

# Regional Integration Observer

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## Editorial

Regional Integration is a process that often includes more than an economic dimension. It reaches out to political, social and cultural affairs. All these aspects of regional integration are subject of interstate negotiations and need rules and regulations to define a common ground that serves as uniting bond. Integration law is insofar essential for the functioning of a regional integration scheme. However, it is not easily created and even less easily enforced. In this regard a supranational institution, a regional court of justice is of utmost importance in the process of regional integration. It cannot only enforce the agreed upon procedures, rules and values, but it can also proactively develop further the community law in the spirit of deeper integration and the common objectives. This of course is only possible, if the court of justice is provided with the necessary competences to bring the states back in line if necessary. Integration law must therefore imply sanction mechanisms for the unintended cases of misbehavior or failure to comply with the integration requirements. This is not only of importance for the realization of the integration objectives but also for the lasting peace in the relations between the member states. Nevertheless, community law can conflict with national law and create tension. Regional integration is therefore also a matter of the national courts of justice. Especially in the European Union many cases have been ruled by the European Court of Justice and many national decisions have contributed to define the limits and interactions of European and national law for the well-being of the integration process. The latest invention of the European member states, the Treaty of Lisbon has once more occupied the national courts of justice as it touched again upon the national sovereignty of the member states. This has been a master example for the challenge as well as the success of integration law.



Ariane Kössler, Junior Fellow at ZEI



The Building of the European Court of Justice in Luxemburg. © European Communities

## The Lisbon Ruling of the German Federal Constitutional Court – One Step Forward, Two Steps back

\* *Andreas Haratsch*

### I. Introduction

According to the ruling of the German Federal Constitutional Court on the German Act Approving the Treaty of Lisbon, the European Union is a union of sovereign states. At the same time, the German Basic Law defines sovereignty as freedom that is organized by international law and is committed to it. One specific manifestation of the openness of the German legal order towards international law is the principle of openness towards European law. Therefore, the Basic Law grants the legislature powers to engage in a far-reaching transfer of sovereign powers to the European Union.

However, Germany shall only participate in a European Union which is committed to democratic, social and federal principles and which guarantees a level of protection of fundamental rights essentially comparable to that afforded by the Basic Law. The fundamental elements of German constitutional law must not be infringed by the transfer

of sovereign rights to the European Union. These elements are the democratic, the federal, the social and the republican principles as well as the rule of law and human dignity. Moreover, the German Basic Law does not only assume the sovereign statehood of Germany but also guarantees it. The so-called 'eternity guarantee' of Article 79.3 of the Basic Law takes the issue of the identity of the free constitutional order not only out of the hands of the constitution-amending legislature but also of the legislature which transfers sovereign powers within the process of European integration. According to the Federal Constitutional Court, the inviolable elements of the German constitution form an insurmountable boundary to future steps of integration.

### II. The Primacy of the European Union Law

The uniform application of the law of the European Union is crucial for the viability of the European legal order. Hence, the application of EU law cannot vary from one Member State to another in deference to subsequent domestic laws, without jeopardizing



In June 2009 the Second Senate of the German Federal Constitutional Court decided on the compatibility of the Treaty of Lisbon with the German Basic Law.

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dizing the attainment of the objectives of the Treaty. To safeguard this uniform application in each Member State, the European Court of Justice (ECJ) has established the principle of primacy in its case-law. Even after the entry into force of the Lisbon Treaty, the primacy of application is not explicitly provided for in the Treaties but still is obtained in the case-law of the ECJ by means of interpretation.

Unlike the European Court which derives the principle of primacy from European law itself, the German Federal Constitutional Court deduces the principle of primacy from the Basic Law. The primary EU law obliges the Member States to bring about the domestic application of EU law. Therefore, primacy of application has legal effect in Germany only with the order to apply the law of the European Union by the national act approving the EU Treaty. It is a primacy by virtue of constitutional empowerment.

Against this backdrop, the Federal Republic of Germany does not recognize an absolute primacy of application of the law of the EU. Previously, the Federal Constitutional Court has made certain reservations to the principle of primacy in its 'Solange'-doctrine with respect to fundamental human rights protection and in its Maastricht ruling with respect to so-called ultra vires measures. In its Lisbon ruling the Court goes even one step further and develops additional reservation with respect to the inviolable core of the German constitutional identity.

### III. The Inviolability of the Constitutional Identity of the Basic Law.

In its Lisbon ruling the Federal Constitutional Court underlines that there are essential elements of the German constitutional order which cannot be affected by the transfer of

sovereign powers to the European Union. As stated above, these elements guaranteed by Article 79.3 of the German Constitution are the democratic, the social and the federal principles, the rule of law and human dignity. Furthermore, the statehood of the Federal Republic of Germany is guaranteed by the eternity clause of the Basic Law. The Federal Constitutional Court has recognised two principles to which particular attention shall be paid in the future process of European integration.

Firstly, the Basic Law does not grant the German state bodies powers to abandon Germany's sovereignty under international law by joining a federal state. In the view of the Federal Constitutional Court, the Member States of the EU must permanently remain the 'Masters of the Treaties'. The 'Constitution of Europe', as laid down in the Treaty on European Union and the Treaty on the Functioning of the European Union, has to remain a derived legal order. The Basic Law does not grant the German state bodies powers to transfer sovereign powers in such a way that their exercise can independently establish other competences for the European Union. It prohibits the transfer of competence to decide on its own competence (so-called 'Kompetenz-Kompetenz').

Secondly, the German constitutional bodies have to ensure, as regards the transfer of sovereign powers to the EU, that the political system of the Federal Republic of Germany still complies with the inviolable democratic principle as laid down in Article 20.1 and Article 20.2 in conjunction with Article 79.3 of the Basic Law. This is the case if the German parliament, the *Bundestag*, retains responsibilities and competences of its own of substantial political importance or

if the Federal Government, which is politically responsible to the German *Bundestag*, is in a position to exert a decisive influence on European decision-making procedures.

Astonishingly, the Federal Constitutional Court in its Lisbon ruling has identified five areas which are deemed especially sensitive and essential for the ability of a constitutional state to democratically shape itself. These are decisions on substantive and formal criminal law (1), decisions pertaining to the police monopoly on the use of force domestically and of the military monopoly on the use of force externally (2), the fundamental fiscal decisions on public revenue and public expenditure, with the latter being particularly motivated, inter alia, by social-policy considerations (3), decisions on the shaping of the welfare state (4) and decisions which are of particular cultural importance, for instance as regards family law, the school and education system and dealing with religious communities (5). The Court holds that these areas must forever remain under the control of the Member States and cannot be transferred to a supranational level. This finding of the Court lacks any reasoning, except for the statement that these areas are traditionally essential ones.

### IV. The Judicial Review to Safeguard the Inviolable Constitutional Core

#### 1. The Identity Review

According to the case-law of the Federal Constitutional Court, only the Court itself is incumbent to exercise the review of whether due to the action of European institutions the inalienable identity of the German constitutional order pursuant to Article 23.1 sentence 3 in conjunction with Article 79.3 of the Basic Law has been violated. The Court points out that the principles of fundamental political and constitutional structures of sovereign states shall not be infringed. This identity review can result in European Union law being declared inapplicable in Germany by the Federal Constitutional Court. Thus, the Court imposes a serious limitation on the principle of primacy of the law of the European Union.

#### 2. The Ultra Vires Review

Already in its Maastricht decision of 1993, the Federal Constitutional Court has opened up the way of an ultra vires review. The Lisbon ruling of 2009 abides by this decision. The ultra vires review applies where EU institutions transgress the boundaries of the competences conferred on it by the Member States. The Federal Constitutional Court argues that the national act of ratification defines the limits of the powers conferred to the European Union and the limits of what has been agreed to by the German parliament. This principle of conferral is an expression of the foundation of the authority of the European Union in the constitutional law of the Member States. Any European level decision or action exceeding

## Andreas Krautscheid, Minister for Federal Relations, Europe and Media of North Rhine-Westphalia, comments on the Effects of the Ruling of the German Federal Constitutional Court on the Treaty of Lisbon

The German Supreme Court's ruling of 30 June, 2009, on the Lisbon Treaty came as a bombshell – even though the Court held that the Treaty was in line with the Constitution. Quite apart from the Court-imposed requirements for further parliamentary procedures, its unkind remarks about the legitimacy of the European Parliament and on the future of the Union gave rise, justifiably, to misgivings and even criticism in some quarters.

The clarification demanded by the Supreme Court in relation to the 'Act Extending and Strengthening the Rights of Bundestag and Bundesrat in European Union Matters', the Federal statute accompanying the ratification of the Lisbon Treaty, fuelled speculation and encouraged some to come up with extra demands that would have put further obstacles in the way of European integration.

However, I am confident that the steps taken by the Federal and State governments



are in full compliance with the requirements handed down by the Court. Federal/State negotiations have produced draft bills that are designed to safeguard the Federal Government's capacity to

act in the EU context. The proposed regulations serve to strengthen the democratic legitimacy of European legislation without creating a bureaucratic monster.

The EU's democratic legitimacy and institutional capacity as well as Germany's ability to act in the EU are very much in North Rhine-Westphalia's interest. By advocating this throughout the negotiations, and by rejecting any moves that went beyond the Court's demands, we embraced our national responsibilities. Germany will continue to be able to play a leading role in Europe and drive forward the process of integration.

For only a strong Europe, with its sights firmly set on federalisation, can be in our interest.

*Andreas Krautscheid, Minister for Federal Relations, Europe and Media.*

the transfer of sovereignty agreed to in the act of ratification would be considered an act adopted beyond EU competences and would be inapplicable in Germany.

Against the backdrop of the considerations of the Federal Constitutional Court with regards to the identity review, the Court seems to create double standards. To avoid this, the ultra vires review can also only apply if an act of a Union institution transgresses the competences conferred and therefore touches the inviolable elements of the German constitutional order, the inalienable constitutional identity pursuant to Article 23.1 sentence 3 in conjunction with Article 79.3 of the Basic Law.

### 3. The 'Solange' Review

In its 'Solange' rulings of 1974 and 1986, the German Federal Constitutional Court has challenged the European Court of Justice's exclusive authority to assess the validity of European law by establishing its own authority to assess the constitutionality of European secondary law. In 1986, the Federal Constitutional Court concluded that as long as the protection of fundamental rights exercised by the ECJ satisfied German standards, the German Constitutional Court would not exercise its jurisdiction to review European secondary law. Constitutional complaints by individuals and submissions by national courts are inadmissible from the outset if their grounds do not state that the evolution of European law, including the rulings of the ECJ, has resulted in a decline below the required standard of

fundamental rights after the 'Solange' decision of 1986.

The Federal Constitutional Court accepted that it would not seek an identical type of protection in the different areas of fundamental rights afforded by European law, but a substantially similar fundamental rights protection. Taking into account that fundamental rights protection only forms a part of the inviolable core of the German constitution in so far as the substance of fundamental human rights is indispensable to the respect of human dignity pursuant to Article 1.1 in conjunction with Article 79.3 of the Basic Law, the 'Solange' review should also only apply if the violation of fundamental rights affects the inalienable German constitutional identity. This assessment is supported by the fact that the EU is supposed to accede to the European Convention on the Protection of Fundamental Rights and Freedoms. In the future, it will not be the task of the German Federal Constitutional Court, but it will be incumbent on the European Court of Human Rights to review the compatibility of the law of the European Union with human rights standards.

### V. Conclusion

Although the German Federal Constitutional Court holds that the German national Act Approving the Lisbon Treaty is compatible with the provisions of the Basic Law, the ruling meets the process of European integration with a deep mistrust. Its main characteristic is a state-centred scepticism about European Union institutions and their

exercise of powers. Therefore, not only the relevant clauses of the Lisbon Treaty are interpreted in a very restrictive way, but also the Court, misled by a conservative notion of statehood, establishes constitutional limits to further steps of integration which appear to be insurmountable. In doing so, the Court misses the characteristics of modern integration states which are distinguished by a wide openness and great flexibility of its essential structural elements towards the process of European integration.

Literally taken, the Lisbon ruling of the Federal Constitutional Court might prevent any further integration steps and petrify the current distribution of legislative powers between Member States and European Union. In establishing itself as the ultimate authority for exercising an identity review, an ultra vires review and a 'Solange' review with regards to fundamental human rights, the Federal Constitutional Court poses a direct challenge to the whole system of the European Union, which is based on the uniform application and interpretation of EU law throughout the Union. In any event, the Lisbon ruling appears to be dogmatically narrow and timid. However, the ongoing process of European integration requires more confidence in the future development and less timidity.

*Andreas Haratsch holds a Chair of German, European Constitutional and Administrative Law at the University of Hagen.*

# The ECOWAS Court of Justice - A Community Institution for the Settlement of Conflicts in West Africa

\* *Daouda Fall*

Law is at the center of the ECOWAS system. In fact, ECOWAS was founded by law. It is based on treaties ratified by the Member States. Those treaties have established institutions and conferred certain powers to them. This stressed role of law in the integration process explains, in practice, why the ECOWAS Court of Justice was founded. The organ was originally created in 1993 but did not become operational until 2001. The Court is the principal judicial organ of the West African Community.

The ECOWAS Court of Justice is composed of seven independent judges selected. The judges serve for a period of four years and cannot be reelected. Judges make their decision in absolute impartiality and claim immunity. This functional independence allows the ECOWAS Court to play an essential role in the resolution of conflicts in the West African Community.

## I. The settlement of conflicts

### *The consultative competence*

This competence is not coercive. Its purpose is to give judicial advice to an ECOWAS organ posing an unclear question to the Court about the interpretation of the treaties.

### *The contentious competence of the Court*

The contentious competence encompasses judicial and arbitral rulings. In 2005 the competence was complemented by the task of reviewing the legality of community acts, the violation of human rights within the Member States, the public function of the community, the extra contractual responsibility of the community, the failing of Member States to comply with their community obligations, a prejudicial competence and an arbitration competence. Action can be brought by every Member State, by the Conference of Heads of States or by the Council of Ministers.

## II. The procedure before the Court

Originally the individual could only access the Court through the intermediation of the Member State it came from. This was changed with the additional protocol of 2005. Now, the Court can be addressed by every person to testify the legality of any act seeming to violate her or his rights.

## III. The scope of the rulings of the Court

According to the Revised Treaty, the decisions of the Court of Justice are legally binding and cannot be appealed. The primacy of Community law prevails in the ECOWAS region. This principle is obligatory for every organ within a Member State. A ruling of a national court cannot suspend or nullify a decision of the ECOWAS Court of Justice. The Court has no direct coercive power. It

depends on the will of the Member States to execute the decisions.

Conscious of this fact the ECOWAS Court has put a focus on raising the awareness of community actors, particularly the citizens of the Member States to their rights, obligations and tasks. It has tried to build up a true area of justice by permitting every citizen within the community to address the Court. For this purpose the Court has implemented several awareness campaigns in different West African countries. Thereby, it wants to create a feeling of proximity of justice and contribute to the prevention of conflicts. Since its founding, the Court has received 78 petitions. 99% of these concerned human rights issues. This explains the extension of the competence of the Court to this matter and the right of individuals to address the Court. The protection of fundamental rights today is a favored field of action in community jurisdiction. The case *Hadijatou Mani Kouroua/ Republic of Niger* has to be explained from this point of view.

## IV. The case *Hadijatou Mani Kouroua/ Republic of Niger*

*Hadijatou Mani Karoua* from Niger has gone to the ECOWAS Court of Justice and called upon it to recognize the violation of her human rights and to condemn the Republic of Niger. She reported that she was sold to Sir Souleymane Naroua for the amount of 400 € according to "wahiya", a custom in the north of Niger. She lived in slavery to this man until 2005 when she was declared free. Still she was refused to leave him because he said that the reason for freeing her was that he wanted to marry her. After escaping in February of 2006, she decided to address a civil court to regain her freedom and live

elsewhere. Her view was confirmed by this court and by the next court of instance. But in December 2006 the Supreme Court of Niger decided to send the case back to the Court of Instance. In between Mrs. *Hadijatou* married Sir *Lambo Rabo* and was then accused by Sir *Souleymane Naroua* of bigamy. As a consequence she was condemned and arrested. Later she was preliminarily set free to await a final judgment of the High Instance Tribunal of Niger. In this period Mrs. *Hadijatou* addressed the ECOWAS Court of Justice, calling for a new legislation in Niger to protect women, for the nullification of the legislation and jurisdiction, which is against the protection from slavery and for reparations for nine years of captivity.

The Court decided in her favor and claimed that she had been a victim of slavery. The Republic of Niger complied with the decision and about 18000 € were paid as reparation. Mrs. *Hadijatou* was given the International Women of Courage Award.

The decision of the Court shows that by its right of interpretation, it plays a fundamental role for the integration of West Africa. The Court can help to achieve the objectives of ECOWAS by creating a judicial order for the community which is in favor of integration and the preservation and protection of individual rights and liberties. For this purpose, the ECOWAS Court of Justice can profit from the example of the European Court of Justice, aiming to install a valid judicial protection of fundamental human rights for the West African citizen.

\* *Daouda Fall* is Director of the Research and Communication Division at the ECOWAS Court of Justice in Abuja, Nigeria.

## Working on an ASEAN Human Rights Mechanism

Since 1993, the Association of Southeast Asian Nations, ASEAN, has been working on the establishment of a Human Rights Mechanism on the basis on the Vienna Declaration and Action Program on Human Rights. After a long step-by-step process, finally in October 2009, Member States founded the ASEAN Intergovernmental Commission on Human Rights to institutionalize this matter. This development shows that an agreement on the regional level, especially in a region where there are still lots of violations, can contribute to a stronger promotion of human rights.

A role model for this approach was Europe. In 1953, the European Convention on Human Rights was passed by the Council of Europe and the European Court on Human Rights was created. To this day, important decisions of the Court have been

made to strengthen human rights in Europe and to increase regional awareness.



The creation of a regional human rights court could be the next step for ASEAN, which would facilitate the possibility to appeal at a regional level. Nevertheless, concerning the long and difficult path to the establishment of the ASEAN Intergovernmental Human Rights Commission, it is conceivable that the lingering reservations of Member States, will impede this in short term, meaning that the incremental approach will continue. This reveals again that law, in this case universal human rights clauses, always needs political support in the first place to be effectively enforced and to be able to develop its own dynamic on a regional level.

# The Role of the Central American Court of Justice in the Central American Integration Process

\* Enrique Ulate Chacón

The Constitutional Court of Costa Rica says: "The Central American Court of Justice is the institution assigned with the task of settling conflicts in relation to norms with a community character." Its attributions and functioning are determined by its own Statute, which has not yet been ratified by Costa Rica. As a consequence, the country and its citizens are suffering from an important disadvantage which is the possible denegation of their right to access the Court. The non-ratification of this constitutive statute by the government of Costa Rica therefore leads to an inequality because, in general, Costa Ricans share the same rights and obligations derived from community law, as the nationals of any other Central American state.

The Central American Court of Justice (CCJ) was created with the Protocol of Tegucigalpa of 1991. Its work is determined by its Statute, which had to be signed by at least three countries in order to enter into force. At the moment four countries have ratified the Statute: Nicaragua, Honduras, El Salvador and Guatemala.

In general the Central American integration process implies a close relationship between the CCJ and the national judges of the Member States. This means, that all national judges are also community judges. Moreover, they are able to demand preliminary rulings by the regional court if they have doubts about the application of community law and its primacy in relation to the internal order of the member states. The duty of internal application of community law by the national judges is established in the "Constitutional Jurisdiction Law", the "Organic Law of the Judicial Power" and the "General Law of Public Administration" of Costa Rica. The judges have the responsibility to apply, with independence and impartiality, the constitution, community law, international treaties and ordinary legislation.

To resolve a concrete case which involves the application of community law, every judge must analyze if it prevails over national law and, if doubts should exist, he or she shall demand a preliminary ruling by the Central American Court of Justice. Thus, community law and its uniform application and interpretation by the member states shall be guaranteed and thereby also the situation of the internal market shall be improved. An example in Costa Rica for such an application of community law vis-à-vis internal norms or prescriptions has been the resolution giving primacy to the "Central American Convention on the unification of basic education", which clearly follows the doctrine of

the Central American Court of Justice. The Court as a consequence maintains a close cooperation with national judges. It is the principal and permanent institution of Central American community law and therefore responsible for resolving conflicts about the application of community law inside the member states, may it be original, complementary or derived. Against this background the CCJ finds itself on the top of the community jurisdiction, and, as articulated in Article 12 of the Protocol of Tegucigalpa, executes the judicial power of the Central American Community.

The CCJ has ample competences. Its rulings effect member states, as well as the different institutions of the "Central American Integration System" (SICA). It also subjects to private law. Because of this competences provided by the statute and different conventions, it is possible to establish three classifications:

- a) The material competence
- b) The functional jurisdictional competence
- c) Other specialized competences

Article 22 of the Statute of the CCJ also establishes a register of actions in relation to the above mentioned classifications and criteria. Examples of actions in this context are among others:

- a) To rule controversies between Member

States, claimed before the Court by one of them. The ruling of border, territorial or maritime disputes require a claim by all affected parties. Ahead of any case there has to be an attempt of reconciliation, which can also be restarted during the trial.

- b) To determine the nullity or infringement of any agreement of a SICA institution.

- c) To rule on the claim of any person concerned, legal, regulative or administrative prescriptions of a state, affecting conventions, treaties or any other norm of Central American integration law or the agreements and resolutions of its institutions.

In correspondence to these criteria, the Court has the power, derived from its Statute, to determine its competence to rule each concrete case ("Kompetenz Kompetenz") and to interpret disputed treaties and conventions in respect to the principles of integration and international law at its own initiative.

The binding force of the judgements of the CCJ has recently forced all the Member States of SICA to amend the Protocol of Tegucigalpa to adjust to the criteria set by the Court.

\* Enrique Ulate Chacón is Professor of Law at the University of Costa Rica, San José.

## The Caribbean Court of Justice



The President of the CCJ, Michael de la Bastide. © Caribbean Court of Justice.

"The Caribbean Court of Justice (CCJ) is a regional court established by the Member States of the Caribbean Community to adjudicate disputes arising with regard to the Revised Treaty of Chaguaramas, which initiates the CARICOM Single Market and Economy (CSME). The importance which the Member States attach to the CCJ is reflected in the affirmation that the Court is essential to the successful operation of the CSME".

The far-reaching effect of the establishment of the Court was adverted to in a recent judgment of the Court in which it

said: "By signing and ratifying the Revised Treaty and thereby conferring on this Court ipso facto a compulsory and exclusive jurisdiction to hear and determine disputes concerning the interpretation and application of the Revised Treaty, the Member States transformed the erstwhile voluntary arrangements in CARICOM into a rule-based system, thus creating and accepting a regional system under the rule of law.

The practical consequences of the Court's fulfillment of this role were illustrated in a case in which the Court at the instance of a company ordered a Member State to reinstate a tariff on imports of cement which it had suspended.

The Court has a second jurisdiction as well, as a final court of appeal from the domestic courts of Member States, but its assumption of this function depends on the Member States making amendments of their constitutions. So far only two have made the amendments and accepted the jurisdiction of the Court."

Michael de la Bastide, President of the Caribbean Court of Justice.

# The Crisis in Latin America's Integration Processes also reveal a Crisis in Integration Law

\* Roberto Ruiz Diaz Labrano

Each integration process reveals particular characteristics: its economic orientation is evidenced through the mechanisms adopted for commercial development, the political orientation is perceived in the rulers' declarations on objectives and expectations, the juridical orientation is evidenced in the constituting documents and in the rules set forth for the organizational structuring and functioning.

The law is definitely transcendental in the "construction" of integration schemes. Without international rules and a legal framework in international agreements that would oblige the governments to the primary purpose of an integration process, the latter will have no chance to succeed. An organizational juridical structure that represents the institution as a legal entity other than the Member States is required; otherwise, the objectives will simply be mere declarations, intentions or statements, which is precisely why the law plays an essential role in the conformation of a block.

The provisions of the Treaty or Agreement that create the new juridical person or legal entity of International Law allow from the outset for the verification of the scope that the scheme will have in the medium and long term. From the programmatic and operative norms laid down in such contract, it is possible to extract the system and degree of depth that is to be expected. For this purpose, the analysis of the competences given to the institutions and the degree of autonomy given or transferred enables a fairly accurate prediction of the project's future.

More than statements or declarations - "political will" -, which most of the time are at least different, if not far from reality, the legal framework or its evolution identify best what can be expected from an integration process. Furthermore, it allows for the ve-

rification of its community or intergovernmental nature and which of these features prevails, as well as to determine if the measures will be effective or not.

We take it for granted that a community system is the one which best responds to the "idea" of integration and to carry out regional development policies. Nevertheless, it is not yet proven that an intergovernmental system could not constitute an adequate temporary recipe for the same purpose, especially when there are major economic differences between the involved states. An intergovernmental system could well be a previous phase in order to reach a stage of maturity and trust in an aimed community, able to transform all economic, cultural, social and political life in the region where integration is sought.

Now then, the law in integration processes, whichever the system, becomes an indispensable instrument to achieve the transformations required to initiate, to advance and to consolidate an integration process. The granting of powers and regulation competences to the institutions is the way to provide the process with instruments that influences in areas and subjects affected by or related to the process. The common legal norms allow the adequacy, adaptation, incorporation of integration norms to the internal legal system, at the same time harmonizing and levelling differences.

From the legal point of view, another no less transcendental expression for the construction of a common legal system is the system for resolving controversies or community justice, indispensable for settling conflicts arising from the natural tension caused by the confrontation of interests and the assignment, waiver or transmission of competences. The efficacy and effectiveness of the system for resolving conflicts is the best way to verify the degree of evolution of an integration process.

In the integration processes in Latin America, one of the expressions of weakness is evidenced in the functioning of organs or institutions for conflict resolution. The scope of their competences are limited and their resolutions, in most cases, lack of mechanisms to enforce them, all this added to the non-compliance of norms, which generates mistrust and insecurity.

In the case of Mercosur, the creation of the Permanent Revision Tribunal and its installation, aside from undoubtedly constituting an institutional progress, requires greater autonomy and attribution of competences which are appropriate for a common institution. The 'Tribunal Andino', similarly, has the difficulties to enforce sentences. Something similar occurs in the Central-American Justice Tribunal, which is why only a profound revision of the circumstances by which the integration processes are currently experiencing can reverse the situation.

We are certain that every progress depends on the consistency and seriousness of the rulers' statements, on the fulfillment of economic objectives and commercial policies set. However, it also depends primarily on the compliance with the norms and measures adopted. And to that end, the system for resolving conflict plays a key role.

The insufficiency of "ideas" and agile mechanisms generates frustration, which is accentuated when contradictory or merely circumstantial policies are adopted, or even worse, when no corrective measures are adopted. These weaknesses are integration's worst enemies. They communicate the message to the general population that integration does not work or that integration does not satisfy their needs.

The lack of a stably defined conduct aimed towards the objective of economically energising and developing the whole region leaves the integration process in Latin America in a virtual stagnation. One could blame the crisis, but, nevertheless, it is more realistic to consider that it is due to the lack of institutional maturity. The region will have to seriously meditate and adopt measures that would radically modify this situation and give real signs of change which reflect that a greater degree of compliance with the agreements between the States' parties could be initiated.

\* Roberto Ruiz Diaz Labrano is President of Mercosur's Permanent Revision Tribunal and Senior Professor of Integration Law at the National University of Asunción, Paraguay.

Prof. Roberto Ruiz Diaz Labrano is one of South America's leading experts in integration law. He has published vastly on the role of law in the Mercosur integration process.

He has recently been designated an Arbitrator and temporary President of the Permanent Revision Tribunal of the Mercosur, which was founded in 2004 on the basis of the Protocol of Olivo. This institution was influenced by the example of the European Court of Justice, which has played an important role in the European integration process.



## Three Questions to Prof. Dr. Christian Koenig, Director at ZEI

**1. Throughout its history, the European Union steadily expanded its legislative competences. What influence can the judgment of the German Federal Constitutional Court on the Treaty of Lisbon have on this development?**

The Second Senate of the Federal Constitutional Court has decided in its judgment that the Act Approving the Treaty of Lisbon (Zustimmungsgesetz zum Vertrag von Lisabon) is compatible with the German Basic Law. In contrast, the Act Extending and Strengthening the Rights of the Bundestag and the Bundesrat in European Union Matters (Gesetz über die Ausweitung und Stärkung der Rechte des Bundestags und des Bundesrates in Angelegenheiten der Europäischen Union) violates Article 38.1 in conjunction with Article 23.1 of the German Basic Law (Grundgesetz) insofar as the Bundestag and the Bundesrat have not been accorded sufficient rights of participation in European lawmaking procedures and treaty amendment procedures. The ratification may not be completed as long as the constitutionally required legal elaboration of the parliamentary rights of participation has not entered into force.

Lisbon can be seen as providing a substantial increase in EU competences, but not to such a point as to extinguish German sovereignty. It is crucial that national democratic institutions play a full role in European decision-making. Therefore, some of the provisions – in particular the simplified procedure for amending the EU Treaties and the “passarelle” clauses by which Member States can give up the veto and move to qualified majority voting without specific amendment – can only be relied on constitutionally if both houses of the German parliament, namely Bundesrat and Bundestag, give their assent.

In essence, the Federal Constitutional Court has made clear that EU law can only be implemented by Germany to the extent that it is compatible with the German Grundgesetz. However, this does not conflict with the doctrine of supremacy of the European Union. In this regard, the judgment confirms the legal theory of conditional acceptance of EU law that was established in the landmark Solange I and Solange II decisions. According to these decisions, Germany will only accept the supremacy of EU law so long as (hence German: solange) EU law guarantees the fundamental rights laid down in the German Grundgesetz. This was developed in Maastricht, according to which there is a limit to the power of the EU, defined in terms of impact and national sovereignty.

To summarize the essence in short: ‘Yes’ to



Prof. Dr. Christian Koenig is Director at the Center for European Integration Studies. He is an renowned expert of European Competition Law.

the Lisbon Treaty but there is the demand that the parliament's right to participation is strengthened at the national level.

**2. The Treaty of Lisbon strengthens the principle of subsidiarity but at the same time extends the competences of the European Union in many policy fields. How can these two processes be weighted?**

The principle of subsidiarity means that the Community must not undertake or regulate what can be managed or regulated more efficiently at national or regional levels. The Community has to act within the limits of the powers conferred upon it.

Concerning the question of transfer of sovereign rights from the Member States to the European Union, the Treaty of Lisbon does not depart from its practice, but it de-

fines the principles that govern this transfer and guarantees that these principles are not infringed. These principles are the principle of conferral (under which the EU shall act within the limits of its competences) and the principles of proportionality and subsidiarity. Competences not conferred upon the European Union in the Treaties remain with the Member States.

The Treaty of Lisbon does in no way change the meaning of these principles. However, it requires that the national parliaments are directly involved in monitoring the proper application of the subsidiarity principle.

**3. In other regional integration systems the implementation of supranational law plays an important role as well. Which conditions and mechanisms are necessary to make this implementation more effective?**

There is a structural problem of associations of sovereign national states: The transfer of competences and the independence of decision-making procedures require an extensive reflection in terms of identity and choice of instruments. The problem occurs if the body has a shape that corresponds to that of a federal state, but the internal decision-making and appointment procedures remain predominantly committed to the pattern of an international organization.

With increasing competences and further independence of the association's bodies it is highly important to establish safeguards that preserve the states' political power of action. One of these mentioned safeguards lies within the ambit of the Courts that monitors, within the boundaries of its competences, the association's authorities and institutions so that they do not violate the constitutional identity by its acts.

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Walter-Flex-Str. 3  
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Editors: Ariane Kössler, Matthias Vogl  
Tel.: +49 (0)228-73-4960  
Fax: +49 (0)228-73-3086  
[www.zei.de](http://www.zei.de)

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