BALANCING DIFFERENCE AND EQUALITY OF POLITICAL RIGHTS IN THE EUROPEAN UNION – A PARADIGM OF CONSTITUTIONAL PLURALISM?

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1. INTRODUCTION

In his essay ‘From State Sovereignty to the Sovereignty of Citizens in the International Relations Law of the EU’, Ernst-Ulrich Petersmann drew attention to the difficult relationship between equality, the democratic framework of transnational cooperation and solidarity. One of the difficulties results from transferring to a transnational level concepts derived from a national context. This problem is well known in the legal order of the European Union. It may lead to major conflicts if an institution of a single Member State gives a unilateral interpretation to notions and concepts which have become the common constitutional heritage of 27 Member States. Resolution of such conflicts is traditionally left to the mechanisms and procedures established by the EU Treaty. The concept of constitutional pluralism would, however, encourage institutions of all participating legal orders to avoid such conflicts by accepting differences, as long as they did not call into question the proper functioning of the legal order at issue.

The representation of the European Union’s citizens in the European Parliament provides an example of conflicting constitutional principles. As regards such a unique institution as the European Parliament, from a purely national view there might appear to be distortions and contradictions that would necessarily undermine the legitimacy of the Parliament. From a transnational perspective one may, however, perceive an example of a fine balance within the European Union, giving a new meaning to hitherto nationally defined values, notably of representation, equality and solidarity.

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The focal point of such conflicts is how equality is to be understood, more precisely the question whether it is possible to reconcile the principles of electoral law governing the election of national Parliaments and those governing the election of the European Parliament (specifically the principle of equal voting rights).

The TEU does not provide an explicit definition of the concepts of political “equality” and “representative democracy” (Articles 4(2) and 10(1) TEU). In the context of the TEU and for the purpose of the composition and functioning of the EU institutions, each notion must have a single meaning. Therefore, the silence of the Treaty does not imply a right of national institutions to give a unilateral interpretation. Such attempts would not only be contrary to the principle of “sincere cooperation” (Article 4(3) TEU), they would also ignore the commitment to constitutional pluralism. Conversely, Member States may well rely on a different meaning of the same notion for their internal requirements.

As far as the political rights of European citizens are concerned, equality seems to have been achieved only to a certain degree. As a consequence, the Parliament’s representativity within the European Union has been questioned: in its decision of 30 June 2009 (“Lisbon”), the German Bundesverfassungsgericht claims to have found a striking example of derogation from the principle of equality in the right to vote in the elections to the European Parliament. On that basis, that court questions the European Parliament’s capacity to be representative and draws far-reaching conclusions for the legal nature of the European Union:

- The European Union lacks, even after the entry into force of the Treaty of Lisbon, a political decision-making body which has come into being by equal election of all citizens of the Union and which is able to uniformly represent the will of the people;\(^3\)
- The European Parliament is not laid out as a body of representation of the citizens of the Union as an undistinguished unity according to the principle of electoral equality.\(^5\)

The statement concerning “equal election” takes up comments in German legal writing which were made regarding the system for the distribution of seats applicable prior to the entry into force of the Treaty of Lisbon.\(^6\) It has received support and criticism from some (German) authors\(^7\) but has not given rise to much discussion in international legal writing.

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\(^3\) BVerfGE 123/267 (“Lisbon”).
\(^4\) Ibid., recital no. 280.
\(^5\) Ibid., recital no. 280, author’s emphasis.