

Comments on the German Constitutional Court's Decision on the Lisbon Treaty

Defending Sovereign Statehood against Transforming the European Union into a State

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German Constitutional Court decision of 30 June 2009 on the compatibility of the Lisbon Treaty with the German Constitution – Overview of earlier case-law – Analysis of the judgment – Comparison with earlier case-law – The Court's reference to sovereignty – The concept of democratic legitimacy – Participation of the German Parliament – Transformation of the EU into a state – Creeping evisceration of state legislative authority – Assessment of the judgment

The message of the German Constitutional Court's (*Bundesverfassungsgericht*) decision on the Lisbon Treaty¹ is that European integration will not be brought to halt by Germany but finds its limits in the German Constitution, the Basic Law. The first aspect of the judgment was received with much relief, the second has brought a mixture of consent and disapproval. However, the judgment does not emerge *ex nihilo*. It is the continuation of a long line of precedents. Therefore, an isolated examination would fail to show where it breaks new ground and where it merely builds on earlier judgments. Likewise, it would be misleading to isolate it from the context of the development that the European integration has taken over the last twenty years, not only by the amendments to the Treaties but also through their interpretation and through the practices of the institutions of the EU and the member states.

THE PRECEDENTS

Ever since its beginnings, ten years after the establishment of the European Economic Community, the jurisprudence of the German Constitutional Court in

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¹ Decision of 30 June 2009 (2 BvE 2/08, 5/08, 2 BvR 1010/08, 1022/08, 1259/08, 182/09).

European matters² has been determined by a number of basic assumptions. It starts from the premise that the Treaties have not established a European state but a community *sui generis*,³ later described by the Court as a confederation (*Verbund*) of sovereign nation-states that is supported by these states and has to respect their national identity.⁴ It was not sovereignty that has been transferred, but only a number of powers (*Hoheitsrechte*), insufficient to turn the Community itself into a sovereign entity.⁵ The sovereignty retained by the member states is protected by the principle of conferred powers; they enjoy the *Kompetenz-Kompetenz*.⁶ It is for them to decide which powers they want to transfer to the Community instead of the Community deciding which powers it wants to take from the states. They are the 'Masters of the Treaties'.⁷

From this premise several conclusions were drawn. National law and Community law are independent legal orders. Community law is neither a part of international law nor of domestic law.⁸ It flows from an autonomous source. Community law, therefore, is not valid in Germany of its own accord, but because of Germany's order to apply it domestically (*Rechtsanwendungsbefehl*).⁹ It derives its legal force within Germany from a domestic act. This act 'opens' the German legal order for law from a source other than the state.¹⁰ As such, Community law differs from international law, which is in need of transformation. The order to apply Community law domestically, in turn, is given wholesale by way of ratification of the European Treaties. This means that secondary Community law that has been enacted in accordance with primary law does not need to be ratified. It takes direct effect within Germany.¹¹

² Decisions of the German Federal Constitutional Court (BVerfGE) 22, 134 (1967); 22, 293 (1967); 31, 145 (1971); 37, 271 (1974) – *Solange I*; 45, 142 (1977); 52, 187 (1979); 58, 1 (1981); 73, 339 (1986) – *Solange II*; 75, 223 (1987); 89, 155 (1993) – *Maastricht*; 102, 147 (2000).

³ BVerfGE 22, 293 (295 f.); 37, 271 (278); 75, 223 (242); 89, 155 (181, 188).

⁴ BVerfGE 89, 155 (181, 186, 189, 190).

⁵ BVerfGE 22, 293 (296); 37, 271 (279 f.); 73, 339 (374 f.) – 1986 (*Solange II*); 89, 155 (183). In the *Maastricht* decision one can find the argument that the member states founded the EU to jointly discharge part of their tasks and to that end to jointly exercise their sovereignty (p. 188 f.) But in so doing, they did not transfer their sovereignty to the EU, cf. BVerfGE 75, 223 (242) – 1987.

⁶ BVerfGE 75, 223 (242); 89, 155 (189 ff., 192-198).

⁷ BVerfGE 75, 223 (242); 89, 155 (190).

⁸ BVerfGE 22, 293 (296); 31, 145 (173 f.); 37, 271 (277 f., 280).

⁹ BVerfGE 45, 142 (169); 52, 187 (199); 73, 339 (375); 89, 155 (190).

¹⁰ BVerfGE 37, 271 (279 f.); 73, 339 (374).

¹¹ In its first case on Community law, in which the question of compatibility of Art. 189(2) EEC with the Basic Law arose, the Court ducked deciding, BVerfGE 22, 134 (1967), at a time when the ECJ had already ruled on this matter from the perspective of Community law in *Van Gend en Loos* (Case 26/62, *ECR* 1963, 1). Since BVerfGE 22, 293 (295 f.) the immediate validity of regulations is also recognised in Germany.

In principle the same is true for the supremacy of Community law. The supremacy had been established by the European Court of Justice¹² before the *Bundesverfassungsgericht* first dealt with the relationship between European law and domestic law. The German Constitutional Court rejected the assumption that the supremacy follows directly from Article 24 Basic Law.¹³ It likewise rejected the assumption that the supremacy was inherent to Community law, for otherwise it would be unable to fulfil its function. In the German Court's view, the legal validity of Community law is not put into question by a lack of supremacy. The Court nevertheless conceded the supremacy, but derived it, like direct effect, from the national order to apply Community law domestically.¹⁴ This order is regarded as constitutive for the applicability of Community law in Germany.

However, Article 24 Basic Law does not empower the German government to open the German legal order without limits. German state institutions may not permit a transfer of powers by which the identity of the German Basic Law would be affected.¹⁵ Further limits result from the democratic principle of the Basic Law.¹⁶ Since the democratic legitimation of the EU emanates from the peoples of the member states, mediated by their parliaments, these parliaments need sufficiently significant fields of activity of their own in which the people can articulate their ideas and interests and thus influence the formation of the political will. As the people exercises its prerogatives mainly by electing representatives, it must be guaranteed that Parliament can decide about Germany's membership in the EU, its existence and further development.¹⁷ In the Court's view, this is only possible if the programme of integration is clearly and predictably regulated in the Treaties. In no case does the Basic Law permit an indefinite authorisation of the EU.¹⁸

The *Bundesverfassungsgericht* is, however, aware that every transfer of powers to the EU entails a democratic loss on the national level. Due to the openness of the Basic Law to integration, this loss does not amount to a violation of the democratic principle. Yet, the Court requires that the loss on the national level be compensated by adequate democratic legitimation on the European level. This legitimation is mainly provided by the national parliaments, which ratify the transfer of powers and control the national executive that is active on the European level. The growing power of the EU makes it necessary, however, that a legitimation by

¹² *Costa v. ENEL*, Case 6/64, *ECR* 1964, 1253.

¹³ BVerfGE 37, 271 (278 f.); 73, 339 (374 f.).

¹⁴ BVerfGE 73, 339 (375); 89, 155 (190).

¹⁵ BVerfGE 37, 211 (279 f.); 73, 339 (375 f.); 89, 155 (184).

¹⁶ BVerfGE 89, 155 (186).

¹⁷ BVerfGE 58, 1 (37) – 1981; 89, 155 (187 f.)

¹⁸ *Idem*.

the European Parliament be added, although it is not deemed capable of replacing the national parliaments since the societal preconditions of democracy are underdeveloped on the European level.¹⁹ In addition, the democratic principle requires that Community powers are exercised by an organ in which the national governments are represented that are subject to democratic control at home.²⁰

Transferred powers can only be exercised within the framework of the Treaties. Amendments to the Treaties are reserved for the member states as the 'Masters of the Treaties'. A change of the integration programme by organs of the EU is not covered by the German ratification law.²¹ Should the EU claim a power that has not been transferred by Germany, acts based on that power will not be valid in Germany. This would be against the constitutive force of the German order to apply Community law domestically.²² Furthermore, the position of the member states must not be allowed to erode through interpretation of the Treaties. Thus, the space for an extensive judicial interpretation is limited.²³ Interpretations that are *de facto* changes to the Treaty are not within the legal power of the Community's institutions. Legal acts based on this kind of interpretations cannot bind the German authorities.²⁴

Similarly, there is a long tradition of jurisprudence regarding judicial review of Community law. The *Bundesverfassungsgericht* distinguishes between Community organs and Community law. Already at an early stage it declared inadmissible constitutional complaints, which directly challenge decisions of Community organs since these organs are not bound by the Basic Law. No interest, however pressing it may be, could justify such an extension of the admissibility of constitutional complaints.²⁵ Yet, the German Court left the door ajar on the possibility of Community powers being measured against the standard of the Basic Law in cases of admissible constitutional complaints (i.e., against actions by German authorities). In the Court's view, this depended on the answer to the question of whether Germany, when transferring sovereign powers according to Article 24 Basic Law, may free the Community institutions from the Basic Law's obligations.²⁶

The answer to that question followed suit seven years later as part of the *Solange I* decision. Accordingly, the identity of the Basic Law, which may not be surrendered by any legal act, includes an adequate and effective protection of funda-

¹⁹ BVerfGE 89, 155 (184).

²⁰ BVerfGE 89, 155 (187).

²¹ BVerfGE 58, 1 (37); 89, 155 (187 f.).

²² BVerfGE 58, 1 (30 f.); 75, 223 (235, 242); 89, 155 (188).

²³ BVerfGE 73, 339 (376); 75, 223 (240 ff.); 89, 155 (187 f., 199, 209 f.).

²⁴ BVerfGE 37, 271 (282); 89, 155 (188).

²⁵ BVerfGE 22, 293 (298).

²⁶ BVerfGE 22, 293 (298 f.).

mental rights against public authorities.²⁷ The Court announced that, as long as this protection is missing on the European level, it will review Community acts according to the standard presented by the German Bill of Rights. Hence, references by German courts to the *Bundesverfassungsgericht* are admissible and necessary if these courts deem Community actions to be incompatible with the Basic Law. However, this presupposes that the domestic courts have sought a prior decision by the European Court of Justice on the interpretation of the relevant Community laws and that their judicial reservations are not cleared by the Court of Justice's ruling.²⁸

Five years after the judgment the *Bundesverfassungsgericht* left it still open whether the situation had changed.²⁹ Yet, in 1986, after a thorough analysis of the European Court of Justice's jurisprudence on fundamental rights protection, the *Bundesverfassungsgericht* reached the conclusion that by then sufficient legal protection had been established on the European level. Thus, in *Solange II* the German Court declared that it would no longer exercise its power to review Community law as long as this state of fundamental rights protection is maintained.³⁰ The Court, however, left no doubt that the transfer of powers to supranational institutions finds its limits in the identity of the German constitutional order, part of which is the existence and effective protection of fundamental rights. Therefore, the judicial power to scrutinise Community acts may be taken up at any moment. The *Bundesverfassungsgericht*'s judgment on the Treaty of Maastricht did not change anything with regard to these matters. It is not a *Solange III* judgment.³¹

However, it was only with the *Maastricht* judgment that the *Bundesverfassungsgericht* drew the procedural consequences from the earlier statement that Community acts without a basis in the Treaties do not apply in Germany. It extended the right of scrutiny to the question of whether Community law is covered by the German implementation order or whether it 'breaks out' of the competence frame determined by the Treaties.³² It is this extension that brings the German Court into conflict with the European Court of Justice that the *Solange* opinions had avoided. While they require but an interpretation of the Basic Law, followed by an appraisal whether the contested Community act is compatible with it, the determination whether a Community act has broken out of the Treaty framework requires an interpretation of the Treaties (if only in their capacity as integral part of the German ratification law), which the Court of Justice claims exclusively for itself.

²⁷ BVerfGE 37, 271 (280); confirmed in 73, 339 (375 f.).

²⁸ BVerfGE 37, 271 (285).

²⁹ BVerfGE 52, 187 (202 f.).

³⁰ BVerfGE 73, 339 (387).

³¹ BVerfGE 102, 147 (163) – 2000 (Banana market regulation).

³² BVerfGE 89, 155 (188). The term 'break out' can already be found in BVerfGE 75, 223 (242).

In sum, Community law is, on the one hand, not applicable in Germany without due regard to the Basic Law. On the other hand, not all Community law that is incompatible with the Basic Law is categorically denied applicability in Germany. To the contrary, it is recognised that the authorisation to delegate powers to the Community level entails a deviation from the Basic Law's legal demands.³³ This does not, however, impede the primacy of Community law. Exceptions are limited to identity infractions of the German Constitution and *ultra vires* acts by the Community institutions. So far there is no case in which a legal act by the Community has been denied applicability. Yet, there are decisions in which the *Bundesverfassungsgericht* protected the primacy of Community law against conflicting decisions by German courts.³⁴

BASELINE OF THE LISBON JUDGMENT

Criteria for review

The new judgment takes all this jurisprudence on board. Since the *Bundesverfassungsgericht* has ruled that the ratification law, and as a consequence also the Lisbon Treaty, are compatible with the German Basic Law, it can confront the dangers that, in its view, nonetheless threaten the German constitutional order only on the domestic level. This takes place in three ways. First, the Court marks the limits for the German institutions when attempting future extension of Union competences or other structural changes. Second, it prescribes parliamentary co-operation on the national level, even in cases where the European Treaties do not require a national ratification process to extend Union competences. Finally, it confirms the constitutional limits of the applicability of Union law in Germany and insists on its own right to review whether the Union institutions have adhered to these set limits.

Germany's sovereign statehood guaranteed

Like in the *Maastricht* judgment the *Bundesverfassungsgericht* derived the standard of scrutiny from the individual right to vote in Article 38 Basic Law. It was this individual right that allowed citizens to launch the procedure for a constitutional review of the Lisbon Treaty in the first place. The review extends to Article 20 Basic Law because elections are the main mechanism to implement the principle of democracy. The principles laid down in this article are not subject to constitutional amendments, which, in turn, brings the eternity clause of Article 79(3) Ba-

³³ BVerfGE 58, 1 (36); 89, 155 (183).

³⁴ BVerfGE 75, 223 (1987).

sic Law into play. This clause is interpreted as the protection of the Basic Law's very identity. It is from this identity of the Basic Law that the *Bundesverfassungsgericht* connects to the issue of sovereignty, which, however, is not explicitly mentioned in the Constitution. Yet, according to the Court the Basic Law not only presupposes the 'sovereign statehood of Germany', it also guarantees it.³⁵

This chain of reference from the right to vote to state sovereignty can only be made if Article 38 Basic Law is interpreted in a substantive way. Were it limited to the mere right of citizens to participate in elections, it would not be evident how it could have been infringed by the ratification of the Lisbon Treaty. However, the *Bundesverfassungsgericht* never adopted such a formal understanding of the right to vote. In its view, Article 38 Basic Law guarantees, among other things, that the elected body has sufficient opportunities to make policy choices in sufficiently important subject-matters. An election of a body without substantial political power would deprive the voters of their most fundamental democratic right. That is why not only the democratic principle but also the right to vote is curtailed if the decision-making powers of the *Bundestag* as the only organ that enjoys direct democratic legitimation are significantly reduced.³⁶

A certain curtailment of the German Parliament's power to make policy choices is, however, an inevitable consequence of the transfer of powers from the national to the international level, which Article 23 and 24 Basic Law permit. It is likewise inevitable that the exercise of transferred competences will not follow the requirements prescribed by the Basic Law for acts of the German authorities. This is a natural consequence of the European integration process that the Basic Law not only permits but in fact requires, as the Court states for the first time in the Lisbon judgment. State sovereignty therefore exists only within the limits of the Basic Law's receptiveness for international and European law (*Völkerrechtsfreundlichkeit und Europarechtsfreundlichkeit*).³⁷

At the same time, Germany's 'sovereign constitutional statehood'³⁸ (*souveräne Verfassungsstaatlichkeit*) forms the limit of integration. According to the judgment, the Basic Law does not authorise the German authorities to give up the national sovereignty. This could not be done even by a constitutional amendment. Such an amendment would fail at Article 79(3) Basic Law. It excludes any changes to the Basic Law's identity. Crossing this line would therefore constitute an assault on the constituent power of the German people. Permission to transform the EU into a federal state can only be given by the people through a new constitution. As long

³⁵ Lisbon Decision, para. 216. All of the following footnotes that only name a number, relate to this decision.

³⁶ Para. 210.

³⁷ Para. 225.

³⁸ Para. 226.

as the Basic Law is in force the EU may not be turned into a state with German consent. It has to remain an association of states (*Staatenverbund*). By this the Court means

a close long-term association of states, which remain sovereign, an association that exercises public authority on the basis of a treaty and whose fundamental order is subject to the disposal of the member states alone and in which the peoples of the states, i.e. the citizens of the states, remain the subjects of democratic legitimisation.³⁹

The characteristics of an association of states whose abandonment is prohibited by the Basic Law include that the EU receives its legal foundation from the member states by way of concluding treaties. The EU is not permitted to constitute itself. This has direct implications on the way the EU is endowed with competences. These competences are transferred according to the principle of conferral and may be withdrawn through the same procedure. A transfer of the *Kompetenz-Kompetenz* to the Union is impermissible. If the Union were to rid itself of its legal dependence on the member states and become a self-supporting entity, Germany would have to make use of the exit clause and leave the EU. This possibility must be guaranteed in the Treaty.

Treaty amendments by Union institutions and Integrationsverantwortung

Insofar as the Treaties provide for amendments of the Treaties by EU institutions, i.e., without conclusion of a new treaty and consequently without national ratification procedures, legal compensation has to occur at the national level in compliance with the requirements of Article 23(1) Basic Law. To this extent German constitutional organs hold a ‘permanent responsibility for the integration process’ (*Integrationsverantwortung*),⁴⁰ which can only be discharged by law. In order to ensure the ‘integration responsibility’, an Act of Parliament is necessary for every textual change to the Treaties. This includes changes under the simplified revision procedure, the ‘lacuna filling’ procedure of the Treaties and changes to the EU’s decision-making procedure. The discharge of the integration responsibility must be subject to judicial review by the *Bundesverfassungsgericht*.

These limits may not be undermined by way of treaty interpretation. The ‘integration programme’⁴¹ has to be determined by the Treaty. Just as the German government is constitutionally prevented from consenting to blanket empowerments, the effect of such empowerments may not be created by treaty interpreta-

³⁹ Para. 229.

⁴⁰ Paras. 245, 236.

⁴¹ Para. 236.

tions. Treaty interpretations that tend to maintain the *acquis communautaire* and to guarantee an effective use of the competences (*implied powers, effet utile*) must be tolerated. An interpretation that expanded or changed the primary law would, however, violate the principle of conferred powers and could ultimately lead to a disposal in the hands of the EU over its legal foundations. This is why there have to be control or break mechanisms, at least for extreme cases, that are able to prevent the Union from ridding itself of its legal dependency on the member states.

As the EU institutions exhibit a ‘tendency to political self-empowerment’⁴² it is not sufficient that the ratification laws and domestic accompanying laws to further integration steps maintain the principle of conferral and make sure that the EU does not avail itself of the *Kompetenz-Kompetenz*⁴³ or violate the integration-resistant identity of the German constitution. Rather, the possibility of an external control by the *Bundesverfassungsgericht* is indispensable in order to determine in concrete cases whether the EU has remained within its contractual boundaries and respected Germany’s constitutional identity:

With progressing integration, the fundamental political and constitutional structures of sovereign member states, which are recognised by Article 4(2) sentence 1 TEU Lisbon, cannot be safeguarded in any other way.⁴⁴

The Union’s level of democratic development

Finally, the *Bundesverfassungsgericht* derives from Article 23(1) Basic Law on the one hand that the European Union, when acting autonomously, has to follow democratic principles and on the other hand must not erode democratic rule in the member states. As far as European democracy is concerned, the Court sees no need that the nation-state model is adopted. The EU’s democratic requirements are rather dependent on the ‘extent and the weight of supranational power.’⁴⁵ If this power increases, the level of democratic legitimacy also has to rise if the increase is to secure German consent. Considering the current development of the EU, the Court finds the level of legitimation sufficient. However, should the development of the EU take a state-like direction, Germany would be forced to demand changes to the Union’s democratic legitimacy. If these demands were to be unsuccessful, Germany would have to leave the Union.

With regard to national democracy, the *Bundesverfassungsgericht* derives further limits from the Basic Law regarding the transfer of sovereign powers to the EU,

⁴² Para. 237.

⁴³ Para. 239.

⁴⁴ Para. 240.

⁴⁵ Para. 262.

even if the threshold of the constituent power of the German people and the sovereignty of the state have not yet been affected. Germany has to retain sufficient room for shaping the economic, cultural and social circumstances of domestic life. In particular, it must have the decision-making power in areas

which affect the citizens' circumstances of life, especially the private space of individual responsibility and of personal and social security, which is protected by the fundamental rights, as well as for those political decisions that particularly depend on cultural, historical and language preconditions and which unfold in a discursive manner in a public sphere that is organised by political parties and Parliament.⁴⁶

Application of the criteria

In subsuming the Lisbon Treaty under these criteria, the *Bundesverfassungsgericht* detects a democratic deficit in the EU in comparison to the level of legitimacy within nation states. The reasons behind this deficit are found mainly in the unequal election procedure for the European Parliament. European democracy is said to be caught in a 'contradiction of values'⁴⁷ (*Wertungswiderspruch*) and 'overfederalised'⁴⁸ (*überföderalisiert*) because its electoral procedure for the European Parliament emphasises the equal representation of states and thereby reduces the equality of the voters. The European Parliament is therefore not regarded as the representation of a European people but rather a representation of the member states' peoples. This deficit is not balanced out by other provisions in the Lisbon Treaty, such as the citizens' initiative, the double majority voting system in the Council, or the participation rights of the national parliaments: 'The Treaty of Lisbon does not lead to a new level of democratic development.'⁴⁹

However, under present conditions of the allocation of powers and the degree of autonomous decision-making, the standard of legitimation is 'still' considered sufficient, provided that the principle of conferral is guaranteed domestically in a way that goes beyond the guarantee given by the Treaties. It is crucial for the Court's approval of the Treaty of Lisbon that it does not transform the EU into a state and thus leaves Germany's sovereignty untouched. The principle of conferral is seen as the most important protection of the member states' statehood. They remain the 'constitutionally organised primary political area' (*verfasster politischer Primärraum*).⁵⁰ The EU is but of additional and secondary importance and limited

⁴⁶ Para. 249, a specific listing of the areas of lawmaking competence that in the Court's view are called 'especially sensitive for the ability of a constitutional state to democratically shape itself' in para. 252.

⁴⁷ Para. 287.

⁴⁸ Para. 288.

⁴⁹ Para. 295.

⁵⁰ Para. 301.

to those tasks that have been conferred to it. Furthermore, it is obliged to respect the national identity of the member states and bound by the principles of subsidiarity and proportionality and the early-warning system.

Protection of German sovereignty and constitutional identity

The special treaty amendment procedure that is introduced or extended by the Lisbon Treaty is only accepted under the precondition of a domestically regulated compensation, countering the procedure's potential threat to German sovereignty. The simplified procedure according to the new Article 48(6) EU has to be treated domestically like a transfer of powers, which requires a ratification law according to Article 23(1) sentence 2 and 3 Basic Law. Similarly, for the so-called passerelle clause according to the new Article 48(7) EU, a ratification law, according to Article 23(1), sentence 2 and, if applicable, sentence 3 Basic Law, will be necessary. Also the 'lacuna-filling' competence in Article 352 FEU requires a domestic ratification law supported by a parliamentary majority necessary to amend the constitution. Only if and when these conditions are met may the German representative in the Council declare Germany's support.

Yet, the *Bundesverfassungsgericht* is not at issue with the confirmation of the primacy of EU law, added to the Lisbon Treaty in Declaration 17. The Court regards it as a mere confirmation of the current state of law. The Lisbon Treaty does not change its nature as an institution transferred to the Union by an international treaty. Its legal validity in Germany still depends on the national order to apply it domestically. Consequently, it is effective only within the scope of this order. In the Court's view, the Treaty does not prevent the member states from denying legal acts of the EU domestic applicability if they are not covered by the order to apply the law. The *Bundesverfassungsgericht* claims the power to review EU acts as to their compatibility with this order and to verify that they do not violate the constitutional identity of the Basic Law. The 'right to review adherence to the integration programme'⁵¹ by the EU remains with the Court.

An abandonment of the territory of Germany does not occur through the Lisbon Treaty. The EU has no territorial sovereignty. Similarly, there is no Union-specific territory. Neither is the citizenry of the member states transformed into a European citizenry by the Lisbon Treaty. In fact, EU citizenship does not constitute a European people with the right to self-determination about its political community formation. EU citizenship is rather derived from state citizenship and added to it. New rights for EU citizens comprised in the Treaty, such as the citizens' initiative, also do not constitute an 'independent personal subject of legiti-

⁵¹ Para. 334.

mation at the European level.⁵² Finally, the extension of EU competences does not lead to an erosion of the statehood of the member states. The German *Bundestag* maintains a sufficiently large sphere for policy choices.

EVALUATION OF THE DECISION

New features

If this substantial judgment is reduced to its core, it appears that the *Bundesverfassungsgericht* is concerned with maintaining the current structure of the EU as a political entity created and supported by the member states, without being a state itself, and to prevent its open or creeping transformation into a state. This is why, on the side of the EU, the German Court puts so much weight on the treaty character of its legal basis, the fact that its public power is not original but derived from the member states, the hetero-determination of its competences and the principle of conferred powers. Conversely, the Court is determined to defend the statehood of the member states and their responsibility for the basic legal structure of the EU. This is why, on the side of the member states, much emphasis is placed on sovereignty, their status as 'Masters of the Treaties', the order to apply Union law, the *Kompetenz-Kompetenz* and constitutional identity. Both sides are connected by the necessity of democratic legitimacy, which has to be maintained also in the process of European integration.

Thereby the Lisbon judgment exceeds previous case-law without deviating from it. In fact, it relies on it. The premises of the decision regarding the validity of Union law and its relationship to national law are based on previous case-law, and the same is true for the *Bundesverfassungsgericht*'s power to review Union law in view of the Basic Law. This applies also to the identity review, which is already part of the core of the *Solange* case-law. It is here that the protection of fundamental rights is already referred to as a substantial part of constitutional identity. Previous case-law is, however, extended and differently accentuated. More emphasis than before is placed on German sovereignty. Nevertheless, the core statement that Germany has not transferred its sovereignty, but only relinquished some of its sovereign powers, already characterised the previous judgments.

What is new are the domestic provisos, which the Court summarises under the 'integration responsibility' of the German *Bundestag*. They extend the prerogative of the German Parliament to consent to Council decisions beyond the limits set by Article 23 Basic Law. Yet, they were instigated by the new or extended possibilities in the Lisbon Treaty to expand competences and alter the decision-making procedures by Council vote and thus without participation of domestic parlia-

⁵² Para. 349.

ments. The subsequent power of the *Bundesverfassungsgericht* to review these decisions of the *Bundestag* also comes as a novelty. The most conspicuous innovation, however, lies in the judgment's prospective character. It does not content itself with stating the compatibility of the Lisbon Treaty with the Basic Law, but develops limits to future integration steps that are neither taken nor envisaged by the Lisbon Treaty.

Because of the preventive character of the decision some basic principles of the integration project, such as the mastery of the member states over the Treaties, their *Kompetenz-Kompetenz* and the principle of conferred powers, all of which already played a prominent role in the Maastricht decision, assume a different function in the Lisbon judgment. While in the Maastricht case the *Bundesverfassungsgericht* was satisfied with stating their recognition in the Maastricht Treaty so that it could be declared compatible with the Basic Law, they have become conditions for the constitutionality of future treaty amendments and thus for the participation of Germany in future integrational steps in the Lisbon judgment. The preventative statements culminate in the negative answer to the question of whether the Basic Law permits the transformation of the EU into a federal state – a question that had been left open in the Maastricht decision.

Appraisal

Sovereignty

The main line of the *Bundesverfassungsgericht's* reasoning that supports the results of the judgment cannot be criticised from a constitutional perspective. The Court follows consistently the premise that Union law enjoys direct effect and primacy in Germany only because of the state's order to apply it domestically, and that this order does not extend to turning the EU into a federal state. This proves neither Euroscepticism nor nationalism. The sovereign statehood of the member states is understood and accepted from the outset as statehood within a larger community of states. The promise of the Basic Law's Preamble that the German people is determined 'to promote world peace as an equal partner in a united Europe' is not revoked by the judgment. The meaning of this promise is explained in Article 23(1) Basic Law. According to this article, the European Union is a means to the end of a united Europe. That is why Germany is constitutionally permitted to transfer sovereign powers to the EU level, provided that the Union fulfils certain conditions, on which, according to the Basic Law, the legitimacy of public power depends.

Whether the Court was right to refer in this context to the term 'sovereignty' or whether that led to a narrowing of the judges' mindset with a view to the judicial results, depends on the notion of sovereignty. Yet, whatever notion one adopts,

the assertion that the decision should not have been based on sovereignty because the term does not feature in the Basic Law⁵³ is rather strange. If it were true that legal interpretation may rely solely on terms that appear in the text of the norm, the fundamental European Court of Justice decision of *Costa v. ENEL* on EU law primacy would not be less illegitimate than the Lisbon decision. However, this is not the case, unless the interpreter of the law is methodologically committed to the crudest form of literalism, or even attempts to make this method binding for national courts only, while international courts are exempted from it.

The Basic Law empowers the Federal Republic to transfer sovereign powers in general and from the very beginning in Article 24(1), and with special reference to the European Union in the new Article 23(1). Indeed, if by sovereignty one understands the possession of the entire range of public powers in a specific territory, there would be no longer sovereignty at all. Sovereignty perceived as the quintessence of public power would already be given up with the relinquishment of but one single power. This concept of sovereignty was the predominant one for a long period of time. Since the end of the Second World War and the development of an order of international law, starting with the foundation of the United Nations, it is no longer sustainable.⁵⁴ Using the term 'state sovereignty' nowadays always includes a compatibility with the existence of supranational public power. This is clearly expressed in the Lisbon judgment.⁵⁵

It is, however, controversial whether the level of public power that is left to the states, including member states of a supranational organisation, can still be classified as 'sovereign'. The question is whether sovereignty in the post-1945 era has been dissolved into its elements, the various powers, or whether sovereignty can be sustained as a concept even if several autonomous actors exercise sovereign powers on one territory. This controversial question cannot be fully discussed here. It suffices to say that the majority of authors tend to agree with the latter interpretation. They recognise the remaining function of sovereignty in the guarantee of the self-determination of a political unity under the conditions of an increasing transfer of public power to the international level where democratic legitimacy is either weak or completely absent.

If this is accepted the *Bundesverfassungsgericht's* differentiation between the notions of sovereignty (*Souveränität*) and sovereign powers (*Hobbeitsrechten*) is not unsound. Sovereignty is then no longer a question of 'all or nothing', but of 'more or less'. It remains true that a community without the right to determine its own basic political order cannot be referred to as sovereign. Apart from that, the an-

⁵³ Cf. Carl Otto Lenz, *Frankfurter Allgemeine Zeitung* of 8 Aug. 2009, p. 7.

⁵⁴ Cf. in this context Dieter Grimm, *Souveränität. Herkunft und Zukunft eines Schlüsselbegriffs* (Berlin, Berlin UP 2009).

⁵⁵ Para. 223.

swer to the question who is sovereign in the context of multi-level governance depends on who decides about the allocation of sovereign powers and how they are allocated in terms of quantity. Sovereign in a multi-level system of governance is the entity that holds the *Kompetenz-Kompetenz* and does not use this power in a way which leaves but a marginal portion for itself. A few scattered powers are not sufficient to constitute sovereignty.

The EU's democratic legitimacy

The *Bundesverfassungsgericht* has been widely criticised for its statement that the EU, in spite of the improvements through the Lisbon Treaty, still lacks a sufficient level of democratic legitimacy, compared to democratic standards of states.⁵⁶ As a matter of fact, precisely because national democracy is chosen as the relevant yardstick, the Court pays little attention to the strengthening of the EU's democratic legitimacy by the Lisbon Treaty. Here the reasoning is indeed somewhat irritating. In the earlier parts of the judgment, the question seemed to be whether the expanded public powers granted to the EU by the Lisbon Treaty are sufficiently democratically legitimated. Now it looks as if the EU had to reach the level of legitimacy of a democratic state. This would indeed be a trap. The lack of a democratic standard equivalent to that of a nation-state puts the EU into the muddy zone of potential incompatibility with the Basic Law. Should it reach a level of democratic legitimacy equivalent to a nation-state, Germany would be unable to remain in the Union. However, the judgment clarifies towards the end that this is not a relevant concern because the EU is not a state nor may it ever become one.

According to the *Bundesverfassungsgericht* this impediment cannot be overcome because the Basic Law prohibits amendments that touch upon the constitutional principles named in Article 79(3). As a matter of fact, the provision protects the identity of the Basic Law against the amending powers of the legislature. This so-called 'eternity clause' is a result of the German experience from 1933. However, it does not mean that the sole function of this clause consists in preventing a return of the national-socialist dictatorship. The basic principles are protected against every enemy of the free democratic order. Yet, it is not as certain whether Article 79(3) Basic Law also excludes steps toward integration that do not abolish the identity principles of the Basic Law but rather re-establish them on a higher level.

The question discussed here is not whether a federal European state, especially from a democratic perspective, is desirable. Rather, it is whether Germany would be allowed to join such a state if its democratic legitimacy were at the level re-

⁵⁶ Cf., e.g., the contributions in the 10 *German Law Journal* (2009), No. 8.

quired by Article 79(3) Basic Law. The Court connects the unchangeable principle of democratic rule with a prohibition of Germany's membership in a European federal state with a simple 'with it': *with* Article 79(3) Basic Law Germany's sovereignty is not only presupposed, but also guaranteed.⁵⁷ This conclusion would be unassailable if democracy could only be realised within the nation state. The democratic preconditions may be less favourable on the European level than on the state level. The EU may even be unable to attain the democratic standard realised under the Basic Law for a long time to come. Yet this does not mean that it may never reach this standard. Therefore, the judgment should have been more elaborate on this point.

Still, Germany's incorporation in a European state would be a step of such magnitude that it could not be done via the routine amendment procedure of the Basic Law. It would mean that the member states of the EU ceased to be the 'Masters of the Treaty' and lost the *Kompetenz-Kompetenz*. The EU would emancipate itself from the member states and would become a self-supporting entity. It would gain the right to self-determination about its legal foundations while the member states would by the same token lose this right. The EU would then be permitted to determine which powers it leaves for the member states. Such an abandonment of national sovereignty would indeed require the direct and explicit consent of the people as the ultimate holders of all state authority (Article 20 Basic Law). Insofar, the Lisbon judgment is certainly correct. Currently, the Basic Law does not provide for a referendum on this matter. But it could easily be created through an amendment to the Basic Law. A new constitution, as the Court thinks, would not be indispensable.

Somewhat unclear is the reasoning behind the list of legislative fields that the Court regards to be 'especially sensitive for the self-determination ability of a constitutional state.' They are discussed in connection with the substantive competences the *Bundestag* must retain for any ratification law to meet the conditions set in Articles 38 and 20 Basic Law. However, it is neither said that these areas are prohibited for EU legislation nor are legal consequences mentioned should the EU become intensively engaged in these areas. To the contrary, the Court admits that 'a definable number or certain types of powers' which are reserved for the member states,⁵⁸ cannot be derived from the principle of democracy. Under these circumstances the list fulfils the function of a warning sign: touching these matters implies a danger to the identity of the member states, as guaranteed in the new Article 4(2) EU, which, in turn, will be guarded by the *Bundesverfassungsgericht*.

⁵⁷ Para. 216.

⁵⁸ Para. 248.

The Bundestag and Treaty amendments by Union institutions

The *Bundesverfassungsgericht* is able to accept the Lisbon Treaty precisely because in this sense it does not contest Germany's sovereignty. Sovereignty is, however, challenged by the simplified treaty amendment and 'lacuna-filling' procedures that feature in the Lisbon Treaty and affect legal positions that Germany may not surrender. To be sure, the member states are protected from being outvoted because the respective Council decisions have to be taken by unanimity and, hence, cannot take legal force without German approval. Still, they are not decisions taken by the 'Masters of the Treaties' but by an EU organ and insofar constitute a self-empowerment of the EU. However, in spite of the justified concerns that these provisions might become a backdoor to a state-like development of the EU, the Lisbon Treaty does not fail. Rather the Court resorts to precautions on the domestic level against such a development.

In parts, the Court reassures itself with a treaty interpretation in conformity with the constitution that, of course, cannot be binding on the Union level. But mainly, the Court requires domestic safeguards that prevent a German Council vote on the aforementioned procedures from being taken on the basis of a government decision alone. The potential veto power for the national parliaments, as established in the new Article 48(7) EU, is not sufficient in this context as it does not require explicit action by the *Bundestag*. The Court rather demands that this kind of treaty amendments are treated in the same way as the transfer of sovereign powers. The loss of domestic democracy that occurs when formal treaty ratification procedures are circumvented must be compensated through the participation of the *Bundestag* in these simplified procedures.

This demand has been interpreted by critics of the judgment as patronising to the German Parliament. Their argument is that, after all, the Parliament already holds the competence to render the decisions that the Court is now calling for. If Parliament decides not to use powers it has this must be taken as an expression of its political will.⁵⁹ Of course, a right to act does not necessarily imply a duty to act. However, a duty to act is not alien to the Basic Law. There are certain responsibilities that the German Parliament may not relinquish. Thus, the experience of the Weimar Republic and the Empowerment Law of 1933 have led to severe restrictions of the possibility to delegate legislative competences. And the *Bundesverfassungsgericht*, through its case-law, has further extended the areas to which a restriction of legislative delegation applies. Moreover, Parliament has to act in cases in which fundamental rights are interpreted as containing duties to protect the liberty they guarantee. The transfer of powers from the national to the EU level is added to this line of argument.

⁵⁹ Christoph Möllers, 'Was ein Parlament ist, entscheiden die Richter', *Frankfurter Allgemeine Zeitung* of 16 July 2009.

It is quite normal that constitutional duties of a state institution can be enforced by the *Bundesverfassungsgericht*. Without a possibility for the Court to control whether the *Bundestag* discharges its responsibility for the integration process, a gap would appear in the German rule of law system. In the same vein, it is difficult to find fault with the Court's claim regarding to exercise *ultra vires* and identity control. This is a direct consequence of the constitutive effect of the 'order to apply the law'. Yet, even after the Lisbon judgment, the Court's aforementioned competence claim remains limited to extreme cases and is far from bringing European integration 'under Karlsruhe's total control'.⁶⁰ In any case, the legal plurality, which is a direct consequence of the concurring competence claims, is no longer regarded solely as a negative development.⁶¹

Risks to identity and evisceration of competences not purely theoretical

The constitutional ban on German state institutions to participate in attempts to transform the EU into a federal state, just like the list of 'sensitive areas', is one of the many *obiter dicta* contained in the judgment. They do not contribute to the solution of the case at hand and are therefore not necessary for the decision. It is easy to rebuke the Court for this practice. However, here the context of the judgment comes in. The transformation of the EU into a state is not just a purely theoretical possibility. Many politicians and academics can imagine the completion of European integration only in the form of a European federal state and orient their ideas on institutional reform accordingly. However, it appears to be even more significant that important changes in the integration programme were not effectuated by way of treaty amendments but through interpretation and application of EU primary law by the Commission and the European Court of Justice, hence without involvement of the member states and the political organs of the EU, solely on administrative and adjudicative paths.

That is facilitated by some peculiarities of Union law that are not always sufficiently taken into consideration. It seems particularly noteworthy that the European treaties have been 'constitutionalised' by the jurisdiction of the European

⁶⁰ As the title went of a critique of the decision by Christian Callies ('Unter Karlsruher Totalaufsicht') in the *Frankfurter Allgemeine Zeitung* of 27 Aug. 2009, p. 8.

⁶¹ Cf., e.g., Monica Claes, *The National Courts' Mandate in the European Constitution* (Oxford, Hart Publishing 2006); Neil Walker, 'The Idea of Constitutional Pluralism', 65 *Modern Law Review* (2002) p. 317; and 'Late Sovereignty in the European Union', in N. Walker (ed.), *Sovereignty in Transition* (Oxford, Hart Publishing 2003) p. 11; Miguel Poires Maduro, 'Contrapunctual Law', *idem*, p. 502; Stefan Oeter/Franz Merli, 'Rechtsprechungskonkurrenz zwischen nationalen Verfassungsgerichten, Europäischem Gerichtshof und Europäischem Gerichtshof für Menschenrechte', 66 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* (2007) p. 361 and 392. The Court did not fail to note that the ECJ is using the same instrument with regard to UN decisions (para. 340).

Court of Justice, but, by contrast to state constitutions, do not only contain the basic principles of the Union order and the norms that regulate the EU organs and their competence and procedure. Rather numerous fields that would be ordinary law in the member states are regulated on the Treaty level and consequently participate in the constitutionalisation. The implications of this difference are considerable. What has been regulated on the treaty level no longer needs to be regulated on the statutory level, nor can it be changed by legislation. The executive and judicial actors of the EU are able to impose what they consider to be the right interpretation without the political actors, Council and Parliament, being able to re-programme that interpretation if they consider its results to be harmful.

However, the implications of the constitutionalisation also extend into the area that is open to legislation, and make their presence known in the form of the familiar asymmetry between positive and negative integration.⁶² While negative integration, i.e., deregulation on a national level in order to implement the internal market, can be accomplished in the administrative mode, positive integration, i.e., re-regulation at the European level in order to correct market failure, relies on the political mode, lawmaking in the Council and the Parliament, for which the threshold of consensus is considerably higher and the chances of success are correspondingly smaller. In practice, this results in a bias toward liberalisation, which extends its effects even into the weakly communitarised field of social policy. To be sure, the member states continue to be legally free in this area, but in practice they cannot maintain their level of social policy without damaging their national economy.⁶³

The tendency toward a creeping evisceration of state legislative authority is promoted by the way in which competences are distributed in the EU. Unlike federal states, the European Treaties do not allocate legislative competencies according to subject-matters, but according to a teleological criterion. The goal, the establishment and the maintenance of the Common Market, has the effect of blurring boundaries. Since every national law can reveal itself to be a hindrance for the four freedoms of the old Article 14(2) EC, divorce law as well as the educational system, penal law as well as monument protection, it depends largely on the Commission's interpretation of Union law and its initiative to enforce it *vis-à-vis* the member states and on the attitude of the European Court of Justice to what extent national rules are overridden by Union law. Even the member states' discretionary space and the boundary between communitarised and inter-governmental lawmaking is now coming under pressure.⁶⁴

⁶² Cf. Fritz Scharpf, *Governing in Europe* (Oxford, OUP 1999) p. 43 et seq.

⁶³ Cf. Fritz Scharpf, *The European Social Model*, 40 *JCMS* (2002) p. 645.

⁶⁴ Cf. for the first of those, e.g., the decisions of the ECJ in the cases *Viking*, Case C-438/05, and *Laval*, Case C-341/05 of Dec. 2007. A striking example for the second one is the Data Reten-

The effects also extend to fundamental rights. The Union and the member states do, to be sure, share a common basis of values. However, among the various guaranteed fundamental rights and freedoms, contradictions do arise. These contradictions tend to be resolved differently on the European level and on the national level.⁶⁵ On the state level, economic rights are consistently the ones that are most weakly protected, and national measures to regulate the economy are scrutinised less vigorously by the constitutional courts than limitations on personal rights. On the European level, it is the other way round. Here, the economic rights tend to prevail over personal, communicative, social and cultural guarantees. Where national constitutional law grants the national legislature the most freedom, European law grants it the least.

Therefore, risks to identity and evisceration of competences are not just a threat on the treaty-making level, but also on the treaty application level. The only way to counter them would be treaty revisions. There are admittedly few prospects of such revisions being made. In the last treaty revision process, the problems mentioned here were not even an issue. Since on the European level, the European Court of Justice forms the keystone of the system and has tended to use this position in a Union-friendly way,⁶⁶ only the highest national courts, particularly the constitutional courts, can potentially counterbalance it. Admittedly, that alone would not allow them to make use of their power if there were no legal grounds for them to act. However, the *Bundesverfassungsgericht* has provided plausible grounds for how its position and controlling authority result from the very premises of Union law and are demanded by the national constitution.

CONCLUSION

The view that the Lisbon judgment of the German Constitutional Court has brought European integration to an end can only be maintained if a European federal state is seen as the ultimate goal of integration. The question whether this is something worth striving for is debatable. Even if it were something worth striving for, it would not be something that can be quickly accomplished. However, as long as the EU is a community of states whose identities are to be protected, then their position as ‘Masters of the Treaties’, *Kompetenz-Kompetenz* and

tion decision, Case C-301/06, which was published during the oral hearings of the German Constitutional Court on the Lisbon Treaty on 10 Feb. 2009. The interpretation and application of the competition rules of Art. 81 et seq. EC has a similar effect on the public services of the member states.

⁶⁵ Cf. Dieter Grimm, ‘Zur Bedeutung nationaler Verfassungen in einem vereinten Europa’, in Merten/Papier (ed.), *Handbuch der Grundrechte VI/2* (Heidelberg, C.F. Müller 2009) p. 3; Christian Callies, ‘Europäische Gesetzgebung und nationale Grundrechte’, *Juristenzeitung* (2009) p. 113.

⁶⁶ Cf., e.g., Karen J. Alter, *Establishing the Supremacy of European Law* (Oxford, OUP 2001).

the principle of limited and specific power transfer all have their well-deserved places. Below these tenets, particularly in the secondary lawmaking process, nothing is changing anyway, as the Court's endorsement of the Lisbon Treaty shows. At best, the decision will increase the EU's mindfulness that its legitimacy depends largely on the democracy of the member states and that it should be hesitant to exhaust this capital.

