is identified by the equal status of price-level stability, of the high employment status, of global economic policy balance and of constant growth (magic square, according to § 1 law for German's stability and growth – StabWG - 1967). The principles under economic constitution law of the Union oppose an employment policy of the Member States and thereby favour the market principle in the interest of global competitiveness and, even more, of the global marketability of capital. This is incompatible with the social principle. This economic order makes it obligatory to curtail workers rights, in

[21] Dazu *K. A. Schachtschneider*, Recht auf Arbeit - Pflicht zur Arbeit, in: ders., H. Piper, M. Hübsch (Hrsg.), Transport - Wirtschaft - Recht, GS J. G. Helm, 2001, S. 827 ff.

particular to reduce the wage share, particularly as the monetary union does not know any of the exchange rates compensating for the differing levels of efficiency among the economies. However, it also prevents, contrary to Art. 45 paragraph 1 ii of Ireland's constitution, the fair distribution of popular income to all people, therefore social policy in the narrower sense, demanded by the social principle.

c) Free movement of capital to the detriment of the people

Above all, the Union does not place any social restrictions against the marketing of capital. Free movement of capital (Art. 63 paragraph 1 TFEU) prevents the Member States from intervening in companies' business location policy. This exposes the Member States to the anti-social pressure of (so-called) system competition, particularly to tax, wage and social competition, which entails general pauperisation of the population. Additionally, jobs and thereby the essential property of the workers are at the disposal of the (direct and indirect) capital owners, whose social interest is already levelled by the fact that they (frequently living in distant countries) are limited to interest of returns. By means of free movement of capital, the influence of the populations on the companies that are crucial for their living is existentially and counter-democratically diminished.

The social obligation of ownership, which Art. 43 paragraph 2 line 1 Irish Constitution expresses clearly through the obligation of the state to regulate the exercising of private property "by the principles of social justice", cannot be realised[22]. It also does not appear in the Charter of Fundamental Rights (Art. 17). The worldwide free movement of capital enables the almost unlimited financial speculations which make up approximately 98% of global capital movement. Creditary money generation, which harbours extraordinary risks to the detriment of the real economy and thereby of workers, is barely restricted. As a result of the free movement of capital, states have forfeited sovereignty over the financial markets to the broadest possible extent. Security of financial circulation is in no way guaranteed, in opposition to Art. 45 paragraph 2 iv

[22] Dazu *K. A. Schachtschneider*, Grenzen der Kapitalverkehrsfreiheit, in: ders. (Hrsg.), Rechtsfragen der Weltwirtschaft, 2002, S. 253 ff.

Irish Constitution, which obligates credit monitoring for the "welfare of the people as a whole". The worldwide financial crisis, triggered by insufficiently backed loans to not so well-off homeowners in the United States, who because of high yields were taken on by speculating monetary institutions (including state-owned institutions, contrary to the law), has led to a world economic crisis which is driving people and populations into poverty. Ireland is particularly affected by this. In the globalised economy of the European Union, the state has no opportunity to assert regulations for private companies which will ensure that the public is protected "against unjust exploitation", as Art. 45 paragraph 3 line 2 Irish Constitution promises. The right to employment is nowhere to be found in the Charter of Fundamental Rights. As compensation, it recognises the right to access to "a free placement service" (Art. 29). Collective bargaining autonomy, which in its core constitutes the essential content of freedom of coalition in Germany, is protected merely "in accordance with Community law and national laws and practices." The internal market principle and the free trade principle lie within the exclusive competence of the Union, which does not formulate any social policy and, because of the differences between the economies is unable to do so, particularly as the world economic order does not permit social policy. (Wesensgehalt)

d) Loss of monetary sovereignty

Monetary/credit policy is essential and existential for the development of the economy[23]. The European Central Bank is not suited for administering a sustainable interest rate policy even for just one Member State, because the monetary area is not ideal. Ireland suffers from the fact that its previous interest rate advantage has been turned into an interest rate disadvantage by the monetary union. The creditary capital is being subtracted because it can no longer be serviced. Real interest rates were all too low, even negative. Now they are so high that they can no longer be generated. The Member States with higher inflation than Germany in particular are forfeiting their

[23] Dazu *W. Hankel, W. Nölling, K. A. Schachtschneider, J. Starbatty,* Die Euro-Klage. Warum die Währungsunion scheitern muß, 1998; *dies*., Die Euro-Illusion. Ist Europa noch zu retten? 2001.

competitiveness more and more, because they are unable to devalue. This is ruining their economy. Germany's large export surplus is largely to the detriment of Member States with inflationary costs. A state which is no longer able to react to the economic situation in terms of monetary policy has lost its economic sovereignty and thereby an essential part of its existential statehood. The dissolution of Member States' economies aimed at with the monetary union will remain an illusion as long as their performance, their internal legalities and, in particular, their social state conditions are heterogeneous. Such denationalisation is incompatible with the social principle, but also with the ownership guarantee, indeed with political freedom. The Member States are deprived of power in the global economy, because trade policy (Art. 206 f. TFEU) has been given over to the exclusive competence of the Union (Art. 3 Abs. 1 lit. e TFEU)[24]. An aid policy with an effect on employment is strictly forbidden to Member States (Art. 107 TFEU). Contrary to Art. 45 paragraph 2 Irish Constitution, the only business location policy that remains is so-called wage flexibility, therefore the reduction of wages, or precisely – because of one-dimensional globalisation – the unemployment forced by cross-border competition, because the social standards to which Ireland is bound are not globalised, particularly not the human rights standards, the realisation of which is demanded by the social principle: such as, in particular, employment wages which enable an adequate standard of living for the family too, in the sense of Article 41 paragraph 2 and 45 paragraph 2 i Irish Constitution.

e) Country of origin principle/principle of mutual recognition

Existential statehood has been conferred essentially to the Union merely with the basic freedoms that are applicable virtually to all areas of policy. The Court of Justice of the European Union unfolds the basic freedoms extensively with repeatedly new unexpected court rulings. In the course of its judicature it has asserted the principle of mutual recognition among the Member States and thereby the country of origin

[24] Schon EuGH v. 13.03.1971 – Rs. 22/70 (AETR), Slg. 1971, 263, Rdn. 15, 19; EuGH, WTO-Gutachten, Slg. 1994, I-5267, Rdn. 76 f.

principle[25]. As a result of this the peoples have largely forfeited sovereignty over circumstances in their countries. They can have only a very limited influence on the employment circumstances in their country, if enterprises from other Member States render service provisions in their country, or determine the quality of foodstuffs if foodstuffs are supplied from other Member States according to their practices; these other Member States may also have procured these foodstuffs from the global market. The immediate applicability and the precedence of basic freedoms, as practised by the Court of Justice (for a long time)[26], have rendered the Member States largely impotent. This is incompatible with the democratic principle.

5. Loss of national legal sovereignty

a) Legal authority of the Court of the European Union

One factor of the existential statehood of a people as an existential state is legal sovereignty, in any case the last word in matters of law. The Irish Constitution includes, rightly, this principle in Art. 6: "all powers of government dirive, under GOD, from the people", in its sovereignty; this is because matters of the law are matters of "national policy", even the most important matters. The judicature in basic issues of law, particularly in fundamental rights issues, requires strong democratic legitimation by the people, in whose name the law is pronounced[27]. Not only the legislative process in

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[25] EuGH v. 20.02.1979 – Rs. 120/78 (Cassis de Dijon), Slg 1979, 649, Rdn 8, 14; EuGH v. 30.11.1995 – Rs. C-55/94 (Gebhard), Slg. 1995, I-4164, Rdn. 37; EuGH v. 22.10.1998 – Rs. C-184/96 (Kommission/Frankreich), Slg 1998, I-6197, Rdn 28; *K. A. Schachtschneider*, Verfassungsrecht der EU, Teil 2,Wirtschaftsverfassung, § 2, II, 2 und 3..

[26] EuGH v. 05.02.1963 – Rs. 26/62 (Van Gend & Loos/Niederländische Finanzverwaltung), Slg. 1963, 1, Rdn. 7 ff.; EuGH v. 15.07.1964 – Rs. 6/64 (Costa/E.N.E.L.), Slg. 1964, 1251, 1269; BVerfGE 37, 271 (279 ff.); 73, 339 (366 ff.); 89, 155 (182 ff., 190 ff., 197 ff.); dazu *K. A. Schachtschneider*, Verfassungsrecht der EU, Teil 1, Organisationsverfassung, i.V., § 5; *ders*., Prinzipien des Rechtsstaates, S. 82 ff.

[27] *K. A. Schachtschneider*, Demokratierechtliche Grenzen der Gemeinschaftsrechtsprechung, in: St. Brink / H. A. Wolff (Hrsg.), Gemeinwohl und Verantwortung, FS H. H. v. Arnim, 2004, S. 779; *ders*., Prinzipien des Rechtsstaates, S. 215 ff.; *ders*., Quo vadis Europa? – Ad finem Democratiae! in: W. Lachmann/R. Haupt/K. Farmer (Hrsg.), Zur Zukunft Europas, Marktwirtschaft und Ethik, 2007, S. 16 ff., 34 ff.

existential areas of life is conferred to the European Union to the broadest possible extent, but also judicature, not only because the legislative process has been communitised and the Union law is being applied according to principles under Union law, but because the European Court of Justice has procured competence concerning law for itself to a large degree without having had this competence conferred to it by means of Union treaties. Every court is obligated to apply Union law in such manner as devised by the Court of Justice. This law has been claiming direct applicability and precedence for more than 40 years[28] (17th Declaration concerning the Treaty of Lisbon). The Court has thereby usurped the power of a supreme constitutional court[29]. Ireland's constitutional changes with integration policy in mind have accepted this application precedunce without barriers. This is a cause for concern if this is to the detriment of the last word of the Irish people in matters of national policy, such as in the case of existential court rulings by the Court of the European Union in particular. The court devises the Union law for all Member State courts and thereby has achieved existential judicature sovereignty for the entire Union.

b) Fundamental rights competence of the Court of Justice of the European Union

The Court of Justice has procured the fundamental rights competences for acts of the Union (initially without text) for itself; this competence has also, however, been passed on to it by the German Federal Constitutional Court, in particular.[30] As a result of this the jurisdiction of the Member States has forfeited competence for the legality of policy to the broadest possible extent. This is a bitter loss of legality at the same time. The European Court of Justice, in its practice of more than fifty years, has not yet recognised a legislative process act of the Union as a breach of fundamental rights. Thus, in the face of the Union's legislative process, fundamental rights protection is running idle. The German Federal Constitutional Court has merely drawn a kind of line of resistance,

[28] Wegweisend EuGH vom 15. Juli 1964, Rs. 6/64 (Costa/ENEL), Slg. 1964, 1251 ff.

[29] Dazu *T. Mähner*, Der Europäische Gerichtshof als Gericht, 2005.

[30] BVerfGE 37, 271 (277 f.); 73, 359 (374 ff., 383 ff., 387); 89, 155 (174 f.); 102, 147 (166 ff.).

the precondition of which, namely the general disregard for the "indispensable fundamental rights standard"[31] , is as good as unverifiable. The Court of Justice and the Court of the European Union are structurally unsuitable for protecting fundamental rights not only because the judges – who all originate from different Member States – have no uniform legal culture and, at best, are able to communicate rudimentarily (although fundamental rights judicature presupposes stringent dogmatics), but because the Court of Justice perceives itself as an engine for integration and sees no occasion to delay or even hinder integration. Incidentally, the contractual foundations of its judicature, particularly the basic freedoms of the internal market, but also fundamental rights (which so far did not even have a textual basis) as well as politics are formulated that open and extensive that they have no binding effect.

c) Lack of democratic legitimation at the European Court of Justice

The extraordinary power of the Court of Justice of the European Union, not even bound in accordance with the principle of constitutional specificity, really requires particularly strong legitimation by the peoples whose living conditions the Court of Justice chooses to turn upside down. On the contrary, the Court of Justice manages entirely without democratic legitimation for its judicature on constitution and fundamental rights. The judges are proposed by the governments of the Member States, of all institutions, and (definitely after the Lisbon Treaty) appointed after a hearing by a (dubious) committee (Art. 254 TFEU), which is asked to state its opinion on the applicants' suitability for the office, with their agreement, only for six years with the possibility of renewed appointment (contingent, therefore) (Art. 19 paragraph 2 sub-paragraph 3 line 2 TEU), by the opponents of fundamental rights, of all people. Every Member State appoints a judge to the Court of Justice and to the Court (Art. 19 paragraph 2 sub-paragraph 1 and 2 TEU). As a result, twenty-six judges each at the Court of Justice and at the Court are unknown to the peoples within the Union. However, the peoples' legal system is also unknown to the judges who are unknown to the peoples; the judges have an impact on

[31] BVerfGE 73, 339 (387); 89, 155 (174 f.); 102, 147 (164); Lissabon-Urteil vom 30. 06. 09, Rdn. 331.

this legal system through their judicature on the Union (pronouncedly more strongly than the legislators). The thoroughly secular treaty organisation and judicature of the Union, the most important principle of which is the (so-called) discrimination ban, in no way lives up to the accentuated religious (Catholic) legal system of Ireland (preamble; family constitution in Art. 41). This is authoritarian paternalism. It is accepted by the heads of state and government because in many cases it asserts the policies on which they themselves are unable to reach agreement. The Court of Justice also amplifies the power of the Commission and of the Council, because it chooses to prop up its policies apologetically. As a result of the transformation of basic freedoms into subjective rights of every citizen and particularly of every business within the Union, [32] the Court of Justice has spread out its power broadly.

6. Decline of the fundamental rights culture

a) Debilitation of fundamental rights protection

Protection of fundamental rights is existential for a constitutional state, which is obliged to be democratic. However, as a result of European integration, fundamental rights protection has wandered into inappropriate, namely not democratically legitimated, hands, as the practice of the European Court of Justice for half a century has evidenced. The Charter of Fundamental Rights of the European Union, which was declared in December 2000 in Nice and now (with slight alterations) has been declared binding through Art. 6 paragraph 1 sub-paragraph 1 TEU, is the shabbiest human rights text which has ever been formulated in the free world[33]. The fundamental rights are not only debilitated textually to the broadest possible extent, but the general principles of fundamental rights application debilitate the intensity of fundamental rights protection. The fundamental rights text contains at least twenty different formulations for the intensity of fundamental rights protection, such as the words “to guarantee”, “to

[32] EuGH vom 5. 02. 1963, Rs. 26/62 (van Gend & Loos), Slg. 1963, 1 ff.

[33] Zur Charta der Grundrechte der Europäischen Union (kritisch) *K. A. Schachtschneider*, Eine Charta der Grundrechte für die Europäische Union, Recht und Politik 1/2001, 16 ff.; *ders*., Eine Charta der Grundrechte für die Europäische Union, Aus Politik und Zeitgeschichte, B 52-53/2000, 13 ff.

protect", "to comply with", "to secure", "to recognise and to respect", "to have the right to be respected", "to respect", "to be forbidden", "to have the right", "to be free", etc. Essential fundamental rights are formulated with the word "to respect", which promises only low protection intensity if it justifies subjective rights at all, such as academic freedom, freedom of the media, corporate freedom. "To respect" means that policies must take these "fundamental rights" into consideration alongside other aspects, nothing more. Whether effective limits for the Union's policies are going to be drawn from these fundamental rights, remains to be seen. Political freedom is not protected in the Charter of Fundamental Rights at all.

b) Enablement of the death penalty and of killing during "uprising" or "riot"

Contrary to the abolition of the death penalty demanded by the principle of human dignity (Art. 102 German Constitution), the Charter of Fundamental Rights enables the re-introduction of the death penalty in the event of war or in the event of imminent threat of war, but also the killing of people in order to suppress an uprising or a riot. Of relevance, admittedly, is not the full-bodied Art. 2 paragraph 2 of the Charter, which prohibits condemnation to the death penalty and execution, but the declaration concerning this article, which originates from the Convention on Human Rights of 1950 (cf. Art 6 paragraph 1 sub-paragraph 3 TEU and Preamble paragraph 2 line 2 and Art. 52 paragraph 3 of the Charter). The authorisations of the Union within the area of joint foreign and security policy are sufficient in order to introduce the death penalty in the interest of the efficiency of missions, of the combating of terrorism or even of defence. Admittedly, this presupposes Ireland's participation in such missions. Uprisings or riots can also be seen in some demonstrations. Operative measures by the European police (Europol) and the police authorities of other Member States can, according to Art. 88 paragraph 2 lit. b and Art. 89 TFEU, be regulated by the Union. In such situations, the use of deadly firearms is no breach of the right to life, according to the Charter of Fundamental Rights. The territorial sovereignty of the Member States is dwindling increasingly.

c) No fundamental rights appeal

A fundamental rights appeal, such as the constitution appeal according to the German Constitution (Art. 93 paragraph 1 no. 4a German Constitution) which is indispensable to a constitutional state, is unknown to the Charter of Fundamental Rights. Fundamental rights (if at all) are protected only within the context of other processes. Citizens are unable to submit Union acts of legislature directly to the European Court of Justice for examination of fundamental rights.

The attractive phrase, “area of freedom, security and justice” (Art. 67 ff. TFEU) conceals the constant loss not only of security within the Union, but also of legality and thereby liberality. The large, de-bordered area of the Union creates ideal pre-conditions for all types of organised crime.

7. Existential criminal policy of the European Union

a) Minimum regulations for crimes and penalties

Harmonisation of civil and civil trial law is becoming increasingly inescapable. This is a further step in the development of the Union state. Co-operation in judicial policy is not only enhanced, but judicial policy is conferred essentially to the Union by means of the Treaty of Lisbon. The Union is empowered to adopt minimum regulations for the establishment of crimes and penalties in areas of “particularly serious criminality”. The mentioned crimes are terrorism, traffickury human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime with a cross-border dimension (Art. 83 TFEU). This applies also for harmonised policy areas (paragraph 2). For additional areas of criminality the Union is able, depending on development, to provide the authority (autonomously) to adopt minimum regulations for crimes and penalties (paragraph 1 sub-paragraph 2), therefore also for abortion. During the so-called emergency brake procedure, however, Ireland is able to deflect such

regulations if “fundamental aspects of its criminal justice system” were going to be affected (paragraph 3).

Minimum regulations of the Union are also enabled for criminal procedure law (Art. 82 paragraph 2 TFEU). Co-operation between the criminal prosecution authorities and the police is set down for the remainder. Eurojust is able to intervene in the investigatory work of the Member States (Art. 85 TFEU). A European Public Prosecutor’s Office can be set up to combat certain crimes affecting the financial interests of the Union (Art. 86 TFEU). The European Public Prosecutor’s Office can even perform the tasks of the public prosecutor’s office before the courts of the Member States. These authorisations have a deep impact on the existential penal sovereignty of the Member States.

b) European arrest warrant

One striking expression of the existential statehood of the Union is the framework resolution concerning the European arrest warrant of 7th June 2002, which in turn is based on the principle of formal mutual recognition. It enables the extradition of a national subject of the Member States to another Member State if this Member State has adopted an arrest warrant against him, even if the actions of the person concerned were without penalty in his country of origin. This casts doubt on the existential protection of the citizen by his state, the basis of the state/citizen relationship. To this end, in Germany the fundamental right of Art. 16 paragraph 2 German Constitution, according to which no German citizen may be extradited abroad, has been supplemented and watered down by a line 2; for now, Germans may be extradited to a Member State of the European Union or to an international court of justice, “as long as constitutional principles are safeguarded”. This regulation is a serious breach of constitutional citizen protection. The constitutional statehood of the Member States is deemed to be recognised. The European arrest warrant is the physical embodiment of the principle of Union citizenship and is thereby an important part of the existential statehood of the Union, indeed it physically embodies an existential Union state, admittedly without a Union people and without democratic legitimacy.

8. General authorisations of the European Union

Extensive competence-competences are to be conferred to the Union (Art. 48 paragraph 6 TEU, Art. 311 paragraph 3 and Art. 352 TFEU).

a) Flexibilisation clause

The flexibilisation clause of Art. 352 TFEU enables the Council to adopt appropriate regulations unanimously at the proposal of the Commission after approval by the European Parliament for the realisation of the exceedingly broadly aimed objectives of the Union according to Art. 3 TEU, even if the treaties do not provide for the necessary powers. All forms of action, in particular the various acts, come under consideration. On this basis the Union can procure as good as any authorisation for itself, without having the Member States be obliged to consent to this. These latter may merely assert their (pitiable) objections arising from the subsidiarity principle (to this end 9) (paragraph 2). Legal regulations of the Member States cannot be harmonised on this basis if this is excluded by the treaties (paragraph 3). This competence-competence goes clearly beyond the corresponding general clause of what is now Art. 308 TEC, which was limited to the realisation of the Common Market.

b) General financial policy clause

The constitution treaty empowers the Union in a general financial policy clause, (Art. 311 paragraph 1 TFEU), to "provide itself with the means necessary to attain its objectives and carry through its policies". This general clause, as a similar one in the Treaty of Maastricht (art. 6 par. 4 TEU valid wording), has been downgraded by the German Constitution Court to a political declaration of intent.[34] But the European Union according to par. 3 s. 2 is to be authorized to establish"new categories of sown

[34] BVerfGE 89, 155 (185 ff.); Lissabon-Urteil vom 30. 06. 09, Rdn. 323 f.

resources" orto abolish existing categories. In fact the member states have to approve this law "in accordance with their respective constitutional requirements". But who has to approve is laid down in the national constitutions. A law of the Council is no international state treaty and does not change the Irish constitution, because the empowerment was transferred already in the Treaty of Lisbon. Therefore the approval of the government is sufficient. With these provisions the Union can introduce European taxes. Had this general clause been obligatory, the Maastricht Treaty would not have come into existence. However, as told, the concessions made to Ireland by the heads of state or government do not change anything in this respect.

c) Simplified Proceedings for the Alteration of the Treaty

With the Simplified Proceedings for the Alteration of the Treaty the EU Council (the heads of state or government together with the president of the EU Council and the president of the EU Commission, Art. 15 Par. 2 TEU) is able to change "all or a part of the regulations of the Part Third of the Treaty on the Functioning of the European Union" "relating to the internal policy and action of the Union" by unanimuty (Art. 48 Par. 6 Subpar. 2 TEU). For this, the European Parliament and the Commission have (only) to be heard, in case of institutional changes concerning monetary policies, the European Central Bank has (only) to be heard. Admittedly, the member states have to agree (again) "in accordance with their respective constitutional requirements". But this requires the consent of the Irish People only if Ireland (the Government, the Parliament or the Supreme Court) treats such (autonomous) alterations of the Treaty like the German Federal Constitutional Court[35] as treaty-analogous constitutional amendments; since the resolution itself is not a treaty. We'll have to wait and see.

The Lisbon Treaty does not provide for a ratification of such a resolution by the member states. Indeed, the resolution of the Simplified Alteration Proceedings must not extend the competencies of the Union beyond the competencies that are transferred

[35] Lissabon-Urteil vom 30. 06. 09, Rdn. 306 ff., 413 ff.

within the framework of the Treaty (Subpar. 3), but in Art. 3 TFEU (exclusive competence) and in Art. 4 TFEU (shared competence) the competencies are extremely vast and wide, for example in the area of exclusive competence for the “determination of the competition rules that are necessary for the proper functioning of the common market”, “Monetary policy for the member states whose currency is the Euro”, in the area of shared competence “Common Market”, “Social policy regarding the aspects mentioned in this treaty”, “Economic, social and territorial cohesion”, “Environment”, “Consumer protection”. “Energy”, “Area of Freedom, Security and Justice” etc. In the regulation of the internal policy areas and the measures in the Third Part of the Treaty that regulate the empowerment and the legislative procedures in more detail, the competencies as such are not named and not limited. Thus, the Simplified Alteration Proceedings allow for a complete alteration of the treaty in the essential areas of the Union, namely the Common Market, the economic and monetary union, the policies in other areas and even the policies concerning the Area of Freedom, Security and Justice, which means in the justice and police policies. Thereby, the reorganisation of the European Central Bank will also be made possible, for example the abolition of the independence of the Central Bank. No convent has to prepare these alterations of the Treaty. The peoples will not have to agree in referendums, not even the national parliaments will be included in the decision-making process by the Treaty. It’s mainly the heads of state or government that will be empowered with the European Council as the leaders of Europe. This Act of Empowerment is absolutely incompatible with the existential statehood to which the constitutional sovereignty of the member states belongs in particular. Several special evolutive clauses are added.

Besides, there are many bridge clauses (“Brückenklauseln”) according to which the Union can autonomously change from the principle of majority vote to the principle of unanimity vote, in particular the general bridge clause of Art. 46 Par.7 TEU. Such resolutions are also basically alterations of the Treaty for which the consent of the Irish People would be needed because of the mentioned reasons.

9. Devaluated principle of subsidiarity

a) The Lisbon Treaty enshrines the principle of subsidiarity in Art. 5 Par. 1, P.1, Par. 3 and 4 as administrative regulation as well as in the principle of limited specified empowerment (Par. 1 P. 1 and Par. 2) and the principle of proportionality (Par. 1 P. 2 and Par. 4). This regulation still faces criticism in the light of the principle of subsidiarity according to EU law.[36]

As far as the area of exclusive Union competence is concerned, the application of the principle of subsidiarity is already explicitly excluded by the Treaty (Art. 5 Par. 3 TEU). And since the areas of Union responsibility are not properly defined with the open principle of subsidiarity, the concurrent exertion of competence due to the shared competence of the Union (Art. 4 TFEU) ultimately has to be committed to the finality of the integration process. For the necessity ("better to achieve") of harmonising the law of the member states there will always be "objectives" of the Union that justify the authority of the Union because of "their volume and their effects on Union level". The attempt to limit the Union competences through the principle of subsidiarity, as formulated in Art. 5 Par. 3 TEU, is as a result ineffectual and thus doomed to fail. The real life experience of the principle of subsidiarity is evidence of this. It is always important who decides on the subsidiarity with what kind of intention.

However, now the national parliaments can (and shall, Art. 5, Par. 3, Subpar. 2 P. TEU) pay attention to the compliance with the principle of subsidiarity. Details are regulated in the protocol concerning the application of the principles of subsidiarity and proportionality. Within (now) eight weeks after having received a draft of Union legislation, the national parliaments or the chambers of one of these parliaments can maintain conclusively, that this legislation may not be compatible with the principle of subsidiarity. The statements of the national parliaments are merely considered. If the

[36] *D. Grimm*, Effektivität und Effektivierung des Subsidiaritätsprinzips, KritV 1/1994, S. 6 ff.; *H.-J. Papier*, Das Subsidiaritätsprinzip als Bremse gegen schleichenden Zentralismus, Vortrag am 26.10.2006 in Tübingen.

number of rejections reaches at least a third of the total amount of the two votes allocated to the national parliaments, the draft has to be "reviewed". This threshold is set at only a quarter of the votes if the draft of a legislation deals with the Area of Freedom, Security and Justice. This is in fact the combined parliaments of nine, respectively seven member states. If the Commission wants to persist on the draft, it has to justify that, nothing more. In the regular legislation procedure, there are particularities: According to detailed regulation, the EU Council can reject a legislation draft with 55% of its members, and the EU Parliament with the majority of the voting papers counted. These procedures transfer the responsibility for subsidiarity to the Union. The subsidiary situation is different in each country, but large countries like Germany do not have more votes than small countries like Malta. It is not obvious that the European Union has any competence for a policy that in particular Germany could not "sufficiently realise" on its own, mostly even better, at least democratically much more legitimised. But also the other way round, small countries may have conditions that stand more opposed to a common policy than the conditions in large countries, for example the regulation of the banking confidentiality.

The European Court of Justice has to decide about claims, restricted to two months, due to a possible violation of the principle of subsidiarity, by an act of law (Art. 8 of the protocol). But not much protection of the principle of subsidiarity can be expected from this Court. With this procedure the national courts shall be excluded from the administration of justice in cases of the principle of subsidiarity. But also in matters of subsidiarity, the Irish People, at least the Supreme Court, must have the last word, because the legislation competencies of the Union or – then – the Irish legislation depends on this decision on subsidiarity. This is a constitutional question.

b) The principle of subsidiarity is a structural principle of democracy. Democracy only exists in small units.[37] The principle of subsidiarity organises the competencies against

[37] Zum Prinzip der kleinen Einheit *K. A. Schachtschneider*, Prinzipien des Rechtsstaates, S. 45, 58, 90 f., 171, 229; wegweisend *Rousseau*, Vom Gesellschaftsvertrag, III, 4, III, 15; eindrucksvoll *K. Lorenz*, Der Abbau des Menschlichen, 1983, S. 222 f.

centralism in the sense of precedence of the small units. Therefore a violation of the principle of subsidiarity is at the same time always a violation of the democratic principle. Likewise, the representation of the people through the parliament is only then constitutionally correctly organised if the integration policies respect the principle of subsidiarity. The competence-competencies completely ignore the principle of limited empowerment and also the principle of subsidiarity. Correctly, the principle of subsidiarity has to be realised in the primary law of the treaty texts. Already the transferral of sovereignty rights has to comply with the principle of subsidiarity, also because only the primary law of the Union as an alteration of the constitution needs agreement by referendum. Because of the practised precedence of Union law over national law, the Union courts have the final responsibility for reviewing the secondary Union law in terms of compliance with the primary Union law, in particular the basic rights and now also the principle of subsidiarity. This is the unconstitutional objective of Art. 5 Par. 3 TEU, the protocol on the application of the principles of subsidiarity and proportionality.

10. Outlook

A united Europe has to comply with the constitution of the humanity of man, of freedom, equality and fraternity in terms of the principle of universal rights in Art.1 of the Universal Declaration of Human Rights. It must be a European Europe. Such a Europe is characterised by the unity of the democratic, constitutional, social and national principle. For the sake of freedom, a united Europe can only be a republic of republics. Only truly federal, it can satisfy the democratic principle and thus maintain the rule of law and the principle of the welfare state. For the sake of peace, it is a duty to establish legal relationships via treaties among the European neighbours. But these treaties must be based on the principles of law which the enlightenment teaches us. The European Union needs new treaties. The best of the nations, elected by the voters, not sent by the party oligarchy, have to develop an agreement that each single country can

consent to, that creates a Europe of the Peoples through the people and for the people who can be citizens in such a polity (community).

The European Union of the Lisbon Treaty is a centralised state with just a few leftover elements of sovereignty of the member states. It wants to belong to the global powers and is rearming more and more for the great war. Its political structures tend towards a bureaucratic dictatorship. The peoples of Europe put all their hope in the Irish People saying NO to the injustice of the Lisbon Treaty, on behalf of all people in the Union. Otherwise, may GOD be with us.