A Reply to Roman Herzog and Lüder Gerken

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Integration in the European Union jeopardizes our democracy; the European Constitution will not stop the substantial erosion of the constitutional institutions of the member states, in particular the parliaments. It will not put an end to the lack of democracy and of separation of powers, nor to inappropriate centralization. Its rejection in France and the Netherlands creates the opportunity to assign to the Union appropriate and transparent structures close to the citizens.

This is heavy stuff. It is presented to us by authors who are not known to be Euro-phobes or populists. They do not lose themselves in well-meaning clouds of criticism concerning the length of the Constitution, or in putting the blame on 'the people in Brussels'. Their concerns have to be taken seriously. That is why their suggestions need to be addressed, both as to principle and detail.

For Herzog and Gerken, the central evil is 'inappropriate centralization'. All elements of national democracy are absorbed by this evil and turned into Euroscepticism and agony on the part of the citizens. In Germany, this absorption power has caused the notorious 84 to 16 ratio between the European and national origin of legislation, as the authors claim. The problem with this analysis is that it compares apples not only with oranges, but also with a whole basket full of fruit. The numerical proportion given above concerns *all* EU legislation and *all* German national legislation, whereas its place in the chain of argument of Herzog and Gerken suggests that it concerns the relationship between *inappropriate* European centralization (84%) and *appropriate* national legislation (16%). While the authors surely did not intend to say that all European Union legislation concerns inappropriate centralization, the manner in which this was presented may nevertheless strengthen prejudices.

However, even if one does not accept the dramatized account of Herzog and Gerken, one cannot deny that the European Union regulates more than is absolutely necessary, and by this centralizes inappropriately. Doubtless, this is one of

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the reasons of the diagnosed dangers for democracy and lack of acceptance of the Union in the member states. Nevertheless, it is highly questionable whether the institutional proposals of the two authors are better medicine than the provisions of the European Constitution. The question needs to be asked: are their proposals capable of producing the clarity, transparency and control of European legislation, which is needed to make the citizens better understand and accept the Union?

In order to avoid inappropriate centralization, the European Constitution should contain a closed list of Union competences, but instead it introduces the 'mixed competencies' (they probably mean 'shared competences', which is not only a linguistic difference, *see* the Articles I-12(2) and I-14)), which opens up a floodgate for an even more dynamic assumption of competences, according to Herzog and Gerken. It is true that in the European Constitution the powers transferred by the member states still serve the relatively broadly conceived political goals of the Union. In the past, this has led to some broadening of competences in favor of the Union, and allowed the Union to adopt measures where national measures would have sufficed. But why then did a huge majority of the Convention, and after that even the Intergovernmental Conference, not give in to the demand for a closed list of Union competences? The answer is as easy as it is fundamental: the Union is no State. Unlike its member states, the Union always has to prove its very existence. For this, the Union's common values and goals are essential. The Union is, and will always be, a creature made by its member states to solve common problems. That is what its competencies have to be geared to and therefore the Union needs to be flexible.

In order to stop the inappropriate and creeping centralization, the authors say that the European Council should have the power to refer policy matters from the European level back to the national level. Member states can already do that today – by changing the treaty by unanimity. According to Herzog and Gerken, in the future, it should be able to do so with a majority vote. That is surprising, as it has been undisputed up until today that such a 'Kompetenz-Kompetenz' lies with all member states together, and not with a majority of them. Accordingly, the *Herren der Verträge* have to agree unanimously on the broadening or diminution of Union competences. Should the competences really be (re-)transferred back to the member states, even if some of them may not want to exercise them (anymore)? It is acceptable to go forwards with a foot on the brake, but highly questionable to step on the gas while driving backwards. That is a sure way to drive your vehicle against the wall.

Herzog and Gerken identify as one of the sources of inappropriate centralization the introduction of legislation via the backdoor of the Council of Ministers, as well as the so-called package deals. The Constitution indeed does not provide for an effective institutional tool to prevent this. But how could it? Package deals

are inevitable where different interests have to be joined. The game to obtain via Brussels something that one cannot obtain on the national level is well-known and frequently used by all member states. In Germany, it is particularly well developed, because not only does the federal ministry play it, but also the sixteen state governments. Why should European constitutional law stem a process that can be stemmed by Germany itself through improved national consultation and voting procedures? Instead of searching for national tools to improve political intelligence, temperance and leadership in European affairs, Herzog and Gerken call for institutional relief on the European level.

The Council of Ministers should become a parliamentary chamber in a classical two-chamber system with the constitutional duty to prevent inappropriate centralization. In practical terms, this implies that its active rights to shape legislation are diminished; the Council would be reduced to a 'Veto-Chamber'. In fact, the right to engineer (not only to prevent) Union legislation compensates the national executives via the Council of Ministers for the transfer of national sovereign rights to the Union. The Council of Ministers, composed of democratically legitimated representatives of the national governments, is indispensable as one of two sources of legitimacy in the bipolar Union. That is at least how the *Bundesverfassungsgericht* saw it in its 'Maastricht Urteil'. Even a strengthened European Parliament could not replace the Council of Ministers in this respect. The Constitution strengthens the former significantly, but it certainly should not be the sole and all-deciding legislature of the Union. As long as the European Union remains a 'federation of States' and the representation of its citizens in Parliament is distorted to the detriment of the bigger member states, it will not be possible to elevate the Parliament over the Council of Ministers. European Union law requires both the authority of the directly elected European Parliament and that of the democratically appointed governments in the Council of Ministers. By suggesting to limit the legislative competences of the Council of Ministers, the ideas of Herzog and Gerken do not lead to more, but to less parliamentary legitimacy of European legislation.

Executive authorities, according to Herzog and Gerken, essentially make European legislation. By this they correctly refer not to the Commission, but to the governments of the member states in the Council of Ministers. They argue that this reduces the separation of powers and, with it, parliamentary democracy in the member states. Indeed, a considerable amount of German law is made by the Council, albeit with the participation of the German government. Certainly, the principle of separation of powers is common to the member states. At the same time, it has not been realized purely and completely anywhere – least of all in the Federal Republic of Germany. A reference to the involvement of the state governments in the Federal legislation through the German *Bundesrat*, the compatibility

of the ministerial office and parliamentary mandate, as well as the parliamentary election of the judges to the German supreme courts (in which 'inappropriate' motives also play a role), should suffice to point this out.

It is true that this cannot be a vindication to further reduce the separation of powers through the European Union. But as long as our country adheres to the European Union as part of a federal order and a legislative community – which our German Basic Law authorizes and even encourages – it must not only be accepted that the system is different from our federal system in Germany, but also that it influences our constitutional principles. In line with this, the German *Bundesverfassungsgericht* declared in its 'Maastricht Urteil' that it is constitutionally acceptable if the democratic legitimization in the European Union takes on different forms than in Germany as long as an equivalent level of legitimization is guaranteed. All this is more likely to be achieved by the European Constitution than by the reform proposals of Herzog and Gerken.

In order to illustrate the 'roundup' of the national parliaments, Herzog and Gerken refer to the so-called 'passerelle' clause in the proposed Constitution, which gives the heads of state and government of the member states the right to decide unanimously that certain matters or certain cases, which according to the European Constitution have to be decided with unanimity, may be decided by a qualified majority vote (Article IV-444). Such a decision surely leads to an expansion of competences on the European level, according to the authors. Indeed, the Constitution does not provide for ratification of such a decision by all national parliaments – but it grants each of them a right to veto. Herzog and Gerken argue that it is much harder for these parliaments 'to topple a decision already taken by the heads of state and government'. This is a mistake. The Constitution explicitly states that the heads of state and government can take no decision until a six-month period has lapsed without any objection from one of the national parliaments (section 3). Ratification would come after such a decision – the right to veto precludes it from being taken. Therefore, the role of the national parliaments is even strengthened, not diminished. However, first and foremost: nothing and no body in the Union can hinder the German *Bundestag* to oblige the German government to agree to the use of the passerelle-clause only after its explicit authorization. This was, by the way, adequately regulated by the Bundestag in its Act authorizing the ratification of the Constitution. Those things that can be better regulated in the member state should not be prescribed by the European Union. The Constitution justly avoids interfering in the relationships between national executives and legislatures, and by that in the constitutional structure of the member states.

Legitimate as it may be to limit the discussion to the dangers of 'inappropriate centralization' and its impact on national democracy, especially the separation of

powers, these aspects are not sufficient for a fundamental inventory check of Europe and its Constitution, as Herzog and Gerken suggest. That has to go further, because the Union is not a state. It is a Union of states. And this is what it will always be. A national model of democracy just does not fit the Union.

The loss of competences complained of by Herzog and Gerken has less to do with the transfer of powers to the European Union than with the loss of national power to control developments concerning globalization, the environment, climate-change, health and consumer protection, security and many others matters. In these areas, the member states long ago lost their grip on the problems and their solutions, which require trans-border decisions. If, against this background of the factual loss of sovereignty for all states in Europe, we build democracy only on national institutions, we are just faking participation and control of our citizens. The European Union does not undermine national democracy. Quite the contrary, without the Union, national democracy probably would have vanished altogether. The Union is a guarantee for national participation in dealing with global problems and their repercussions on the national states.

National democracy as it has developed over the past 200 years in Europe is precious. No reasonable politician, whether he counts himself in Brussels and Strasbourg among the 'federalists' or the 'intergovernmentalists', or is agnostic in this matter, would recklessly sacrifice it for any European construction. In order to legitimize and limit political power, the European Constitution establishes a system of 'checks and balances' in the European Union which is appropriate for a federation of states. By doing so, it pursues the same goal that the national separation of powers seeks to achieve. It fits with the 'homogeneity principle', which requires a democratic level in the European Union comparable to that in Germany.

The Constitution does not turn a blind eye on the centralization tendencies. And it provides for instruments that are more suitable for a federation of states than the proposals of Herzog and Gerken. For example, it requires unanimity in the Council in order to trigger the so-called flexibility-clause (Article I-18). This means that Germany has a veto right. In contrast to the current treaties, under the Constitution, its application is subject to the control of the national parliaments (section 2). It prevents the undermining of the conferred competences by explicitly prohibiting that measures based on the Article entail harmonization of member states' laws where the Constitution excludes this (section 3).

National parliaments not only have the usual rights of ratification, *inter alia,* when it comes to Treaty changes or the funding of the Union, but they also obtain a role in the European legislative procedure. The Constitution will give them the power of controlling compliance with the principle of subsidiarity. That gives them an instrument to counter inappropriate centralization. By using it, indi-

rectly they can also shape European legislation (the *Länder* parliaments in Germany have no such power!). It is plainly untrue that their reproach that the subsidiarity principle has been breached only entails non-mandatory consequences. If a reproof has no consequences during the ongoing legislative procedure, the parliaments have the right to file a complaint with the European Court of Justice via their respective governments. Additionally, Herzog and Gerken call for a veto for every national parliament in the ongoing procedure, as well as a right of review for every single German state. Finally they demand, for whatever legislation in such circumstances still can come about, the establishment of a 'Court for Competency Issues', which they think will be independent because it should be made up of members from the constitutional courts of the member states. This would not fence in the capacity of action of European politics, but simply annul it.

Herzog and Gerken fundamentally mistrust the European Court of Justice. As all Union institutions – they hold – it is determined to make its contribution to 'the development of an ever closer union' (Article 1(5) EU) – that means: to centralization. Their mistrust is nourished by judgments that amazed the 'experts' – as if this does not occur at times with judgments of national supreme courts. Whilst scolding the Court of Justice, however, they miss one important modification: the Constitution deliberately abolishes the notion of 'ever closer union'. In its preamble, it states that 'the peoples of Europe are determined to transcend their former divisions and, united ever more closely, to forge a common destiny'. That is far more than semantics. It is a different perspective. The European Court of Justice has to be aware of this in the future.

Furthermore, the Constitution explicitly obliges the Union to respect 'the equality of Member States before the constitution as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security' (Article I-5(1)). This shall and will guide the Court of Justice in its future development of European law. Against this background, there is no need for a 'Court for Competency Issues' parallel to the Court of Justice.

The proposals of Herzog and Gerken will by no means make the European Union more transparent. They will not make it easier for its citizens to detect who is responsible for which policy in the Union. It is also unlikely that they effectively reduce the scepticism of many citizens. On the contrary, their proposals transform the sensible system of checks and balances, which the Constitution holds for the 'Union of states and citizens', into one which leads to complete inability to act, without really improving the democratic influence for its citizens. They lead them on the wrong track into a dead-end.