

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

The *Lisbon Case*: A Critical Summary

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A. Introduction

The aim of this casenote is to depict the essential content of the German Federal Constitutional Court's *Lisbon Case*.¹ Therefore, it is of mainly descriptive nature. It primarily addresses readers wishing for a brief overview before approaching the decision itself or particularly those who might like to avoid reading the ruling in its exuberant length. In order to keep this a straightforward contribution, large parts of the judgment had to be set aside and certain necessary simplifications had to be undertaken. I acknowledge these and commend readers to the other contributions in this special collection of the *German Law Journal* for varied and deeper treatments of the case.

The ruling concerns two *Organstreit* proceedings and four constitutional complaints, which were consolidated for joint adjudication. The subjects of the proceedings were three different acts. First, the Act Approving the Treaty of Lisbon. Through this line of inquiry the German Federal Constitutional Court could verify the compatibility of the Treaty of Lisbon with the German Basic Law as a general matter. The second and third matters before the Court concerned two German laws enacted to accompany the Treaty of Lisbon: the Act Amending the Basic Law (Articles 23, 45 and 93) and the Act Extending and Strengthening the Rights of the German Federal Parliament (*Bundestag*) and the German Federal Council of States (*Bundesrat*) in European Union Matters.

In its judgment the Court addresses three questions: (1) Does the level of legitimization of the European Union comply with constitutional requirements?; (2) Does the Treaty of Lisbon abandon state sovereignty of the Federal Republic of Germany?; and (3) does the *Bundestag* retain sufficiently weighty responsibilities and competences of its own? The legal starting point with respect to every question was an alleged violation of Article 38 (1)[1] of the Basic Law, a right equivalent to a fundamental right.² According to this

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

² *Id.* at paras. 173, 208.

provision of the constitution the members of the German *Bundestag* are to be directly, freely, equally and secretly elected. It guarantees the citizens right to take part in the law-making function of the state authority and to influence its exercise.³ The right to determine, in equality and freedom, public authority through elections and other votes is the fundamental element of the principle of democracy.⁴ Article 38 (1)[1] of the Basic Law works like a hinge, enabling the examination of fundamental normative constitutional stipulations.⁵

B. Level of Legitimization of the European Union

According to Article 23 (1)[1] of the Basic Law the elaboration of the European Union has to correspond to democratic principles.

The Court explains that the constitutional requirements imposed on the organizational structure and on the decision-making procedures of the European Union by the principle of democracy depend on the extent to which sovereign responsibilities are transferred to the Union and the extent to which political independence in the exercise of the sovereign powers is transferred.⁶ However Article 23 (1)[1] does not require “structural congruence.”⁷ Rather, the European Union is free to look for its own ways of democratic *supplementation* by means of additional, novel forms of transparent or participative political decision-making procedures.⁸

The Federal Constitutional Court comes to the conclusion that, with a view to the extent of competences that have been transferred and the degree of independence of decision-making procedures, the level of legitimization of the European Union still complies with constitutional requirements to the extent that the principle of conferral is safeguarded to an extent that goes beyond the measure provided for in the Treaties.⁹ Within the present framework of integration it is, therefore, not required to democratically develop the

³ *Id.* at para. 179.

⁴ *Id.* at para. 211.

⁵ See Armin von Bogdandy, *Das Leitbild der dualistischen Legitimation für die europäische Verfassungsentwicklung*, 83 KRITISCHE VIERTELJAHRSSCHRIFT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT 284, 287 (2000).

⁶ Lisbon Case, BVerfG, 2 BvE 2/08 from 30 June 2009, para. 262, available at: http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208.html.

⁷ *Id.* at para. 266.

⁸ *Id.* at para. 272.

⁹ *Id.* at para. 275.

system of the European institutions in analogy to that of a state.¹⁰ In detail the Court assesses the following subjects regarding their effect on the level of democratic legitimization:

In the opinion of the court the democratic legitimization through the European Parliament is limited due to the Member State's contingents of seats resulting of the regressively proportional composition that Article 14.2(1) sentence 3 TEU Lisbon prescribes.¹¹ Therefore it is not the "European People" that is represented but the peoples of Europe organized in their states.¹² So even after the new formulation of Article 14.2 TEU Lisbon and contrary to the claim that Article 10.1 TEU Lisbon seems to make, the European Parliament is not a representative body of a sovereign European people.¹³ This is a strong but factually valid critique of the self-understanding of the European Parliament.

In the opinion of the Court the election of the German contingent opens up to the right to vote of the citizens of the Federal Republic of Germany a *complementary* possibility of participation in the system of European institutions.¹⁴ The concept of a complementary democratic legitimization is already to be found in the *Maastricht Case*.¹⁵ In this sense the *Lisbon Case* affirms *Maastricht*.

The Court employs similar reasoning about the legitimizing effect of elements of participative (such as providing the citizens of the Union and the representative associations with the possibility of communicating their views) and associative respectively direct democracy (like the European citizens' initiative, 11.4 TEU Lisbon). These instruments, the Court held, can only have a complementary and not a central function when it comes to legitimizing European public authority.¹⁶

The same applies to the legitimizing effect of what is known as the double qualified majority. According to Article 16.4 TEU Lisbon a qualified majority is defined as at least 55% of the members of the Council, comprising at least fifteen of them and representing Member States comprising at least 65% of the population of the Union. This only

¹⁰ *Id.* at para. 278.

¹¹ *Id.* at para. 284.

¹² *Id.* at para. 286.

¹³ *Id.* at para. 280.

¹⁴ *Id.* at paras. 274 and 286.

¹⁵ BVerfGE 89, 155 (184).

¹⁶ Lisbon Case, BVerfG, 2 BvE 2/08 from 30 June 2009, para. 294, available at: http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208.html.

counteracts excessive federalism, the Court concluded, without complying with the democratic precept of electoral equality.¹⁷

C. State Sovereignty

It was argued to the Court that the evolution of the European Union into a federal state (with the consequence that the Federal Republic of Germany loses its sovereignty) transgresses the competences of the Federal Republic. Only a Constitutional Act emanating from the German people, taken pursuant to Article 146 of the Basic Law, could be the foundation for such integration.¹⁸

According to the Federal Constitutional Court the principle of democracy is not amenable to weighing with other legal interests.¹⁹ But, at the same time, the Court stresses that the elaboration of the principle of democracy by the Basic Law is open to the objective of integration Germany into an international and European peaceful order.²⁰ The constitutional mandate to realize a united Europe follows from Art. 23 (1) of the Basic Law, not to mention the constitution's Preamble.²¹ The Court mentions the openness towards European law ("*Grundsatz der Europarechtsfreundlichkeit*").²²

But, according to the Court, the empowerment to embark on European integration applies only within the limits of the inalienable "constitutional identity" that is outlined in Article 79 (3) of the Basic Law ("*unverfügbare Verfassungsidentität*").²³ Thus, the Court concluded that the Basic Law does not grant the bodies acting on behalf of Germany powers 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. This step is reserved to the directly declared will of the German people alone.²⁴ Hence the *Lisbon Case* contains, in contrast to the *Maastricht Case*,²⁵ the explicit refusal to create a European federal state.

¹⁷ *Id.* at para 292.

¹⁸ *Id.* at para. 113.

¹⁹ *Id.* at para. 216.

²⁰ *Id.* at para. 219.

²¹ *Id.* at para. 225.

²² *Id.* at para. 225.

²³ *Id.* at para. 219.

²⁴ *Id.* at para. 228.

²⁵ BVerfGE 89, 155.

Rather, the Court explains that Article 23 (1) of the Basic Law underlines that the Federal Republic of Germany takes part in the development of a European Union which is designed as an association of sovereign national states (a so-called “*Staatenverbund*”). The concept of a *Staatenverbund* was first mentioned in the *Maastricht Case*.²⁶ In the *Lisbon Case* the Court gives a clear and brief definition of this concept: It covers a close, long-term association of states that nonetheless remain sovereign, an association that 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 their Member States, *i. e.* the citizens of the states, remain the subjects of democratic legitimization.²⁷

In this context it is worth mentioning that the Federal Constitutional Court identifies European primary law as the Constitution of Europe, but with the constraint that it remains a derived fundamental order.²⁸

The Court decides that the Treaty of Lisbon neither transfers the constituent power nor abandons state sovereignty of the Federal Republic of Germany.²⁹ To justify its decision it differentiates in accordance with Jellinek’s “*Allgemeine Staatslehre*,” which envisions three components: state authority, state territory and state people.

According to the Court the European Union does not exercise territorial authority that replaces that of the Federal Republic of Germany.³⁰ Territorial state authority continues to exist unchanged under the changed conditions of cross-border mobility.³¹ Also, the Federal Republic of Germany will continue to have a state people. The citizenship of the Union is solely derived from the will of the Member States.³²

With reference to the *Maastricht Case* the Federal Constitutional Court explains that the Basic Law prohibits the transfer of competence to decide in its own competence (so-called *Kompetenz-Kompetenz*).³³ Moreover the integration program of the European Union must be sufficiently precise. So far as the people are not directly called upon to decide, only the

²⁶ *Id.* at 190.

²⁷ Lisbon Case, BVerfG, 2 BvE 2/08 from 30 June 2009, para. 229, available at: http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208.html.

²⁸ *Id.* at para. 231.

²⁹ *Id.* at para. 275.

³⁰ *Id.* at para. 345.

³¹ *Id.* at para. 344.

³² *Id.* at para 346.

³³ *Id.* at para 233.

German Parliament can take the responsibility for democratic legitimacy.³⁴ To the extent that the Member States elaborate the law laid down in the Treaties in such a way that an amendment of the law can be brought about without a ratification procedure or to a decisive extent by the institutions of the Union, a special responsibility is incumbent on the legislative bodies, apart from the Federal Government, as regards participation. In Germany, national participation has to comply with the requirements of Article 23 (1) of the Basic Law (responsibility for integration or “*Integrationsverantwortung*”).³⁵ This term is used by the Court on several occasions within the decision.³⁶ It is one of the key-terms of the decision since it was not used in the *Maastricht Case*.

In this context the Court points out that, within German jurisprudence, it must be possible to assert the responsibility for integration if obvious transgressions of the boundaries take place when the European Union claims competences and to preserve the inviolable core content of the Basic Law’s constitutional identity by means of identity review.³⁷ *Ultra vires* review (“*Ultra-vires-Kontrolle*”) and identity review (“*Identitätskontrolle*”) can result in Community or Union law being declared inapplicable in Germany. To preserve the viability of the legal order of the Community it is only to the Federal Constitutional Court to decide. In which type of proceeding the Federal Constitutional Court’s jurisdiction may be invoked for such review is explicitly left open by the Court.³⁸ The directness and intensity in which the Court addresses this issue is remarkable. This could be a reaction to several highly disputed judgments by the ECJ in the recent past, prominently highlighted by Roman Herzog and Lüder Gerken in an article published by the *Frankfurter Allgemeine Zeitung*.³⁹

With regard to the Treaty of Lisbon the Court highlights different aspects in order to prove that sovereign state authority will be preserved.

The Court points out that the Treaty of Lisbon confirms the principle of conferral (in contrast to the *Kompetenz-Kompetenz*) and provides for other mechanisms of protection that relate to specific competences within the Treaty of Lisbon.⁴⁰

³⁴ *Id.* at para. 236.

³⁵ *Id.* at para. 236.

³⁶ *Id.* at paras 236, 238, 243, 245, 264, 272, 317, 319, 365, 375, 409, 411 and 415.

³⁷ *Id.* at para. 240.

³⁸ *Id.* at para. 241.

³⁹ Roman Herzog and Lüder Gerken, *Stoppt den Europäischen Gerichtshof*, FRANKFURTER ALLGEMEINE ZEITUNG, Sept. 8th, 2008, p. 8.

⁴⁰ Lisbon Case, BVerfG, 2 BvE 2/08 from 30 June 2009, para. 299, available at: http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208.html.

The new provision on Treaty amendments under primary law are not held to be contrary to sovereign state authority because the Court finds that the institutions of the Union cannot independently amend the foundations of the European Union and the Treaties. This applies to the ordinary procedures (Article 48.2-5 TEU Lisbon), the simplified revision procedures (Article 48.6 TEU Lisbon), the so-called bridging clauses (*e.g.* Article 48.7 TEU Lisbon), and the flexibility clause (Article 352 TFEU).⁴¹ According to the Court the exercise of these instruments requires either a law within the meaning of Article 23 (1)[2] and [3] of the Basic Law or the approval of the *Bundestag* and, to the extent that this is required by the national provisions on legislation, the *Bundesrat*.⁴² Time will tell if these measures will effectively embed the *Bundestag* and the *Bundesrat* in the European decision making process.

Worth mentioning is that this jurisprudence seems to conflict with the wording of Articles 47.7(3) sentence 2 TEU Lisbon and 81.3.(3) sentence 2 TFEU, according to which national parliaments only have a *right* to express their *opposition*. Nevertheless the incompatibility should be of minor importance since a populous country like Germany should usually be interested in applying and not opposing the application of bridging clauses.

As a consequence of this part of its ruling the Court declared Article 1 § 4.3 no 3 of the Act Extending and Strengthening the Rights of the *Bundestag* and the *Bundesrat* in European Union Matters to be incompatible with the constitution. This norm further develops the rights of the *Bundestag* and the *Bundesrat* in relation to Articles 47.7(3) sentence 2 TEU Lisbon and 81.3(3) sentence 2 TFEU.

The Court also affirms its *Maastricht* jurisprudence concerning Article 6.4 TEU by stating that Article 311.1 TFEU (which is identical with the former provision) has to be understood as a statement of intent that does not establish a competence.⁴³

As further evidence for Germany not having lost its state sovereignty the Court depicts the right of a member state to withdraw from the Union, now codified in Article 50 TEU Lisbon,⁴⁴ and the fact that the Court itself possesses the right to pass a final decision.⁴⁵ Thereby the Court affirms settled case law.⁴⁶

⁴¹ *Id.* at para. 299 and 306.

⁴² *Id.* at para. 307.

⁴³ *Id.* para. 324.

⁴⁴ *Id.* at paras. 299 and 329.

⁴⁵ *Id.* at paras. 299 and 331.

⁴⁶ *Id.* at para. 340.

D. Sufficiently Weighty Responsibilities and Competences of the German *Bundestag*

It was also argued to the Court that the European Union has taken on tasks in all politically relevant areas of life⁴⁷ -- or, as formulated by another complainant -- there has been a sell-off of the state's very own competences.⁴⁸

According to the Court the principle of democracy sets content-related limits to the transfer of sovereign powers that do not already result from the inalienability of the state sovereignty.⁴⁹ In conformance and continuance with the *Maastricht Case* the Court explains that the *Bundestag*, representing the people, and the Federal Government borne by it, have to retain a formative influence on political developments in Germany.⁵⁰ European unification on the basis of a union of sovereign states under the Treaties may not be realized in a way that the Member States do not retain sufficient space for the political formation of the economic, cultural and social circumstances of life. This is supposed to apply in particular to areas that shape the citizens' circumstances of life, in particular the private space of their own responsibility and of political and social security, which is protected by fundamental rights, and to political decisions that particularly depend on previous understanding as regards culture, history and language and which unfold in discourses in the space of a political public that is organized by party politics and Parliament.⁵¹ The Court lists certain areas of democratic formative action comprising, *inter alia*, citizenship, the civil and the military monopoly on the use of force, revenue and expenditure including external financing and all elements of encroachment that are decisive for the realization of fundamental rights, especially as regards intensive encroachments on fundamental rights such as the deprivation of liberty in administration of criminal law and the placement in an institution. Further on these areas include cultural issues such as the disposition of language, the shaping of circumstances concerning the family and education, the ordering of the freedom of opinion, of the press and of association and the dealing with the profession of faith or ideology.⁵²

The Federal Constitutional Court comes to the conclusion that the German *Bundestag* still retains sufficiently weighty responsibilities and competences of its own.⁵³ In detail the

⁴⁷ *Id.* at para. 101.

⁴⁸ *Id.* at para. 103.

⁴⁹ *Id.* at para. 247.

⁵⁰ *Id.* at para. 246.

⁵¹ *Id.* at para. 249.

⁵² *Id.* at para. 249.

⁵³ *Id.* at para. 275.

Court deals with a variety of areas, namely criminal law,⁵⁴ judicial cooperation in civil matters⁵⁵ and administration in justice⁵⁶, common commercial policy,⁵⁷ deployment of the armed forces abroad⁵⁸ and social policy.⁵⁹

In contrast to the *Maastricht Case*, the Court tries to determine areas that have to remain in the competence of the *Bundestag* in a substantial manner, rather than concentrating on the different mechanisms that might safeguard the competences of the *Bundestag* like the principle of conferral, subsidiarity or proportionality. These principles are also mentioned within the *Lisbon Case*, but with comparative brevity.⁶⁰ A precise assignment of the areas that must be retained by the *Bundestag* also is not being achieved through this decision. Nevertheless, the Court's attempt to demarcate the constitutional identity as in substantive terms is at least a progressive attempt at clarity.

E. Conclusion

The *Lisbon Case* fixes the boundaries of integration in new clarity aligned with the tightened threat of declaring an act transgressing the boundaries of the Treaty of Lisbon as inapplicable in Germany. It is in line with the former *Maastricht Case*, absorbs the logic and standard of the latter and perpetuates it in a consequent manner insofar as the Treaty of Lisbon differs.

⁵⁴ *Id.* at para. 352.

⁵⁵ *Id.* at para. 367.

⁵⁶ *Id.* at para. 368.

⁵⁷ *Id.* at paras. 370.

⁵⁸ *Id.* at para. 381.

⁵⁹ *Id.* at para. 392.

⁶⁰ *Id.* at para. 304.

