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

The *Lisbon Case* of 30 June 2009 – A Comment from the European Law Perspective

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A. General Assessment

In its 30 June 2009 judgment[1] on the Treaty of Lisbon, the German Federal Constitutional Court stated that "there are *no decisive constitutional objections* to the Act Approving the Treaty of Lisbon," but only as long as "the provisos that are specified in the grounds" are taken into account.[2] Thus, in conformity with the terms of the judgment, the Court has made the constitutionality of the Act Approving the Lisbon Treaty dependent on an amendment of the Act Extending and Strengthening the Rights of the *Bundestag* (German Federal Parliament) and the *Bundesrat* (German Federal Council of States) in European Union Matters. One could also put it another way: The Act Approving the Lisbon Treaty is *unconstitutional* as long as the constitutional concerns specified in the judgment are not met.

This raises the more general question of whether constitutionality should be made dependent on the existence of a particular piece of ordinary legislation. The obligations imposed by the Court on the legislature and the government have been derived directly from the Basic Law. It may be true that the "Act Extending and Strengthening the Rights of the *Bundestag* and the *Bundesrat* in European Union Matters" is unconstitutional in that it unduly restricts the parliament's involvement in Union Matters. In this case, it would have sufficed to declare the act unconstitutional. This would have enabled the constitutional organs (parliament, government) to shape their mutual relationship in accordance with the constitutional requirements. But this is not what the Court did. It declared the "Act Extending and Strengthening the Rights of the *Bundestag* and the *Bundesrat* in European Union Matters" unconstitutional *and* requested the constitutional organs to elaborate the act in accordance with the grounds of the judgment, thereby manifestly restricting their constitutional margin to freely shape their mutual relationship on the basis of Article 23 of

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[1] Lisbon Case, BVerfG, cases 2 BvE 2/08 and others from 30 June 2009, *available at* http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html..

[2] *Id.* at paras. 207, 420 (emphasis added).

the Basic Law and conforming with the principle of federal loyalty (*Grundsatz des bundesfreundlichen Verhaltens*).[3]

From a European law standpoint it is doubtful whether the involvement of the parliament in the formation of the government's will as requested by the Court's judgment, be it by way of an act or "in another suitable manner,"[4] is in conformity with the Treaty of Lisbon. First, the Treaty itself provides for the participation of the national parliaments.[5] In the case of the simplified revision procedure ("bridging clause") of the new Treaty on European Union (TEU), a national parliament can make known its opposition within six months of the date of notification of an envisaged revision.[6] The Court says that "this is not a sufficient equivalent to the requirement of ratification; therefore the approval by the representative of the German government always requires a law within the meaning of Article 23 (1)[2], and if necessary [3] of the Basic Law."[7] However, the procedure as laid down in the TEU cannot be construed as imposing only a minimum requirement.[8] It clearly specifies the role of national parliaments within the simplified revision procedure and limits their involvement. Consequently, national parliaments can no longer be understood as mere national institutions but must also be construed as institutions of the Union, with rights and duties.[9]

Second, and more generally, the required involvement of the German parliament in the adoption of Union acts can conflict with the necessary "responsiveness to the needs of European integration" (*Europatauglichkeit*) of the German federal state.[10] In particular, Article 203 EC Treaty is based on the assumption that the Member States' governments are sufficiently capable of acting on the Union level.

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[3] *See* BVerfGE 92, 203.

[4] *See* Lisbon Case, BVerfG, cases 2 BvE 2/08 and others from 30 June 2009, para. 320, *available at* http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html.

[5] Treaty on European Union as amended by the Treaty of Lisbon of 13 December 2007 [hereinafter TEU], art. 12.

[6] *See id.* at art. 48 para. 7

[7] Lisbon Case, BVerfG, cases 2 BvE 2/08 and others from 30 June 2009, para. 319, *available at* http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html..

[8] *See* TEU, *supra* note 5, at art. 48, para. 7.

[9] *See* TEU, *supra* note 5, at art. 12.

[10] *See* Matthias Niedobitek, *Zur "Europatauglichkeit" des deutschen Bundesstaates nach der Föderalismusreform*, *in* EUROPÄISCHE FORSCHUNGSPERSPEKTIVEN—ELEMENTE EINER EUROPAWISSENSCHAFT 201 (Peter Jurczek & Matthias Niedobitek eds., 2008).

All in all, the judgment is characterized by mistrust towards the federal organs, the federal government in particular,[11] and by the attempt to consolidate the competence of final review on the Federal Constitutional Court itself.[12]

B. The European Union as a "Union of Sovereign States"

In the Court's view the Basic Law not only assumes sovereign statehood but also guarantees it.[13] Sovereign statehood, it says, is even protected by the so-called eternity clause.[14] An integration of Germany into a federal state—and thus a loss of sovereignty—would require the German people to freely adopt a new constitution.[15] In order to establish that finding the Court refers to the "identity of the free constitutional order."[16]

But sovereignty is not a material (substantial) concept but a formal concept. It is essentially restricted to the Member States' remaining original subjects of international law.[17] Not surprisingly, the Court has specified the identity of the constitutional order by listing *substantial* principles, such as democracy, the rule of law, the principle of the social state, or the substance of elementary fundamental rights, which are, in their fundamental quality, not amenable to any amendment.[18] However, the Court failed to demonstrate which provision of the Basic Law is opposed to an integration of Germany into a European federal state. The preamble of the Basic Law points in the opposite direction.

All the substantial principles mentioned by the Court also could be, and in fact are in several cases, part of a sub-national constitution. The democratic principle is mentioned, *e.g.*, in the Constitution of Hamburg[19] and the Constitution of Thuringia.[20] The rule of law and the principle of the social state are enshrined in the same articles. All German *Land*

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[11] Lisbon Case, BVerfG, cases 2 BvE 2/08 and others from 30 June 2009, paras. 318, 320, *available at* http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html.

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

[13] *Id.* at paras. 216, 228.

[14] GRUNDGESETZ (GG) (Basic Law or Constitution) art. 79, para. 3.

[15] *Id.* at art. 146.

[16] Lisbon Case, BVerfG, cases 2 BvE 2/08 and others from 30 June 2009, para. 216, *available at* http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html.

[17] *Id.* at para. 298.

[18] *Id.* at para 217.

[19] VERFASSUNG DER FREIEN UND HANSESTADT HAMBURG (Constitution) art. 3, para. 1 (Hamburg).

[20] VERFASSUNG DES FREISTAATS THÜRINGEN (Constitution) art. 44, para. 1 (Thuringia).

(state) constitutions, with the exception of Hamburg, contain fundamental rights to a varying degree.[21] In addition, many *Land* constitutions protect these values through eternity clauses similar to Article 79 (3) of the Basic Law.[22] These examples are only taken from German federal law but they could of course be supplemented by numerous examples from foreign countries, such as the Québec National Assembly's "Act Respecting the Exercise of the Fundamental Rights and Prerogatives of the Québec People and the Québec State".[23]

This does not put into question the Court's finding that the European Union as designed by the Treaty of Lisbon is not a federal state.[24] However, it seems to be wishful thinking when the Court tries to establish that "the guarantee of national constitutional identity under constitutional and under Union law go hand in hand in the European legal area."[25] In other words, the Court's competence of final review, which, it says, is rooted in constitutional law, is not only compatible with but indeed required by European law. Later, however, the judgment frankly admits that the exercise of that right would clearly constitute an infringement of primary EU law.[26]

C. The Democratic Principle

Given that the constitutional starting point of the Court's judgment is Article 38 of the Basic Law, which is devoted to the election of the members of the German *Bundestag*, it is not surprising that the whole judgment centers on the democratic principle. In that regard the main findings were already expressed in the Court's *Maastricht Case* of 12 October 1993,[27] which had the same constitutional starting point. But the *Lisbon Case* gives some important clarifications.

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[21] *See* Matthias Niedobitek, *Fundamental Rights in the Constitutions of the German Länder*, *in* FUNDAMENTAL RIGHTS IN EUROPE AND NORTH AMERICA (Albrecht Weber ed., 2001).

[22] *See generally* Matthias Niedobitek, *Constitutional Law—Sub-national Constitutional Law—Germany*, *in* INTERNATIONAL ENCYCLOPAEDIA OF LAWS para. 56 (Roger Blanpain, André Alen, G. Alan Tarr, Robert F. Williams eds., 2006).

[23] C. Gaz. 3/01 at 323.

[24] Lisbon Case, BVerfG, cases 2 BvE 2/08 and others from 30 June 2009, para. 277, *available at* http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html.

[25] *Id.* at para. 240.

[26] *Id.* at para. 340.

[27] BVerfGE 89, 155. *See also* DAS MAASTRICHT-URTEIL DES BUNDESVERFASSUNGSGERICHTS VOM 12. OKTOBER 1993—DOKUMENTATION DES VERFAHRENS MIT EINFÜHRUNG 751 (Ingo Winkelmann ed., 1994) (giving an English translation).

In the *Maastricht Case*, the Court stated quite generally that functions and powers of substantial importance would have to remain for the German *Bundestag*.[28] Now the *Lisbon Case* defines specific areas that the Court thinks have "always been deemed especially sensitive for the ability of a constitutional state to democratically shape itself."[29] These areas are: (1) decisions on substantive and formal criminal law, (2) decisions on the disposition of the police monopoly on the use of force towards the interior and of the military monopoly on the use of force towards the exterior, (3) the fundamental fiscal decisions on public revenue and public expenditure, (4) decisions on the shaping of circumstances of life in a social state, and (5) decisions which are of particular importance culturally, for instance as regards family law, the school and education system, and dealing with religious communities.[30]

While it is less important to know which particular areas are specified, the approach itself deserves closer attention. In order to demonstrate the admissibility of a constitutional complaint pursuant to Article 38 of the Basic Law, it will no longer be necessary to claim that the German *Bundestag* has lost functions and powers to such an extent that it has, in fact, ceased to be a real "parliament." Rather, it will suffice to submit "in a sufficiently determined manner that the democratic possibilities of the German *Bundestag* of shaping [the given area] would be restricted by the competences of the European Union pursuant to the Treaty of Lisbon to such an extent that the German *Bundestag* would no longer be able to fulfill the minimum requirements [in the given area] that result from Article 23 para. 1 sentence 3 in conjunction with Article 79 para. 3 of the Basic Law."[31] What the Court failed to demonstrate, however, is a necessary connection between the minimum requirements in a given area and their fulfillment through the German *Bundestag*. In other words, it is constitutionally not excluded to entrust a supranational organisation with the fulfillment of the requirements mentioned. Obviously, the Court confuses the minimum requirements of the democratic principle with the other principles protected by Article 79 (3) of the Basic Law, whose protection cannot be effected through a constitutional complaint based on Article 38 of the Basic Law.

The possible role of the European Parliament within the system of democratic legitimization has been limited. In the *Maastricht Case* the Court appreciated the European Parliament's contribution to the democratic legitimization of the Union's authority and argued for a gradual increase of its role as European nations grow

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[28] *Id.* at 186.

[29] Lisbon Case, BVerfG, cases 2 BvE 2/08 and others from 30 June 2009, para. 252, *available at* http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html.

[30] *Id.*

[31] *Id.* at para. 182 (regarding the principle of the social state).

together.[32] Now, the Court has assessed the European Parliament's role in much more critical terms. In summary, the Court concludes that there is a "deficit of European public authority . . . [that] cannot be compensated by other provisions of the Treaty of Lisbon."[33] It also follows from the findings of the *Lisbon Case* that the European Parliament's role cannot be strengthened *ad libitum* at the cost of the national parliaments. Only because the European Parliament is part of an institutional structure that "is exactly not laid out in analogy to a state," does it comply with democratic principles.[34] In other words, the relatively weak and only complementary role of the European Parliament is the reason why it is compatible with the national constitutions.[35]

In regard to the role of the national organs, the Court has invented the new term *Integrationsverantwortung* (responsibility for integration) which it derived from Article 23 of the Basic Law.[36] This term particularly serves to justify the extension of the German parliament's interference in the government's action in Union matters. Even when, *e.g.*, special bridging clauses are restricted to areas that are already sufficiently determined by the Treaty of Lisbon, the Court requests the *Bundestag* and, as the case may be, the *Bundesrat* "to comply with the responsibility for integration in another suitable manner."[37]

D. Autonomy and Primacy of the Law of the Union

The findings of the Court with regard to the nature of the Union's legal order, particularly the question of primacy of EU law, are well known from former judgments. The Court reiterates that the Member States "permanently" remain the masters of the treaties. EU primary law, it says, remains a derived fundamental order that is not independent of an alien will.[38] The Union is said to be subject to the principal of conferral;[39] that is to say, all competences of the Union are conferred upon it by the Member States. The European Union "has secondary, *i.e.* delegated, responsibility."[40] Consequently, in regard to the primacy of the law of the Union, "the foundation and the limit of the applicability of

[32] BVerfGE 189, 155 (185).

[33] Lisbon Case, BVerfG, cases 2 BvE 2/08 and others from 30 June 2009, para. 289, *available at* http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html.

[34] *Id.* at para. 278.

[35] *Id.* at para. 262.

[36] *Id.* at para. 236.

[37] *Id.* at para. 320.

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

[39] *Id.* at para. 298.

[40] *Id.* at para. 301.

European Union law in the Federal Republic of Germany is the order to apply the law which is contained in the Act Approving the Treaty of Lisbon."[41] In Germany, primacy of Union law "only applies by virtue of the order to apply the law issued by the Act Approving the Treaties."[42] Thus, the Court declares itself fit to find inapplicable legal instruments transgressing the competence limits (*ausbrechende Rechtsakte*).[43]

Evidently, this doctrine is the very basis of the Federal Constitutional Court's alleged right to pass a final decision (*Letztentscheidungsrecht*). In other words, the Court claims to be the final arbiter.[44] This amounts to a circular argument. The Court concludes from the "continuing sovereignty of the people which is anchored in the Member States and from the circumstance that the states remain the masters of the Treaties . . . that the Member States may not be deprived of the right to review adherence to the integration programme."[45]

However, notwithstanding the long tradition of this doctrine and its popularity[46] among the constitutional courts in Europe,[47] this conception is erroneous for several reasons.[48] Although it is true that the Union is based on treaties concluded by the Member States (and in that regard constitutes a "derived" legal order), the Member States themselves have agreed on the establishment of a legal order that is characterized by autonomy and

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[41] *Id.* at para. 343.

[42] *Id.*

[43] *Id*. at para. 240. *See also* LÜDER GERKEN, VOLKER RIEBLE, GÜNTER H. ROTH, TORSTEN STEIN & RUDOLF STREINZ, "MANGOLD" ALS AUSBRECHENDER RECHTSAKT (2009), *available at* http://www.cep.eu/analysen-zur-eu-politik/sonstige-themen/mangold-gutachten/.

[44] *See* Mattias Kumm, *Who is the Final Arbiter of Constitutionality in Europe?* (Jean Monnet Program, Working Papers No. 10, 1998) *available at* http://www.jeanmonnetprogram.org/papers/98/98-10-.html.

[45] Lisbon Case, BVerfG, cases 2 BvE 2/08 and others from 30 June 2009, para. 334, *available at* http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html.

[46] Interestingly, the German Federal Constitutional Court refers to the Lisbon judgment of the Czech Constitutional Court of 26 November 2008. See Lisbon Case, BVerfG, cases 2 BvE 2/08 and others from 30 June 2009, para. 338, *available at* http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html. The Czech Constitutional Court on its part made reference to the jurisprudence of the German Court. *See* nález Ústavního soudho cj. 19 / 2008 / Sbírka nálezu a usnesení Ústavního soudu (decision of the Czech Constitutional Court docket 19 / 2008 / Collection of Court Decisions of the Constitutional Court), para. 116 (Nov. 26 2008), *available at* http://angl.concourt.cz/angl_verze/doc/pl-19-08.php.

[47] *See generally Offene Staatlichkeit – Wissenschaft vom Verfassungsrecht*, HANDBUCH IUS PUBLICUM EUROPAEUM vol. II (Armin von Bogdandy, Pedro Cruz Villalón & Peter M. Huber, eds., 2008) (with several national reports).

[48] *See* Matthias Niedobitek, *Der Vorrang des Unionsrechts*, *in* CONTINUING THE EUROPEAN CONSTITUTIONAL DEBATE – GERMAN AND CZECH CONTRIBUTIONS FROM A LEGAL PERSPECTIVE / DEUTSCHE UND TSCHECHISCHE BEITRÄGE AUS RECHTLICHER SICHT 61–104 (Matthias Niedobitek & Jirí Zemánek, eds., 2008).

primacy. They established a court whose task is to finally interpret community law. Furthermore, the Union's legal order needs no (additional) national order of application since it already contains such an order.[49] The Court acknowledged this, at least incidentally, in its 14 October 2004 decision where it, somewhat puzzlingly, stated that European integration had opened itself for the directly effective order of application derived from the Community source.[50]

Moreover, assuming that the order to apply Union law is based on a national act runs contrary to the doctrine of uniform application of EU law. In that perspective, Community law would form a constitutive part of the national laws of the Member States. But such a perception ignores the very nature of Community law as described by the European Court of Justice.

E. The Flexibility Clause

Today the so-called flexibility clause is enshrined in Article 308 EC Treaty.[51] According to that provision, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures, if action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and if this Treaty has not provided the necessary powers.[52] The Treaty of Lisbon abandons the element "in the course of the operation of the common market" and instead refers to "the framework of the policies defined in the Treaties."[53] The Court considers this to be an extension of the Union's competence.[54] The provision, it says, "can . . . serve to create a competence which makes action on the European level possible in almost the entire area of application of the primary law."[55]

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[49] *See* Claus Dieter Classen, *Art.24, para.17*, *in* KOMMENTAR ZUM GRUNDGESETZ, vol. 2 (Hermann von Mangoldt, Friedrich Klein & Christian Starck, eds. 5th ed. 2005). *See also* Niedobitek, *supra* note 48, at 70.

[50] *See* BVerfGE 111, 307 (319) ("Selbst die weit reichende supranationale europäische Integration, die sich für den *aus der Gemeinschaftsquelle herrührenden innerstaatlich unmittelbar wirkenden Normanwendungsbefehl* öffnet . . .").

[51] Treaty on European Union (February 7, 1992), art. 308.

[52] *Id.*

[53] TEU, *supra* note 5, at art.352.

[54] Lisbon Case, BVerfG, cases 2 BvE 2/08 and others from 30 June 2009, para. 327, *available at* http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html.

[55] *Id*.

However, the opposite is true. For a long time, it has been undisputed among scholars that the clause "in the course of the operation of the common market" does not pose any obstacle to the realization of a new Community policy. Its sole function is to lay down a ranking order for Community objectives for the purposes of the scope of application of Article 308 EC Treaty and to entrust Community institutions with the task of giving priority to and taking due care of the functioning of the Common Market.[56] Therefore, by concentrating the new flexibility clause on "the policies defined in the Treaties," it rather restricts its field of application. This is complemented by new procedural requirements, in particular the consent of the European Parliament (instead of consultation of the European Parliament).[57]

F. Outlook

The Federal Constitutional Court has newly adjusted the relationship between government and parliament in European Union matters. However, it is not convincing to make the constitutionality of the Act on the Treaty of Lisbon dependent on a particular shape of the Act Extending and Strengthening the Rights of the *Bundestag* and the *Bundesrat* in European Union Matters. Rather, the Court should have restricted itself to explain the constitutional requirements and leave it to the constitutional organs to decide the form and contents of their mutual relationship.

Now it remains to be seen whether or not a new Act Extending and Strengthening the Rights of the *Bundestag* and the *Bundesrat* in European Union Matters, once adopted, will be brought before the Court. But before the adoption of that Act, the federal government must grapple with the claim of the Christian Social Union that the government, acting within the Council, should be bound more strictly to parliamentary votes.[58]

Lastly, many other uncertainties remain: the referendum in Ireland on 2 October 2009, the subsequent ratifications by Poland, the Czech Republic, and, not to forget, the United Kingdom.[59] The force of the Treaty of Lisbon is still an open question.

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[56] *See* MATTHIAS NIEDOBITEK, THE CULTURAL DIMENSION IN EC LAW 297 (1997).

[57] See TEU, *supra* note 5, at art. 352.

[58] FRANKFURTER ALLGEMEINE ZEITUNG (Frankfurt am Main) July 16, 2009, at 1.

[59] FRANKFURTER ALLGEMEINE ZEITUNG (Frankfurt am Main) July 1, 2009, at 2.