The Present and Future Meaning of the State and the role of the Federal Constitutional Court - Interview

By Justice Professor Dr. Dr. Udo Di Fabio
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Interview with Justice Professor Dr. Dr. Udo Di Fabio, Bundesverfassungsgericht, Schlossbezirk 3, 76131 Karlsruhe, Germany

In this exclusive interview with Federal Constitutional Court Justice, Professor Udo Di Fabio, GLJ looks forward to some of the challenges the Court will face in next fifty years, especially the meaning for the Court of domestic (privatization) and international (europeanization) changes to the role of the nation state. The interview begins with an exploration of the nature and role of the Federal Constitutional Court in light of radical changes in the law as well as the social sciences. Justice Di Fabio also addresses the Court's narrow role as an interpreter of legal texts, noting that the Court performs this function while also exercising broader, quasi-legislative authority within a pluralistic and post-traditional society. The interview then turns to questions related to the role of the state and the traditional public structuring of societal authority as set against the general turn to societal self-structuring, especially in the context of the debate over the nature of the European Union's authority.

[1] **GLJ**: Justice Di Fabio, in light of competing theoretical proposals to adequately describe concepts of state and society or politics and market in times of changing forms of public government and a continuing trend towards privatization and private ordering – the *systems theory* of Niklas Luhmann being one of the most eminent proposals – there is a strong need to take a closer look at judge-made law and the role in particular of such exposed and involved an institution as the FCC. Which role do you see for the FCC in present days, and which role do you expect the Court to play in the future? During the oral arguments in the *Jehovah's Witnesses* case, decided by the Court on 19 December 2000 [See, e.g., 1 GLJ No. 2 (15 October 2000); 2 GLJ No. 1 (15 January 2001)], you referred to the Court as a "post-modern institution". Would you please illuminate this remark? (1)

[2] **Justice Di Fabio**: The phrase "post-modern" is itself a term that is in dispute, particularly by Niklas Luhmann. Nevertheless, the phrase points to a certain problem. It points to the process of our leaving behind some of our well established, constructed presuppositions which are closely connected to modern thinking. And that is, I might say, putting it mildly. Where we are headed and what will happen remains uncertain. So we cannot say at this point whether it is appropriate to refer to what is coming as a second-modernity, a post-post-modernity or possibly a new-modernity. We are still strongly connected to where we have been; I would say that today we find ourselves in an intermediate and developmental period, somewhere after modernity. But some of our classical *Festlegungen* (definitions) are definitely changing and that can hardly be disputed. We cannot deny the fact that particularly modern distinctions and presuppositions that were introduced and established in the light of modern thinking, are becoming contingent. But still, our constitutional state and all of our constitutional thinking are products of modernity. In light of this shift, and the tension that accompanies it, the Court is directly *betroffen* (involved) in scrutinizing the persistent validity of modern distinctions and boundaries.

[3] One obvious example of the shift away from modernity is the ideological boundary, once so totally fixed and inviolable, known as the state. Take the Schengen agreement.(2) Pursuant to that treaty state boundaries continue to exist, while they are simultaneously overcome, one might say, in an almost dialectical manner. Such developments constitute fundamental challenges to the concepts of both state and law, as both have to assess and accommodate these phenomenon and processes.

[4] As for the Federal Constitutional Court, you mentioned the Jehovah's Witnesses case. This case provides an excellent example of these ideological developments in the context of a conflict between different *Grundrechte* (fundamental rights). In the Jehovah's Witnesses case the issues demonstrate a kind of dissolution or *Verflachung* (flattening) of traditional boundaries. The liberal origin of fundamental rights defines them primarily as a mechanism for keeping the state's authority in check and at bay, indeed, fundamental rights exist as rights over and against the authority of the state. But the German constitutional system provides for the quasi-public status of religious groups, thus integrating the state and private spheres and thereby preserving certain pre-modern elements that are inherently in contradiction with the liberal conception of fundamental rights. If we were to conceive of this issue (the state's relationship to religion) with a strictly modern mind-set, we would strive for something like the American model with its clear boundary separating societal freedom (here, the individual's spiritual expression) from the state as the realm of public law. In fact, we need to understand that our partly pre-modern system establishes a sort of corporate proximity between the state and religious communities because it is the perception of the German constitutional doctrine that these private communities also safeguard and contribute to the formation of, and this is important to acknowledge,

the constitutional foundations of the state. The tricky issue with the Jehovah's Witnesses case stems from the fact that we were asked not only to consider this interplay between the state and private/societal actors, but to make this consideration in the context of a religious community that has, for a long time, maintained doctrinal opposition to the state. This was, in fact, the reason the Jehovah's Witnesses had been denied the quasi-public status in the first place. The case required this community, skeptical of public life as it is, to avail itself of the authority of the state's courts in order to acquire a quasi-public status, all while claiming the right of religious freedom.(3) This is, we could say, a paradox. The Witnesses' answer to this paradox was simply that the proximity should not to be too strong and that, indeed, the state was not in the position to require even a modestly positive attitude towards the state. This dynamic cluster was surely the most interesting part of the conflict before the Court.

[5] If we enlarge our perspective, however, it is evident that this particular conflict is not altogether atypical. We have continued to conceive of fundamental rights as rights over and against the state, while simultaneously attempting to mobilize the idea of those fundamental rights in order to define a catalogue of duties owed by the state, thereby committing the state to a certain degree of engagement in our private existence. This has become very obvious since the seventies with the beginning of the debate about whether fundamental rights reflected *Schutzpflichten* (duties to protect). Today, we tend to discuss the matter with reference to institutional guarantees or participatory rights, or, in other words, the *Gewährleistungspflichten des Staates* (the state's duty to establish and promote certain standards). Interestingly, this debate is taking place at a moment in history when the state is also perceived to be receding, pulling back its regulatory claims.

[6] Conceiving of fundamental rights from these two sides (as protection over and against the state while at the same time requiring protection and engagement from the state) indeed presents new and interesting perspectives. When we observe that there are attempts to appropriate or to equalize both sides on a systematic level, the conflict with the classical, liberal model of fundamental rights as rights over and against the state becomes more than obvious. At least one aspect is very clear: if we look at these phenomenon through the glass of Systems Theory, and your starting question and remark pointed in that direction, we are led directly to the question of *distinctions.* Systems Theory starts from the idea that thinking always begins with distinctions and that every distinction is applied to, implemented or set into a pre-existing *Einheit* (unity). But along the way one eventually loses the awareness of the fact that recognizing, finding or defining distinctions is indeed an arbitrary, discretionary act. Indeed, a pre-existing unity relies upon a whole range of conditions, presuppositions and assumptions. The arbitrary act of introducing the distinctions in the first place is, however, beginning to be neglected. By this, a fundamental paradox is being introduced into the law and legal thinking, and it has been one of Systems Theory's major aims to emphasize this paradox.

[7] If we first conceive of the fundamental rights in their classical, liberal connotation and understand them as rights directed over and against the state, but now consider them from a Systems Theory's perspective, one can see that this liberal conception of fundamental rights is just another arbitrary distinction. The underlying (arbitrary) distinction in this context is the divide between society and the state. Today it is becoming clearer, especially in a case like the Jehovah's Witnesses, that these two spheres actually constitute a unity. This blending, and the impact it has on our controlling assumptions, becomes particularly clear in light of the dramatic dissolution of the named boundaries. In such a context it becomes increasingly difficult to defend the old distinctions. At the same time, the distinction continues to lie at the very heart of our constitutional thinking. It is important, however, to ask what the newly created unity, which is the result of the blurring of traditional distinctions, means and to be aware that the new, unified distinctions can themselves become the center of our attention.

[8] It seems that while we are speaking of the idea of fundamental rights with the underlying assumption of *natürliche Freiheiten* (societal, or natural freedom) in opposition to *öffentliche Gewalt* (public authority), we fail to acknowledge that public authority as such, indeed by having been placed into this world as a distinction, is largely responsible for creating a context in which we can even think in categories like "freedom". Surely this thesis deserves closer investigation. What it implies, however, is the idea that we simply cannot conceive of a construct, like the individual or societal freedom, without conceiving in some way of the public actor whether it is the "state", "government", or "public authority". Without this point of reference we might still have some idea of freedom but we certainly would not be able to conceive of it in these modern connotations.

[9] We can thus see that the distinction between state and society, as such, opens a spectrum of possibilities and thereby enables us to conceive of freedom in this modern sense. This particular understanding of freedom builds on the existence of this *Gegenspieler* (oppositional presence) and thereby facilitates our conception of another dimension of freedom, *i.e.* of freedom through the state, or through the nation or other collective actors. Here, we might indeed see the beginning of a sort of collective notion of freedom. In other words, in order to defend a conception of freedom that includes, for example, being protected against the basic risks of life (namely sickness, age, poverty), a collective actor is necessary because the individual is not capable of making such claims. So, in that sense, freedom seems to always have included another and not just an individual dimension. That is, if we think of

freedom as a union in the pre-modern sense, then the very notion of freedom unfolds in an altogether different way. In my view, all of this is becoming visible now, now that we no longer trust the firm distinction between state and society.

[10] **GLJ:** Yet, it seems that this insight is only slowly spreading.

[11] **Justice Di Fabio:** That is true. At the same time, we must see that in Germany this idea has never really vanished. Yet, it is only the diminution of the idea that freedom is always dependent on some kind of community, that allowed us to fully pursue our path into the Western world and Western thinking, *i.e.* after 1945. But now, some fifty years later, we can see the remnants in our views and conceptions of this pre-modern thinking surfacing simultaneously as we call into doubt exactly these modern connotations that we once understood to be the successors of our pre-modern thinking.

[12] **GLJ:** In this light, how would you proceed to define the role of the state? The academic and political discourse seems to be dominated by notions of third sector, cooperative state action or contractual governance. Certainly figures such as Otto Mayer may still cast their "long shadow" over present-day deliberations in this field, especially in administrative and constitutional law, but the question arises again and again how to adequately assess the role if not the very idea of the state today.

[13] **Justice Di Fabio:** Honestly, these questions alone deserve a lengthy treatment. Indeed it seems that the notion of the state, as we have discussed it so far, is only present as that side of the distinction made by liberal thinking which is absent and excluded. The state, understood in this way, is the "antipode", and yet we must consider the state when we speak of freedom. On the other hand, we could focus our attention directly on the state as such. What we will see then, when looking at the other side of the coin, is precisely that there cannot be a thoughts about the state without, at the same time, conceiving of the individual actor.

[14] It is clear that the state, figuring as it now does in our thinking as a highly disputed concept, deserves its own focus. Obviously not in a classical conception of the state; not the theory of state that has been predominant in traditional German Public Law thinking. In times where the notion of the state is a matter of fierce debate, it is clearly a challenge to cling to the notion at all. Even if one proposes a conciliatory phrase like the "open state" one is easily misunderstood as operating with the traditional constructions.(4)

[15] **GLJ:** It seems as if the reappearing distinction of state and society almost naturally suggests similar misunderstandings. Thus, those who have the aim of defending traditional notions of the "state" can only point to the *promises* that are captured, stored or stalled in, on the one hand, this very notion, and in the state/society distinction, on the other. A valuable way of further exploring this entanglement of the notion of the state might be to examine the state within the discourses concerning European integration. But instead of going directly into these debates, let us consider for a moment a theoretical proposal which clearly aims at overcoming the state/society divide and which is openly received among progressive thinkers of Europe as well. At present, some defend the idea that the institution of the state, an institution apparently in full retreat, might be substituted, accompanied or adjusted by a concept of responsibility. While the crisis of the regulatory state, which was heavily debated in the seventies and the eighties, might suggest a closer look at the "tasks" of the state, the recent proposal on this line of thinking has introduced the notion of responsibility. Used in this way, responsibility is understood as having different degrees of intensity in various contexts. The central thrust of the proposal consists in overcoming the habitual ways of conceiving of state and society as two different realms, introducing instead the idea of *Verantwortungsteilung* (shared responsibility). What is your impression of this possibility?

[16] **Justice Di Fabio:** An interesting proposal indeed. I recently gave a speech concerning concepts of "shared responsibility" in which I voiced various criticisms towards of the idea. In my view, responsibility is part of some kind of institutional thinking that itself builds on a whole set of prerequisites. Some of these prerequisites are very practical, in the field of fault and causation for example. It is interesting to me, however, that some assume that it is possible to rely on the granting of *partial responsibility*, a certain measure of responsibility that is itself embedded within a complex web of agreements, without answering the inevitable questions about the location and institutionalization of *Letztverantwortung* (final responsibility). It would seem to me that this final responsibility is the responsibility as such and we might ask why we don't limit ourselves to using just this term instead of introducing a catalogue of different degrees or measures of responsibility.

[17] At the same time, we can easily see why there is such a strong emphasis on the term responsibility. The underlying idea is in fact indispensable for the constitutional state. If the unity of the state's authority can no longer be adequately represented, because various stages of *Ausdifferenzierung* (differentiation) have opened the state towards hierarchical cooperation with other states and within international organizations and towards horizontal cooperation with societal actors, the need arises to assess these processes by using the classical categories. Within

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our understanding of the unity of the state's authority, the notion of responsibility was always present. Examples are the accountability of a public agent, of the parliament owed to a political constituency, or in simple terms, private law liability. Now, to localize responsibility becomes increasingly difficult as decision making structures grow more and more complex. As these structures are divided, so also is our understanding of responsibility divided.

[18] Our central concern then must be that the notion of responsibility loses its substance as we are no longer able to assess responsibility against the background of unity. Underlying this shift is a far greater process which we might denominate as post-modernism. Its characterization is the inadequacy of our traditional categories which are closely tied to sharp edged distinctions. Our old categories must lose their illuminating and persuasive force when the distinctions fade away. One example of a sharp edged distinction that is fading, which we already mentioned when we spoke of the public authority, is the state. It is precisely when the state reaches out into society and loses its clear boundaries that the conception of responsibility loses its very foundations. We then witness an expansion of the facets and holders of responsibility, which once rested exclusively with the state.

[19] At the same time, when we look at European integration, the idea of shared responsibility is a promising term. I recently suggested in a speech to substitute the notion of *Souveränitätsteilung* (shared sovereignty) with the concept of shared responsibility. From a state theory perspective, it does not seem convincing to dissolve and to separate a term such as sovereignty, which, in my view, describes a final responsibility. It seems quite obvious that while one might be able to split responsibility, it is probably not possible to imagine a partition, a splitting of final responsibility. In that sense, when we speak of the partition of sovereignty, we risk losing the sense and meaning inherent in the term sovereignty.

[20] **GLJ:** What, then, is sovereignty? Could it be understood as the quintessential core of the concept of the state?

[21] **Justice Di Fabio:** The core of the state is its meaning as last element in a chain of deduction. The claim put forward by the state, by public authority, is to render definite decisions for others. This is in fact an *Ungeheuerlichkeit* (outrage, scandal), at least from the perspective of *Privatrechtsgesellschaft* (private law society), that I might be bound by a decision taken by others. This must seem entirely alien to, say, an American or an Englishman, but in Germany with its tradition, it is not altogether surprising. In the German context it is almost as if this surprise, this *Erstaunen* (awe) is captured in our institutions. There is great reverence, evident throughout the structures of our public system, for the fact that someone or something else makes decisions for me. With this I do not only mean marginal authority but the binding establishment of rights and of duties. This is, from a liberal point of view, surely in need of further justification.

[22] What is really touched upon here is the issue of legitimacy. The question is why and how can it be that the public authority, the collective actor takes these decisions. This leads us directly back to discourses about the *Gesellschaftsvertrag* (social contract), a constructive idea meant to provide just this legitimacy. Ideas like this have a very strong radiance and influence as they lie at the foundation of our democratic institutions and have, furthermore, made a worldwide career. Therefore, we find it rather difficult to define or to construct public authority without relying on these assumptions in democratic theory. We would have to reach back to pre-modern, religious foundations of public force, if we searched for an alternative to a political system, the legitimacy of which resides with the political community of its citizens. But if we make this backwards leap we also need to embrace the closed conception of citizenship. This is the antique idea of the Polis. The Polis was surrounded by clear boundaries and from its center, from its market place, collectively binding decisions were adopted. This image is persuasive in such a way that our public law thinking and our state theory has never fully succeeded in shedding this background. Possibly, we never meant to. While we cannot say then, why there is such a strong tendency to defend boundaries, one things nevertheless becomes quite obvious: we can assess the core meaning of sovereignty as being the *Urformel* (root formula) of democracy. So, I am somewhat alarmed when hearing these days numerous proposals to drop the notion of sovereignty.

[23] **GLJ:** Turning to Europe: what is the meaning of sovereignty here? What is sovereignty's fate? Must the very notion be discarded, or will sovereignty be transferred to another actor? And if there is, like you said, a close link between sovereignty and legitimacy, won't we have to assess the connection between the two in their new, European constructions. In light of the recently adopted European Charter of Fundamental Rights, our question would be whether the link between sovereignty and legitimacy must be imagined through the concept of a constitution.

[24] **Justice Di Fabio:** If I were at first to look at it from a purely academic and scientific, but less political way, it can well be imagined that the states preserve their national sovereignty even as they grant greater powers to the European Union. At the same time the set of sovereign powers might also be transferred towards another actor. This makes clear, however, that it is not possible to divide, to share and to split sovereignty because we need a final instance of authority willing to take responsibility. To speak of sovereignty always implies the question as to the origin and the source of legitimacy. And if we are asked to accept the existence of two authorities, of two sovereigns we

would no longer be able to recognize who holds final responsibility and who holds final legitimacy. It is for these reasons that I am skeptical of proposals regarding the splitting of sovereignty. To split responsibility, however, appears to be more adequate. We can see in Europe that the responsibility is being split between the Union and the Member States. This can very well be imagined and it is practiced already. The European Union's sovereignty resides with the Member States, as is reflected in the Treaties and other texts. This is the reason why, if we want to make changes to primary European law, if we wish to change the Treaties, we have to conclude treaties under public international law.

[25] What we are witnessing at present, though, is that some would like to move beyond this status quo while others are strongly committed to it. Take the example of a covenant that would be authorized to change primary European law. Another example is the proposal to change the Council into a Chamber of States as we find it in some Federal States. Underneath these proposals we find the clear urge to transfer sovereignty. This transfer is not merely one of *Hoheitsrechte* (authoritative rights) which we have known for a long time. Instead, what is discussed here is a transfer of sovereignty, a transfer which can take place only once. Sovereignty can only be transferred once, and to be sure, once the European Union receives this sovereignty, there will never again be mention of a partition, of a sharing of sovereignty. We must see that these proposals are concerned with nothing less than the founding of a state, in a public international law sense. As much as I can understand the subtleties of the political discourse that will lead many to avoid giving these issues open, public discourse, I have strong reservations and difficulties from an academic and legal perspective. From that perspective I find it very troubling that it is not being openly discussed that we are opting for the foundation of a new state, which would also include the creation of a European Volk (people). This must be stated very clearly, in particular, from a constitutional law point of view. You simply cannot take away from a constitutional subject like, say, the French or the German people, the *Letztentscheidungsmacht* (the decisive authority) without asking this people. This is nothing that you can just decide in the course of Intergovernmental Conferences. This must be submitted to the people themselves.

[26] **GLJ:** But what are we to make of those openings, those amendments to the German Basic Law which seem to point in that direction? If the Basic Law includes or will include provisions, *e.g.* in Art. 16 para. 2, concerning the extradition of German criminals for criminal prosecution abroad or if we witness that the German jurisprudence in the case of Egon Krenz and other former GDR-leaders is under review by the European Court of Human Rights in Strasbourg, are we not already seeing a transfer of sovereignty?

[27] **Justice Di Fabio:** No, not at all. And this what I would like passionately to defend and what, at the same time, gives me occasionally reason for some resignation as it might be impossible to make this sufficiently clear. It is closely connected to our starting question concerned with post-modernism. Because, our modern thinking is not only characterized by our usage of certain modern categories and conceptions. It goes, indeed, much deeper. We employ a specific logic, in fact, a *zweiwertige Logik* (two-valued logic), which excludes the "third". In no way did we follow the scientific proposal of Hegel. This, in our views, appears only as a *Horrorvorstellung* (traumatic vision) that could only lead to Marxism and to Communism. In that view, reality is perverted and subverted by all kinds of *Kunststücke der Dialektik* (dialectical magic). Unfortunately, dialectical thinking as such was discredited by Marxism. This is unfortunate because it becomes more and more clear that our two-poled thinking encounters frontiers it can not or not easily transcend. This is confirmed when we regard developments in the natural sciences. To be constantly asking "either – or" does not seem too promising if we want to access the changes I have described so far.

[28] Let us turn back to the question whether our state, our constitutional system has not already implemented provisions or allowed such openings that we are possibly no longer able to make - as a nation state - this claim to sovereignty in the way we are used to. I am of the opinion that there has not been the sovereignty transfer desired by some. Instead, it is here that we can see the advantage of an alternative logic, i.e. one that is not confined to two poles. We can now hold on to the specifically modern distinction which transports the notion of sovereignty while we can, at the same time, move beyond these confines. In a dialectical move we emphasize the importance of the distinction while reformulating it on a different level, thereby illuminating what is potentially hidden within the distinction that can be made visible only through this dialectical move.

[29] In ancient times, the notion of the state played a marginal role. Rather, an imperial claim of world rule and world government dominated political thinking. The modern notion of the state, in contrast, is one of boundaries, of confinements. That is why, when we speak today of the "open state", it must appear like a contradiction unto itself, and a contradiction that cannot and must not be tolerated by bipolar or two-valued thinking. This thinking would say either "open" or "state". An alternative logic can very well imagine the state to be open as much as it can imagine that it is closed. This is precisely the case when a state transfers *Hoheitsrechte* (authoritative rights) while holding on to its sovereignty. It is this state that can, by its own discretion, reduce or reclaim the transferred authority. The state's identity, therefore, can depend on the practice of leaving transferred rights untouched. At the same time, the state knows that this is its last option. Beyond this there is only the option of *Austritt* (to exit). There is an ongoing legal dispute about the matter of exiting the Union, as some desire to transfer sovereignty as such to the Union. Compare

this with the German land of Bavaria. While the Bavarian people are not sovereign and cannot, therefore, leave the Federal Republic, it is quite the contrary with Germany or any other Member State vis-à-vis the European Union. So, in a European perspective, the people in the Member States are sovereign and thus reserve the right to exit. No one is even considering this fundamental truth in Germany. It seems impossible for some to even consider this basic fact about the relationship of the Member States to the Union. From a strictly academic, scientific and logical perspective, however, we see that there must be an exit option. Under which conditions such an option may be taken up, resides again in the discretion of the Member States. It is here that the transfer of rights to the European Union is limited and brought to a halt. This, of course, holds true only as long as sovereignty continues to reside with the Member States.

[30] But is it not provocative to realize that there are these two levels of policy and decision making, one in Brussels and one in the Member States? On the one hand we see politics in Brussels, increasingly apt and professionally experienced when shaping fields such as anti-trust law or other fields of regulatory law, and on the other hand we see the Member States that, conscious of their sovereignty, assume a particular conceptual responsibility for the Union as well as their own political responsibility, authority and discretion. That is why there will be another Intergovernmental Conference in 2004. It is here, between and in light of these two levels, that we see a new concept, a new model of separation of powers emerging. We will fail in our attempt to assess its new quality if we try to translate this phenomenon into the language and categories that we take from the federalism model known to us from our nation-state background. The separation of powers model with which we deal here, goes one decisive step further in that it is a much more free construction. This must be the case because it is well beyond our classical understanding of the state. This new conception necessarily involves the classical states, and these remain the responsible actors, the existence of which is necessary for the functioning of this new model. This state is open to such a degree that it desires, in a constructive sense, this *Bindung* (commitment) with an entity that lies outside its sovereignty. We can see the opening of state taking place, for example, towards the European Convention of Human Rights. Interestingly, the open state understands this commitment to be reciprocal. Its reasoning builds on the hope that, possibly far away, another state will follow this example and commit itself to something outside of itself.

[31] This process of openness and external commitment seems to rest on complex grounds. At the same time, if we look at this from a more, let us say, post-modern perspective, a perspective where we apply an alternative multi-valued logic, we come to perceive the phenomenon of the open state almost as obvious. However difficult the progressive or modern terminology may be, if we look at the open state in the way I've sketched it here today, we can easily see that it is itself a result of such thinking; of conceiving of the state in ways that run counter to those bipolar confinements in which we are used to think about the state.

[32] From this perspective, then, we must see that what Germans have recently suggested [as to the future of the European Union] only seems progressive at a first glance. A closer look reveals that it is in fact regressive. But if we cling to two-valued logical thinking, the Chancellor's proposal might indeed be called progressive. Because, within this framework, there really cannot be an alternative to the creation of a federal state on the European level when we want to go beyond a separation of powers between the European Union and nation states. But we have to ask ourselves what should the progressiveness of the European Federal State really be, if not only the repudiation of the old model of the nation state. Clearly the progressive vision of the nation state would not be the realization of an *Aufhebung* but only the recreation, the re-founding of what we had on a new level. This would, of course, mean that we inevitably will face the risks of, whether voluntarily or not, assuming the role of a superpower. We might also face older risks, such as those that the nation state had been facing, but mostly we would have to deal with risks and problems resulting from international pressure urging us possibly to be the guardian of the world's safety.

[33] In contrast thereto, the model that involves the necessary legitimation from the nation states has my full sympathy. Take, for example, Israel's foreign minister inquiring with the German government about a possible mediating role of Germany in the ceaseless conflict with the Palestinians. Germany's rejection, as we see, is not based only on inner German policy considerations, but instead on Germany's partaking in the common policy concept of the European Union. Thus, the proposal communicated to the Israelies was to direct their suggestion to the Union itself. Underneath this answer we can see a very promising venue after all. The nation-state should, indeed, reserve the right to independently form its foreign policy opinion, but instead of reacting individually towards a foreign nation, the Member State would delegate the issue to a commission, to a common representative in foreign policy issues as would be the case with regard to the second pillar of the European Union. This seems, in fact, to be a very progressive model for foreign policy and if we look at the United Nations or NATO, we can see this very delegation, this deferral of certain issues to these organizations. This is not to say that nation states are deficient or operating badly. Rather, they are to be criticized when acting in isolation and in an autocratic mode. Here we only begin to see the advantages of a mode of international cooperation under the roof of international organizations, which would allow for a substantial improvement in International Public Law and International Relations. The array and quality of the advantages in conceiving of the state and its foreign policy relations have not become entirely visible. Instead, it seems as if Old European conceptions are very influential and indeed decisive when we hear the proposal to overcome this openness in order to take a clear decision with regard to the localization of sovereignty. At the end of

these wishes we would see nothing but the return to the allegedly happy future of the *closed* state. This state would have an enormous market, some 400 million inhabitants and would personify the force and thrust of a whole continent. While we can only guess here, even at underlying motives to face the USA as possibly an equal international actor, I am highly dismissive of such tendencies. If nothing less, this would mean a clear retreat, in particular with regard to our political culture.

[34] **GLJ:** Thank you, Justice Di Fabio.

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(1) Decision of the Federal Constitutional Court (Bundesverfassungsgericht - BVerfG) of December 19, 2000; published in Neue Juristische Wochenschrift 2001, Pp. 429-433; Deutsches Verwaltungsblatt 2001, pp. 284-289; Juristische Schulung 2001, p. 496. The case concerned the question whether the Jehovah's Witnesses should be granted the legal status of quasi- public recognition known as the *Körperschaft des Öffentlichen Rechts* (Article 140 of the Basic Law).
(2) A number of European states entered an agreement to pursue a common policy towards asylum seekers. The agreement includes the obligation to control the entry of foreigners and at the same time delegates the authority to the state of entry the power to issue documents that will (1) either lead to the foreigner's expulsion, prejudicing entry to all other Schengen-states, or (2) allow the entering foreigner to move freely within the European States.
(3) Article 4 of the Basic Law.
(4) *See, e.g.* Udo Di Fabio, DAS RECHT OFFENER STAATEN (1998).

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