

Zentrum für Europäische Integrationsforschung
Center for European Integration Studies
Rheinische Friedrich-Wilhelms-Universität Bonn



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Is the European Federation a “Mission Impossible”?

A Critical Analysis of the
German Constitutional Court’s
Judgment on the Lisbon Treaty

Discussion Paper

**C201
2010**

ISSN 1435-3288

ISBN 978-3-941928-03-9

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A Critical Analysis on the German Constitutional Court’s Judgment on the Lisbon Treaty

Why this title?

The Treaty of Lisbon¹, also called the European Reform Treaty, is now in practice the Constitution of the European Union (EU). It takes the place of the Draft Treaty on a Constitution for Europe of 2004 which failed to obtain approval in the French and Dutch referenda held on it in 2005. The Lisbon Treaty conceals its constitutional character in three documents – a revised Treaty on the European Union (TEU Lisbon), a Treaty on the Functioning of the European Union (TFEU) and a Charter of Fundamental Rights – but in fact it transfers essentially the same powers and competences from the Member States to the EU as the Draft Constitution had done².

¹ Consolidated versions of both Treaties (TEU and TFEU): Official Journal of the EU (OJ) C 115 of 9 May 2008 - Published together with the Charter of Fundamental Rights and with references to the Draft Constitution in: Cowgill, Anthony and Cowgill, Andrew (eds.) (2008), *The Lisbon Treaty in Perspective*, Stroud: British Management Data Foundation.

² Cf. Arts. I-12 to I-18 Draft Constitution on the one hand and Arts. 2-6 TFEU plus Art. 24 TEU Lisbon on the other.

Since Germany is traditionally a strongly European-minded Member State it was, therefore, no surprise that the Federal Constitutional Court's approval of the Treaty by its judgment of 30 June 2009 (a document of no less than 421 paragraphs plus five headnotes³) was widely welcomed in the country as one more step on the stony path towards the final ratification of the Treaty now in force since 1 December 2009. The relief felt about the Court's decision was, however, substantially modified among Germany's more politically and legally informed public, when the grounds of the judgment and its headnotes came to be known and understood in detail. Most of the country's constitutional lawyers and political scientists criticized it on various grounds (well summarized and with numerous individual critical comments: Lhotta/Ketelhut, 2009: 864-88 and Müller-Graff, 2009: 331-360). Those who defended it (as in particular Kirchhof, 2009 who had been the Court's rapporteur in the "predecessor case" on the Maastricht Treaty) did so mainly by in essence repeating the Court's argumentation so that their evaluations need not be reviewed here.

In its substance the judgment did not raise any objections to the Treaty itself, but it stated that "the Act Extending and Strengthening the Rights of the Bundestag and the Bundesrat in European Union Matters ... infringes Art. 23.1 of the Basic Law⁴ in so far as rights of participation of the German Bundestag and the Bundesrat have not been elaborated to the extent requiring taking into account the provisos that are specified" in the decision. These provisos will be dealt with at a later stage in this article.

Thus the Court required certain legislative measures to be taken in relation to that Act in order to pave the way for the ratification of the Treaty by Germany, but it did not – in its judgment as such – make any statements on the legal nature of the EU and in particular on any federal or non-federal characteristics that it had. Numerous such statements are, however, contained in the grounds of the judgment and some (indirectly) even in its headnotes.

³ BVerfG, 2 BvE 2/08 of 30 June 2009; NJW 2009 pp. 2267 et seq.; for official English translation see Internet <http://www.bverfg.de/entscheidungen/es200906302bve000208en.html>.

⁴ For the quoted provisions of the Basic Law see appendix to this article.

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What substantially matters here for understanding the title of the article are the two very high barriers which the Court erected under German constitutional law against attempts to give the European Union the status and the legal qualifications of a federation or a federal state:

- First (and in the specifically European context) it holds that the composition of the European Parliament does not comply with standards of democratic representation because “it, as the representation of the peoples in their respectively assigned national contingents of Members, is not laid out as a body of representation of the citizens of the Union as an undistinguished unity according to the principle of electoral unity” (par. 280⁵). In other words: As long as the Members of the European Parliament are not elected under the strictly applied principle of “one man one vote” and thus without regard to national contingents, it would be impossible for Germany to belong to a European Federation with such an institution at its centre, because that would be a violation of democracy as one of the central constitutional principles enshrined by Art. 79.3 in connection with Art. 20.1 of the German Constitution, the Basic Law (BL).
- Secondly (and with particular regard to Germany) the Court requires a new Constitution for the country to be passed by referendum (allegedly under Art. 146 BL) if Germany wants to become a constituent part of a European Federation (par.228).

These two barriers are, indeed, very difficult if not impossible to overcome.

5 The paragraphs of the judgment are quoted according to their numbers in the official text; see note.

The Court's Reasoning and Conclusions to be Analyzed

The Court based these two barriers mainly on its understanding of

- its own notion of an “association of sovereign national states” (*“Staatenverbund”*)
- the characteristics of the EU as a supranational body
- the notions of “constitutional identity” and in that context of “sovereignty”
- the requirements for democratic representation in a federally or quasi-federally organized body
- the “principle of conferral”, the new categorization of EU competences and its implications
- the rejection of an EU “competence on competence” and the need for clear delimitations of EU-competences.

After investigating these matters and summing up the results of that analysis the judicial prospects for a European Federation will have to be considered.

The “Association of Sovereign National States” (“Staatenverbund”)

In characterizing the legal nature of the EU the Court rather stubbornly sticks to its barely translatable notion of a *“Staatenverbund”*, which it created in its judgment on the Maastricht Treaty. It tries to define this notion now (in its headnote no.1) as a concept covering “a close long-term association of states which remain sovereign, an association which exercises public authority on the basis of a treaty, whose fundamental order, however, is subject to the disposal of the Member States alone and in which the peoples of the Member States, i.e. the citizens of the states, remain the subject of democratic legitimization”. Thus, in terms of comparative federal-

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ism, it tries to locate the EU somewhere between a confederation and a federation.

In doing so, however, it does not take note of the substantial changes towards a federal structure inherent in the Lisbon Treaty and originating in the Draft Constitution⁶. Further, in this attempt it entangles itself in several ambiguities and self-contradictions, and it also shows either an inadequate understanding or an inappropriate evaluation concerning comparative facts of federal structures.

In at least three instances the judgment contains strange ambiguities which are hardly understandable in the Court’s framework of argumentation: In par. 277 it says that the EU “is not the transfer of a model of a federal state to the European level but the extension of the federal model under constitutional law by a dimension of supranational cooperation”. More than that, in par. 288 it concedes that “the democracy of the EU is approximated to federalized state concepts”, but at the same time it states that “measured against the principle of representative democracy, however, it would to a considerable degree show excessive federalization”. Attempting to explain this, the judgment refers to the composition of the European Council, the Council, the Commission and the Court of Justice where “the principle of equality of states remains linked to national rights of determination, rights which are, in principle, equal”. That, however, does not show any contradiction to federal structures nor is it, therefore, an “excessive federalization”. Another obvious ambiguity is to be found in par. 368 where the Court uses the term of “the federal association of the EU”.

Basic facts of federal structures would seem to be disregarded in the Court’s concept of second chambers when it holds (in par. 271) that “the Council is not a second chamber as it would be in a federal state but the representative body of the masters of the Treaties” and that, “correspondingly, it is not constituted according to proportional representation but according to the image of the equality of states”. What, then, is the difference from federal states? In them the second chambers represent the constituent units of the federation and in hardly any one of them does that representa-

6 See the references in the publication quoted in note 1.

tion take place on the basis of proportionality but much rather on that of the equality of the units. Examples are – most clearly – the USA and also – with differentiations – Germany itself.

Likewise the Court's views on secession demonstrate a lack of appropriate comparative evaluation: In par. 329 it expresses the view that “the right to withdraw underlines the Member States' sovereignty and shows apart from this that ... the EU does not transgress the boundary towards a state within the meaning of international law”. This is obviously meant to imply that the right of secession is solely a matter of international law and not of a federal constitution. That, however, is not so since the Supreme Court of Canada has made it clear in the Québec Referendum Case⁷ that under certain conditions constituent units of a federal state do, in fact, have the right to secede from the federation.

These inadequacies in the Court's argumentation can only be explained by the misplaced over-emphasis on the “state” in the over-long and often too sophisticated debate on the question whether the EU is already a “federation” or a “federal state” or whether these two terms are identical, while that question has only been obscured and hidden by the mysterious term “*Staatenverbund*”. Rather than centrally concentrating on the characteristics of a federation this debate has more often than not been more or less occupied in investigating the question whether the EU needs the classical criteria of a state of having a territory with a people by and over which public power is exercised vis-à-vis the individual and bodies of individuals. The decisive fact that the EU is equipped with such public legislative power has been frequently obscured by rather futile, because second order, debates about its “state territory” and its “state citizenry” (Burgess, 2006: 226-247; Watts, 2008: 131).

7 Reference re Secession of Québec, 1998; File No. 25506.

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The Characteristics of the EU as a Supranational Body

The EU is the only international organisation which has legislative powers that are directly effective on its citizens and on bodies of its citizens. That is its distinguishing feature combined with the fact that its law is superior to that of the Member States. While this was hitherto undisputed the German Constitutional Court now even attempts to modify this or even to “argue it away” by saying that “the law which is established supranationally does not have ... a derogating effect that annuls law. The primacy of application of European law does not affect the claim to validity of conflicting laws in the Member States; it only forces it back as regards its application to the extent required by the Treaties and permitted by them pursuant to the order to apply the law given nationally by the Act approving the Treaty” (par. 335). Obviously seeing itself that this is an overdone intrusion of the principles of the law of nations into the supranational sphere the Court admits that “this construction ... is rather theoretical in everyday application of the law because it often does not result in practical differences as regards its legal effects” (par. 336). So why make this point at all? (Callies, 2009 a, b). Here is the statement in which the real motivation of the Court shines through “This construction”, it says, “has ... consequences for the relation of the Member States’ jurisdiction to the European one. Bodies of jurisdiction with a constitutional function may not, within the limits of the competences conferred on them – this is at any rate the position of the Basic Law – be deprived of the responsibility for the boundaries of their constitutional empowerment for integration and for the safeguarding of the inalienable constitutional identity” (still par. 336).

So that reference to the Court’s own position in the context of downplaying the supranational character of the EU brings us to two other central notions within its argumentation.

The Notions of “Constitutional Identity” and of “Sovereignty”

The Court points out “the inviolable core content of the constitutional identity of the Basic Law” in “Art. 23.1 sentence 3 in conjunction with Art. 79.3” and it considers itself to be the only institution empowered to review whether this core content is respected (headnote 4). Since the principle of democracy as enshrined in Art. 20 BL is unamendably protected by the so-called eternity clause of Art. 79.3 BL the Court concludes that “the Basic Law thus not only assumes sovereign statehood but guarantees it” (par. 216).

The judgment makes that statement although the notion of “sovereignty” cannot be found in any provision of the Basic Law (Lenz 2009). The framers of the Constitution knew well why they omitted this term, which is universally understood as the unlimited totality of sovereign rights, in its text. Otherwise they could not have empowered the Federation in Art 24.1 BL that it “may by law transfer sovereign powers to international organizations” (Schwarz 2009). Seeing that itself the Court immediately takes refuge in a limited definition of sovereignty by saying (in par. 223) that “the Basic Law abandons a high-handed concept of sovereign statehood that is sufficient unto itself and returns [from where?] to a view of the state authority of the individual state which regards sovereignty as ‘freedom that is organized by international law and committed to it’ “. But why then emphasize “sovereignty” so strongly vis-à-vis the EU which is, after all, not governed only by international but even by supranational law?

The answer comes in par. 228, and it hits right at the focus of this analysis: “The Basic Law does not grant the bodies acting on behalf of Germany to abandon the right to self-determination of the German people in the form of Germany’s sovereignty under international law by joining a federal state. Due to the irrevocable transfer of sovereignty to a new subject of legitimation that goes with it, this step is reserved to the directly declared will of the German people alone”. That is, indeed, a daring statement, and it raises several questions:

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- Is the right to self-determination “abandoned” by joining a federal state (or, for that matter, a federation)? Federations have frequently been established in order to protect rather than to abandon that right.
- Is the transfer of sovereign rights to a federation necessarily irrevocable? Numerous reforms of federations – including in particular recent German ones – have been taking place with the shifting back of legislative and other powers to the constituent units of the federation.
- Is the EU really a “new subject of legitimization” in that context? Numerous national competences have already been transferred to it ever since it came into existence without anyone at any time ever doubting its legitimization.
- From where does the Court take the conclusion that joining a European Federation “is reserved to the directly declared will of the German people alone” and thus requires a new Constitution established by a referendum?

The theory that joining a European Federation would require a new Constitution of Germany is only supported by one of the leading commentaries on the Basic Law (Dreier, 2000: no.16), while three of them (von Campenhausen, 2001: no. 23; Hömig, 2007: no. 5 and Zuleeg, 2001: no. 7) reject it.

That apparently means first of all that the “identity” of the Constitution as defined by Art. 79.3 BL, and secured, in its own opinion by the Court alone, would not be sufficiently safeguarded by European law, if Germany became a Member State and thus a constituent unit of a European Federation. This clearly ignores the obligation of the EU (which would certainly be the same in a European Federation) to respect the national identities of the Member States “inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government” (Art. 4.2 TEU Lisbon). The fact that the German Constitutional Court quite obviously mistrusts the European Court of Justice as an efficient watchdog of this obligation can hardly be a sufficient reason to ignore it.

Furthermore, and with a view to Art. 146 BL, the German Court seems to take it for granted that a new German Constitution would necessarily have

to be passed by a referendum. That, however, is by no means undisputed in terms of German constitutional law. Most of the leading commentaries of the Basic Law ever since it came into force up to the present time hold that the procedure of creating a new Constitution has been left open and that thus the term “freely adopted by the German people” in Art. 146 can also refer to adoption by a freely elected Constituent Assembly acting on behalf of the people as its legitimate representative (von Campenhausen, 2001: no. 20; Dreier, 2000: no. 49; von Mangoldt, 1953: no. 2; Scholz, 2009: nos. 11, 25 and 26; Seifert, 1982: no. 3; Speckmaier, 2002: nos. 20-25 and Zuleeg, 2001: no. 6). Thus the Court’s requirement of a referendum in the case of Germany becoming part of a European Federation is, in fact, a highly questionable one. In the light of the objective stated in Art. 23.1 BL of “establishing a united Europe ... that is committed to ... federal principles” such a requirement can also hardly be justified by the theory (held by Dreier, 2009: 95-97) that making Germany a component part of a European Federation would a “downgrading” (*Rückstufung*) of its identity. The Court’s statement that “the Basic Law does not waive the sovereignty contained in the last instance in the German Constitution” (par. 340) is no valid argument against all of this.

Last but certainly not least, a comparative look “across the fence” should also be very much in place in this context: If the theory that joining a federation would require the constituent parts establishing a federation to pass new constitutions of their own for that act to be valid, then one should certainly expect that this would have had to be the case when the oldest federation in modern history, the United States of America, was founded in 1787. That, however, was not so: Some of the original 13 States later passed new constitutions, but there was no such requirement, and one of the original States’ constitutions, the 1780 one of Massachusetts, is even still in force today though now, of course, with numerous amendments (Williams 1989).

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The Requirements for Democratic Representation in a Federally or Quasi-Federally organized Body

The Court’s objections against recognizing the European Parliament as a duly democratically legitimized representation of the Member States’ population have been referred to already at the beginning of this article when describing the barriers which the Court erected against establishing a European Federation. Together with and alongside those statements other relevant parts of the judgment are a strange mix of strong language on the one hand and retracting self-contradictions on the other.

While the Court holds that “the Treaty of Lisbon has ... decided against the concept of a European federal constitution in which a European Parliament as the body of representation of a new federal people ... would be the focus” (par. 277), it also states almost simultaneously that “the composition of the European Parliament need not do justice to equality in such a way that differences in the weight of the votes of the citizens of the Union depending on the Member States’ numbers of inhabitants are forgone” (par. 278⁸). It explains this by emphasizing that “the democratic fundamental rule of the equality of opportunities of success (‘one man one vote’) only applies within a people, not in a supranational body of representation which remains a representation of the peoples linked to each other by the Treaties” (par. 279).

While the Court grants that “with the present status of its integration [the EU] is ... not required to democratically develop the system of the European institutions in analogy to that of a state” (par. 278), it argues precisely on that basis by stating that “measured against requirements in a constitutional state, the EU lacks ... a political decision-making body which has come into being by equal election of all citizens of the Union and which is able to uniformly represent the will of the people” (par. 280). But taking a closer look at the European Parliament being “a representation of the peoples” (see above) the Court concedes “that it would be perceived as insuffi-

8 So the Court itself also already in its Maastricht judgment: BVerfGE 89, 155 (182 et seq.).

cient if a small Member State were represented in the European Parliament for instance by only one Member of Parliament if the principle of electoral equality were taken more strongly into account. The affected states argue that otherwise it would no longer be possible to reflect national majority situations in a representative manner on the European level. Already due to this consideration, it is not the European people that is represented within the meaning of Art. 10.1 TEU Lisbon but the peoples of Europe organised in their states with their respective distribution of power that has been brought about by democratic elections taking account of the principle of equality ...” (par. 286).

So what is wrong then with the democratic legitimization of the European Parliament? (Kottmann/Wohlfahrt, 2009: 453; Möllers, 2009 and Möllers/Schorkopf, 2009) Or can that only be acknowledged if organized under the standards of equality as enshrined in Art. 79.3 with Arts. 20 and 38 of the German Basic Law? Is that not, indeed, a “mission impossible” since – as admitted by the Court itself – “the Member States follow the construction pattern of a federal state *without being able* to create the democratic basis for this ... in the form of the equal election of a representative body of representation of the people and of a parliamentary European government that is based on the legitimizing power of a people of the Union alone” (par. 296)?

And is that inability, or rather impossibility, a convincing reason to deny the EU the chance of becoming (or perhaps being already?) a Federation? Federal dispensations have very often been chosen because “federal ... intertwining creates possibilities of action which otherwise would encounter practical or territorial limits, and they make the peaceful balancing of interests easier” (thus the Court itself in par. 247). Admittedly “at the same time they make it more difficult to create a will of the majority ... that directly goes back to the people” the Court says directly after the previous quotation (ibid). But it cannot resist quoting Art. 20.2 of the German Basic Law in the immediate context of this argument. Is then the Basic Law the only valid standard under which all of this is to be evaluated?

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Federations have a more flexible way to approach such problems, but that is what the Court does not seem to see, let alone appreciate. Outside the EU there are at least three examples for this: In the USA and in Switzerland every constituent unit must be represented in the first chamber, i.e. the House of Representatives resp. the National Council (*Nationalrat*) by at least one member irrespective of the size of the unit’s population in proportion to the entire federal population (Art. I § 2 Sentence 3 of the American resp. Art 149 § 4 of the Swiss Constitution). Likewise in Canada smaller Provinces have a right to a higher numbers of seats in the House of Commons than that to which they would be entitled on the basis of strict proportionality of their shares of population numbers (Secs. 51, 51A Constitution Act 1867). All of that has never given rise to any doubts about the federal character of those countries. So why should it have to in the structures of the EU, where the reasons for tolerating such deviations from strict democratic equality are certainly even stronger?

The “Principle of Conferral”, the New Categorization of EU Competences and its Implications

The English term “principle of conferral” as used in the official translation of the Court’s judgment is incomplete since it does not give the full meaning of the German term to be translated. That German term reads “*Prinzip der begrenzten Einzelermächtigung*”. Fully translated that would have to be “the principle of *limited single* conferral”, and the omission of these two adjectives hides an innovation created by the Treaty of Lisbon which is, indeed, of substantial importance in the context of the Treaty’s federal structures: For the first time in EU primary law, Arts. 2–6 TFEU contain and define categories of EU “competences” which are, of course, not “*unlimited*”, but which are anything other than “*single*” conferrals of powers. Instead, they transfer whole legally defined groups of powers in several categories from the Member States to the Union. Both the term “competences” and such distinctions between categories of competences held by the upper level vis-à-vis the constituent units are, however, the identifying

features of federal structures. Since the relevant articles of the Lisbon Treaty and those of the then forthcoming Draft Constitution are identical, this fact had already been pointed out as early as in 2002 (Leonardy, 2002: 36-38).

The judgment of the German Constitutional Court on the Lisbon Treaty, however, hardly takes note of that fact. Instead, it clings to its term of “single conferral”, although this term is now no longer contained in the text of the Treaty, as it had been in that of the Draft Constitution (see Art. I-11). Besides that, the Court again makes some statements in this context which are self-contradictory: In par. 278 it refers *both* to the “continued validity of the principle of [single] conferral” *and* to “the competences newly accorded by the Treaty of Lisbon”, and in par. 300 it does the same rather mysteriously by saying that “the distribution of the European Union’s competences and their delimitation from those of the Member States takes place according to the principle of [single] conferral”. Its reasoning for this is (in par. 301) that “the principle of [single] conferral is a mechanism of protection to preserve the Member States’ responsibility. The European Union is competent for an issue only to the extent that the Member States have conferred such competence on it”. That, however, is nothing but a truism in terms of a federal structure, and thus for this it would not have been necessary to refer to that doubtful principle. At least, though, the Court concedes that the approach of “categorization and classification of the EU’s competences according to exclusive competences, competences shared with the Member States and competences to carry out actions to support, coordinate or supplement the actions of the Member States ... is performed for the first time” (par. 302).

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The Rejection of an EU “Competence on Competence” and the Needs for a Clear Delimitation of EU-Competences

The field in which the Court earns substantial merits is, however, its strong prohibition “to transfer sovereign powers in such a way that their exercise can independently establish other competences for the European Union. [The Basic Law] prohibits the transfer of competence to decide on its own competence (*Kompetenz-Kompetenz*)” (par. 233). The Court rightly continues that “if ... competences are only transferred in an undetermined manner or with the intention of their being further developed dynamically, or if the institutions are allowed to newly establish competences, to round them off in an extending manner or to factually extend them, they risk transgressing the predetermined integration programme and acting beyond the powers which they have been granted” (par. 238).

From that “the objective of clear delimitation of competences” (par. 303) is logically derived (Bünger/Höreth/Janowski/Leonardy, 2005: 93-125). The Court rightly devotes central parts of its judgment to this objective and, in particular, those directly leading to its conclusions for the actions to be taken by the German institutions in order to pave the way for the Treaty’s ratification by Germany. It does so by giving very profound attention to the fact that “the EU may neither in the ordinary ... and simplified revision procedures ... nor via what is known as the bridging clauses ... or the flexibility clause ... independently amend the foundations of the EU under the Treaties and the order of competences vis-à-vis the Member States” (par. 306).

While – in agreement with the Court – no problems are to be seen and solved within the ordinary revision procedure (par. 308), protective precautions are obviously necessary in the other cases enumerated above (in par. 306). All of these cases are marked by the fact that in the areas of their application the European Council and/or the Council of Ministers have under certain circumstances rights of decision with majorities or rights to exercise powers other than those normally provided for by the Treaties, and such

powers can also touch upon the competence structures particularly under the so-called flexibility clause. It is neither possible to describe all of these areas in sufficient detail here nor would that be necessary within the scope of the topic which is the subject of this analysis, and the significance of this latter reason will have to be pointed out at the end of this part of the analysis.

Thus it can and will have to be sufficient to state here what the Court ruled to be necessary in German constitutional law in order to make ratification of the Lisbon Treaty possible:

- In the simplified procedure under Art. 48 Sec. 6 TEU Lisbon the consent of the German representative in the European Council to a decision of that Council to amend the Third Part of the TFEU (on the internal policies and measures of the Union) “requires a law within the meaning of Art. 23.1 sentence 2 of the Basic Law as a *lex specialis* with regard to Art. 59.2 of the Basic Law since it needs to be treated like a transfer of sovereign powers” (par. 312).
- The same applies to decisions of the European Council or the Council of Ministers “to act by a qualified majority and not by unanimity in a certain area or in a specific case” (par. 315) and thus to apply either the general or one of the special bridging clauses: These steps, too, require a law in each case to authorize the approval of the respective German representative.
- Likewise the use of the flexibility clause in Art. 352 TFEU “constitutionally requires ratification by the German Bundestag and the Bundesrat” (par. 328), so that “the German representative in the Council may not declare the formal approval of a ... law-making proposal ... as long as these ... preconditions are not fulfilled” (par. 328).

Since the German legislation passed to facilitate the ratification of the Lisbon Treaty prior to the Court’s judgment did not sufficiently meet these requirements the Court ruled that “the Act Extending and Strengthening the Rights of the Bundestag and the Bundesrat in European Union Matters”

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had to be revised accordingly (no. 4a of the judgment as such⁹). That was the central and legally the only direct effect of the proceedings before the Court.

So that raises the question, of course, why all the other and, indeed, wide-ranging statements of the Court as outlined above in this analysis, were necessitated as being part of the grounds for the judgment or whether they are altogether to be qualified as *obiter dicta*. It can certainly not be doubted that every Member State’s constitutional or other highest court has the right to define its own institutions’ rights and obligations in positioning itself in the relevant procedures within the Union’s institutions. But does that justify such daring statements as referred to above?

The answer is given by the Court itself in another no less wide-ranging statement, which comprises almost all of the areas discussed here as problematical in one sentence: “From the continuing sovereignty of the people which is anchored in the Member States and from the circumstance that the States remain the masters of the Treaties, it follows – *at any rate until the formal foundation of a European federal state and the change of the subject of democratic legitimization which must be explicitly performed with it [emphasis added]* – that the Member States may not be deprived of the right to review adherence to the integration programmes” (par. 334). Given the numerous barriers erected by the Court against a “formal foundation of a European federal state” the parenthesis in this sentence can only be qualified as a cynical conclusion.

⁹ The Acts passed anew to comply with the Court’s demands are: (a) Gesetz über die Ausweitung und Stärkung der Rechte des Bundestages und des Bundesrates in Angelegenheiten der Europäischen Union (Integrationsverantwortungsgesetz); Bundesgesetzblatt (BGBl) I 2009 p. 3022 (b) Gesetz zur Änderung des Gesetzes über die Zusammenarbeit von Bundesregierung und Deutschem Bundestag in Angelegenheiten der Europäischen Union; BGBl I 2009 p. 3026 (c) Gesetz zur Änderung des Gesetzes über die Zusammenarbeit von Bund und Ländern in Angelegenheiten der Europäischen Union; BGBl I 2009 p. 3031 – all of 22 September 2009 – and (d) Gesetz zur Umsetzung der Grundgesetzänderungen für die Ratifizierung des Vertrags von Lissabon; BGBl I 2009 p. 3822 of 3 December 2009.

Summary and the Judicial Prospects for a European Federation

In summary, the results of this analysis of the Court's main obstacles as outlined at the beginning would seem to be:

- First, that the composition of the European Parliament does not in fact strictly comply with the principle of “one man one vote”, but that this standard cannot be applied in its pure form to the representative institution of a supranational body to an extent which makes this institution lack the quality of democratic legitimization.
- Secondly that there is no sufficient basis in the judgment for the assumption that, in the event of Germany becoming a component part of a European Federation there would be a need for a new constitution of the country, let alone one passed by a referendum.

All in all, and in view of its numerous ambiguities, self-contradictions (Kottmann/Wohlfahrt, 2009: 443) and *obiter dicta* not legally required for its decision, the judgment can duly be classified as a daring piece of judicial activism. In some parts, in particular in its cynical conclusion as quoted above (in par. 334), it even betrays an attitude of judicial arrogance vis-à-vis the political institutions both at the national and at the supranational level. That applies most obviously to the claim quite clearly raised that it is legitimate for the German Constitutional Court to state that the EU has now reached its final state of integration, so that any further visions like that e.g. of a “United States of Europe” or – as termed by the former German Federal President Johannes Rau in 2001 – of a “Federation of the European National States” (excerpt of relevant speech in Leonardy, 2002: 324-325) would now have to be ruled out. That, however, is the clear impression the Court gives, and in doing so the judgment is a strongly political one hidden in legal terms (Böse, 2010: 80; Fischer, 2009; Fritz-Annahme, 2009; Nettesheim, 2009; Rüttgers, 2009 a,b).

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This would also seem to explain why the Court does not apply any judicial effort to investigate into the question whether the EU is not, in fact, a federation already in its present shape. Its supranational powers to pass legislation directly effective on and to the individual citizen, combined with lists of competences, set up by the Lisbon Treaty, would have presented ample reasons to investigate that question which, though, cannot and need not be examined here in adequate depth (Annet, 2010: 107-126).

What needs to be at least hinted at, however, is the obvious reluctance of the German Constitutional Court to acknowledge the supremacy of the European Court of Justice in matters relating to the institutional and power structures of the EU and thus to its constitutional bases. That reluctance was already displayed in the past, in the area of human rights with the so-called “as long as I” and “as long as II” decisions of the German Court. With the judgment on the Lisbon Treaty this reluctance or even refusal has now been extended far beyond that area (Lhotta/Ketelhut, 2009: 870-877). Its clearest expression is contained in par. 241, where the Court openly suggests “the creation by the legislature of an additional type of proceedings before the Federal Constitutional Court that is specially tailored to “ultra vires review” and “identity review” to safeguard the obligation of German bodies not to apply in Germany, in individual cases, legal instruments of the European Union that transgress competences or that violate constitutional identity” (see also headnote 4 of the judgment, in which the Court in essence claims to have such powers already).

That, however, would seem to be a clear violation of Art. 19.3 lit. b TEU Lisbon, which states that it is the function of the European Court of Justice to “give preliminary rulings, at the request of courts ... of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions”. The German Court has up to now never addressed such requests to the European Court of Justice although it would be legally obliged to do so in the same way as all German courts are obliged under Art. 100 BL to apply for a preliminary ruling of the Federal Constitutional Court, if and whenever constitutional questions are directly relevant for the decision to be given (Müller-Graff, 2010: 27). Therefore the logical consequence would be to pass legislation on the need for such requests by the

German to the European Court, rather than on powers of “*ultra vires* review and identity review” for the German Court in matters of European law. Thus it would be correct – and obviously also necessary – to do the opposite of the German Court’s proposal in par. 241 of its Lisbon judgment (Müller-Graff, 2009: 350).

The need for such a legislative step in German law would seem to be all the more relevant, if not urgent, since otherwise it will hardly be possible to achieve corrections of the Lisbon judgment. Such corrections will, however, be necessary if that judgment with all its obstacles to further European integration and ultimately a European Federation is not to be the last word. In view of the German state objective of “establishing a united Europe ... committed to ... federal principles” as defined by Art. 23.1 BL¹⁰, such a last word would, indeed, be a strange result. A European Federation therefore must not be and need not be a “mission impossible”.

For those who, like the author, feel guided by facts as by visions alike it might be appropriate to add that the present financial crisis and its threats for the Euro have proved the needs for a federally organized European form of government more dramatically than anything else in the past. It will be interesting to watch how the German Constitutional Court will cope with such implications in the possibly already rather near future.

¹⁰ The author was one of the drafters of that article.

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Appendix

Relevant Provisions of the German Basic Law

Art. 1 [Human dignity – Human rights – Legally binding force of basic rights]

- (1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.
- (2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.
- (3) The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law.

Art. 20 [Constitutional principles]

- (1) The Federal Republic of Germany is a democratic and social federal state.
- (2) All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive and judicial bodies.
- (3) The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice.

Art. 23 [European Union – Protection of basic rights – Principle of subsidiarity]

- (1) With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law. To this end the Federation may transfer sovereign powers by a law with the

consent of the Bundesrat. The establishment of the European Union, as well as changes in its treaty foundations and comparable regulations that amend or supplement this Basic Law, or make such amendments or supplements possible, shall be subject to paragraphs (2) and (3) of Article 79.

(2) The Bundestag and, through the Bundesrat, the Länder shall participate in matters concerning the European Union. The Federal Government shall keep the Bundestag and the Bundesrat informed, comprehensively and at the earliest possible time.

(3) Before participating in legislative acts of the European Union, the Federal Government shall provide the Bundestag with an opportunity to state its position. The Federal Government shall take the position of the Bundestag into account during the negotiations. Details shall be regulated by a law.

(4) The Bundesrat shall participate in the decision-making process of the Federation insofar as it would have been competent to do so in a comparable domestic matter, or insofar as the subject falls within the domestic competence of the Länder.

(5) Insofar as, in an area within the exclusive competence of the Federation, interests of the Länder are affected, and in other matters, insofar as the Federation has legislative power, the Federal Government shall take the position of the Bundesrat into account. To the extent that the legislative powers of the Länder, the structure of Land authorities, or Land administrative procedures are primarily affected, the position of the Bundesrat shall be given the greatest possible respect in determining the Federation's position consistent with the responsibility of the Federation for the nation as a whole. In matters that may result in increased expenditures or reduced revenues for the Federation, the consent of the Federal Government shall be required.

(6) When legislative powers exclusive to the Länder concerning matters of school education, culture or broadcasting are primarily affected, the exercise of the rights belonging to the Federal Republic of Germany as a member state of the European Union shall be delegated by the Federation to a representative of the Länder designated by the Bundesrat. These rights shall

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be exercised with the participation of, and in coordination with, the Federal Government; their exercise shall be consistent with the responsibility of the Federation for the nation as a whole.

(7) Details regarding paragraphs (4) to (6) of this Article shall be regulated by a law requiring the consent of the Bundesrat.

Art. 24 [Transfer of sovereign powers]

(1) The Federation may by a law transfer sovereign powers to international organisations.

Art. 42

(2) Decisions of the Bundestag shall require a majority of the votes cast unless this Basic Law otherwise provides.

Art. 52 [... Decisions ...]

(3) Decisions of the Bundesrat shall require at least a majority of its votes.

Art. 59 [International law]

(2) Treaties that regulate the political relations of the Federation or relate to subjects of federal legislation shall require the consent or participation, in the form of a federal law, of the bodies responsible in such a case for the enactment of federal law. In the case of executive agreements the provisions concerning the federal administration shall apply *mutatis mutandis*.

Art. 79 [Amendment of the Basic Law]

(3) Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.

Art. 146 [Duration of the Basic Law]

This 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.

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