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

The German Constitutional Court says "*Ja zu Deutschland!*"

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A. Introduction

In announcing the decision of the *Bundesverfassungsgericht* (BVerfG - Federal Constitutional Court) on the constitutionality of the Lisbon Treaty,[1] the Presiding Justice of the Second Senate summed up the judgment by proclaiming: "*Das Grundgesetz sagt 'Ja' zum Vertrag von Lissabon*."

B. Repetition

The German Court repeats much that had been said before. Most fundamentally, the Court explains once again that it views the European legal order as a secondary order, derived from that of the Member States. The Court continues to compare the European Union to international organizations by repeatedly discussing "international and supranational organizations"[2] in one breath. Once states transfer "sovereign powers" to such an institution,[3] the latter may indeed develop "independently" and "show[] a tendency of political self-enhancement."[4] And yet, the Member States remain the "masters of the Treaties."[5] The functional "Constitution of Europe," *i.e.* the primary treaty law "constituting the powers of the Union," simply remains an "*abgeleitete*

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[1] Lisbon Case, BVerfG, 2 BvE/08 from 30 June 2009, *available at*: http://www.bverfg.de/entscheidungen/es20090630_2bve000208.html.

[2] *See, e.g.*, *id*. at para. 237.

[3] *Id*. at para. 231.

[4] *Id*. at para. 237.

[5] *Id*. at para. 231.

Grundordnung," *i.e.* a derivative legal order. So, too, European citizenship is a "derivative" status that does not challenge the existence of the German people ("*Staatsvolk*").[6]

As in the *Maastricht Case*, the Court makes way for the application of European law within Germany. European law does not preempt Member State law in the sense of annulment but "forces back" conflicting Member States' law to allow for the application of Community law.[7] The Court pledges to adhere to the old *Solange* compromise and refrain from reviewing European secondary law and acts for their compatibility with fundamental rights "as long as the European Union guarantees an application of fundamental rights that in substance and effectiveness is essentially similar to the protection of fundamental rights required unconditionally by the Basic Law."[8]

Unsurprising, then, is the Court's elaboration of the impossibility that German state institutions would grant the European Union license to determine its own powers ("*Kompetenz-Kompetenz*").[9] Similarly unsurprising is the insistence on Germany's power to leave the Union, which, in the Court's (somewhat sloppy) view, would not be an instance of internationally problematic "secession," but "merely the withdrawal from a *Staatenverbund* that is founded on the principle of reversible self-commitment."[10] The Lisbon Treaty presents no problem in this regard,[11] especially as it now makes the previously existing right of withdrawal explicit.[12]

C. Innovation

Despite ample repetition of the *Maastricht* refrain, the Court did manage to cover some new ground—both at the concrete level of imposing legal rules as well as at the level of conceptualizing the European and Member State legal orders.

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[6] *Id*. at paras. 346–50.

[7] *Id*. at para. 335.

[8] *Id*. at 191 (citing BVerfGE 73, 339 (376, 387); BVerfGE 102, 147, (164)).

[9] *Id*. at para. 233 (citing, among others, 89 BVerfGE 155, 187 f., 192, 199).

[10] *Id*. at para. 233.

[11] *Id*. at paras. 298–99.

[12] *See, e.g.*, *id*. at para. 329.

I. Operational Matters

1. Blocking Passerelle

The central innovation of the Court's *Lisbon Case* concerns the so-called *passerelle* clauses, which allow the Council to move from unanimity to qualified majority voting or from the special to the ordinary legislative procedure.[13] These provisions give national parliaments six months to veto a proposed switch in procedure. The Court, however, fuses the representative of the German government in the Council to its national legislature by holding that Germany's representative in the Council must in no case agree to a change in procedure unless and until the legislature has voted on the matter. "Silence on the part of the *Bundestag* and *Bundesrat*," the Court explains, "is . . . not sufficient for exercising this responsibility."[14] Moreover, with regard to the general (as opposed to subject-matter specific) bridge clauses, a vote by the legislature is not enough. Here the Court requires the German legislature to take the extra step and pass a law to ratify what the Court describes as a change in primary treaty law within the meaning of Basic Law Article 23(1).[15]

2. The Curious Case of the Emergency Brake

The Court even subjects the so-called "emergency brake" system to a forced legislative vote to instruct Germany's representative in the Council. In the course of considering certain legislative proposals concerning criminal law[16] and social security,[17] a Council member may raise an objection that suspends consideration of the measure and refers the matter to the European Council.[18] These procedures push in the opposite direction as the

[13] *See, e.g.*, *id*., at para. 316. *See also*, Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, art. 48(7) 2007 O.J. (C 306) 1 [hereinafter Lisbon Treaty] (general bridge clause); Lisbon Treaty art. 31(3) (CFSP bridge clause Council); Consolidated Version of the Treaty on the Functioning of the European Union, May 9, 2008, art. 81(3), O.J. C 115/47, at 78 (2008) [hereinafter TFEU] (family law); TFEU art. 153(2) (social rights); TFEU art. 192(2) (certain environmental provisions); TFEU art. 312 (2) (multi-annual financial framework); TFEU Art. 333(2) (enhanced cooperation).

[14] Lisbon Case, BVerfG, 2 BvE/08 from 30 June 2009, para. 413, *available at*: http://www.bverfg.de/entscheidungen/es20090630_2bve000208.html..

[15] *Id*. at paras. 319 and 413.

[16] TFEU arts. 82(3) & 83(3).

[17] TFEU art. 48(2).

[18] Under Article 48 TFEU, the European Council may then terminate the legislative process, ask the Commission for a new proposal, or refer the matter back to Council to proceed with the legislative process. Under Articles 82 and 83 TFEU, the European Council may only refer the matter back to the Council after a unanimous vote and does not appear to have the option of requesting a new proposal from the Commission. Under Articles 82 and 83 TFEU, however, nine Member States, may also choose to proceed on the basis of the closer cooperation provisions of the Treaty.

passerelle clauses, suspending the more Community-friendly procedure that would be used absent intervention by a Member State. Nonetheless, the Court subjects these emergency brakes—along with the *passerelle* clauses—to an affirmative instruction on the part of the *Bundestag* and, where appropriate, the *Bundesrat*.

The Court's decision on the emergency brake provision leads to a rather surprising result. Recall that in the emergency brake provisions the more Community-friendly procedure is the default procedure. This procedure is only set aside upon the objection of a Member State representative in the Council. Nonetheless, the Court holds:

> [T]he German representative in the Council may *only exercise this right* of the Member States *on the instruction* of the German *Bundestag* and, to the extent that this is required by the provisions on legislation, the *Bundesrat*.[19]

This has three curious consequences. First, the German representative in the Council cannot invoke the emergency brake against the wishes of parliament. If the German parliament chooses not to invoke the emergency brake, then neither can the German government. This stands in marked contrast to the situation under the *passerelle* clauses, where the German government *as well as* the German legislature must agree before the more Community-friendly procedure is used. Second, the German representative in the Council cannot act at all with regard to the emergency brake provision in the absence of parliamentary instruction. This means that if the German legislature is deadlocked or otherwise fails to act, the more Community-friendly procedure will be used. Here, too, the Court, most likely unwittingly, pushes in favor—not against—integration.

Third, the Court speaks only about instructing the German representative in the "Council," saying nothing about the German representative in the European Council. This means that the German legislature might instruct the German representative in the Council to invoke the emergency brake only to have the German representative in the European Council to throw the matter back to the Council thus lifting the brake altogether.

3. Implied Powers, the Flexibility Clause, and Ultra Vires *Review*

In discussing the Union's flexibility clause, the Court opens with a tendentious slight of hand. It suggests that the doctrine of implied powers is, in principle, nothing unusual in the scheme of European integration. The Court likens the effective interpretation of powers ("*wirksame Kompenzauslegung*") to the U.S. doctrine of "implied powers," (citing

[19] Lisbon Case, BVerfG, 2 BvE/08 from 30 June 2009, para. 400, *available at*: http://www.bverfg.de/entscheidungen/es20090630_2bve000208.html (emphasis added).

the International Court of Justice case on *Reparation for Injuries suffered in the Service of the United Nations*), and to the French doctrine of *"effet utile* in international treaty law."[20] Although the Court here adds a parenthetical citation to Pierre Pescatore for an understanding of the latter concept "especially as regards European law," the main gist of the paragraph suggests an international, as opposed to constitutional, understanding of implied powers.[21] A constitutional understanding of "implied powers" that invokes the U.S. tradition would have had to grapple with the powerful vision of implied powers laid out in Justice Marshall's opinion in *McCulloch v. Maryland*. The Court's simple citation to international law as somehow representative of the American tradition of implied powers is a rather underhanded way of avoiding this comparison. We are left, then, with no argument for the Court's watered down understanding of the implied powers doctrine in Europe.

The Court further subjects any Council decision to resort to the general implied powers provision of Article 352 TFEU to a ratification law pursuant to Basic Law Article 23(1). The Lisbon Treaty lifts the current limitation of Article 308 EC (which demands that the use of implied powers serve the goals of the internal market) to allow the invocation of implied powers in the service of all "policies defined in the Treaties."[22] In the Court's view, this new generality leaves the scope of the flexibility clause ill-defined and, thus, tantamount to an invitation to substantive, fundamental treaty changes.[23] The Court also sees this as raising concerns in light of the constitutional prohibition against granting the Union plenary powers or against delegating to the Union the power to determine its own competences.[24] Accordingly, the Court says, the flexibility clause can only be kept within constitutional bounds by subjecting its exercise to a ratification law.

Finally, the opinion highlights the potential for *ultra vires* review in the Court itself. After reiterating the possibility of such review, which had already been laid out in the *Maastricht Case*, the Court elaborates significantly on this idea here. It engages in the rather interesting argument that the "European-friendly" application of constitutional law demands that the Court engage in *ultra vires* review itself. More importantly, however, the Court expressly lays out each of the various possibilities for such review under current procedures. And it closes with what looks like an invitation to the legislature to create "additional types of proceedings before the Court that are especially tailored to *ultra vires*

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[20] *Id.* at para. 237.

[21] *Id.* at para. 237.

[22] TFEU art. 352(1).

[23] Lisbon Case, BVerfG, 2 BvE/08 from 30 June 2009, para. 327, *available at*: http://www.bverfg.de/entscheidungen/es20090630_2bve000208.html..

[24] *Id*. at para. 328.

review and identity review to safeguard the obligation of German bodies not to apply in Germany, in individual cases, legal instruments of the European Union that transgress competences or that violate constitutional identity."[25]

4. Collective Security and International Representation

In the Lisbon decision, the Court suggests for the first time that the European Union is currently not a system of "collective security" within the meaning of Basic Law Article 24(2). It says that "even if the European Union . . . were to be developed into" such a system, no supranational decision-making could control the specific deployment of German troops.[26] This raises the interesting possibility that efforts such as the current German naval deployment on the coast of Africa, where German troops are subject to a joint EU command, are unconstitutional. Under Article 24 of the Basic Law, Germany may only restrict its sovereign powers over its own troops in the context of a system of collective security. If the EU does not currently qualify as such a system, then Germany would presumably have to maintain command over its own troops unless the intervention is authorized by the UN or NATO.

The Court similarly treads unreflectively into international terrain by suggesting, without warrant or argument, that states have to keep their formal status as a contracting party in an International Organization so that their membership will not be completely mediated by the European Union.[27] The WTO is the case in point. The Court seems to assume that WTO membership must be organized by a mixed agreement under which Member States remain parties. The Court tells us that if the EU alone were a member of the WTO, the German state would somehow be deprived of its proper function in trade negotiations. But it is far from clear, with regard to the powers the United Nations Security Council for example, what this doctrine could mean for the institutional structure of international law. Indeed, one might well argue that the Court frustrates the national interest it seeks to serve. Under the existing conditions of a European Customs Union it seems odd that the European member states would be inevitably committed to fragmenting their common European negotiating power. In any event, the real practical impact of the Court's decision on this point is debatable.

[25] *Id*. at para. 241.

[26] *Id*. at para. 255.

[27] *Id*. at paras. 374–75.

II. Imagining a Union of Member States

1. Statehood (re)gained

For the Court, democracy is a concept that is limited to a state with a people and its territory. Without either drawing on international or constitutional law to make its claims explicit the Court emphasizes the idea of territoriality. The basic point seems to be to define European territoriality and European citizenship as derivative phenomena. In so doing the Court does not struggle with primary or secondary law on citizenship, borders, or security. Instead, it immunizes itself from these potentially burdensome considerations. Europe without borders is merely "accessory to the state territory of the member-states."[28] So, the state is a state because it is autonomous; it is autonomous because it is a state.

2. The European Parliament Dismissed

In order to ensure a monist conception of European democracy *via* the national political process the Court must deprive the European Parliament of its legitimacy. It does so with a problematic but well known move, the juxtaposition of parliamentarism and democracy, a pattern belonging to the worst traditions of German constitutional theory.[29] The Court belittles the growing emancipation of Parliamentarians from their role as members of national delegations and their growing constitutional self-perception as pan-European delegates on a left-right dimension.[30] Nor does it credit Parliament's remarkable efforts to control the Commission. All this is rendered worthless because of the European Parliament's election procedure.

The Court states correctly that the voting mechanisms to the European Parliament do not function according to a strict rule of democratic equality, one (wo)man, one vote. As a consequence, however, the Court denies any claim on the part of the European Parliament to democratic representation. The Court's statist logic assumes that, if there is no people there is no parliament. As there is no European people, the European Parliament is not a real parliament, *i.e.* a popular representation (*Volksvertretung*). It is only a "second chamber," a logic that *en passant* denies the United States Senate as well as the Swiss *Ständerat* its character of democratic representation.[31]

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[28] *Id*. at para. 345.

[29] CARL SCHMITT, DIE GEISTESGESCHICHTLICHE LAGE DES HEUTIGEN PARLAMENTARISMUS (1923).

[30] *See* Daniel Halberstam, *The Bride of Messina: Constitutionalism and Democracy in Europe*, 30 EUR. L. REV. 775 (2005).

[31] Lisbon Case, BVerfG, 2 BvE/08 from 30 June 2009, para. 286, *available at*: http://www.bverfg.de/entscheidungen/es20090630_2bve000208.html..

A twin fallacy lies buried in this argument. On the one hand, the distinction between a representative "parliament" and a non-representative second chamber that is not strictly apportioned according to one person one vote is specific to Germany. In the German political system the second legislative organ, the *Bundesrat*, comprises representative of the *Länder* governments. As a body composed of executives, it is not, strictly speaking, a parliament. But to draw on this distinction to undermine the representative quality of the European Parliament belies the Court's assertion that the standards it applies to the European Union do not reflexively repeat national constitutional law.

On the other hand, the Court is not even able to give a coherent description of the German institutions. Elsewhere in the opinion, it clearly identifies the *Bundesrat* as a "chamber of a national parliament."[32] If the *Bundesrat*, a non-egalitarian representation of the states´ executives, is treated like a Parliament, then the European Parliament must, *a fortiori*, be treated as one, too.

There is more. The almost French-Republican egalitarian demands the Court applies are especially irritating given the fact that the German federal system is often discussed as a prime example of a non-majoritarian political system.[33] One might argue in favor of the Court that it insists on at least one egalitarian body in a democratic order. But even this is not convincing because egalitarian legitimacy necessarily disappears in the joint decision-making procedure. According to the Court's logic, a law-making procedure that requires the consent of *Bundestag* and *Bundesrat*, which is regularly the case, could even violate the democratic principle of the German Basic Law in Germany. That a German court, operating in a system that is notorious for federal deadlock, so vigorously advocates a strict majoritarian conception of democracy must be one of the decision's bigger ironies. And the fact that, according to the decision, the Federal government acting at the European level must at times be controlled by both *Bundestag* and *Bundesrat*, leads to a final short-circuit. To borrow from the words of the Court, the German system itself might be "over-federalized."

Caught in its own contradictions the Court looks for contradictions in the European legal order. The Court holds that the electoral law of the European Parliament "shows an assessment of values that is in contradiction to the basis of the concept of a citizen's Union that [the Union] has of itself."[34] The alleged contradiction stems from the fact that the

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[32] *Id*. at para. 407.

[33] GERHARD LEHMBRUCH, PARTEIENWETTBEWERB IM BUNDESSTAAT (3d ed. 2000); *Fritz Scharpf, The Joint-Decision Trap: Lessons from German Federalism and European Integration*, 66 PUB. ADMIN. 239 (1988).

[34] Lisbon Case, BVerfG, 2 BvE/08 from 30 June 2009, para. 287, *available at*: http://www.bverfg.de/entscheidungen/es20090630_2bve000208.html..

"representation in the European Parliament does not take as its nexus equality of the citizens of the Union (Article 9 TEU Lisbon), but nationality."[35] But this assessment of the European law is flatly wrong. An Italian citizen who lives in Lithuania votes for the Lithuanian contingent in the European Parliament. A Spanish citizen who lives in Greece can stand as a candidate for elections of the Greek contingent to the European Parliament. It is a territorial nexus that is created by the right to free movement that defines the representative structure of the European Parliament. That might not live up to any strict ideal of democratic equality but it still has a logic that is connected to the rather profound idea of European citizenship.

3. An Unnecessary Theory of Necessary State Functions

For quite a long time a strange commonplace in German constitutional scholarship has been the lack of any *Staatsaufgabenlehre*, that is, a theory of what necessary tasks the state must fulfill.[36] It was hoped that scholars might define this field in a purely conceptual effort without any reference to the necessarily open democratic process. This dream of a conceptual deduction of the being or essence of the state *Wesen* and its agendas never took concrete form. Instead, it remained a nostalgic sentiment about what might have been a complete theory of the state.[37]

It is no accident that such a theory has never been written.[38] In a different context, the United States Supreme Court has also struggled with, and retreated from, comprehensively defining what constitutes traditional areas of state regulation.[39] An open democratic process makes it difficult to define in any comprehensive way what areas of legislation form the state's "necessary" tasks. To be sure, any such theory would, indeed, help us draw meta-constitutional lines around the power of the state. Any such doctrine could then protect the state from various forms of disaggregation, privatization, as well as Europeanization and internationalization. Still, in Germany, the dream of a *Staatsaufgabenlehre* project has long been forgotten.

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[35] *Id*.

[36] *See* CHRISTOPH MÖLLERS, STAAT ALS ARGUMENT 146 n.67 (2000).

[37] This feeling seems to be rather common. *See* CHRISTOPH MÖLLERS, DER VERMISSTE LEVIATHAN 44-47 (2008).

[38] The closest book may be from Hans Peter Bull. *See* HANS PETER BULL, DIE STAATSAUFGABEN NACH DEM GRUNDGESETZ (2d ed. 1977).

[39] For the development of traditional component state powers, see, e.g., National League of Cities v. Usery, 426 U.S. 833 (1976); Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985); New York v. United States 505 U.S. 144 (1992); Printz v. United States 521 U.S. 898 (1997); United States v. Lopez, 514 U.S. 549 (1995). In the context of U.S. federalism, the Supreme Court's substantive distinction between the areas of state and federal powers is notoriously undertheorized, as is the Court's procedural or organizational understanding of component state autonomy. *See, e.g.*, Daniel Halberstam, *Comparative Federalism and the Issue of Commandeering*, *in* THE FEDERAL VISION 213 (Kalypso Nicolaïdis & Robert Howse eds., 2001).

Forgotten? Suddenly and without precedent the Court's *Lisbon Case* develops its own *Staatsaufgabenlehre*. The Court defines five areas in which the state must take a role: Criminal law (substantial and procedural), war and peace, public expenditures and taxation, welfare, and culture and religion. These tasks are, according to the Court, "especially sensitive for the ability of a constitutional state to democratically shape itself."[40] But is there any theory or argument behind this list? We find none in the opinion. The Court merely refers to its own imagination of past sovereignty. The opinion asserts that "*seit jeher*," "since ever," the state has fulfilled these tasks as an expression of its sovereignty.

This is obviously not the case. The welfare function of the European nation state has often been described as the beginning of the end of the idea of sovereignty, as the point of dissolution of the state into society.[41] Religion was a decisive topic of the Westphalian Treaty System that stands at the very beginning of the modern concept of sovereignty in Public International Law, a concept the Court otherwise explicitly endorses. Religion did not belong to state sovereignty at the very moment of its invention.[42] On the other hand, what about the omission of Civil Law in the list? Despite the fact that German BGB, the Civil Code, was the central codification of the newly founded German nation-state, the Court does not even mention this area of law as being special to the German state's identity or sovereignty. And what about the control over currency—a field that often has been mentioned as a classical prerogative of the state? From either a historical or a systematic perspective, the list makes no sense.

Then again, why does the Court classify just the five areas on its list as necessary parts to state sovereignty? The answer is simple. The "theory" of the Court is a *post-hoc* argument in support of a preordained result.

The only concrete holding of the decision with its myriad treatise-like passages strikes down the *Begleitgesetz*, the accompanying statute that organizes the participation of the *Bundestag* and the *Bundesrat* with regard to the *passerelle*-provisions of the treaty. According to the Court, the Federal government in certain areas cannot agree to a *passerelle* procedure that shifts from unanimous to majority decision-making in the council without confirmation by parliament. As an initial matter, it seems rather questionable whether this mechanism increases the effectiveness of parliamentary control.[43] What is

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[40] Lisbon Case, BVerfG, 2 BvE/08 from 30 June 2009, para. 252, *available at*: http://www.bverfg.de/entscheidungen/es20090630_2bve000208.html..

[41] The pioneering author may be Harold Laski. *See* HAROLD J. LASKI, STUDIES IN THE PROBLEM OF SOVEREIGNTY (1924). But see also the works of Léon Duguit.

[42] STEVEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 79–80 (1999).

[43] *See infra* Part C.

most striking, however, is that the policy areas that define sovereignty map perfectly onto the subject matter of the specific *passerelle* clauses that are at issue in this case.

One cannot but suspect that the Court designed its theory around the only result it could possibly achieve. Without becoming responsible for the fall of the Lisbon-Treaty on the one hand, but with the firm intention to show its readiness to intervene, on the other, the treatment of the *passerelle* was a perfect target. This small result thus wags a meta-constitutional theory that no proper constitutional interpretation could create.

The deep irony of this part of the decision lies in the fact that the alleged theory of the sovereign state simply stems from a negative reading of the European Treaties. There is no convincing systematic argument why other policy areas do not "necessarily" belong to the state. What the Court deems to be protected are merely the leftovers of European integration recycled as necessary elements of state sovereignty. A more devastating bankruptcy of a solipsistic theory of the state is hard to imagine.

4. The Constitutional Double-bind

The Court leaves Europe in a double bind—a combination of mutually defeating commands.[44] On the one hand we learn about the forbidden finality of a European *Bundesstaat*. On the other hand, the current level of integration is said to fail minimal constitutional standards for a European polity. The more Europe seeks to deepen its polity, then, the more it runs up against the prohibitions of the German constitution. At some point European integration must stop or the Germans will have to give up their constitution.

The treatment of the European Parliament is a case in point. The Court dismisses the legitimacy achievements of the European Parliament. But it does so in reviewing whether the Treaty respects the "democratic principles" that the German constitution demands of European integration. But why does the Court examine the European Parliament at all if, as the Court suggests, all democratic legitimacy stems from the Member States? The answer is that the Court seems to accept that the European Parliament delivers some additional legitimacy to the EU as long as the EP does not become too important, i.e. of equal importance to the Council.

The suggestion that the Parliament adds legitimacy to the Union seems to contradict the Court's own explicit thesis that the framework of democracy is something "inviolable" that cannot be "balanced."[45] Moreover, the argument about the EP's added legitimacy creates

[44] GREGORY BATESON, STEPS TO AN ECOLOGY OF MIND 159–338 (1999).

[45] Lisbon Case, BVerfG, 2 BvE/08 from 30 June 2009, para. 216, *available at*: http://www.bverfg.de/entscheidungen/es20090630_2bve000208.html..

a strange ambivalence in which the EP somehow remains both a necessary element and a threat to the constitutionality of European integration.

The Court shows a similar ambivalence in reviewing European Social Policy.[46] On the one hand, European integration cannot be a purely market-oriented project. This would violate the German constitutional obligation to promote the "social principle" in the EU. On the other hand, it would be even more dangerous to erect a complete European welfare system and thereby establish a European *Bundesstaat* through the backdoor.

These ambiguities, the juxtaposition of numerous commands pulling in opposite directions, create a double-bind. Whatever Europe does—in whatever way it develops—would seem to violate the standards set forth by the Court. There might be too much, and there might be too little parliamentary legitimacy; too much or too little social standards, and so on. Notwithstanding its grand announcement that the Basic Law has renounced all forms of "political Machiavellianism," the Court turns out to be a wicked strategist itself. Read carefully, its decision condemns the EU to *finalité* in a state of perpetual deficiency.

D. The Role of the Constitutional Court

I. Instructing the German Parliament to Instruct the German Government

The Lisbon-decision urges the German *Bundestag* to control the government in a way that the parliament itself could have done but did not do. Early commentators of the decision were quick to criticize parliament for its failure and to congratulate the Court for its democratic sensitivity.[47] But did the *Bundestag* really not know what it was doing when it decided upon the so called *Ausweitungsgesetz* (*i.e.* the now unconstitutional statute that organizes the participation of the *Bundestag* and the *Bundesrat* in the process of European integration)?

Political science has taught us that parliamentary control of international negotiations between governments is an extremely problematic and often fruitless effort. The two-level game of governments in the international arena has often been described,[48] and there is so far no convincing remedy to put national parliaments in a stronger position in such settings. This is particularly problematic in parliamentary systems in which the main responsibility of the majority is to back and strengthen the government.[49] The authors of

[46] *Id*. at paras. 393–94.

[47] *See, e.g.*, Heribert Prantl, *Verfassungsgericht zu Lissabon-Vertrag - Europäische Sternstunde*, SÜDDEUTSCHE ZEITUNG, July 1, 2009.

[48] Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427 (1988).

[49] WALTER BAGEHOT, THE ENGLISH CONSTITUTION 69 (1967).

the Basic Law, ever mindful of the demise of Weimar, were especially keen to guarantee the stability of the government. It seems quite improbable that formal obligations of parliamentary consent will materially enhance Parliament's political influence in the European decision-making procedure. Parliament will not have more substantial influence but it will be explicitly held politically responsible for the results that are defined by the government.[50]

The Court's profession of concern about the utter destruction of the German constitution seems strange in light of its failure to grapple substantively with the single most important provision on the subject: Basic Law Article 23. This provision, which brings the project of European integration into the framework of the Basic Law, expressly requires that the Federal government adhere to the orders of the German *Bundestag*. The explicit idea of the provision is that the German parliament may, but need not, commit the Federal Government to a certain position in the European context. This norm expresses respect for the democratic will of the legislature that seems especially well-suited to a parliamentary system in which the parliamentary majority regularly has the same political agenda as the Government. One would think that the framers of Article 23 meant to provide a comprehensive statement of the constitutionally required relationship between Parliament and Government in matters pertaining to European integration.

The Court does not engage with any of this and simply holds that the provisions of the *Ausweitungsgesetz* violate Basic Law Article 23(1), which is the general norm requiring that Germany participate in European integration according to "democratic standards." The Court does not seem to consider the possibility that Article 23(1) may not be the relevant norm, as Basic Law Article 23(3) provides the definitive and comprehensive statement of the constitutionally required procedural standard that should govern this case. Turning to Basic Law Article 23(3), however, would be inconvenient, given that the *Bundestag* and the *Bundesrat* specifically adhered to its provisions during the deliberations on the ratification of the Lisbon Treaty.

The decision to set aside the specific norm of Basic Law Article 23(3) in favor of invoking the more general norm of Article 23(1) only makes sense in light of the Court's massive Euro-skeptic reservations expressed in the course of analyzing the statute. Because the Court is confronted with a specific constitutional norm that seems to govern the case at hand, the opinion must turn to a grand theory of democratic legitimacy. It also needs a super-constitutional norm to transform this theory into legal argument.

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[50] In addition to that, there is a certain irony in the fact that in other cases of foreign relations law the Court took just the opposite stance. In many cases regarding the parliamentary participation in the development of NATO, the Court did not only refrain to develop constitutional duties for parliamentary participation but, to the contrary, defined its constitutional limits. BVerfGE 68, 1; BVerfGE 104, 151.

This is where Basic Law Article 79(3) comes in. The normative basis for transforming high theory into insuperable doctrine is the so-called "eternity clause." This norm imposes certain unalterable constitutional standards, including the principle of democratic legitimacy. The Court seems to interpret Article 23(1) in the light of Article 79(3) to give the first norm a higher status all in the service of bypassing the more specific Basic Law Article 23(3). But Article 79(3) was not meant to protect Germany against Europe. It was meant to prevent the German state from a new 1933, from a slow slippage into totalitarianism without an obviously illegal break. Though nobody in the constituent Parliamentary Council believed that any norm could save a political order, the norm would nonetheless serve as a sign for the identity of the new democratic constitution. It is thus highly dubious that Basic Law Article 79(3) was meant to preserve the sovereignty of the German state within the process of European integration.

To operationalize the theory that European democracy is grounded exclusively in the Member States, the Court conjures up the idea of a "modification of treaty law" (*Veränderung des Vertragsrechts*)[51] that needs the explicit consent of the German legislature.[52] *Veränderung* is another key term in the Court's elaborate opinion that must be examined with care. It signifies the modification of the Treaties that is not a formal amendment (which would be termed a *Vertragsänderung*). One might, of course, argue that every substantial reinterpretation of the Treaties is a modification of the treaty of the former kind—not all of which can demand a fresh round of ratification. Moreover, the Treaty of Nice knows many explicit textual provisions that allow for what the Court would now term "modifications," such as the possibility to change the number of European Commissioners or Advocates General on the ECJ by unanimous decision of the council.[53] But the Court does not object to these. Instead, it seems to object to those modifications that were somehow not "sufficiently defined" in the Treaty. We are generally left to wonder what this means in practice, but one thing is clear: by introducing the term of "*Veränderung*," the Court installs itself as the arbiter to distinguish—perhaps with the help of its flawed *ad-hoc* theory of state functions—between the modifications that require ratification and those that do not.

Perhaps the Court's most plausible "we-know-it-when-we-see-it" objection is to Art. 352 TFEU, the new Flexibility Clause. The near-universal applicability of this clause threatens to leave the scope of European competences truly open ended. But to submerge this real concern in a host of unsubstantiated judgments, as the Court did, obscures the real

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[51] Lisbon Case, BVerfG, 2 BvE/08 from 30 June 2009, para. 409, *available at*: http://www.bverfg.de/entscheidungen/es20090630_2bve000208.html..

[52] *Id.*

[53] Treaty Establishing the European Community, Dec. 24, 2002, art. 213(1)(3), 2002 O.J. (C 325) 33, 120 [hereinafter EC Treaty]; EC Treaty art., 222(2).

question of articulating more precisely and more usefully what should be done about Article 352 TFEU and why. To be sure, Article 352 TFEU may well be overbroad. But if every invocation of Article 352 TFEU demands ratification, even the more limited resort to Article 352 TFEU for market purposes (which the Court approved in the *Maastricht Case* absent any special national ratification procedure) will now be much harder than it was ever before.

The remaining judgments on the German parliament's relation with the government seem highly suspect as well. It is unclear why the specific *passerelle* clauses—or even the general *passerelle* clause—should be subject to national ratification. To be sure, these clauses tighten European integration. But the scope of this tightening is perfectly defined. There are numerous clauses that provide for qualified majority voting and the ordinary legislative procedure. What these procedures entail is perfectly known. Indeed, choices between the two forms of decision with regard to a single policy area already exist, as in the famous twin articles of 94 and 95 EC or the many provisions that allow for a choice of governance by directive or regulation. Moreover, the Member States could clearly have opted to subject all the areas covered by the various *passerelle* clauses directly to the more integrated decision making procedure on such matters. But the Court gives no reason why this greater power does not include the lesser power exercised here.

The Court's decision on the emergency brake also makes no sense whatsoever. Here, the Court subjects the *invocation* of the emergency brake to the prior consent of the German legislature. Although integration enthusiasts should welcome the interesting and almost certainly unintended result of this holding,[54] this part of the opinion does not safeguard Germany from any creeping loss of power.

II. Super Counter-Majoritarianism

The idea that the "eternity clause" of Basic Law Article 79(3) protects German sovereignty (or "statehood") is an academic invention of the 1980s.[55] In the *Lisbon Case* the Court now uses this norm to create a somewhat irritating choice between two alternatives: The people of Adenauer, Brandt, and Kohl who want continued European integration and empowerment of the European parliament in a thoroughly democratic spirit must remain within the bounds determined by the Court—or else the German people must give up its constitution.

In a rather surprising twist, the Court seems to expand its reviewing power beyond all limits to reach for judicial control even of the *pouvoir constituant* of the German people. Given the general carelessness of the opinion one might think the passages in questions

[54] *See supra* Section B.

[55] *See* MÖLLERS, *supra* note 36, at Ch. 17.

are merely accidental. But as there at least three references to this idea, we should take the Court at its word. The Court states, for example, that Article 23(1) of the Basic Law does not bind the German state, but the German "people."[56] In other passages, the Court explicitly leaves open whether the German people themselves might not be bound by the eternity clause.[57] If this were true, however, there could be no revolutionary escape into a European federation for the German people whatsoever.

Finally, the Court takes Basic Law Art. 146 (which envisions that the German people may give itself a new constitution) to contain a right that can be invoked by individuals in Court.[58] This idea is conceptually so absurd that even the Court has a hard time expressing it. We learn that this is "a pre-constitutional right" that the Basic Law merely "confirms."[59] The Court explains the idea in its, by now characteristic move, of denying what it supports: "The fact that Article 146 of the Basic Law does not establish an independent claim that can be asserted by a constitutional complaint . . . is not contrary to the possibility of lodging a constitutional complaint against the 'loss of statehood.' For this does not rule out that a violation may be challenged under Article 146 of the Basic Law in conjunction with the fundamental rights and rights equivalent to the fundamental laws . . . ."[60]

All in all, the revolutionary act of constitution-making is down-sized to an ordinary act that is henceforth under review of the Court. According to the decision, the people who want a democratic revolution must petition the Court.

E. Conclusion

The German Federal Constitutional Court has never made true on the *Maastricht Case's* promise to review European acts under the *ultra vires* doctrine. In no case since *Solange I*[61] has the Court reviewed or struck down an act of the European authorities. *Maastricht* had come to look like a hollow threat, especially after the Court passed on the opportunity to intervene in the *Banana Case*.[62] The case of the Lisbon Treaty, therefore, put considerable pressure on the Court to show its true colors. Would it soften the project of national

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[56] Lisbon Case, BVerfG, 2 BvE/08 from 30 June 2009, para. 229, *available at*: http://www.bverfg.de/entscheidungen/es20090630_2bve000208.html..

[57] *Id*. at para. 217.

[58] *Id*. at para. 180.

[59] *Id*. at para. 179.

[60] *Id*. at para. 180. A source of these conceptual confusions may be found in the writings of one of the plaintiffs, Dietrich Murswiek, cf. MÖLLERS, *supra* note 36, at 409-412.

[61] BVerfGE 37, 271.

[62] BVerfGE 102, 147.

constitutional review or give some kind of new credibility to its claims in the *Maastricht Case*.

As the naked judgment touches only upon German statutory law, the entire decision seems rather like a performative utterance in which the Court underlines its own importance in a strange combination of rhetoric and verbosity. The *Lisbon Case* takes over 421 paragraphs to make several confused points. Indeed, the Court's opinion might make even the most hardened critic nostalgic for the relative clarity of the *Maastricht Case*, which took less than half as many words to review a historic treaty amendment that gave substantial new powers to the European polity, erected the European Union, established a Common Security and Defense Policy, and created a new currency.

Has the Court said "*Ja zum Vertrag von Lissabon*"? We think not.[63]

[63] There is one nice point in the opinion at paragraph 415. Article 1, § 4(3), cl. 3 of the Act Extending and Strengthening the Rights of the *Bundestag* and the *Bundesrat* in European Union Matters provides that in formulating the German government's position with regard to the general bridge clause, the *Bundesrat* and *Bundestag* can each override the other's invocation of the veto. As the Court properly points out, however, only the *Bundestag* can override the *Bundesrat's* suggestion of a veto. To allow the *Bundesrat* to override the *Bundestag's* veto, is a misunderstanding of German constitutional law. We could not agree more.