

## Special Section: The Federal Constitutional Court's *Lisbon Case*

### The European Union as An Association of Sovereign States: Karlsruhe's Ruling on the Treaty of Lisbon

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#### A. The European Union – A Secondary Political Area

Sixty years after the promulgation of the German constitution, which from the beginning was distinguished by its “visionary openness towards Europe,” the German Federal Constitutional Court reassessed the historic process of European integration. It reviewed the compatibility of the legal foundations of the European Union with the German Basic Law and provided a thorough overview. The Treaty of Lisbon and its sweeping, integrating reform of the European Union is compatible with the Basic Law, the Court's Second Senate ruled, so long as it is applied within the framework outlined by the Federal Constitutional Court. However, the Court found that the German implementation law is not consistent with the Basic Law. Accordingly, the Court made clear that Germany can continue with the ratification of the treaty only after introducing a new implementation law. The 147-page decision<sup>1</sup> could be summarised in the following way: The European Union is an association of sovereign states and, hence, a secondary political area.

After hearing two days of oral arguments in February it was clear that a fundamental decision could be expected from Karlsruhe. This was not a certainty from the outset. The constitutional complaints and the *Organstreit* petitions dealt with merely another amendment, under international law, to the existing primary law governing Germany's membership in the European Union. Moreover, observers familiar with the Court did not expect an extensive ruling on European matters from Karlsruhe. Rightly so. After all, the Court had not met the expectations it raised in the 1993 *Maastricht Case* regarding its will and authority to supervise Germany's membership in the European Union.<sup>2</sup>

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<sup>1</sup> Lisbon Case, BVerfG, 2 BvE 2/08, from 30 June 2009, available at: [http://www.bverfg.de/entscheidungen/es20090630\\_2bve000208.html](http://www.bverfg.de/entscheidungen/es20090630_2bve000208.html). Citations are to the unofficial English translation, available at: [http://www.bundesverfassungsgericht.de/entscheidungen/es20090630\\_2bve000208en.html](http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html).

<sup>2</sup> BVerfGE 89, 155 (English translations: BVerfG, 1 COMMON MARKET LAW REVIEW 57 (1994); BVerfG, 33 INTERNATIONAL LEGAL MATERIALS 388 (1994)). See Matthias Herdegen, *Maastricht and the German Constitutional Court*, 31 COMMON MARKET LAW REVIEW 233 (1994); Juliane Kokott, *Report on Germany*, in THE EUROPEAN COURT AND NATIONAL COURTS – DOCTRINE AND JURISPRUDENCE 77 (Anne-Marie Slaughter *et al.* eds., 1998).

The *Lisbon Case*,<sup>3</sup> however, has the same significance as the *Maastricht Case*. But the Court's decision of 30 June 2009 is more than a "*Maastricht II*." To begin with, the Court rearticulated its understanding of the existing European framework. First, the European Union, which was newly created in 1992, embodies a strong will for political union; since 1992 new spheres of common activity have noticeably opened up, including working together in the areas of home affairs, justice, foreign and security policies.<sup>4</sup> Second, the European Union has expanded to 27 member states; a path at odds with the deepening of the Union's common political identity for which some had hoped. Third, the intention of drafting a common European constitution failed, casting doubts on the ability to shape Europe politically from top to bottom – from political elites to the breadth of society. Fourth, those who, after the *Maastricht Case*, considered Germany's membership in the European Union to still be under the supervision of the German Federal Constitutional Court are now embracing national *ultra vires* reservations.<sup>5</sup>

The *Lisbon Case*, although based on *Maastricht*, is more farsighted in its reasoning and legal approach, as this comprehensive rearticulation of the current framework suggests. Above all, the decision emphasized that Germany's participation in European integration will be viewed through the lens of the constitution's provisions for international law. Making the human individual its foundation, the Court's decision pursued a line of reasoning that combined democratic theory with a modern understanding of sovereignty. Assigning spheres of primary and secondary responsibility, the Court emphasized the joint responsibility of the German Federal Parliament (*Bundestag*) regarding external relations and developed a control mechanism that permits the legal monitoring of the assignment of competences in a multi-level system in individual cases. Article 38(1) of the Basic Law, in conjunction with Article 23 (1) of the Basic Law, form the legal foundation for this scrutiny.

The following sections elaborate on the central ideas behind the Court's judgement and put the case into context as regards the future development of the European Union. First, the Court invoked a particular model of electoral democracy and constitutional identity (B.). From this the Court drew conclusions for primary law that would permit an interpretation of the Lisbon Treaty that is consistent with the German Basic Law (C.). The Federal Constitutional Court reinforced its conclusions with a refashioning of the procedural constitutional apparatus, and encouraged an amendment from the parliament

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<sup>3</sup> For a systematic overview of the Treaty, see Paul Craig, *The Treaty of Lisbon*, 33 EUROPEAN LAW REVIEW 137 (2008); Michael Dougan, *The Treaty of Lisbon 2007*, 45 COMMON MARKET LAW REVIEW 617 (2008); THE LISBON TREATY (Stefan Grillier and Jacques Ziller eds., 2008); Franz Mayer, *Die Rückkehr der Europäischen Verfassung? Ein Leitfaden zum Vertrag von Lissabon*, 67 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 1141 (2007).

<sup>4</sup> Ulrich Everling, *Reflections on the Structure of the European Union*, 29 COMMON MARKET LAW REVIEW 1056 (1992).

<sup>5</sup> Christian Tomuschat, *Die Europäische Union unter der Aufsicht des Bundesverfassungsgerichts*, 20 EUROPÄISCHE GRUNDRECHTE-ZEITSCHRIFT 489 (1993).

(D.). The organizational law obtains – with the responsibility for integration (*Integrationsverantwortung*) – a new category and progresses towards further involvement of the parliament in external relations (E.). Finally, the Court concluded that the European Union could escape the “vice of constitutional law” in a constituent moment; but the Court surmised that it is more likely that European integration will tend, in its form, towards an interstate, secondary community (F.).

## B. Two Central Premises Behind the Judgement

The intellectual core of the judgement consists of two premises that arise from a common basis. The first premise is that of electoral democracy as a classical form of legitimization for the self-determination of citizens under the condition of equality (I). The second premise is that of constitutional identity, understood as establishing a political community of a specific – although alterable – form (II).

### I. Electoral Democracy

The Court’s constitutional assessment was based on Article 38 (1) of the Basic Law.<sup>6</sup> With this approach the Court took up the same line of reasoning that it followed in *Maastricht*. The citizens’ right to determine public authority in equality and freedom (with regard to both the people who govern and the scope and content of public authority) is not to be understood as a specifically German element of the principle of democracy, but as a universal principle. The right of participation in legitimizing public authority inheres in the individual. The Court explained that “The right to free and equal participation is anchored in human dignity (Article 1 (1) of the Basic Law).”<sup>7</sup> The universal character of this statement becomes apparent in later parts of the decision.<sup>8</sup>

With comparative law arguments and with references to the European Convention on Human Rights, the legitimizing model in modern territorial states is described as a model of responsive democracy. A responsive democracy, the Court explained, is a unification of authority (*Herrschaftsverband*); its institutions are formed through periodic majority decisions of the citizens, and they have to answer – according to the dualism of government and opposition – to an observing and controlling public.<sup>9</sup> The fact that many

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<sup>6</sup> GRUNDGESETZ [GG] [Basic Law or Constitution] art. 38 (1) (“Members of the German Bundestag shall be elected in general, direct, free, equal, and secret elections. They shall be representatives of the whole people, not bound by orders or instructions, and responsible only to their conscience.”).

<sup>7</sup> Lisbon Case, BVerfG, 2 BvE 2/08, from 30 June 2009, para. 211-12, available at: [http://www.bverfg.de/entscheidungen/es20090630\\_2bve000208.html](http://www.bverfg.de/entscheidungen/es20090630_2bve000208.html).

<sup>8</sup> *Id.* at para. 217 (“It may remain open whether, due to the universal nature of dignity, freedom and equality alone, this commitment even applies to the constituent power, (...)”).

<sup>9</sup> *Id.* at para. 249.

states do not meet this standard, the Court reasoned, does not change its universal character because a modern western constitutional state can claim universality even without being able to achieve it.<sup>10</sup> The statement also expresses the normative claim that intense relations between states are only possible if the subjects involved share “the same foundation of values of freedom and equal rights and which [...] make human dignity and the principles of equal entitlement to personal freedom the focal point of their legal order.”<sup>11</sup> The Court here invoked its case-law on systems of collective security, which was developed with reference to the command to peace (see, for example, the Preamble, Article 24 (1), and Article 26 of the Basic Law).<sup>12</sup> It is now applying this jurisprudence to the European integration process and any form of interstate cooperation.

The Second Senate’s decision to base its reasoning on human dignity and personal freedom has far-reaching consequences. It is not the state, but the citizen, who stands at the center of things. The state is mentioned often in the judgement, not as a myth or an end in itself, but as a necessary organizational form of the political community of individuals – a historically grown and identity-forming community. At this point the Court could have quoted, as grounds for this conclusion, *Einstein’s* well-known words: the state exists only for the sake of its people.<sup>13</sup> Nevertheless, it should be noticed that human dignity is mentioned at several points in the case but is not extensively developed. The Court seemed to signal that a fuller picture of this facet of human dignity will emerge from later decisions and is not to be left as a merely self-explanatory reference to Article 1 (1) of the Basic Law. Interestingly, the European Union also submits itself to the primacy of human dignity,<sup>14</sup> and it is specifically the Court’s reference to the individual that might give the decision its greatest resonance in other European legal systems.<sup>15</sup>

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<sup>10</sup> See Udo Di Fabio, *Menschenrechte in unterschiedlichen Kulturräumen*, in *GELTEN MENSCHENRECHTE UNIVERSAL* 63 (Günter *Nooke* and Georg *Lohmann* eds., (2008).

<sup>11</sup> Lisbon Case, BVerfG, 2 BvE 2/08, from 30 June 2009, para. 211-12, available at: [http://www.bverfg.de/entscheidungen/es20090630\\_2bve000208.html](http://www.bverfg.de/entscheidungen/es20090630_2bve000208.html).

<sup>12</sup> BVerfGE 121, 135 (153).

<sup>13</sup> Article 1.1 of the Herrenchiemsee draft of the Basic Law from 1948 adopted Albert Einsteins *dictum*: “Der Staat ist um des Menschen willen da, nicht der Mensch um des Staates willen.” See 2 DER PARLAMENTARISCHE RAT 1948–1949, AKTEN UND PROTOKOLLE – DER VERFASSUNGSKONVENT AUF HERRENCHIEMSEE 580 (Peter Bucher ed., 1981).

<sup>14</sup> Case C-159/90, SPUC v. Gorgan, 1991 E.C.R. I-4685; Case C-377/98, Kingdom of the Netherlands v. European Parliament and Council of the European Union, 2001 E.C.R. I-7079; Case C-36/02, *Omega* Spielhallen- und Automatenaufstellungs v. Oberbürgermeisterin der Bundesstadt Bonn, 2004 E.C.R. I-9609. See Charter of Fundamental Rights of the European Union, art. 1, 2000 O.J. (C 364) 1, 10; Frank Schorkopf, *Human Dignity, Fundamental Rights of Personality and Communication*, in *EUROPEAN HUMAN RIGHTS AND FREEDOMS* § 15 paras 3-16 (Dirk Ehlers ed., 2007),.

<sup>15</sup> See, *supra* note 14. See also Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 *EUROPEAN JOURNAL OF INTERNATIONAL LAW* 655 (2008).

*II. Identity of the Constitution*

The second central premise behind the judgement seamlessly builds on the idea of electoral democracy. The claim to free and equal participation in the construction and exercise of public authority is one of the unalterable principles of German constitutional law. It is laid down in Article 20 (1) and (2) in conjunction with Article 79 (3) of the Basic Law.<sup>16</sup> The Court declared in straightforward terms: “The principle of democracy is not amenable to weighing with other legal interests; it is inviolable.”<sup>17</sup> The Court explained that, if the democratic principle is neither amenable to balancing nor violable, then the constituent parliament, maybe not even the *pouvoir constituant*, can dispose of this facet of the identity of the free constitutional order. It follows that no authority to do so can be transferred to interstate or supranational legal entities. Such decisions are out of parliament’s reach.

From this point of view the guarantee of electoral democracy is, at its heart, a special, distinguished form of the guarantee for Germany’s constitutional identity that is otherwise laid down in Article 79 (3) of the Basic Law. The special emphasis in Article 23 (1)[2] of the Basic Law on the democratic principle for the European integration justifies the separation of these two above mentioned premises. Their common purpose is the justification of human dignity. Article 79 (3) of the Basic Law is designed to prevent totalitarian lapses but also to prevent changes in the positive law that could cut the bond between the German constitution and its universal foundation recognised under international law.<sup>18</sup>

In this part of its reasoning the Federal Constitutional Court guaranteed German statehood (“The Basic Law not only presupposes sovereign statehood, it even guarantees it.”)<sup>19</sup> and noted that the path to any departure from this guarantee – this is to be discussed later – lies only in the creation of a new constitution under the terms of Article 146 of the Basic Law. The Court did not stop with an abstract guarantee for German statehood. It dared to take the step to the middle level of abstraction and substantiated the identity ensured by the constitution. The Court listed the areas to be regulated nationally – amounting to a definition of necessary public tasks – summarized as the space where citizens’ economic, cultural and social living conditions are shaped. This sphere, the Court held, is reserved for

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<sup>16</sup> GRUNDGESETZ [GG] [Basic Law or Constitution] art. 20 (1) (“The Federal Republic of Germany is a democratic and social federal state. (2) All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive, and judicial bodies.”; Article 79 (3): “Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.”).

<sup>17</sup> Lisbon Case, BVerfG, 2 BvE 2/08, from 30 June 2009, para. 216, available at: [http://www.bverfg.de/entscheidungen/es20090630\\_2bve000208.html](http://www.bverfg.de/entscheidungen/es20090630_2bve000208.html).

<sup>18</sup> *Id.* at para. 218.

<sup>19</sup> *Id.* at para. 216.

the member states and cannot be communitarized. Essential elements of this sphere include: citizenship; the civil and the military monopoly on the use of force; revenue and expenditure including external financing; all elements of encroachment that are decisive for the realization of basic liberties; disposition of language; the shaping of circumstances concerning the family and education; the ordering of the freedom of opinion, of the press and of assembly; and dealing with the profession of faith or ideology. The pivotal argument for this non-exhaustive enumeration is reference to a political decision that draws on a linguistically, culturally and historically influenced prior understanding of those involved. For the first time the Court's reasoning refers to a discursive process – possibly a reference to the much-lauded deliberative model of society.<sup>20</sup>

Whoever assumes, at this point in the Court's reasoning, an implied preference for the Westphalian conception of sovereignty,<sup>21</sup> will be disappointed by the judgement. The Court supported its reasoning on a reconstructed modern concept of sovereignty, putting the free commitment of the states in the center. It also offered a definition of this model: "Sovereign statehood stands for a pacified space and the order provided within this space on the basis of individual freedom and collective self determination. The state is neither myth nor an end in itself, but a historically grown, globally recognised form of organisation of a capable political community."<sup>22</sup> With this the Senate also turned against the competing notion of an impotent nation that is unable to do anything and everything and can, therefore, solve all factual issues only within a transnational association.<sup>23</sup> Altogether, supranational cooperation is treated in positive terms.

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<sup>20</sup> JÜRGEN HABERMAS, *Drei normative Modelle der Demokratie: Zum Begriff deliberativer Demokratie*, in DIE EINBEZIEHUNG DES ANDEREN 277 (1996); Jürgen Habermas, *Why Europe Needs a Constitution*, 11 *New Left Review* 5 (2001).

<sup>21</sup> See András Jakab, *Neutralizing the Sovereignty Question*, 2 *EUROPEAN CONSTITUTIONAL LAW REVIEW* 375, 384 (2006) and the contributions in *SOVEREIGNTY IN TRANSITION* (Neil Walker ed., 2003).

<sup>22</sup> Lisbon Case, BVerfG, 2 BvE 2/08, from 30 June 2009, para. 224, available at: [http://www.bverfg.de/entscheidungen/es20090630\\_2bve000208.html](http://www.bverfg.de/entscheidungen/es20090630_2bve000208.html).

<sup>23</sup> Frank Schorkopf, *Politische Herrschaft als verantwortete Selbstbestimmung*, 84 *DIE FRIEDENS-WARTE* 89 (2009).

### C. Reflections in the Treaty of Lisbon

The two key premises – electoral democracy and constitutional identity – form the standard against which the Court evaluated European Union institutions (I), procedures (II) and areas of competence (III).

#### I. Institutions

In the center of the Court's attention to European institutions stands the European Parliament. The Court acknowledged that with the Lisbon Treaty the Parliament continues in its role as a complementary structure for legitimizing European public power. The fact of unequal elections to the European Parliament is put into the historical context. This approach can be interpreted as a renunciation of the approach that argues that a more consequential involvement of the European Parliament (at least as presently constituted) will induce a solution to Europe's legitimacy crisis through the slow diminishment and eventual resolution of the democratic deficit.<sup>24</sup> While this small democratic deficit continues to monopolize the debate and motivate European as well as national politics to take considerable efforts to totally parliamentarize the European Union, the Federal Constitutional Court took a different view. If the European Union decides to pursue the analogy to a state (*staatsanalog*), then the EU has to comply with the standards of legitimization of political power with which an electoral democracy must contend. The Court countered the *sui generis* argument, which seeks to excuse the European Union from these standards. The *sui generis* argument not only describes the EU structure but also normatively shapes it, ultimately implying that the European Union cannot comply with the traditional legitimization structures that operate on the member states because it represents an altogether new form or arrangement of public authority.<sup>25</sup>

Nonetheless, with the current mode of election to the European Parliament, the European Union is still plagued by a significant democratic deficit. It is perpetuated in the primary law through the principle of degressive proportionality – a census related to citizenship.<sup>26</sup> The Second Senate did not accept the argument that the inequality inherent in Europe's parliamentary elections should be justified by functional, politically pragmatic and moral reasons. Universalizing the model of electoral democracy as the Court did immunizes the

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<sup>24</sup> Gertrude Lübke-Wolff, *Europäisches und internationales Verfassungsrecht*, 60 VERÖFFENTLICHUNGEN DER VEREINIGUNG DEUTSCHER STAATSRICHTSWISSENSCHAFTLER 245 (2001).

<sup>25</sup> See Paul Kirchhof, *The Balance of Powers Between National and European Institutions*, 5 EUROPEAN LAW JOURNAL 225 (1999); Stephan Breitenmoser, *Die Europäische Union zwischen Völkerrecht und Staatsrecht*, 55 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 951 (1995).

<sup>26</sup> Treaty on European Union, art. 14.2, Dec. 29, 2006, 2006 O.J. (C 321E) 12-13 [hereinafter TEU]. See Resolution on the Composition of the European Parliament, Eur. Parl. Doc. P6\_TA(2007)0429 (for the details of the principle of degressive proportionality).

legitimization of political power – founded in self determination – against any claims of emergency- or crisis-driven justifications (*Zwecknotwendigkeit*). Due to the universality of the model, the Court reasoned, alternative models of democracy – especially the model of participatory democracy<sup>27</sup> – cannot provide sufficient legitimization. *Co-determination* of the people is not the same thing as *self-determination* of the people. Such models of decentralized, work-sharing participation hold the potential to increase and effectuate the primary legitimating force derived from elections on the basis of equal votes.

Since the Treaty of Lisbon contains many such elements, these statements contain a significant critique of the path chosen for Europe, dampening expectations that further inclusion at the institutional level of national parliaments, associations, groups and other forces of society, would bring a higher level of legitimacy.<sup>28</sup> Shortly after the elections to the European Parliament, which were held on 7 June 2009, the Federal Constitutional Court took a stand in a debate that has engaged legal literature for the past few years. The Court clearly objected to wide-spread efforts to imagine a more flexible understanding of the democratic principle.<sup>29</sup> Democracy is not played off against parliamentarism because the model of electoral democracy requires a certain form of parliamentarism – epitomized in the principle of equal votes. The European Union can comply with this model, too.

The European Commission is described by the Court as part of a European government that fulfils its mandate hand in hand with the European Council of Ministers and the European Council. According to the Federal Constitutional Court these organs' functions are institutionally exhausted, making a further development in the direction of more autonomy impossible. This barrier results from the fact that there is no "election by the demos in which due account is taken of equality," including the possibility of being voted out of office. This, of course, is what is necessary to make elections politically effective. Considering the current struggle for power between the European Council and the European Parliament over the nomination of the new President of the Commission, the Court's words take on a rather contemporary significance.<sup>30</sup> If the President of the

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<sup>27</sup> Anne Peters, *European Democracy after the 2003 Convention*, 41 COMMON MARKET LAW REVIEW 37 (2004); Giandomenico Majone, *Europe's Democratic Deficit: The Question of Standards*, 4 EUROPEAN LAW JOURNAL 5 (1998).

<sup>28</sup> Frank Schorkopf, *Maßstäbe für die institutionelle Architektur der Europäischen Union*, in DIE EUROPÄISCHE UNION NACH LISSABON 83 (Eckhard Pache and Frank Schorkopf eds., 2009).

<sup>29</sup> See FRITZ WILHELM SCHARPF, DEMOKRATIETHEORIE ZWISCHEN UTOPIE UND ANPASSUNG (1970); Fritz Wilhelm Scharpf, *Democratic policy in Europe*, 2 EUROPEAN LAW JOURNAL 136 (1996); Martin Nettesheim, *Demokratisierung der Europäischen Union und Europäisierung der Demokratietheorie – Wechselwirkungen bei der Herausbildung eines europäischen Demokratieprinzips*, in DEMOKRATIE IN EUROPA 143 (Hartmut Bauer et al. eds., 2005).

<sup>30</sup> See Council Presidency Conclusions, No. 11225/09 of 19 June 2009, para. 10, available at: [http://ec.europa.eu/danmark/documents/alle\\_emner/institutionelle/090619\\_konklusioner\\_en.pdf](http://ec.europa.eu/danmark/documents/alle_emner/institutionelle/090619_konklusioner_en.pdf). See also *Charlemagne – A Hoper but Not A Pleaser*, THE ECONOMIST (June 25, 2009, available at: [http://www.economist.com/world/europe/displaystory.cfm?story\\_id=13899661](http://www.economist.com/world/europe/displaystory.cfm?story_id=13899661)).



Commission were to be elected by the European Parliament alone, the election of the Members of Parliament would at the same time decide on a European government. This link between government and parliament would require an election in which due account is taken of equality.<sup>31</sup>

The Federal Constitutional Court gave the European Court of Justice only a little attention. But most of the Court's reasoning applies equally to the ECJ. The path of *ultra vires* review as well as the identity review, by which the decision of the Federal Constitutional Court is to be enforced, is still to be discussed. The reasons stated by the Court highlight, however, that the problems lie in the interpretation the European Court of Justice has given the Treaties and not the wording of the Treaties themselves. To a great extent the Second Senate took into account the jurisprudence from Luxemburg. Its critical view of the ECJ's jurisprudence is evident, on one hand, from the quotes it chose, and on the other hand, from its deliberate silence regarding the ECJ's decisions. Concerning citizenship of the Union, special reference is made to the cases *Martínez Sala*,<sup>32</sup> *Grzelczyk*,<sup>33</sup> *Baumbast*,<sup>34</sup> *Trojani*<sup>35</sup> and *Zhu*<sup>36</sup> (all decided by the ECJ between 1998 until 2002), but also to the new, more cautious case *Förster*.<sup>37</sup> The Court's statements regarding what the ECJ termed an annexed competence in criminal law are not supported by quotes from ECJ decisions, but the Federal Constitutional Court judged them to be questionable if not unconstitutional.<sup>38</sup>

## II. Procedure

The principle of conferral provides the strongest support for the Second Senate's critical evaluation of EU law on the institutional level. The principle reflects the general outline permitting the member states to transfer individual competences onto the European

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<sup>31</sup> Lisbon Case, BVerfG, 2 BvE 2/08, from 30 June 2009, para. 285-297, available at: [http://www.bverfg.de/entscheidungen/es20090630\\_2bve000208.html](http://www.bverfg.de/entscheidungen/es20090630_2bve000208.html).

<sup>32</sup> Case C-85/96, *Martínez Sala v. Freistaat Bayern*, 1998 E.C.R. I-2691 (paras 62-63).

<sup>33</sup> Case C-184/99, *Grzelczyk v. Centre public d'Aide Sociale d'Ottignies-Louvain-la Neuve*, 2001 E.C.R. I-6193 (paras. 31-32).

<sup>34</sup> Case C-413/99, *Baumbast and R v. Secretary of State for the Home Department*, 2002 E.C.R. I-7091 (para. 82).

<sup>35</sup> Case C-456/02, *Trojani v CPAS*, 2004 E.C.R. I-7573 (para. 31).

<sup>36</sup> Case C-200/02, *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department*, 2004 E.C.R. I-9925 (para. 25).

<sup>37</sup> Case C-158/07, *Jacqueline Förster v. Hoofddirectie van de Informatie Beheer Groep*, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62007J0158:EN:HTML>; Lisbon Case, BVerfG, 2 BvE 2/08, from 30 June 2009, para. 350, available at: [http://www.bverfg.de/entscheidungen/es20090630\\_2bve000208.html](http://www.bverfg.de/entscheidungen/es20090630_2bve000208.html).

<sup>38</sup> The proper cases – not cited by the Court – are: Case C-176/03, *Commission v. Council*, 2005 E.C.R. I-7879; Case C-440/05, *Commission v. Council*, 2007 E.C.R. I-9097.

Union, and protecting them against a European competence to decide on its own competence (*Kompetenz-Kompetenz*). Correspondingly, the Court used this principle extensively to narrowly interpret Lisbon's clauses for simplified modification procedures, including the bridging or flexibility clauses. The Court left no doubts that Article 352 TFEU (Article 308 TEC) constitutes – from the view of today's degree of integration – an unacceptable clause. According to the mandate of the European Council of Laeken on the distinct attribution of competences, this clause is, in effect, an anachronism. The note to the conclusions made by the European Council of Laeken – found in the Senate's justification – can be interpreted in this way.<sup>39</sup>

With considerable skepticism the Court also looked at the bridging clauses, those treaty provisions allowing for an autonomous alteration of the primary law concerning legislation and majority rules applicable to certain institutional decisions. The same applies to clauses allowing for a simplified alteration of the primary law, which can be decided by the European Council and ratified by the member states. The Treaty of Lisbon contains 29 alternatives of these clauses, including the Treaty amendments in the ordinary procedure. The Court concluded, again relying on the international law character of the European Union and the decisive role the Basic Law assigns to the *Bundestag* in such matters, that the enforcement of such amendments would require the German *Bundestag* to pass a law according to Article 23 (1)[2] of the Basic Law or pass a constitutive resolution. The German representative to the Council is – under certain circumstances – bound to the parliamentary will. This interpretation is guided by the thought that more indefinite and far-reaching provisions for the developmental dynamics in the primary law would intensify parliamentary involvement. If new competences are to be transferred through bridging clauses, the Court explained, then the *Bundestag* and *Bundesrat* have to take the responsibility for that step of integration.

In the case of the so called “emergency-brake proceedings” (Article 48.1, 82.3 and Article 83.3 TFEU) the Court took its critique one step further. In these cases, involving freedom of movement and the administration of criminal law, the member states can ask for a matter to be referred to the European Council to achieve the suspension of the ordinary legislative procedure. For such a radical departure from ordinary European procedure that is thus even farther removed from legitimizing parliamentary action, the Court held that the German representative in the Council may, in all three cases, exercise this right of the

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<sup>39</sup> See Lisbon Case, BVerfG, 2 BvE 2/08, from 30 June 2009, para. 328, available at: [http://www.bverfg.de/entscheidungen/es20090630\\_2bve000208.html](http://www.bverfg.de/entscheidungen/es20090630_2bve000208.html). See also Udo Di Fabio, *Some remarks on the allocation of the competences between the European Union and its Member States*, 39 COMMON MARKET LAW REVIEW 1289 (2002) (remarking the paradox that the Laeken project failed to clarify the European competences and the consequences of this).

member states only on the instruction of the German *Bundestag* and – to the extent that this is required by the provisions on legislation – the *Bundesrat*.<sup>40</sup>

### III. Fields of Competence

Looking at the structure and course of the oral proceedings, the Court would have been expected to take up the submissions of the complainants, turning then to investigate the details of selected fields of competence. The Court fulfilled this expectation. The Court's reasoning contains substantial sections discussing European competence in penal and civil law, external trade relations, common defence within the Common Foreign and Security Policy (CFSP), and the social dimension of European integration.

The Court's clarification of social issues tries to deal with the constant accusation that European integration bears a "neoliberal structure" and needs "a drop of social oil."<sup>41</sup> On the basis of a substantial analysis of the body of European positive law and the jurisprudence of the European Court of Justice, the Court concluded that the German constitutional demand for social justice – although it has only been vaguely defined as a constitutional principle – has not been violated by the European Union legal order. The Court did not elaborate further on the procedural admissibility of the complaint. This fact, viewed in conjunction with the Court's paragraph considering the political orientation of the applicant party and the constitutional complaints brought by members of that party – seemed aimed at creating legal peace as regards the allegations of unconstitutional "neoliberal integration" at the European level.

It is worth remarking that the Court did not take a quantitative stance on the question of European competences. It responded to the alleged "loss of statehood" (*Entstaatlichung*), which was based on the notion that a state has to control a certain *number* of sovereign rights, on a different level.<sup>42</sup> As mentioned earlier, the Court provided a catalogue of sovereign powers. It justified its decision not with a necessary *number* of abstract tasks lying in the state's responsibility, but with the less-formalistic idea of constitutional

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<sup>40</sup> See Lisbon Case, BVerfG, 2 BvE 2/08, from 30 June 2009, paras. 365, 400, 419, available at: [http://www.bverfg.de/entscheidungen/es20090630\\_2bve000208.html](http://www.bverfg.de/entscheidungen/es20090630_2bve000208.html).

<sup>41</sup> Fritz Wilhelm Scharpf, *The European Social Model: Coping with the Challenges of Diversity*, 40 JOURNAL OF COMMON MARKET STUDIES 645 (2002); Brian Bercusson, *The Trade Union Movement and the European Union: Judgment Day*, 13 EUROPEAN LAW JOURNAL 279 (2007); Christian Joerges and Florian Rödl, *Informal Politics, Formalised Law and the "Social Deficit" of European integration*, 15 EUROPEAN LAW JOURNAL 1 (2009).

<sup>42</sup> The Federal Constitutional Court cited an article published by Tilman Hoppe shortly before the oral proceedings in the Lisbon Case. See Tilman Hoppe, *Die Europäisierung der Gesetzgebung: Der 80-Prozent-Mythos lebt*, 20 EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 168 (2009) (the Court seemed to be reacting to arguments raised by the Bundestag's advocates during the oral proceedings that pointed to studies allegedly proving a smaller dependency of national legislation on the requirements of EU law). But see Ingolf Pernice, *Plädoyer für Lissabon*, WHI-Paper 5/09, 15, available at: [http://whi-berlin.de/documents/whi-paper0509\\_04.pdf](http://whi-berlin.de/documents/whi-paper0509_04.pdf).

identity. For certain fields of policy there is not sufficient responsiveness at the European level.<sup>43</sup> Bringing the two arguments together creates a theory of (currently) necessary state tasks – including criminal law, education, culture, language, taxes and finance including the raising of credit.<sup>44</sup> They derive from a heuristic that universalizes findings from the comparative view on the daily routine of integration. Consequently, in the future further integration in these fields will need to be justified in detail. In this regard the Federal Constitutional Court unequivocally stated that European integration has reached its legal limits.

With respect to the other policy areas the extension of the requirement of parliamentary approval of all military depoyments should be mentioned. The mandatory requirement of parliamentary approval for the deployment of the German armed forces (*Bundeswehr*) is not amenable to further integration of this sector without action by the German parliament.<sup>45</sup> These statements are not aimed at the legal situation that will exist after the Treaty of Lisbon enters into force but at politically envisioned steps of integration that are hoped for in the future. For example, a Common European Defence is to be achieved through the military integration of the North Atlantic Treaty. From the viewpoint of international law the passage referring to “system-relevant” international organisations,<sup>46</sup> should be highlighted. That this concern led to questions about Germany’s continuing membership in the World Trade Organisation during the oral proceedings surprised the advocates, who clearly hadn’t prepared detailed arguments on the issue. The Court made clear in its reasoning that the loss of international legal personality must be avoided in all cases.

#### D. Enforcement within German Jurisdiction

Commentary on the Court’s *Maastricht Case* has gradually developed and taken the perspective that, in 1993, the Federal Constitutional Court raised a standard that it did not meet in the following years. The figure of “legal instruments transgressing the limits” (*ausbrechender Rechtsakt*) remains schematic. The Second Senate’s *Banana Case*<sup>47</sup> increased the procedural requirements for constitutional complaints against European measures to an almost insurmountable level but left most of the European challenges to the *Maastricht Case* unanswered. Therefore, the *Lisbon Case* especially will be judged by

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<sup>43</sup> See Jukka Snell, “European Constitutional Settlement” – An Ever-closer Union, and the Treaty of Lisbon, 33 EUROPEAN LAW REVIEW 619, 637 (2008).

<sup>44</sup> Lisbon Case, BVerfG, 2 BvE 2/08, from 30 June 2009, para. 352, available at: [http://www.bverfg.de/entscheidungen/es20090630\\_2bve000208.html](http://www.bverfg.de/entscheidungen/es20090630_2bve000208.html).

<sup>45</sup> *Id.* at paras. 255 and 384.

<sup>46</sup> *Id.* at para. 372.

<sup>47</sup> BVerfGE 102, 142.

the means it provides to enforce its substantive declarations. The Second Senate developed two bases for constitutional complaints in EU-matters: *ultra vires* control (I) and identity control (II). There are procedural safeguards against these complaints. For example, both concerns could be substantiated by the German *Bundestag* through a European abstract review of statutes (III).

### I. *Ultra Vires* Control

With the idea of *ultra vires* control, the Federal Constitutional Court took up the statement concerning “legal instruments transgressing the limits” from the *Maastricht Case*, yet also departed from it. The *Lisbon Case* both linguistically and dogmatically follows international law by taking up the classical notion of public power acting without competence.<sup>48</sup> This semantic change is apparent in the Court’s general reasoning, but also in a chain of citations attributing findings of “legal instruments transgressing the limits” to the ruling in the *Maastricht Case*. Significantly, the Court abandoned the term *ausbrechender Rechtsakt*.<sup>49</sup>

With the *ultra vires* control, the Court continued its reasoning on the basis of the principle of conferral, because an international institution acting *ultra vires* does not regulate its competences and is reminded of its secondary judicial and political status. This opportunity to invoke the Court’s review makes it possible to challenge whether supranational action stays within the authorised limits. The *Lisbon Case* takes this a step further by requiring that adherence to the subsidiarity principle also be subject to this form of review. The latter does not constitute *ultra vires* control in the true sense because matters of subsidiarity require the European Union – in the first place – to possess a competence.<sup>50</sup> The subsidiarity principle, however, regulates the conditions under which competences may be exercised.

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<sup>48</sup> The doctrine stems from the French and Anglo-american legal order. See Gerhard Leibholz, *Das Verbot der Willkür und des Ermessensmissbrauchs im völkerrechtlichen Verkehr der Staaten*, 1 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 77, 94 (1929). From the perspective of international law, see Rudolph Bernhardt, *Ultra Vires Activities of International Organizations*, in *Theory of International Law at the Threshold of the 21<sup>st</sup> Century – Essays In Honour of Krzysztof Skubiszewski* 599 (Jerzy Makarczyk ed., 1996). Another hint to the Court’s orientation towards international law is the systematic approach it takes in respect of the “loss-of-statehood” (*Entstaatlichung*) argument, which takes up Georg Jellinek’s three-elements. *Lisbon Case*, BVerfG, 2 BvE 2/08, from 30 June 2009, paras. 299, 344 and 346, available at: [http://www.bverfg.de/entscheidungen/es20090630\\_2bve000208.html](http://www.bverfg.de/entscheidungen/es20090630_2bve000208.html).

<sup>49</sup> *Lisbon Case*, BVerfG, 2 BvE 2/08, from 30 June 2009, para. 240, available at: [http://www.bverfg.de/entscheidungen/es20090630\\_2bve000208.html](http://www.bverfg.de/entscheidungen/es20090630_2bve000208.html) (citing BVerfGE 58, 1 (30-31); BVerfGE 75, 223 (235, 242); BVerfGE 89, 155 (188)).

<sup>50</sup> Philipp Kiiver, *The Treaty of Lisbon, the National Parliaments and the Principle of Subsidiarity*, 15 *Maastricht Journal of European and Comparative Law* 77 (2008).

The Court introduced into its reasoning relevant parts of the oral proceedings, which was unexpected and is important to the new concept of *ultra vires* control. In the oral proceedings the authorized representatives of the government and the *Bundestag*, Ingolf Pernice and Christian Tomuschat, expressed their sympathy for the possibility of judicial review of the competences assumed by the European Union.<sup>51</sup>

When one thinks on the Court's *Solange* line of cases, the *ultra vires* control constitutes a most remarkable change.<sup>52</sup> The decision contains – in its section on admissibility and further on – the well-known formula that the Federal Constitutional Court would no longer examine the compatibility of European secondary law with German fundamental rights “so long as” a protection of fundamental rights exists on the European level that is comparable to that secured by the German Basic Law. According to the *Lisbon Case*, however, any European legal act can be scrutinized for its conformity with the German constitution regarding “obvious” transgressions of the boundaries of competence and identity. The dogmatic insinuated in the Court's reasoning shows that the Federal Constitutional Court has given up on the suspension of national scrutiny reservations for community legislation, thereby increasing the pressure on European institutions to basically justify any European legal act. Although the renewed scrutiny reservation is reserved for cases of “obvious transgressions,” the signal is clear. The Court wants to play a more active role in European legal matters. Potential complainants and applicants will attentively take notice of this signal. How the Federal Constitutional Court will deal with the additional number of cases is one of the exciting follow up questions.

## II. Identity Control

The *ultra vires* review of European legal acts can only provide a relative measure of enforcement. It refers to the respective competence order; its application depends on the demarcation of competences between member states and the European Union in each individual case. The non-transferable competences – relating to constitutional identity – cannot be effectively safeguarded with the *ultra vires* complaint. Therefore, the Federal Constitutional Court introduces another method of enforcement – the identity control constitutional complaint.

The identity complaint – procedurally based on Article 79 (3) of the Basic Law – redefines the argument of a “loss of statehood.” It is understood as a protection to the constituent power of the people and to the principles laid down in Articles 1 and 20 of the Basic Law. The Court pointed out that the principles of “fundamental political and constitutional structures of sovereign member states” – as recognised by Article 4.2 sentence 1 TEU-

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<sup>51</sup> Lisbon Case, BVerfG, 2 BvE 2/08, from 30 June 2009, para. 240, available at: [http://www.bverfg.de/entscheidungen/es20090630\\_2bve000208.html](http://www.bverfg.de/entscheidungen/es20090630_2bve000208.html).

<sup>52</sup> BVerfGE 37, 271; BVerfGE 73, 339.

Lisbon – are to be safeguarded. “In this respect, the guarantee of national constitutional identity under the constitution and under Union law go hand in hand in the European legal area.”<sup>53</sup> Along with this thought goes the justification for a national scrutiny reservation, without which a safeguarding of these structures would not be possible.

The identity control will play an important role in the field of constitutional practice enumerating necessary state tasks. In the individual case the meaning of the principles laid down in Article 1 and 20 of the Basic Law should be determined through substantial interpretation efforts. The Court gave the important hint later in the judgement: “Areas that shape the citizens’ circumstances of life, in particular the private space of their own responsibility and of political and social security, which is protected by the fundamental rights, and to political decisions that particularly depend on previous understanding as regards culture, history and language and which unfold in discourses in the space of a political public that is organised by party politics and Parliament.”<sup>54</sup>

### III. European Review of Statutes?

Legal imagination is fired by the following, summary advice given to the parliament by the Court: The two complaints cannot only be enforced within the existing forms of actions, but the parliament can create a new form of action.

The *ultra vires* and the identity complaint can be raised by “everyone” through the constitutional complaint. The subjective content of Article 38 (1) of the Basic Law – generally recognised through its inclusion in Article 93 (1)[4a] of the Basic Law – is affirmed and broadened by the judgement. The reasoning mentions that the principles of Article 23 (1) of the Basic Law also can be the subject of a complaint. How else might a complaint on the violation of the principle of the social state be admissible? The Court did not give a formal explanation<sup>55</sup> but mentioned that the content of Articles 23 (1)[1] along with 79 (3) of the Basic Law are linked to human dignity. It also should be noted that the standard of review is determined by the individual and ultimately by Article 1 (1) of the Basic Law. In this possibility rests enormous potential for new methods referring to the protection for constitutional law according to the contents of Article 23 (1) of the Basic Law.

The Court’s suggestion refers to the broader question whether there is a need for a supplementary form of action: a European review of statutes. This would allow the implementation of a national review procedure for the scrutiny of the compatibility of

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<sup>53</sup> Lisbon Case, BVerfG, 2 BvE 2/08, from 30 June 2009, para. 240, available at: [http://www.bverfg.de/entscheidungen/es20090630\\_2bve000208.html](http://www.bverfg.de/entscheidungen/es20090630_2bve000208.html).

<sup>54</sup> *Id.* at para. 249.

<sup>55</sup> *Id.* at para. 181.

European legal acts with the Basic Law and especially monitoring their adherence to the distribution of competences and to the principle of subsidiarity. A possibility would be national preliminary rulings relieving the courts of the burden of having to decide on the violation of the order of competence. The parliament would have the possibility to set the rules for such a review of statutes.

Such a process might help avoid conflicts with the European Court of Justice. A conflict can – without intentional transgression – result from an interpretation of EU-statutes by the ECJ, which later constitutes a national legal problem. The interpretation of national constitutions, maybe even their application to the facts of the case, isn't always obvious or pending, leading to a conflict according to the course of the proceedings. Member state courts, lower in the national hierarchy, apply European law according to the ECJ interpretation and have to deal with constitutional objections by the involved parties. But their decisions stand under the supervision of Karlsruhe. A German preliminary ruling on the interpretation of the Basic Law, carried out by the Federal Constitutional Court by defining the constitutional identity, could make that clandestine or even only assumed line visible. Avoiding the conflict will not be possible in every case, hence the ECJ is aware of the means by which its own decision was predetermined. And also the Federal Constitutional Courts' decisions will be predetermined if its decision is not followed by the ECJ and the court therefore has to assess the violation of the constitution. National legislative initiatives are thus to be expected. The suggestions of the Court on these points require further deliberation from practitioners and scholars.

### **E. Machinery of Government (*Staatsorganisation*)**

The constitutional complaints and the *Organstreit* application that gave rise to the Court's *Lisbon Case* dealt with the Act of Approving the Treaty of Lisbon, but also with the accompanying German laws. By reviewing the Extending Act the Court had to deal with the machinery of government (*Staatsorganisation*). It ascribes the responsibility for integration to the constitutional bodies (I) and strengthens the position of the parliament at the expense of the government in EU-affairs (II)

#### *I. Responsibility for Integration of the Constitutional Bodies*

The Court's new jurisprudence on the deployment of the German armed forces has introduced the concept of responsibility for integration (*Integrationsverantwortung*) into constitutional law.<sup>56</sup> The responsibility for integration deals with the problem that treaties under international law can create a dynamic system of rules by authorising the contractual bodies to enact secondary law or by legitimising political decisions that interpret and advance the treaty provisions. Keeping the parliament involved in the

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<sup>56</sup> BVerfGE 104, 151 (208); BVerfGE 108, 34 (43); BVerfG 121, 135 (153).



process of development should compensate for the lack in predictability of such treaty-based developments that exists at the time of ratification. If the legitimization of supranational secondary acts cannot be directly constructed, at least the institution with the greatest base of legitimacy should be involved. The responsibility for integration takes up the thought of democratic responsiveness, hence the delegates are elected directly by the people and are answerable to the people in the political process and in elections.

The *Lisbon Case* introduced the responsibility for integration into Germany's external public law that is focussed on Europe. Every constitutional body, including the Federal Constitutional Court, has the responsibility to assume its own institutionally specific responsibility in the integration process. The Court explained: "It is aimed at ensuring, as regards the transfer of sovereign powers and the elaboration of the European decision-making procedures, that in an overall view, the political system of the Federal Republic of Germany as well as that of the European Union comply with democratic principles within the meaning of Article 20 (1) and (2) in conjunction with Article 79 (3) of the Basic Law."<sup>57</sup> According to this understanding the *ultra vires* and the identity challenge are – with respect to function – adequate forms of the responsibility for integration for a constitutional court.

In the centre of this part of the Court's reasoning is the German *Bundestag*. The Court declared the implementation law to the Treaty of Lisbon incompatible with the Basic Law because the parliamentary participation the law provided, especially regarding the initiation of changes pursuant to bridging clauses and amendment procedures, did not provide a sufficient level of parliamentary involvement. The legislative bodies can actualize their competences in accordance with Article 23 (1)[2] of the Basic Law only with a law or a constituent decision.<sup>58</sup> The legislative organs must decide whether the democratic authentication level is sufficient or whether the primary law must be changed accordingly, or whether acting on a European level is not possible at all. The consequence is that Germany would have to work towards a change in the Union or, ultimately, refuse any further participation.<sup>59</sup>

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<sup>57</sup> Lisbon Case, BVerfG, 2 BvE 2/08, from 30 June 2009, para. 245, available at: [http://www.bverfg.de/entscheidungen/es20090630\\_2bve000208.html](http://www.bverfg.de/entscheidungen/es20090630_2bve000208.html).

<sup>58</sup> Further possible provisions that the new Extending Act might contain can be derived from the accompanying resolution of the *Bundestag* to the Act, which had been declared unconstitutional by the Court. See *Bundestag Resolution 24 April 2008 zum Vertrag von Lissabon* (BTDrucks 16/8917, 6; BTPlenprot 16/157, 16482 B; René Brosius-Linke, *Innerstaatliches Demokratiedefizit als Stolperstein für den Vertrag von Lissabon?*, 61 DIE ÖFFENTLICHE VERWALTUNG 997 (2008).

<sup>59</sup> Lisbon Case, BVerfG, 2 BvE 2/08, from 30 June 2009, para. 264, available at: [http://www.bverfg.de/entscheidungen/es20090630\\_2bve000208.html](http://www.bverfg.de/entscheidungen/es20090630_2bve000208.html).

*II. Division of Powers*

The responsibility for integration lies with the constitutional bodies, which must pursue their authority in this respect in line with their competence in supra-national affairs. The Federal Constitutional Court, for example, exercised its responsibility by issuing its decision in the *Lisbon Case*. The *Bundestag* and the *Bundesrat* (when involvement of the Federal Council of States would be required for actions at the national level) are substantially strengthened by additional decision reservations. Also, the Federal President receives a new justification for exercising his or her right to scrutiny. It looks as if the *Lisbon Case* has strengthened the position of the constitutional bodies mentioned at the expense of the Federal Government.

It will certainly be noticed with concern in the Federal Government, and in the Foreign Office in particular, that the executive's prerogative in foreign affairs has lost ground relative to its previous position. This goes equally for cooperation at European Union level.

After the *Lisbon Case* the *Bundestag* will be able to give the Federal Government directives concerning the voting behaviour of the German representative in the Council.<sup>60</sup> Basically the Federal Constitutional Court drew conclusions from a development that has changed the normal process for policy making and legislation. The Basic Law expected supranational and international decision making to be limited exceptions in comparison to national acts and regulations. But today cross-border action has become an alternative means for shaping policy. The stronger involvement of the *Bundestag* in European legislation compensates for the decreasing possibility of parliamentary fine tuning. The political responsibility remains constitutionally with the parliament – directly elected by the citizens – that must stand up to its citizen and to the public for its actions. Taking into account the paramount position of the government, the fear is unfounded that the foreign power will become a matter of concerted actions of parliament and government.

It is uncertain whether this path – with regard to the experiences made with the extensive commitment of the Danish government to its parliament<sup>61</sup> – will result in different decisions or in a higher acceptance of European actions. It depends on whether the members of the German *Bundestag* and the states (*Länder*) through the *Bundesrat* will venture to demand what is constitutionally possible. The parliamentary system of government – with its structural combination of government and parliamentary majority – has the ability to counteract parliamentary self-confidence and independence. The appearance of parliamentary delegates at the oral proceedings in Karlsruhe showed,

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<sup>60</sup> *Id.* at paras. 365, 400 and 419.

<sup>61</sup> Per Lachmann, *The Treaty of Maastricht vs. the Danish Constitution*, 67 NORDIC JOURNAL OF INTERNATIONAL LAW 365 (1998).

however, that the members of the *Bundestag* assume their responsibility for integration more consciously and beyond parliamentary group lines. In the debate at the *Bundestag* on the day following the publication of the Court's decision a corresponding self-assurance was to be noticed.

## F. Ways Out

Which conclusions are to be drawn from the Court's *Lisbon Case*? Which ways out are open, so that the constantly progressing integration of the union can continue its predetermined path? The establishment of a European Federal State is imaginable and through Article 146 of the Basic Law also possible (I). More likely, however, is a deceleration of European integration as Europe selects its fields of action according to the limited framework for action of a community governed by the rule of law, rather than to a supra-national majority-will to effective problem solving (II).

### I. European Federal State and the Creation of a New Constitution

With the *Lisbon Case* the Federal Constitutional Court made a claim to survey the past decades of European integration up to the failure of the Constitutional Treaty. This historical understanding of the European integration is the basis for the Court's interpretation and it provides the motives, after which the Treaty of Lisbon – temporarily the last event in the quest of an ever closer union – is categorized.<sup>62</sup> According to the Court's narrative two conflicting forces affect the idea of a political union of Europe. According to one force, Europe should emerge as a political nation. According to the other view, economic integration should create the practical necessity for a political communitization. Initially the latter force prevailed and was overhauled by the Single European Act in 1987 and particularly by the Union Treaty of Maastricht of 1993. The Court regarded the Constitutional Treaty as the focus of this development and interpreted its political failure also as a (provisional) end to the movement aiming to establish a European Federal State. The Court wanted to eliminate any doubt about whether this project was actually terminated.<sup>63</sup> The Treaty of Lisbon is an amendment treaty under international law carrying out desirable and necessary consolidations in the primary law, continuing however the functional-pragmatic path.<sup>64</sup>

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<sup>62</sup> Mark Gilbert, *Narrating the Process: Questioning the Progressive Story of European Integration*, 46 JOURNAL OF COMMON MARKET STUDIES 641 (2008).

<sup>63</sup> *But see* Ana Maria Guerra Martins, *The Treaty of Lisbon – After all another Step towards a European Constitution?*, in CECI N'EST PAS UNE CONSTITUTION – CONSTITUTIONALISATION WITHOUT A CONSTITUTION? 56 (Ingolf Pernice and Evgeni Tanchev eds., 2009).

<sup>64</sup> Lisbon Case, BVerfG, 2 BvE 2/08, from 30 June 2009, paras. 2-33, available at: [http://www.bverfg.de/entscheidungen/es20090630\\_2bve000208.html](http://www.bverfg.de/entscheidungen/es20090630_2bve000208.html).

The Court stated clearly that the European Federal State is only possible, from a German perspective, through the creation of a new constitution according to Article 146 of the Basic Law. The references to Article 146 of the Basic Law do not hold a prominent place in the Court's reasoning and it seems as if the Court does not want to direct any unnecessary attention to this path. But the Court showed that it assumes the need for a direct decision of the German people, such a procedure presumably being under complete control of the Federal Constitutional Court. Neither a gradual factual nationalization of the European Union nor a constitutional amendment giving up sovereignty that is achieved by an elected, representative convention can create a European state.

## *II. Dynamic and Static of the Integration*

The Court, with its judgement, aimed at providing a realistic action framework, i.e. the continuation of the European integration on the basis of the Treaty of Lisbon. The extensive interpretation of the treaty provisions restricts the scope for political shaping from within the European Union. If practitioners take the judgement seriously, then the legislation in the field of criminal law<sup>65</sup> will be restricted to the boundary areas bearing a special "cross-border" element. The cautious activities of the Commission in the area of education<sup>66</sup> are already judged negatively at this stage. The privileges granted to Ireland within the European Council as regards European Common Defence are also claimed by the Federal Republic of Germany for itself: there can be no deployment of armed forces initiated by the EU without the formal approval of the German parliament. This judgement gives the overall impression that the Court wants to hinder integration and to steer it into a less dynamic path. But positive results from the European project should not be achieved by creating new competences and seeking the next change in primary law, but, rather, through actions within the existing institutional framework. The decision also can be interpreted as a silent critique on political determinism, which is driven by purported inherent necessities.

The critique is linked with an emphasis on the European. The Federal Constitutional Court compared the principle of openness towards European law (*Europarechtsfreundlichkeit*) with the already recognised principle of openness towards international law (*Völkerrechtsfreundlichkeit*).<sup>67</sup> With this step, the Court stressed the reciprocity of member states and of the European Union as an association (*Verbund*).

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<sup>65</sup> Clemens Ladenburger, *Police and Criminal Law in the Treaty of Lisbon*, 4 EUROPEAN CONSTITUTIONAL LAW REVIEW 20 (2008); Steve Peers, *EU Criminal Law and the Treaty of Lisbon*, 33 EUROPEAN LAW REVIEW 507 (2008).

<sup>66</sup> European Commission *Communication – Improving competences for the 21st Century: an Agenda for European Cooperation on Schools*, COM(2008) 425 of 3 July 2008.

<sup>67</sup> Daniel Lovric, *A Constitution Friendly to International Law: Germany and its Völkerrechtsfreundlichkeit*, 25 THE AUSTRALIAN YEARBOOK OF INTERNATIONAL LAW 75, 89 (2006).

However, the *Lisbon Case* also can be seen as an offer to practitioners and scholars to enter into a trans-border discussion over the treaty association between the EU and its member states. The latter will not be able to simply reject this offer with by accusing the Court of applying, once more, an outmoded ideal of sovereignty and the state.<sup>68</sup> At the same time it is an offer to the member states of the European Union to reconsider and abandon their defensive self-perception in the process of integration. The Court published an English-language translation of the decision alongside its official judgement in the *Lisbon Case*. The Court cited the “Lisbon rulings” of other national constitutional courts and incorporates, to a large extent, literature on international and European law. The Court wants to be open for a European discourse over the constitutional basis of the European Union, over the principles and rules connecting the different legal levels. The signals aimed at the ECJ are clear. The ECJ is mentioned several times in the ruling and its jurisprudence is quoted. The ECJ is also present where the grounds of the verdict mention other institutions and regulations. The premium guiding this decision was possibly the supervisory consideration, what the ECJ would “make” from new regulations. In certain places the Court criticized the jurisprudence that interprets competences extensively, but also showed appreciation for more reserved tendencies in recent ECJ decisions.<sup>69</sup> The Federal Constitutional Court takes an institutional counter position to the ECJ.

The *Lisbon Case* will be judged by the ability of the Federal Constitutional Court to meet the standards it has set for itself. Skepticism will be widespread that the Court will have achieved little but a wagging forefinger – a lot of sound and fury adding up to nothing. But the Court was determined that its decision would have real and not just expressive force. This is clear in the strident tone of its reasoning and from the Court’s unanimity – the judgement was issued in its result unanimously and in its reasoning without a dissenting opinion.<sup>70</sup> Cases suitable for testing the Court’s resolve already are pending. For example, the *Honeywell/Mangold Case*<sup>71</sup> and the *Data Retention Case*<sup>72</sup> are pending with the

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<sup>68</sup> See Joseph H. H. Weiler, *The state “über alles” – Demos, Telos and the German Maastricht Decision*, EUI WORKING PAPERS 95/19 (1995), also published in 2 Festschrift für Ulrich Everling 1651 (1995) (Ole Due and Markus Lutter and Jürgen Schwarze eds., 1995). From a more recent perspective, see Julio Baquero Cruz, *The Legacy of the Maastricht-Urteil and the Pluralist Movement*, 14 EUROPEAN LAW JOURNAL 389, 411 (2008).

<sup>69</sup> Lisbon Case, BVerfG, 2 BvE 2/08, from 30 June 2009, para. 346, available at: [http://www.bverfg.de/entscheidungen/es20090630\\_2bve000208.html](http://www.bverfg.de/entscheidungen/es20090630_2bve000208.html) (a passage on the union citizenship). See Annette Schrauwen, *European Union Citizenship in the Treaty of Lisbon*, 15 MAASTRICHT JOURNAL OF EUROPEAN AND COMPARATIVE LAW 55 (2008).

<sup>70</sup> Lisbon Case, BVerfG, 2 BvE 2/08, from 30 June 2009, para. 421, available at: [http://www.bverfg.de/entscheidungen/es20090630\\_2bve000208.html](http://www.bverfg.de/entscheidungen/es20090630_2bve000208.html) (“The decision was reached unanimously as regards the result, by seven votes to one as regards the reasoning.”).

<sup>71</sup> BVerfG, Constitutional Complaint, 2 BvR 2661/06 (Against the judgment of the Federal Labour Court, 7 AZR 500/04, from 26 April 2006; BAG, 23 Neue Zeitschrift für Arbeitsrecht 1162 (2006)). See Monika Böhm, *Umfang und Grenzen eines europäischen Verbots der Altersdiskriminierung im deutschen Recht*, 63 JURISTENZEITUNG 324 (2008).

Second Senate. Since the latter case also preoccupies the First Senate,<sup>73</sup> this case might provide the first opportunity for the First Senate to take up the doctrine of the *Lisbon Case*. Numerous further cases will be brought to Karlsruhe based on the new dogmatic of the “double-hurdle.” An appropriate appreciation of the *Lisbon Case* from the political side can only be expected after the Treaty of Lisbon has overcome the final barriers of ratification. The political success of this major project – of “Lisbon” – is currently in the forefront. The enthusiasm, even gratitude, of the public over the Court’s decision shrouds the details of the reassessment.

Has the Basic Law lost its openness towards Europe?<sup>74</sup> No, the Basic Law views the European Union as an association of sovereign states. Europe can still become a primary political area, if the respective will has been formulated by the constituent power – the citizens. The Federal Constitutional Court, as is its duty, “watches over this.”<sup>75</sup>

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<sup>72</sup> See Preliminary Injunction Case, BVerfGE 121, 1.

<sup>73</sup> See *id.*, confirmed by Order from 22 April 2009, Federal Gazette (*Bundesgesetzblatt*) part I 2009, 1139.

<sup>74</sup> See Böckenförde’s critique. Ernst-Wolfgang Böckenförde, *SÜDDEUTSCHE ZEITUNG*, July 7, 2009, at 1.

<sup>75</sup> Lisbon Case, BVerfG, 2 BvE 2/08, from 30 June 2009, para. 218, available at: [http://www.bverfg.de/entscheidungen/es20090630\\_2bve000208.html](http://www.bverfg.de/entscheidungen/es20090630_2bve000208.html).