

Lisbon – Terminal of the European Integration Process?

The Judgment of the German Constitutional Court of 30 June 2009

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Abstract

The main result of the judgment of the German Constitutional Court on the Lisbon Treaty was the finding that the Treaty itself was compatible with the Basic Law. The additional finding that the accompanying act defining

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the powers of the German parliamentary bodies in European matters did not meet the requirements of the democratic principle lacked the same political relevance. The defect could be repaired in a few weeks time.

The Court showed a high degree of judicial activism in declaring the constitutional complaints submitted to it admissible. Notwithstanding many passages that raise no objections, it proceeds essentially from an attitude of euro-scepticism, viewing the European integration process as a zero-sum game where Germany stands permanently on the losing side. In denying that true democracy could exist outside the state, the Court missed an opportunity to reconcile the democratic principle with integration and globalization processes in which Germany is involved, not only *de facto* but also guided by explicit directions imparted in the text of the Basic Law. Its presence to submit to strict review all secondary acts of Union law on different grounds, conceived as a necessary device to maintain national sovereignty, may seriously hamper the integration process. By ventilating far-reaching conjectures about future developments that might compel Germany to leave the Union or put into place new constitutional foundations for its participation in the Union, the Court acted more like a political organ than as a judge tasked with pronouncing on a specific legal issue submitted for its adjudication.

I. Introduction

The judgment of the German Constitutional Court (henceforth: Court) of 30.6.2009¹ on the Treaty of Lisbon (henceforth: Lisbon Treaty) has caused not only great interest well beyond the German borders, but also vivid emotions. Although scrutinizing the constitutionality of legislative acts of a national parliament is essentially a domestic matter, the consequences to be drawn from that judgment will not remain confined to Germany. What the judges in Karlsruhe have said about the relationship between European law and national law, about the requirements of democratic governance and about its powers of review with regard to European legislation will also shape the attitude of the other Member States *vis-à-vis* the European Union (henceforth: Union). Germany does not enjoy a privileged position within the Union. The rights claimed by one of the Member States for itself may also be claimed by all the others. And it is in particular the

¹ BVerfG, Judgment 2 BvE 2/08 of 30.6.2009, <http://www.bundesverfassungsgericht.de>. Fortunately, an English translation was provided immediately together with the original German text: <http://www.bverfg.de/en/index.html>.

spirit permeating such a monumental pronouncement which will inevitably determine the future political climate in the ongoing integration process. If distrust and distance become the leitmotifs for the institutionalized cooperation within the Union, it will become ever harder to overcome the manifold challenges which the 27 European nations will have to face in the coming years and decades. Unfortunately, the judgment of 30.6.2009 is indeed founded on a largely negative assessment of the European integration process.

The essential facts are simple although the procedural situation looks extremely complex at first glance. Two different remedies were filed against the Act Approving the Treaty of Lisbon,² an Act Amending the Basic Law³ as well as against the Act Extending and Strengthening the Rights of the Bundestag and the Bundesrat in European Union Matters.⁴ On the one hand, some members of the Bundestag, both from the right hand side and of the extreme left hand side of the political spectrum, complained about a violation of their constitutional rights as deputies. In fact, the Basic Law (BL) provides for an “institutional complaint” (Organstreitverfahren) pursuant to which persons or institutions holders of specific constitutional powers may defend these powers against any encroachment by another holder of constitutional powers (Art. 93 (1) clause 1 BL). The second remedy was a series of constitutional complaints, which every citizen may submit to the Court if he/she believes that his/her fundamental rights under the Basic Law have been violated (Art. 93 (1) clause 4a BL). Curiously enough, the authors of these constitutional complaints were primarily the same persons that had filed an “institutional complaint”, but they were not the only ones: a little number of common citizens had also submitted a constitutional complaint to voice their grievances. All of the constitutional complaints pointed to an infringement of Art. 38 BL, the constitutional provision that grants to every German national the right to take part in elections to the Bundestag and to be elected.

It is primarily in dealing with the constitutional complaints that the Court unfolds its reasoning on the compatibility of the Lisbon Treaty with the Basic Law. In order to understand fully the judgment, the reader does not have to go into the intricate considerations on the basis of which the Court has rejected the great bulk of the “institutional complaints”. By opening up the gates to the constitutional complaints, the Court secures for itself review powers that have no limit *ratione materiae* whatsoever. Ac-

² Of 8.10.2008, Federal Gazette (Bundesgesetzblatt – BGBl.) 2008 II, 1038.

³ Of 8.10.2008, BGBl. 2008 I, 1926.

⁴ Bundestag document (Bundestagsdrucksache- BTDrucks.) 16/8489.

cordingly, the judgment abstains from focusing on the specific individual rights of the authors of the communications. Instead, it examines the Lisbon Treaty in each and every regard, looking for any feature that could possibly collide with the norms and principles enshrined in the Basic Law.

The following observations will first present the main operative results of the proceedings that came to their conclusion with the judgment of 30.6.2009 (II.). Thereafter, an effort will be made to highlight the outstanding doctrinal holdings of the Court, which are not directly related to the actual outcome of the proceedings (III.). In a last section, some critical observations will be advanced (IV.). Indeed, many passages of the judgment contain statements that are based on highly subjective interpretations of the Basic Law and will hardly ever find wide support among German lawyers.

II. The Operative Results of the Proceedings

1. Dismissal of the Constitutional Complaints against the Lisbon Treaty

The constitutional complaints against the Act Approving the Lisbon Treaty were rejected. Since the substantive content of the Act of Approval is determined by the Lisbon Treaty itself, this means that the constitutionality of the Treaty was confirmed, albeit with some slight caveats. Thus, the Court has removed a roadblock on the way to Lisbon. Had the Court decided otherwise by ruling that the Basic Law does not permit a conferral of powers as wide as provided for under the text of the Treaty, the European integration process would have come to a definitive halt. If one of the founding members, and moreover the largest nation among the participating states, had concluded that its constitutional framework did not allow for the strengthening of the European institutions and the relevant decision-making mechanisms, the concept of an “ever closer union among the peoples of Europe”⁵ would have suffered a fatal blow. From that agony, the European Union would not have recovered. Obviously, the constitutional judges were quite aware of that delicate situation. They must have felt under considerable pressure to come out with a positive decision on the Lisbon Treaty. This may explain the fact that a large section of the judgment, in guise of

⁵ Preamble of the Treaty on European Union (TEU), para. 13. This formula was already contained in the first paragraph of the Preamble of the Treaty Establishing the European Economic Community, 25.3.1957.

compensation, is devoted to all kinds of imaginary threats which might, in the future, result for Germany from a continuation of the integration process. In any event, however, the Treaty has received the blessing of the Court. In fact, the act of ratification was deposited in Rome on 25.9.2009, immediately after the new version of the Act of Extending and Strengthening the Rights of the Bundestag and the Bundesrat in European Union Matters⁶ had been published in the Federal Gazette.⁷

2. Unconstitutionality of the Accompanying Law

On the other hand, the original version of the Act of Extending and Strengthening the Rights of the Bundestag and the Bundesrat in European Union Matters was found to be incompatible with Art. 38 (1) in conjunction with Art. 23 (1) BL. The Court held that when the European Union is endowed with new powers by way of the simplified amendment procedure (mainly: Art. 48 (6) Treaty on European Union (TEU)), when a determination is made to switch in the Council from voting by unanimity to majority voting (so-called *passerelle procedure*, mainly: Art. 48 (7) TEU), or when recourse is had to the flexibility clause of Art. 352 Treaty on The Functioning of the European Union (TFEU), the vote of the German representative in the Council is not enough although in each case Germany has a veto power because of the requirement of unanimity. The democratic principle requires that such fundamental decisions must, in principle, be made by virtue of a formal statute of the two parliamentary bodies.

This verdict by the Court does not directly affect Germany's European commitments. Essentially, it is left to every Member State to decide how it regulates the internal procedure for the enlargement or strengthening of powers of the EU institutions. The relevant treaty provisions generally provide that such new rules shall enter into force only after having been approved by the Member States in accordance with their respective constitutional requirements. Thus, states are free to prescribe that their national parliaments must intervene in order to confirm a relevant decision of the Council. However, it is also incumbent on Member States to see to it that they can effectively deal with any situation arising from the integration process. It is trivial to note that no state is obligated to assume new obligations. But domestic procedures should not be so cumbersome as to put an insurmountable *a priori* obstacle in the way of any amendment of the Treaty

⁶ Of 22.9.2009.

⁷ BGBl. 2009 I, 3022.

or of endeavours to effectuate the decision-making process at Union level, or as to delay the requisite internal procedures almost endlessly. In this regard, however, no anticipatory assessment can be made. If in a specific situation the German Government should encounter serious procedural difficulties in trying to obtain the necessary approval for an act needing legislative confirmation, such difficulties would have to be resolved on an *ad hoc* basis. In principle, it falls among the sovereign powers of every Member State to decide in full freedom on significant extensions of the area of jurisdiction of the Union. As already pointed out, the Lisbon Treaty does indeed respect this delimitation of powers.

III. The Main Doctrinal Holdings of the Constitutional Court

1. The European Union – Not a State

The Court maintains its former case law to the effect that the Union is not a state, and it confirms that it will not become one pursuant to the Lisbon Treaty.⁸ This inference is considered to be so important that it figures as the first one of the headnotes (*Leitsätze*) designed to reflect the essence of the judgment. It may be recalled that in its famous *Maastricht* judgment of 12.10.1993⁹ it coined the expression “*Staatenverbund*” to characterize the Union. This characterization, at that time translated in the most diverse ways,¹⁰ had the great advantage of avoiding the dichotomy between “*Bundesstaat*” (federal state, federation) and “*Staatenbund*” (confederation) with its historical connotations in German history. In other words, “*Staatenverbund*”, which the official translation of the judgment now renders as “association of sovereign national States”, had originally no precise meaning and could be filled in by any content to the liking of the interpreter concerned.¹¹ In any event, however, it makes clear that it lacks the specific quality of a state.

This finding of the Court will not encounter any serious opposition. It had been one of the main contentions of the complainants that by virtue of the Lisbon Treaty the scope *ratione materiae* of the powers of the Union

⁸ See, in particular, BVerfG (note 1), paras. 226 et seq., 277 et seq., 329.

⁹ BVerfGE 89, 155 et seq.; English translation: ILM 33 (1994), 388 et seq.

¹⁰ The text reproduced in ILM 33 (1994), 388, headnote 8, opted for “inter-governmental community”.

¹¹ The judgment gives now a definition of a *Staatenverbund* (BVerfG (note 1), para. 229).

would increase to such an extent that, *de facto* at least, the Union would reach the level of statehood. Attention was drawn, in particular, to the fact that the still prevailing distinction between intergovernmental matters under the existing EU Treaty and Community matters under the EC Treaty would be abandoned under the new Treaty.¹² However, in this respect the criticisms lacked any kind of plausibility from the very outset. The intentions of the negotiating governments were absolutely clear. Not a single one of them wanted to establish a federal state to the detriment of the component units of the Union. As far as the text of the Lisbon Treaty is concerned, Art. 4 (2) points out in the most explicit manner that the Union is required to respect the “national identities” of the Member States. To dismiss this clause as pure formalism evidenced a high degree of arbitrary subjectivism. And lastly, the new clause of Art. 50 (1) TEU, pursuant to which any Member State “may decide to withdraw from the Union in accordance with its own constitutional requirements”, shows unequivocally that the Member States have kept and will keep their sovereign freedom, in harmony with the right of self-determination of their peoples. Thus, on this specific issue the Court remains fully within the mainstream of legal thinking.

2. The European Union – an Entity Derived from the Sovereignty of the Member States

The Court also re-affirms its earlier jurisprudence according to which the Union is not a self-reliant, autonomous entity. Repeatedly, it emphasizes that the Union is derived from the sovereign powers of its Member States.¹³ This inference stands in full conformity with the point of departure of the Court. It holds that any public power must have its source of legitimacy in the *puissance constituant* of the people concerned. Since the Union does not have a people, it cannot stand alone, it must seek its legitimacy in the democratic processes as they unfold in the 27 Member States.

This second proposition is unchallengeable as far as its method of analysis is concerned. Only some Euro-enthusiasts have contended from time to time that the European Community has become an independent actor who has emancipated itself from the tutelage of the Member States.¹⁴ It simply

¹² This is true only in a formal sense. Although the Lisbon Treaty abolishes the distinction between European Community and European Union, the Common Foreign and Security Policy will remain subject to the unanimity rule, see Arts 22 (1), 24 (1) TEU.

¹³ BVerfG (note 1), para. 231.

¹⁴ See discussion by *H. P. Ipsen*, *Europäisches Gemeinschaftsrecht*, 1972, 191, 209.

cannot be denied that the Union is derived from political decisions taken by the competent parliamentary bodies in the Member States. On the other hand, it has also become clear that the Community as it came into being in the fifties of the last century has long since become an entity with its own constitutional rules, as forcefully observed by the Court of Justice of the European Communities (CJEC) in *Van Gend & Loos* in 1963.¹⁵ In particular, the Constitutional Court does not take into account the fact that through the elections to the European Parliament, which bypass the governmental level of the Member States, the Union has gained a non-negligible degree of legitimacy of its own. The multi-level system of governance as it has already taken shape and will further progress through the Lisbon Treaty is more complex than the simplistic model resorted to by the Court according to which the alternative is clear-cut: either the Union has freed itself from all the ties which link it to the Member States, or it is in the hands of these states considered to be the “masters” of the Treaty.¹⁶ A system of governance which constitutes a composite whole with a distribution of powers at different levels (“Verfassungsverbund”)¹⁷ is nothing which the Court acknowledges as a living reality – notwithstanding quite a number of insightful paragraphs underlining that on the basis of the Basic Law Germany is prepared, and even enjoined, to integrate itself into international structures.¹⁸ Furthermore, the fact that the Union is derived from the Member States does not permit any direct inferences regarding the control powers held by them.

¹⁵ *Van Gend & Loos*, Rs C-26/62, Slg. 1963, 3, English Text at: European Court Reports (1963) 1, (25). The following year, German constitutionalists immediately emphasized the original character of the community power, see, e.g., *P. Badura*, *Bewahrung und Veränderung demokratischer und rechtsstaatlicher Verfassungsstruktur in den internationalen Gemeinschaften*, VVDStRL 23 (1996), 34 et seq., headnote 14.

¹⁶ BVerfG (note 1), paras. 231, 235, 298, 334.

¹⁷ See *I. Pernice*, *Europäisches und nationales Verfassungsrecht*, VVDStRL 60 (2001), 148, (163 et seq.).

¹⁸ BVerfG (note 1), paras. 219 et seq. In para. 225, the Court establishes a close connection between “*Völkerrechtsfreundlichkeit*” (openness to international law) and “*Europarechtsfreundlichkeit*” (openness to European law). One may find this equation a downgrading of the specific emphasis which the Basic Law places on the high value of a united Europe see *S. Cassese*, *Trattato di Lisbona: la Germania frena*, *Giornale di diritto amministrativo* 15 (2009), 1003 (1005). This assumption does not seem to be well-founded.

3. *Kompetenz-Kompetenz*

By contrast, unreserved broad consensus underlies the holding of the Court that the Union lacks any *Kompetenz-Kompetenz*.¹⁹ The institutions of the Union have never contended that they enjoy a power that would authorize them to extend their area of jurisdiction at their own free will, without or against the will of the Member States, thereby amending the constitutional setup in their favour. In fact, the Lisbon Treaty has no clause that might suggest the existence of such a power. However, *Kompetenz-Kompetenz* can also be understood in a more restricted sense as the authority of an institution to define its own scope of competence.²⁰ In this sense, the architecture of the Union is quite unequivocal. The Court of Justice of the European Union (CJEU) has been endowed with jurisdiction to give binding interpretations of the law of the Union (Art. 267 TFEU) – and thereby also to determine the borderline between national jurisdiction on the one hand, and Union jurisdiction on the other. Apparently, the Constitutional Court is concerned that this power of the CJEU to interpret, as the guardian of Union legality, the Lisbon Treaty with binding effect for the Member States, might come close to *Kompetenz-Kompetenz*. The Court does not openly acknowledge that it finds itself at odds with many of the pronouncements of the CJEC.²¹ In fact, however, the fear of being “tricked out” by the CJEU stands visibly behind its discussion of the issue of *Kompetenz-Kompetenz* – which otherwise would have no *raison d’être* in the judgment.

4. The Principle of Conferral of Powers

In close connection with the observations devoted to *Kompetenz-Kompetenz* the Court emphasizes, time and again, the principle of conferral of powers (*Prinzip der begrenzten Einzelermächtigung, principe des compétences d’attribution*).²² It is of course fully legitimate to stress this limitation of Union powers, which has found an explicit reflection in Art. 5 (1) TEU.

¹⁹ BVerfG (note 1), paras. 233, 322, 324; see also the *Maastricht* judgment, (note 9), German text at BVerfGE 89, 194 (199), English text at ILM 33 (1994), 428 et seq.

²⁰ See C. Schmitt, *Verfassungslehre*, 1928, 386.

²¹ But see BVerfG (note 1), para. 352 where the Court deals with the “annex competence” claimed by the CJEC for the European Community in criminal matters. On the other hand, the jurisprudence of the CJEC receives praise in para. 398 regarding issues of social policy.

²² BVerfG (note 1), paras. 233 et seq., 298 et seq.

The essential question is, however, who is to monitor compliance with the principle of conferral. The options are clear. Review powers can be attributed either to the CJEU, which has the general mandate to “ensure that in the interpretation and application of the Treaties the law is observed” (Art. 19 (1) TEU), or they can be discharged by the national courts of every Member State, and in particularly their constitutional courts. According to the basic philosophy of the European treaties, it is the function of the CJEU to see to it that the European treaties be properly interpreted and applied. On the other hand, in a constant line of judgments of principle, the Constitutional Court has made clear that it considers itself to be the guarantor of the basic rights and freedoms of citizens. Accordingly, in *Solange I* it claimed the right to review secondary acts of Community legislation as to their compatibility with the Basic Law,²³ in *Solange II*, twelve years later when the European legal order together with the CJEC had become “human-rights-minded”, it modified its position by stating that it would refrain from such review as long as the Community legal order would “generally” maintain human rights standards, which it found to be the case;²⁴ eventually in the *Maastricht* decision it departed visibly from *Solange II* by creating the concept of a “derailing legal act” (ausbrechender Rechtsakt), not covered by the powers of the Community institutions.²⁵

The Lisbon Treaty did not touch upon the issue. Therefore, there were no grounds to assume that the new text might contain a prohibition to maintain the Court’s jurisprudence. But the Court does not content itself with stating that indeed it will not forego the powers claimed by it – which, this should be noted in passing, have never been exercised in practice to the detriment of a Community legislative act.²⁶ It develops a new doctrine of review of the exercise of Union powers which, it argues, is designed to control whether the Union remains within the confines of the powers assigned to it and must additionally verify whether “the inviolable core content of the constitutional identity of the Basic Law” pursuant to Art. 23 (1) clause 3 in conjunction with Art. 79 (3) BL is respected.²⁷ No mention is made, in

²³ BVerfGE 37, 271 et seq.; English translation: Decisions of the Federal Constitutional Court, Vol. 1/I: International Law and Law of the European Communities, 1992, 270 et seq.

²⁴ BVerfGE 73, 339 et seq., headnote 2; English translation: Decisions of the Federal Constitutional Court, Vol. 1/II: International Law and Law of the European Communities, 1992, 613 et seq.

²⁵ BVerfG (note 9); German text at BVerfGE 89, 155 (188); English text at ILM 33 (1994), 388 (423). For a comment see G. Röss, Der ausbrechende Rechtsakt, *Zeitschrift für öffentliches Recht* 64 (2009), 387 et seq.

²⁶ In a dispute concerning the legal regulation of the banana market the CJEC rejected a reference for a preliminary ruling as inadmissible: BVerfGE 102, 147 et seq.

²⁷ BVerfG (note 1), para. 240.

this connection, of the “cooperation” with the CJEC, which it had emphasized in the *Maastricht* judgment. Apparently, the Court is willing to exercise this control independently, without involving the CJEU before finding a conflict between an act of secondary legislation and the Basic Law. In fact, to date it has never made a referral to the CJEC under the present Art. 234 TEU.²⁸ The Court goes even further by suggesting that for that purpose a special procedure should be established by way of legislation,²⁹ thereby openly encouraging disputes to be submitted to it. The decision in *Solange I* was indeed based on an utterly “creative” reading of the relevant procedural provision of the Basic Law (Art. 100 (1))³⁰ just like in 1993 the *Maastricht* decision which established the precedent for the judgment under review. Apparently, the Court wishes for the future to evade criticism on jurisdictional grounds.

These findings reveal a dramatic worsening of the relationship between the two courts in Karlsruhe and Luxemburg. Summing up its somewhat scattered holdings, the Constitutional Court now contemplates three modalities of review of Union acts, i.e. acts of secondary legislation:

- In the first place, the Court sees itself as the guarantor of the fundamental rights under the Basic Law, ready to remedy any violation of these rights if the standard of protection falls “generally” (“*generell*”) below an appropriate level, commensurate with the degree of protection as secured by the Basic Law.³¹ This first control modality is not stressed in the instant case. *Solange II* is reconfirmed in principle, but the reader looks in vain for the word “*generell*”.³²

- Second, the Court considers itself competent to scrutinize Union legislation with a view to identifying any departure from conferred powers. In this regard, it has never been clear and has not been clarified in the judgment under review whether the Court wishes to focus on each and every individual case of an assumed inconsistency or whether it intends to reserve its control powers for instances of structural deficits.³³

²⁸ Discussed by J. Bergmann/U. Karpenstein, Identitäts- und Ultra vires-Kontrolle durch das Bundesverfassungsgericht – Zur Notwendigkeit einer gesetzlichen Vorlageverpflichtung, ZEuS 12 (2009), 529 et seq.

²⁹ BVerfG (note 1), para. 241.

³⁰ A referral to the Constitutional Court under Art. 100 (1) BL is normally confined to parliamentary (i.e. German) statutes.

³¹ BVerfGE 73, 339 (385). English translation: Decisions of the Federal Constitutional Court (note 24), 631; see BVerfG (note 1), para. 337.

³² BVerfG (note 1), para. 191. This omission cannot be a simple accident of drafting.

³³ BVerfG (note 1), para. 240.

- Third, the Court deems it necessary to ascertain whether the “constitutional core” of the German legal order has been infringed.³⁴ This third modality of control is somewhat enigmatic. How should developments in the Union, where German representation is secured in all relevant bodies, be able to hurt the basic values of the German constitutional system? In Art. 2, the Treaty on European Union sets forth the values upon which the Union is founded. The words used there – human dignity, freedom, democracy, equality, the rule of law and respect for human rights – echo faithfully the key concepts of the Basic Law. Notwithstanding this accurate parallelism, the Court deems it necessary to reflect on a possible clash between the two value systems. It is hard to follow its line of reasoning. Here, in para. 332, its mistrust towards the Union finds perhaps its most tangible expression.

Taken together, these different review modalities amount to a considerable strengthening of the mechanisms of control hitherto claimed by the Court. In the *Maastricht* judgment, the “derailing act” was mentioned more *en passant*, as a remote eventuality. In the instant judgment, by contrast, inasmuch as the Court articulates the wish to see its powers to review secondary acts of Union legislation institutionalized through specific legislation, it emphasizes its determination not to condone any *ultra vires* acts.

5. Primacy of the Law of the European Union

One of the main issues debated in the proceedings was the primacy of Union law over national law. It is well known that the abortive European Constitutional Treaty contained in its introductory title on the definition and the aims of the Union a provision explicitly confirming the primacy of the law of the Union (Art. I-6). The rejection of the Constitutional Treaty and its transformation into the Lisbon Treaty led to the deletion of that provision. The issue of primacy was relegated to Declaration No. 17 of the Lisbon Conference, where reference is made to the jurisprudence of the CJEC, which started with the *Costa v. ENEL* judgment of 15.7.1964.³⁵ According to the Court, this declaration does not change the legal position. It maintains that the relevant jurisprudence operates solely within the general systematic framework of the treaties, which are unable to make binding determinations on the fundamental legal relationship between the two competing legal orders. Since the legal order of the Union is derived from the

³⁴ BVerfG (note 1), paras. 240, 340.

³⁵ *Costa v. ENEL* Rs C 6-64, Slg. 1964, 1251; English text at: European Court Reports (1964) 585 et seq.

sovereignty of the Member States, it cannot displace the original powers of the Member States, which must remain competent to examine whether the Union has respected the borderlines that delimit its area of jurisdiction.³⁶

IV. The Objectionable Features of the Judgment

It was already pointed out that the judgment, which has been acclaimed by some constitutionalists,³⁷ has also aroused strong criticism.³⁸ This criticism reflects much more than purely political malaise. Not only does the Court risk losing the broad political support which it has almost always enjoyed among the German populace;³⁹ one can also point to quite a number of issues where its legal craftsmanship lends itself to serious objections.

³⁶ BVerfG (note 1), paras. 331, 339, 343.

³⁷ A jubilant praise of the judgment can be found in the article by *K. F. Gräditz/C. Hillgruber*, *Volkssouveränität und Demokratie ernst genommen – Zum Lissabon-Urteil des BVerfG*, JZ 64 (2009), 872 et seq.; see also *P. Kirchhof*, *Faszination Europa*, *Frankfurter Allgemeine Zeitung*, 19.9.2009, 8; *F. Schorkopf*, *Der Mensch im Mittelpunkt*, *Frankfurter Allgemeine Zeitung*, 16.7.2009, 6; *F. Schorkopf*, *The European Union as an Association of Sovereign States: Karlsruhe's Ruling on the Treaty of Lisbon*, *German Law Journal (GLJ)* 10 (2009), 1219 et seq.; *F. Schorkopf*, *Die Europäische Union im Lot*, *EuZW* 20 (2009), 718 et seq. Generally positive also *D. Grimm* (former judge of the Constitutional Court), *Das Grundgesetz als Riegel vor einer Verstaatlichung der Europäischen Union. Zum Lissabon-Urteil des Bundesverfassungsgerichts*, *Der Staat* 48 (2009), 475 (486 et seq.).

³⁸ See *C. Calliess*, *Unter Karlsruher Totalaufsicht*, *Frankfurter Allgemeine Zeitung*, 27.8.2009, 8; *C. D. Classen*, *Legitime Stärkung des Bundestages oder verfassungsrechtliches Prokrustesbett?*, JZ 64 (2009), 881 et seq.; *D. Halberstam/C. Möllers*, *The German Constitutional Court Says 'Ja zu Deutschland'!*, GLJ 10 (2009), 1241 et seq.; *C. O. Lenz*, *Ausbrechender Rechtsakt*, *Frankfurter Allgemeine Zeitung*, 8.8.2009, 7; *C. Möllers*, *Was ein Parlament ist, entscheiden die Richter*, *Frankfurter Allgemeine Zeitung*, 16.7.2009, 27; *M. Nettesheim*, *Ein Individualrecht auf Staatlichkeit? Die Lissabon-Entscheidung des Bundesverfassungsgerichts*, NJW 2009, 2867 et seq.; *E. Pache*, *Das Ende der europäischen Integration?*, *EuGRZ* 36 (2009), 285 et seq.; *C. Schönberger*, *Lisbon in Karlsruhe: Maastricht's Epigones at Sea*, GLJ 10 (2009), 1201 et seq.; *P. Terhechte*, *Souveränität, Dynamik und Integration – Making Up the Rules as We Go Along?*, *EuZW* 20 (2009), 724 et seq.; *C. Tomuschat*, *The Ruling of the German Constitutional Court on the Treaty of Lisbon*, GLJ 10 (2009), 1259 et seq.; *C. Tomuschat*, *A Defensive Wall for the Sovereign State?*, *European Voice*, 9.9.2009, <http://www.europeanvoice.com>. For an attempt to formulate a well-balanced assessment see *M. Ruffert*, *Nach dem Lissabon-Urteil des Bundesverfassungsgerichts – zur Anatomie einer Debatte*, *Journal for Comparative Government and European Policy* 7 (2009), 381 et seq.

³⁹ But see on earlier controversial cases *F. Hufen*, *Die Bewahrung gesellschaftlicher Werte durch das Bundesverfassungsgericht*, in: G. F. Schuppert/C. Bumke (eds.), *Bundesverfassungsgericht und gesellschaftlicher Grundkonsens*, 2000, 61 et seq.

1. The Admissibility of the Constitutional Complaints

Maybe the most crucial stage on the path of adjudication was the examination of the admissibility of the constitutional complaints. Essentially, a constitutional complaint serves to permit a person believing that his/her fundamental rights under the Basic Law have been violated to vindicate those rights (Art. 93 (1) clause 4a BL). Yet none of the complainants could argue that his/her specific individual rights had been actually infringed. They founded the remedies filed by them on the case law of the Court evolved in the *Maastricht* judgment of 1993.⁴⁰ In that judgment, the subject-matter of which was the Maastricht Treaty establishing the European Union and transforming the European Economic Community into the European Community, the Court held for the first time that Art. 38 BL did not confine itself to guaranteeing the right to vote in elections to the Bundestag and to stand as candidate, but went well beyond such a “formal” understanding of the provision. If read in light of the democratic principle, Art. 38 BL bestowed on every citizen a right to elect a Bundestag which had substantial decision-making powers. A parliamentary body deprived of the bulk of its competences, shrunk to a hollow entity lacking any real clout, did not satisfy the democratic requirements as laid down in the Basic Law.⁴¹

This was and still is a bold interpretation of Art. 38 BL, which nobody had foreseen before the event. In concrete terms, the Court’s jurisprudence means that any conferral of powers on a supranational organization, or even the traditional way of treaty-making through which normally no more than legal commitments at the international level are established, may be challenged by citizens dissatisfied with the political decision underlying the instrument concerned. Thus, for instance, accession to the United Nations would now be within the reach of individual complaints arguing that the powers of the Security Council constitute an unacceptable inroad into German governmental authority. Likewise, the dispute settlement procedure under the WTO system might also be deemed to be too far-reaching inasmuch as Germany has to accept the binding nature of the findings of the WTO dispute-settlement bodies. As from now, no major determination on matters of foreign policy seems to be immune from complaints emanating from citizens contending that Germany is going to steer a wrong course.

The respondents in the proceedings, both the Federal Government and the Bundestag, had argued that this line of reasoning should not be continued. To extend the scope of the constitutional complaint in such an expan-

⁴⁰ See note 9.

⁴¹ BVerfG (note 1), paras. 175, 210, 246.

sive fashion amounted to introducing an *actio popularis* that was alien to Germany's legal system. In fact, both Art. 19 (4) BL, which provides that everyone is entitled to seek legal redress before a judge for injuries suffered from public authorities, and Art. 93 (1) clause 4a BL, which deals with the constitutional complaint, specify that any claimant must assert a personal, individual violation of rights. This requirement is of course not easily fulfilled when the target of a judicial challenge is a statute. For that reason, the Court has constantly held that a complainant must be affected personally, directly and presently ("*selbst, unmittelbar und gegenwärtig*").⁴² These three criteria serve to limit constitutional complaints to instances where the existence of actual, tangible injury can be shown to exist. In the case of the Lisbon Treaty, it requires great skill to contend that a *prima facie* case can be made in that sense. The reasoning must seek to prove that in a situation where all German citizens without any exception are similarly concerned everyone is "personally" affected.⁴³ Most of what the Court says centres on possible future developments. Scenarios are imagined that have nothing to do with present-day circumstances. And lastly, many intermediary steps would be necessary before any of the threats taken into account by the Court might ever be capable of materializing. Interestingly enough, the Court does not deal squarely with the issue.⁴⁴ No effort is made to demonstrate that the three relevant criteria are in fact fulfilled. The Court believes that the invocation of Art. 38 BL as such provides a sufficient basis for the admissibility of the complaints.

It is true that in the case of an international treaty the legal position has features that distinguish it profoundly from routine cases. Once an international treaty has been duly ratified, the principle *pacta sunt servanda* prevents objections *ex post*.⁴⁵ This is probably the weightiest one of the reasons which have prompted the Court to accept the admissibility of the complaints. However, under the Basic Law the individual citizen has not been elevated to the rank of a guarantor of perfect constitutional legality. The constitutional complaint is designed to protect his/her personal rights and freedoms. To scrutinize statutes that come fresh out of the legislative machinery is a particularly delicate undertaking. The Basic Law has created a

⁴² See BVerfG (note 1), para. 171.

⁴³ The U.S. Supreme Court holds taxpayers' suits generally to be inadmissible because a taxpayer can only allege that "he suffers in some indefinite way in common with people generally", see *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923); *DaimlerChrysler v. Cuno*, 547 U.S. 332 (2006).

⁴⁴ BVerfG (note 1), paras. 171 et seq.

⁴⁵ This principle, however, is not absolute, see C. Tomuschat, *Pacta sunt servanda*, in: FS M. Bothe, 2008, 1047 et seq.

special procedure for that purpose, namely the “abstract review of norms” (Art. 93 (1) clause 2). Some high-standing actors are granted the right to file this remedy: the Federal Government, a Land government, or a third of the members of the Bundestag. They enjoy a full right to submit to judicial assessment any legal enactment right after its entry into force. Whenever an international treaty is in issue, the proceedings may even be initiated immediately after the closure of the parliamentary proceedings, before the signing of the act by the Federal President and its promulgation in the Federal Gazette, precisely because of the hardening effect, the bindingness which international ratification entails. The individual citizen, however, lacks standing to bring into motion a proceeding of abstract review of norms.

In the instant case, none of the privileged actors had seen fit to seize the Court under Art. 93 (1) clause 2 BL. Like in the case of the *Maastricht Treaty*, the Court saw this passivity implicitly as a failure to discharge their constitutional duties. Therefore, it recognized the individual citizen, represented in the instant case primarily by some members of the Bundestag who exercised their rights like any man or woman on the street, as *defensor legalitatis*. At first glance, this might seem to be a glorious idea. Where governmental institutions fail to act, the ordinary citizen enters onto the stage and rights what has gone wrong. However, things are not as simple as they may appear at first glance. The right to initiate a constitutional proceeding is a precious and extremely delicate asset. Parliamentary legislation never satisfies everybody. Allowing any discontent person to challenge a new statute before the Court immediately after its enactment amounts to a signal inviting everyone to make use of that opportunity at the earliest possible date. Constitutional proceedings are costly not only for the parties in litigation. They are likely to undermine legal certainty generally also in instances where no hard evidence is available that might point to an existing incompatibility with the Basic Law. In particular, the procedure of abstract review incites the complainants to speculate, to imagine the most implausible scenarios. The situation is totally different once a statute has been put into practice. As from that moment, a firm basis of administrative decisions and/or judicial findings ties the interpretation to a bottom of hard realities that discard any highly subjective conjectures.

For this reason, in most countries legislation has generally been extremely cautious in permitting individuals to directly attack legal statutes. Normally, as in Germany, the circle of legitimate actors has been carefully circumscribed. In France, review of norms is possible only before the entry into force of a law, under conditions fairly similar to those applicable in

Germany to statutes approving international treaties.⁴⁶ In Italy, statutes are not immune from review *principaliter*, but only in connection with disputes between the National Government and anyone of the regions.⁴⁷ Spain has a system which to a great extent resembles the regime under the Basic Law.⁴⁸ Similar requirements govern abstract review of norms in other states endowed with constitutional courts. The only other countries where every citizen is authorized directly to challenge a legal statute believed to infringe constitutional rights are Hungary⁴⁹ and Colombia.⁵⁰ In Colombia, this legislative boldness has provoked skyrocketing numbers of legal actions. Accordingly, an effort has been made to restrict the number of complaints by imposing on any complainant the burden to substantiate in detail his/her grievances, thereby discarding any hastily written and superficial applications.

The simple fact is that the Court, considering that the system of legal review did not operate appropriately, due to the passivity of the institutions or persons entrusted with securing the constitutionality of legislative acts, has conferred on the individual citizen an official status of vigilante – a transformation which the legal profession has not yet become fully aware of. In the case of the Lisbon Treaty, everyone enjoying the right to vote under Art. 38 BL could have filed a constitutional complaint. Actually, however, in the proceedings which led to the judgment of 30.6.2009, only two individuals acting separately and two groups of claimants, the first group consisting of 53 persons – all of them members of the party “Die Linke” – and a second group consisting of four persons, were involved. But it has not become known how many other holders of rights under Art.38 BL went the way to Karlsruhe: the Court has not disclosed the relevant figures.

⁴⁶ Art. 61 (2) of the French 1958 Constitution provides: “ ... Acts of Parliament may be referred to the Constitutional Council, before their promulgation, by the President of the Republic, the Prime Minister, the President of the National Assembly, the President of the Senate, sixty Members of the National Assembly or sixty Senators.”

⁴⁷ Art. 127 of the Constitution provides: “(1) Whenever the Government regards a regional law as exceeding the powers of the region, it may raise the question of its constitutionality before the Constitutional Court within sixty days of the publication of the law. (2) Whenever a region regards a State law, another act of the State having the force of law, or a law of another region as infringing on its own sphere of powers, it may raise the question of its constitutionality before the Constitutional Court within sixty days of the publication of said law or act.”

⁴⁸ Constitution, Art. 162 (1) (lit. a).

⁴⁹ See W. Sadurski, *Rights Before Courts. A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe*, 2008, 6 et seq.

⁵⁰ Constitution, Art. 241 (4).

The dramatic transformation which recourse to Art. 38 as the foundation of the complaints against the Lisbon Treaty has brought about may be synthesised in two main propositions.

- The scope *ratione materiae* of the scrutiny of the Court has no limits. Since the Court has postulated a right for every citizen to elect a Bundestag with substantial powers, any provision of the Lisbon Treaty could be appraised from that angle. Indeed, the Court fully avails itself of that opportunity. It does not leave out any part of the Treaty, going into its most remote corners, including aspects of military defence.⁵¹ The highpoint of its reasoning is reached in the passages where it scrutinizes participation in the WTO as a relevant aspect of the scrutiny it feels obligated to carry out on the basis of the constitutional complaint.⁵²

- The Court does not focus specifically on Art. 38 BL, i.e. the individual rights of the complainants. Right from the start of its own reasoning, it states quite unequivocally that it intends to examine “on the basis of Article 38” the alleged violation of the democratic principle and of the principle of the social welfare state as well as the alleged loss of statehood.⁵³ Thus, it proceeds exactly in the same way as it would have had to proceed in the case of an abstract review of norms. It is true that early in its jurisprudence it started including general, objective constitutional principles in the arsenal of legal yardsticks when considering constitutional complaints.⁵⁴ Legal doctrine in Germany has generally hailed this qualitative leap ahead as a most welcome strengthening of the rule of law.⁵⁵ However, never before has the scope of the review by the Court taken such breadth and depth as in the case at hand. In such circumstances, this jurisprudence may appear more

⁵¹ Surprisingly, the Court states that the European Union cannot yet be deemed to constitute a system of collective security in accordance with Art. 24 (2) BL (BVerfG (note 1), paras. 255, 390). This issue was not discussed during the proceedings. As a consequence, Germany would have to withdraw its contingents from the current military EU operations, in particular the EU mission Atlanta. However, the relevant passages seem to have a considerably more restrictive meaning. What the Court truly wishes to say is that the requirement of assent by the Bundestag for any operation of the Bundeswehr abroad cannot be taken away by the inclusion of security and defence matters in the Lisbon Treaty.

⁵² BVerfG (note 1), paras. 370 et seq.

⁵³ BVerfG (note 1), para. 167.

⁵⁴ BVerfGE 33, 247 (259); 45, 63 (74); 81, 278 (290).

⁵⁵ C. Gusy, Die Verfassungsbeschwerde, in: R. C. Van Ooyen/M. H.W. Möllers (eds.), *Das Bundesverfassungsgericht im politischen System*, 2006, 201, 211 et seq.; H. Lechner/R. Zuck, *Bundesverfassungsgerichtsgesetz. Kommentar*, 5th ed. 2006, § 90 margin numbers 9 et seq.; somewhat more cautious are K. Schlaich/S. Koriath, *Das Bundesverfassungsgericht*, 7th ed. 2007, 153 margin numbers 272 et seq.

prone to strengthen the powers of the Court than the rights of the aggrieved individual.⁵⁶

It is obvious that in every country the balance of the constitutional architecture depends greatly on the definition of standing in constitutional proceedings. It is quite erroneous to believe that the rule of law is best served by granting broad, even unlimited access to a constitutional court. If any constitutional difficulty can be brought before a competent judge by anybody, one result is certain, namely that the power of the judiciary will increase to the detriment of the relevant parliamentary bodies. *Alexis de Tocqueville* has written remarkable pages on the inherent limitations of judicial power.⁵⁷ He observes that in the United States the judges are bound by three functional characteristics of their office. First, the judges adjudicate actual disputes, but they do not directly challenge laws. When a judge “pronounces upon a law without reference to a particular case, he steps right beyond his sphere and invades that of the legislature”. Second, judges pronounce “on particular cases and not on general principles”. Third, judges “can act only when called upon”, when the judicial power is seized of the matter. Some of these propositions may have become obsolete through the victorious progress of the concept of constitutional jurisdiction. But as far as *Alexis de Tocqueville* wished to say that legal principles should be framed by the legislative branch of government, and not by the judiciary, he is still right today.

At the end of this discussion, one simply has to note that, notwithstanding all the good arguments which militate against the dramatic extension of the powers which the Court has procured for itself by adhering to an extravagant interpretation of Art. 38 BL, the case law as it originated in the *Maastricht* judgment and has been consolidated in the judgment under review, is probably destined to stay. Germany will have to find out in the coming years and decades whether its trust in the beneficial effects of an omnipresent constitutional judge is truly warranted.⁵⁸

⁵⁶ See criticism by *E. Benda/ E. Klein*, *Verfassungsprozessrecht*, 2nd ed. 2001, 167 et seq.; *E. Klein*, *Zur objektiven Funktion der Verfassungsbeschwerde*, DÖV 35 (1982), 797 (801 et seq.); *W. Knies*, *Auf dem Weg in den verfassungsgerichtlichen Jurisdiktionsstaat?*, in: FS K. Stern, 1997, 1135 (1173 et seq.).

⁵⁷ *Democracy in America*, 1848, translation by *G. Lawrence*, ed. by *J.P. Mayer*, 1969, Vol. 1, Part I, Chapter 6, 100.

⁵⁸ See also *C. Tomuschat*, *Das Europa der Richter*, in: FS G. Ress, 2005, 857 et seq.

2. European Integration – a Zero-Sum Game?

As far as the substance of the judgment is concerned, the reader is struck by the general sceptical approach to the issues examined by the Court. Throughout the text, the Court views the European integration as a slow but progressive process of erosion of national sovereignty. Dominant is the theme of “loss of statehood”, which serves as one of the three main parameters of its scrutiny.⁵⁹ Quite obviously, the Court is of the view that a zero-sum game is unfolding. Powers previously held by Germany travel to the Union and will never come back. There are quite remarkable passages in the judgment where mention is made of the willingness of the framers of the Basic Law to lead the Federal Republic of Germany into an international and European peaceful order. The concept of “*Europafreundlichkeit*”, intelligently translated as “openness to Europe”, also makes its appearance.⁶⁰ Vice-President *Vosskuhle*, the President of the Chamber which was entrusted with adjudicating the case, opened the delivery of the judgment with the words: “The Basic Law says ‘Yes’ to Europe.” But nowhere does the Court engage in a thorough assessment of the achievements of the integration process. The reader is compelled to conclude that its task was to establish a list of deficits, ascertaining whether the burdens caused during almost six decades had by now exceeded any reasonable threshold. The fact that Germany has found a “*Heimat*” in Europe, that peace has been secured through cooperation in the most diverse fields and that, above all, Germany has gained an important role in contributing to shaping the destinies of 26 other nations in Europe, not as a dictator but as an actor relying not just on traditional methods of diplomacy, but on institutionalized mechanisms under the rule of law, has not gained any visibility. This is a fundamental lacuna in a judgment which deliberately chooses not to confine itself to the application of the words of the Basic Law, but puts forward a general vision of Europe. Indeed, the gains which Germany has made by being able to have a decisive say in the development of policies for the Union as a whole, are tremendous. Germany as a nation-state would never have been able to put the hallmark of its thinking on the policies of its neighbours by traditional methods of bilateral policies. Of course, these are reciprocal processes. Germany cannot unilaterally insist on prevailing on its partners, it must also be ready to accept the views of the others in the conduct of its

⁵⁹ In that regard see BVerfG (note 1), paras. 236 et seq.

⁶⁰ BVerfG (note 1), paras. 219 et seq.

policies. Thus, a network of mutual relationships has emerged, relying on mutual trust, which ensures a high degree of political stability.⁶¹

3. Preamble to the Basic Law and Art. 23 Basic Law Marginalized

One wonders, therefore, why the Court has made so little of the Preamble of the Basic Law with its vision of world peace in a united Europe,⁶² and of Art. 23 (1) BL which requires Germany to “participate in the development of the European Union” “with a view to establishing a united Europe”. These two provisions are by no means neglected by the Court. It recognizes that they encapsulate the general political orientation which the framers of the Basic Law wished to impart to the state ship when it recommenced its journey in 1949 under a democratic constitution. However, the affirmation of “*Europafreundlichkeit*” is each time overshadowed and narrowed by the concept of the sovereign state.⁶³ One can hardly say that it does justice to the grand design which animated the framers not only in 1949, but also in 1992 when the Basic Law was amended through the insertion of the new Art. 23 (1), the integration provision. It was a matter of common understanding in 1949 that Germany had embarked on a totally erroneous course during the years of the Nazi dictatorship and that also the preceding years from 1871 to 1919 had been marred by excessive nationalism. The members of the Parliamentary Council felt that self-reliant nationalism could not be a recipe for the future. Therefore, right from the beginning they paved the way for the transfer of powers to international organizations (Art. 24 (1) BL) and manifested their trust in systems of collective security (Art. 24 (2) BL). By contrast, the judgment views the sovereignty of the German state as the ultimate guarantee of peace, security and well-being, thereby ignoring the simple historical fact that the rise of Germany from the ashes of World War II was precisely the result of its being enshrined in European alliances of like-minded states.

⁶¹ For a positive vision of the integration process see Czech Constitutional Court, judgment Pl ÚS 19/08 of 26.11.2008, para. 108, <http://www.concourt.cz/clanek/urlMethodCall/sessionContext/>, for which “the transfer of certain state competences ... is not a conceptual weakening of the sovereignty of a state, but, on the contrary, can lead to strengthening it within the joint actions of an integrated whole”.

⁶² The phrase can be traced back to a proposal by Parliamentary Council member *v. Mangoldt* in November 1948 and did not encounter any objections. It was maintained in all the subsequent drafts, see summary of the travaux in: JöR, Neue Folge 1 (1951), 32 et seq.

⁶³ BVerfG (note 1), paras. 226 et seq.

4. The Doctrine of the Sovereign State

In this sense, the judgment betrays a deliberate intention to remain within the confines of a traditional legal doctrine that has not taken note of the developments of the modern world where national sovereignty, in order to survive, must be pooled with other national sovereignties in order to be able to face up to the manifold tasks which human societies are compelled to grapple with. It holds that quite a number of areas must forever remain under decisive German influence, mentioning, in this connection, areas where Community legislation has already gained considerable ground.⁶⁴ No convincing reasons are given why specifically the subject-matters explicitly identified must remain shielded from determinations by Union institutions. In a classical perspective, the sovereign right to establish one's own currency would have to be counted as a component of those core elements; yet it is a matter of common knowledge that already the *Maastricht Treaty* created the European currency, the Euro. It is also forgotten that way back in the fifties the project of a European Defence Community, providing for a common military force of the six members of the European Coal and Steel Community, had been launched. This project drowned politically in the French *Assemblée Nationale* on 30.8.1954; in Germany, no objections were raised at that time as to any alleged incompatibility with the Basic Law.

5. Further Steps in the Integration Process Constitutionally Barred

In para. 264, a black scenario is described where Germany's governmental institutions, through the activity of the Union, would lose any real power so that Germany might be compelled to leave the Union. In this connection, the Court hints⁶⁵ that further steps of integration would have to be based on

⁶⁴ BVerfG (note 1), para. 249: "Essential areas of democratic formative action comprise, *inter alia*, citizenship, the civil and the military monopoly on the use of force, revenue and expenditure including external financing and all elements of encroachment that are decisive for the realisation of fundamental rights, above all as regards intensive encroachments on fundamental rights such as the deprivation of liberty in the administration of criminal law or the placement in an institution. These important areas also include cultural issues such as the disposition of language, the shaping of circumstances concerning the family and education, the ordering of the freedom of opinion, of the press and of association and the dealing with the profession of faith or ideology." Similar statement in para. 252.

⁶⁵ BVerfG (note 1), para. 179.

Art. 146 BL,⁶⁶ a provision which nobody fully understands⁶⁷ and which may be “better” than Art. 23 (1) BL only from a theoretical viewpoint: Art. 146 BL endeavours to constitutionalize the dormant pre-constitutional “*pouvoir constituant*” which could overturn the Basic Law as a whole, obviously under a total lack of guarantees such as those laid down in Art. 23 (1) and 79 BL in that it would permit decision-making by a simple majority whereas Art. 23 (1) in connection with Art. 79 (2) BL requires a two-thirds majority in both houses of Parliament. To say that a new stage of integration could be reached only through Art. 146 BL means to leave the architecture of the Basic Law and opens up the gates of revolutionary anarchy.⁶⁸ Indeed, the Court denies any right for the people, organized as a community under the existing law, to change its constitutional framework in an orderly and peaceful manner. Whatever it may have wished to convey, the doctrine of the “*pouvoir constituant*” raises in the judgment its gorgonic head. Well-pondered procedures are cast away, instead the decision-making process is left to the vagaries of contingent events.⁶⁹ Not by accident does the “*pouvoir constituant*” figure in *Carl Schmitt’s* constitutional doctrine as a centrepiece.⁷⁰ For him, the state of exception marks the essence of the constitutional edifice while he had no great interest in the running of the daily affairs of a nation. In any event, it must be assumed that the Court holds by implication that the Treaty of Lisbon marks the outer limit of the European integration process on the basis of Art. 23 BL. Explicitly, however, it has refrained from issuing such a clear verdict.

⁶⁶ “The Basic Law, which since the achievement of the unity and freedom of Germany applies to the entire German people, shall cease to apply on the day on which a constitution freely adopted by the German people takes effect.”

⁶⁷ See, for instance, *H. Dreier*, Commentary on Art. 146, in: *H. Dreier* (ed.), *Grundgesetz. Kommentar*, 2nd ed. 2008, Art. 146 margin numbers 28, 33 et seq.; *R. Scholz*, Commentary on Art. 146, in: *T. Maunz/G. Dürig* (eds.), *Grundgesetz. Kommentar*, 29th Update 1991, Art. 146 margin numbers 20 et seq.; *P. M. Huber*, Commentary on Art. 146, in: *M. Sachs* (ed.), *Grundgesetz. Kommentar*, 5th ed. 2009, Art. 146 margin numbers 7 et seq. For an attempt to demonstrate the usefulness of Art. 146 BL even after the completion of the process of German re-unification see *H. Dreier*, *Das Grundgesetz unter Ablösungsvorbehalt?*, in: *H. Dreier* (ed.), *Macht und Ohnmacht des Grundgesetzes*, 2009, 159 (172 et seq.).

⁶⁸ The observations in BVerfG (note 1), para. 179 are, however, quite ambiguous in that regard.

⁶⁹ *H. Dreier* (note 67) is not able to point to viable method to overcome the anarchic features of the *pouvoir constituant*.

⁷⁰ *C. Schmitt* (note 20), 82: “There can be no regulated procedure binding on the exercise of the constituent power.”

6. Abundance of *obiter dicta*

On the other hand, the judgment contains many passages that have nothing to do with the issues to be adjudicated.⁷¹ One reads, for instance, without any surprise that “every democratic government knows the fear of losing power by being voted out of office”,⁷² but may be rightly surprised why such a trivial statement had to be included in the reasons. Many other passages resemble more an academic lecture than a judgment called upon to make determinations on hard issues.⁷³

7. The Democratic Principle

The Court derives many inferences from the key concept of democracy. To take this concept as the point of departure for the scrutiny of the Lisbon Treaty can hardly be criticized. The Basic Law provides in Art. 23 (1) that the European Union in whose construction Germany is called upon to participate must, first of all, be committed to democratic principles. This proviso finds its European reflection in Art. 2 TEU. However, the Court does not content itself with noting this semantic parallelism. It inquires into the factual veracity of a programmatic statement of faith which, in its view, must be present above all in the institutional structures of the Union and cannot be taken at face value. Democracy, it holds, is characterized above all by strict equality of all citizens with regard to the right to vote.⁷⁴ The right to vote in the sense of “one man, one vote” must be understood in a broad sense. It requires that equality must also be strictly reflected in the representative body that emerges from the electoral process. However, the Court notes that “one man, one vote” applies only within the framework of a state, not within the representative body of a supranational organization.⁷⁵ In fact, the modalities of the electoral system provided for in the Lisbon Treaty do not follow a strict mathematical model of equality. The pattern of representation is modified to the benefit of the smaller Member States in order to permit them to be present in the European Parliament with a group

⁷¹ Reference may be made to BVerfG (note 1), paras. 213, 247 et seq., 250 et seq.

⁷² BVerfG (note 1), para. 270.

⁷³ Italian constitutional judge *Sabino Cassese* speaks of a sum of “*luoghi comuni*” (commonplaces) in his article referred to above, *S. Cassese* (note 18), 1006. *C. Schönberger* (note 38), 1207 calls the judgment “lengthy, repetitive, meandering and sometimes outright fuzzy”.

⁷⁴ BVerfG (note 1), paras. 214, 282.

⁷⁵ BVerfG (note 1), para. 279.

of deputies who are capable of reflecting the pluralist structure of the nation concerned (principle of degressive proportionality).⁷⁶ This premise leads necessarily to a representation of Luxemburg and Malta in the European Parliament which is proportionately ten times or even twelve times higher than Germany's parliamentary group; the Court also notes that Sweden, for instance, will send twice as many deputies to the European Parliament than it would be entitled to in application of the ratio applied to France and Germany.⁷⁷

The Court sees this disproportionality as a basic defect of the constitutional order of the Union. Accordingly, it comes to the conclusion that the European Parliament is unable to provide the requisite democratic legitimacy to the activities of the Union.⁷⁸ It accepts this state of affairs only because of the supplementary democratic legitimization which the Union will continue to receive from national parliaments, either directly or through the ministers acting in the Council who all are accountable to their national parliamentary bodies.⁷⁹ The Court is right in emphasizing the crucial role which national parliaments are called upon to play within the framework of the Union. For the first time in the history of the integration process, this role is explicitly acknowledged in a treaty provision (Art. 12 TEU), and by requiring a considerable strengthening of the powers of the Bundestag and the Bundesrat in amendment procedures, in switching from unanimity to majority voting and in resorting to the flexibility clause, the Court has given even more weight to their constitutional powers, creating for that purpose the felicitous expression of "responsibility for integration".⁸⁰

However, it must be called a fundamental error to contend that true democratic legitimacy can exist only within a state where democratic equality extends to the distribution of seats in the relevant parliamentary assembly.⁸¹ Federal entities – and the Union is such an entity – are subject to their own logic. The rigidity which the Court postulates cannot even be found in Germany, where the Bundesrat is also founded on the principle of degressive proportionality (Art. 51 BL): the distribution of votes among the German *Länder* varies from three to six votes. Even more dramatic is the example of the United States of America where in the Senate each state is entitled to two Senators, irrespective of its size. Mention may also be made of the

⁷⁶ TEU, Art. 14 (2).

⁷⁷ BVerfG (note 1), para. 285.

⁷⁸ BVerfG (note 1), paras. 280 et seq.

⁷⁹ BVerfG (note 1), paras. 262, 271, 274.

⁸⁰ BVerfG (note 1), paras. 238 et seq., 245.

⁸¹ BVerfG (note 1), paras. 279 et seq.

similar arrangement for the Swiss Council of States (Ständerat).⁸² The Court seeks to discard the evidentiary value of this observation by pointing out that, in general, reliance on the principle of equality of states is “only tolerated for the second chamber existing beside Parliament”.⁸³ This attempt by the Court to harmonize its line of reasoning with generally accepted standards of democracy can hardly be called convincing. In the United States, the Senate is a more powerful body than the House of Representatives. Although originally some criticisms had been voiced *vis-à-vis* the rule on the composition of the Senate, in the sense that the uniform attribution of two seats pertained more to aristocratic thinking than to the democratic principle,⁸⁴ the Senate became a fully acknowledged institution already in the 19th century. Currently, there are no plans whatsoever to change the constitutional balance with a view to attaining a degree of equality closer to the views embraced by the Court.

Since the Court does not accept the European Parliament as a full-fledged democratic institution, it sees no reason to assess the considerable increase in legislative power which the Parliament will enjoy under the Lisbon Treaty. After the entry into force of the Treaty, the European Parliament will be on a par with the Council in almost all fields of legislative competence of the Union. The ordinary legislative procedure will be the rule (Art. 289 TFEU). Thus, the European Parliament will become a key actor in the European decision-making process. This considerable strengthening of the Parliament was inspired by the consideration that the losses gained by national parliaments could be compensated by the gains of their European counterpart. Thus, the democratic balance remained equilibrated. Unwisely, the Court dismisses this line of reasoning by downscaling the European Parliament.

Issues of constitutional interpretation are highly complex and always controversial.⁸⁵ In scholarly disputes, opponents may charge one another without any systemic difficulty with advocating an incorrect understanding of a given principle. It is of course much more difficult to blame a constitutional court which, by definition, has the last word in such disputes. One must note, however, that the Court bases itself on an abstract concept of the state that does not take into account the reality of a federal entity or highly

⁸² Art. 150 of the Swiss Constitution.

⁸³ BVerfG (note 1), para. 286.

⁸⁴ See *A. N. Holcombe*, *Our More Perfect Union*, 1950, 24. For harsh contemporary criticisms of equal representation in the U.S. Senate, see *S. Levinson*, *Our Undemocratic Constitution*, 2006, 49 et seq. and *D. Lazare*, *The Frozen Republic*, 1996, 285 et seq.

⁸⁵ For a sophisticated analysis of the different theories of constitutional interpretation see *J. Riecken*, *Verfassungsgerichtsbarkeit in der Demokratie*, 2003.

developed international organization, whatever term one may choose according to personal preferences. The Lisbon Treaty as the text organizing that entity cannot be isolated from the foundations from which it arises. The Union is based on agreements that have to be accepted by each and every one of its members. As the Court itself has observed, to date a “European people” has not yet emerged. Even on the basis of the Lisbon Treaty, the Member States will remain the most prominent actors, and accordingly “one man, one vote” stands on a level of parity together with the principle of sovereign equality of states (Art. 2 (1) UN Charter). Luxemburg and Malta would never accept the rigors of the position suggested by the Court. It would appear to be rather far-fetched to maintain that with a view to obtaining full democratic legitimacy, electoral districts would have to be formed of Luxemburg and fragments of the territory of the German state of Saarland, or that the Maltese population should vote together with a part of the Sicilian population. Critics could chastise the views propagated by the Court as an imperialist doctrine, invented to secure the dominant influence of Germany in the Union and to marginalize the smaller nations. The Court, on its part, relies on the negative concept of “over-federalization” (“*Überföderalisierung*”; the official translation speaks of “excessive federalization”) in order to justify its unitary doctrine.⁸⁶

By stating that genuine democracy can thrive only within a state, the Court blocks the door to the democratization of the many international entities to which Germany, as an active participant in the ongoing process of globalization, has already adhered to and will adhere to in the future. This is a distressing, discouraging finding. It simply cannot be denied that in our time governance takes place not only through governmental authorities, but also through intergovernmental agencies with different degrees of density of powers. It should be one of the primary goals of democratic nations to see to it that such intergovernmental agencies be complemented by democratically legitimated bodies to the extent possible, in order to avert the danger of being subjected to bureaucratic forces intent on pursuing their technological purposes without caring for the views prevalent at the grassroots level. Commentators may be inclined to think that the Karlsruhe Court lives indeed in an ivory tower and has not been sufficiently exposed to the winds that blow around the globe.

⁸⁶ BVerfG (note 1), paras. 288, 290, 292.

8. The Eternity Clause of the Basic Law

Basing large parts of the judgment on Art. 79 (3) BL, the “eternity clause” of the German Constitution, must have been tempting for the Court. Indeed, Art. 79 (3) BL is explicitly mentioned in the integration provision of the Basic Law, Art. 23 (1), as a limit to the transfer of powers to the Union. Pursuant to this provision, no amendment of the principles laid down in Arts 1 and 20 BL shall be admissible. Among the principles mentioned in Art. 20 (1) BL, the democratic principle comes first. Additionally, Art. 23 (1) BL provides that the Union as the fruit of such transfer must be in consonance with democratic principles. Thus, on the one hand the Basic Law prohibits abandoning democracy internally as a result of the transfer of sovereign powers; on the other hand, it requires that such powers may only be entrusted to democratic hands.

It was therefore fully legitimate to inquire into the reality of the system of governance ushered in by the Lisbon Treaty and its consequences for the constitutional framework as it exists in Germany. In many passages of the judgment,⁸⁷ the Court makes explicit reference to Art. 79 (3) BL as the basis of its inquiry into the constitutionality of the Treaty which has come before it under Art. 38 BL. The question is inescapable: does the Court not make an excessive use of Art. 79 (3) BL? There was no need for it to ground its reasoning on Art. 79 (3) BL since the democratic principle is explicitly mentioned in Art. 23 (1) BL as a general requirement for the integration process. The eternity clause was conceived as a defence against anti-democratic forces like the national-socialist movement intent on toppling the constitutional order and replacing it by an arbitrary dictatorship. Here, the key issue was whether the system of representation in the European Parliament with its parameter of “degressive proportionality” may be reconciled with the democratic principle. The system of “degressive proportionality” is the fruit of careful negotiations among the 27 participating states. It has existed since the origins of the European Parliament as “Parliamentary Assembly”. The Court challenges the democratic purity of that system by emphasizing “freedom and equality” as the indispensable benchmarks of citizens’ voting rights. As shown above, its rigid construction of the requisite features of democracy is highly debatable, given the “federal environment” in which it is destined to operate.⁸⁸ In any event, the issues to be tackled did not have

⁸⁷ See, e.g., BVerfG (note 1), paras. 175, 182, 193, 208, 211, 218 et seq., 244 et seq., 261, 264, 339.

⁸⁸ See also critical observations by *M. Nettesheim* (note 38); *C. Schönberger* (note 38), 1208.

the slightest flair of a head-on attack on democratic values as envisioned by the authors of the constitutional text.

The result of light-handed recourse to Art. 79 (3) BL would appear to be calamitous. The constitutional framework is shoved into a state of petrification. What the Court derives from the eternity clause cannot be circumvented in an orderly manner, neither by ordinary legislation nor by a constitutional amendment. Its holdings become sacrosanct, and it may even be difficult for the Court itself to revise views which it has expressed on that legal foundation. The political consequence of resorting to Art. 79 (3) BL in matters which do not fall within the highest category of constitutional relevance will inevitably be a certain *capitis diminutio* of that provision – since it may become worn out by routine. It would certainly be better to reserve it for extreme situations.

9. Review of Union Legislation by the Constitutional Court

The most disturbing immediate effects of the Court's judgment may result from the review power which the Court claims with regard to *ultra vires* measures enacted by the Union authorities.⁸⁹ One cannot deny, as pointed out above, that the Union's establishment has its roots in the sovereign powers of the Member States. However, the Member States have conceived of a legal system that has its own specific mechanisms of checks and balances, of law-giving, law enforcement and judicial review, a system in which all Member States are endowed with extensive rights of participation. The structural deficits of the past have been cured. Major lacunae, as they originally existed with regard to human rights protection, have been filled in. In particular, national parliaments have seen their role significantly enhanced. The European system of governance is not hermetically closed, it exists in active symbiosis with the national constitutional systems. It may be intriguing to see that in some instances this supranational system may move in a direction not foreseen by one of the 27 actors encompassed by it. But according to the inherent institutional logic, defects in the activities at the European level should be identified and corrected at that level, a task which within a group of like-minded countries based on open dialogue should generally be successful. Unilateral remedial action may become necessary in extreme circumstances. The jurisprudence of the highest courts of the

⁸⁹ BVerfG (note 1), para. 240.

Member States is unanimous in that regard.⁹⁰ But to examine individual acts as to their compatibility with the principle of conferral of powers would lead onto an erroneous course. Inevitably, the judiciary of other Member States would follow suit. Very quickly, the Union's bases of mutual trust could then be undermined.

10. Limits of the Binding Nature of the Judgment

In any event, as far as the actual effect of the judgment is concerned, it will be necessary to consider with the utmost care the scope of the grounds that partake of the binding nature of the pronouncements of the Court in accordance with Art. 31 of the Act on the Federal Constitutional Court. Regarding the challenges brought against the Lisbon Treaty itself through the Act of Approval, the operative decision handed down by the Court consists of no more than a rejection of the constitutional complaints. This amounts to saying that the great bulk of the observations of the Court must be classified as *obiter dicta*.⁹¹ In the last paragraph of its reasons, when deciding on costs, the Court makes an implicit attempt to overcome the limits of said Art. 31 by stating that the Act of Approval is compatible with the Basic Law “only taking into account the provisos that are specified in this decision”. However, three arguments stand in the way of this assertion. First of all, a domestic judgment cannot produce effects beyond the borders of the German jurisdictional space. The Treaty of Lisbon is an international instrument which henceforth will be governed by international rules of interpretation, as modified in the jurisprudence of the Court of Justice of the European Communities. Germany is not able to impose its interpretation of

⁹⁰ See for the Czech Republic: Czech Constitutional Court (note 61), para. 120; France: Conseil constitutionnel, decision of 10.6.2004, No. 2004-496 DC, <http://www.conseil-constitutionnel.fr>, para. 7: “la transposition en droit interne d’une directive communautaire résulte d’une exigence constitutionnelle à laquelle il ne pourrait être fait obstacle qu’en raison d’une disposition expresse contraire de la Constitution”; Italy: Constitutional Court, Judgment 232/1989, FRAGD, http://www.cortecostituzionale.it/versioni_in_lingua/english_version.asp, para. 3.1 (theory of “contro-limiti”); Poland: Constitutional Court, judgment of 11.5.2005 (headnotes), K 18/04, <http://www.trybunal.gov.pl/eng> (where manifestly too broad a power of review is claimed); Spain: Constitutional Court, declaration DTC 1/2004, 13.12.2004, <http://www.tribunalconstitucional.es/en>, para. 4.

⁹¹ View also held by *D. Thym*, In the Name of Sovereign Statehood: A Critical Introduction to the Lisbon Judgment of the German Constitutional Court, CML Rev. 46 (2009), 1795 et seq.

the Treaty onto its partners.⁹² Second, as far as the internal effects of the Lisbon Treaty are concerned, the lengthiness and the complexity of the Court's findings do not lend themselves to a rigid application of the legal proviso on the bindingness of the Court's decisions. And lastly, the question must be put whether a Court can really make determinations that would reach out in time years and decades beyond the date of the delivery of the relevant decision.

11. Reservations upon Ratification?

Rightly, the Federal Government has abstained from entering a reservation when ratifying the Lisbon Treaty, contrary to suggestions made in political circles and legal writings.⁹³ According to the Vienna Convention on the Law of Treaties, reservations to constituent instruments of an international organization require “the acceptance of the competent organ of that organization” (Art. 20 (3)). It may be doubtful, in the process of European integration, which organ could be authorized to make a binding determination; apparently, when the provision was drafted, the lawyers involved bore the United Nations family in mind.⁹⁴ But the most intriguing difficulties might result from the power of the other Member States to object to a reservation (Art. 20 (4) clause b)). An objecting state enjoys even the right to declare that it wishes to preclude the entry into force of the treaty between itself and the reserving state. Accordingly, a reservation could have totally destroyed the project embodied in the Lisbon Treaty.⁹⁵ A common undertaking must be based on a common understanding. The academic saying: *tot capita, tot opinioniones*, is not a good recipe for an “ever closer union”.

⁹² A similar question arose with regard to the East-West Basic Treaty, BVerfGE 36, 1 et seq., English translation: Decisions of the Federal Constitutional Court, (note 23), 244, where the Court observed (269): “All statement in the grounds of judgment, including those not referring exclusively to the content of the Treaty itself, are necessary, and are therefore within the meaning of the case law of the Federal Constitutional Court part of the grounds underpinning the decision.”

⁹³ See *K. F. Gräditz/C. Hillgruber* (note 37), 878.

⁹⁴ See International Law Commission (ILC), Commentaries on Art. 17 of the draft convention, Yearbook of the ILC II (1966) 207, para. 20.

⁹⁵ In a decision of 22.9.2009, 2 BvR 2136/09, the Constitutional Court expressed doubts as to the lawfulness of a reservation to the Lisbon Treaty. A constitutional complaint raising this issue was dismissed as inadmissible.

12. Lack of Individual Opinions

None of the judges has appended an individual opinion to the judgment. The Court only reveals that the “decision was reached unanimously as regards the result, by seven votes to one as regards the reasoning”.⁹⁶ This is utterly surprising, given the one-sided emphasis characterizing many of the observations of the Court. Because of the secrecy which surrounds its deliberations, and which is also kept in practice, it is impossible to know what motivated the members of the Chamber not to depart from the text which in many passages bears the hallmark of the rapporteur, judge *Di Fabio*. Thus, the public is prevented from learning about the dialogue that took place among the judges. It is hardly imaginable that they were all in full agreement with the views propounded by the majority. Individual opinions have not really become popular in the Court. The Karlsruhe judges are the only ones in Germany authorized publicly to express their dissent or to acknowledge that they would have preferred another avenue leading to the result finally concluding the dispute. Their extraordinary position may at the same time be seen as a moral commitment to enlighten the public at large when issues of principle are to be decided that do not allow for easy answers. In such disputes, a split Court would appear to be infinitely more beneficial to the constitutional order than a seemingly consensual bench which prefers not to disclose its internal struggles.⁹⁷

V. Concluding Observations

Through its judgment of 30.6.2009, the Court has put in jeopardy its wide recognition as the most trustworthy institution within Germany’s political system. Large parts of the judgment are motivated by judicial activism. Instead of confining itself to deciding on the issues before it, the Court has wished to settle the constitutional problems connected with the European integration process once and for all, not only with regard to the present time, but also with regard to a remote future. It stands to reason that such an attempt carries considerable risks – not only for the Court itself, but also for the polity as a living organism.

⁹⁶ BVerfG (note 1), para. 421.

⁹⁷ We essentially agree with *H. J. Lietzmann*, *Kontingenz und Geheimnis. Die Veröffentlichung der Sondervoten beim Bundesverfassungsgericht*, in: *Das Bundesverfassungsgericht im politischen System* (note 55), 269 et seq.