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**Article abstract**

The 2009 decision on the ratification of the *Lisbon Treaty* by the German Federal Constitutional Court (FCC) is a landmark ruling on European integration. According to the FCC, the *Lisbon Treaty* is compatible with the *German Basic Law* because it does not lead to the creation of a European State.

Despite the presence of some continuity with the previous jurisprudence on German participation in the EU, the Lisbon ruling took some of the arguments to a new level with regard to national sovereignty and the limits of European integration. This article highlights the elements of the decision which were set on a path of collision with the interpretations of the European Court of Justice marking an increased distance between Luxembourg and Karlsruhe.

# KARLSRUHE-LUXEMBOURG: A NEW DISTANCE AFTER THE 2009 *LISBON TREATY* RULING

Francesca Astengo<sup>\*</sup>

The 2009 decision on the ratification of the *Lisbon Treaty* by the German Federal Constitutional Court (FCC) is a landmark ruling on European integration. According to the FCC, the *Lisbon Treaty* is compatible with the *German Basic Law* because it does not lead to the creation of a European State.

Despite the presence of some continuity with the previous jurisprudence on German participation in the EU, the Lisbon ruling took some of the arguments to a new level with regard to national sovereignty and the limits of European integration. This article highlights the elements of the decision which were set on a path of collision with the interpretations of the European Court of Justice marking an increased distance between Luxembourg and Karlsruhe.

Rendue en 2009, la décision de la Cour constitutionnelle fédérale allemande (FCC), portant sur l'intégration européenne, est historique. Selon la FCC, le *Traité de Lisbonne* est compatible avec la *Loi fondamentale allemande*, car elle ne conduit pas à la création d'un État européen.

Malgré la présence d'une continuité avec la jurisprudence antérieure sur la participation allemande à l'Union européenne, la décision de la FCC élève à un nouveau niveau les arguments relatifs à la souveraineté nationale et aux limites de l'intégration européenne. Cet article met en évidence les éléments de la décision qui entrent en conflit avec les interprétations préalablement retenues par la Cour de justice de l'Union européenne, marquant d'autant l'écart entre Luxembourg et Karlsruhe.

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The German Constitutional Court's 2009 ruling in the *Lisbon Case*<sup>1</sup> is a crucial turning point with regards to the resurgent role of national actors, coming forth as protagonists in a new kind of European political renationalization.

By declaring its compatibility with the *German Basic Law*,<sup>2</sup> the Federal Constitutional Court safeguarded the *Lisbon Treaty*, allowing for the ratification process to continue until its eventual entry into force, on December 1, 2009. However, it also delivered a potentially tremendous blow to the entire integration process. After the *Lisbon* ruling, the idea of European integration that had been taken for granted during the past half century could no longer be considered under the same terms. Pioneered by Judge Pescatore, the integration process, understood as an intrinsically dynamic, ever-increasing and self-sustained phenomenon in which the concept of transition is presumed to be in constant progression, could be no more.

The German Constitutional Court's decision provides an opportunity to reflect on a number of issues. The purpose of this article is to highlight elements of the German Constitutional Court's decision, specifically those set on a collision-course with the teachings of the European Court of Justice (ECJ). After recalling the main positions of the latter on fundamental aspects of European integration, we will focus on the revolutionary aspects of the Federal Constitutional Court's decision, in order to draw conclusions regarding the increased distance between Luxembourg and Karlsruhe.

## I. The Perspective of the European Court of Justice

The European Court of Justice has contributed immensely to the shaping of the European system. Its effort in portraying the European Communities (EC) first and Union later, as an independent and original legal order, has been a constant in the history of European integration. Through creative case-law, the Court has supplemented and clarified treaty provisions to an extent that often went well beyond the intentions of founding Member States.<sup>3</sup> The European Court of Justice is not directly involved in the elaboration or revision of the treaties, a task that is formally in the hands of Member States during the Intergovernmental Conference. However, through the development of fundamental principles such as direct effect and supremacy of EC law or state liability, the Court has generated enormous influence on

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<sup>1</sup> Judgement of the Second Senate of 30 June 2009, 2 BvE 2/082 BvE 2/08 and 5/08, 2 BvR 1010/08, 1022/08, 1259/08 and 182/09: BVerfGE 123, 267; [2010] 2 CMLR 712, (Federal Constitutional Court, Germany). Online: Das Bundesverfassungsgericht <[http://www.bverfg.de/entscheidungen/es20090630\\_2bve000208en.html](http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html)> [*Lisbon Case*].

<sup>2</sup> *Basic Law for the Federal Republic of Germany in the revised version published in the Federal Law Gazette Part III, classification number 100-1, as last amended by the Act of 21 July 2010*, Federal Law Gazette I at p 944, online: Bundesministerium der Justiz <[http://www.gesetze-im-internet.de/englisch\\_gg/englisch\\_gg.html](http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html)> [*German Basic Law*].

<sup>3</sup> See Alec Stone Sweet, *The Judicial Construction of Europe* (New York: Oxford University Press, 2004).

legal and political processes in Europe.<sup>4</sup>

During the past six decades, judges in Luxembourg have interpreted European integration as a lively and ever-evolving process. At times, it was considered a “stop and go” process, but never one of backtracking. According to the ECJ’s evolutionary approach, European integration is a dynamic process, in which powers and competences of the Union are constantly evolving, and treaties mark “a new stage in the process of creating an ever-closer union among the people of Europe.”<sup>5</sup>

The idea of intrinsic dynamism pervading European integration has been corroborated by steady and coherent jurisprudence aimed at characterizing the European Union as being completely independent from Member States.

This was the case already in the first years following the creation of the European Community. As early as 1963, the European Court of Justice stated that “the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights [...] and the subjects of which comprise not only Member States but also their nationals”,<sup>6</sup> concluding that *Treaty* provisions produce “direct effects and create individual rights which national Courts must protect.”<sup>7</sup> In support of its view, the ECJ pointed to the *Treaty*’s Preamble; it refers not only to governments but to peoples. In affirming that the *EC Treaty* was “more than an agreement which merely creates obligations between the contracting states”,<sup>8</sup> the Court made its willingness to transform a regional free-trade community into an autonomous legal order clear. It argued that “to ascertain whether the provisions of an international treaty extend so far in their effects it is necessary to consider the spirit, the general scheme and the wording of those provisions.”<sup>9</sup> In following years, the same Court stated that Community law took precedence over national law and could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as community law and without the legal basis of the community itself being called into question.<sup>10</sup> The Court held that by creating a Community of unlimited duration, with its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the member states had limited their sovereign rights and have thus created a body of law binding both their nationals and themselves.

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<sup>4</sup> Torben Spaaks, “Explicating the Concept of Legal Competence” in Jaap C Hage and Dietmar von der Pfordten, eds, *Concepts in Law* (New York: Springer 2009) 67; Donna Starr-Deelen, and Bart Deelen, “The European Court of Justice as a Federator” (1996) 26:4 *Publius: The Journal of Federalism* 81.

<sup>5</sup> *Treaty on European Union*, 7 February 1992, 1757 UNTS 267, 1992 OJ, C 191/1, art 1 [*Maastricht Treaty*].

<sup>6</sup> *Van Gend en Loos v Nederlandse Administratie der Belastingen*, C-26/62, [1963] ECR I-2 at I-12 [*Van Gend en Loos Case*].

<sup>7</sup> *Ibid* at I-12.

<sup>8</sup> *Ibid*.

<sup>9</sup> *Ibid* at I-14.

<sup>10</sup> See *Flaminio Costa v Enel*, C-6/64, [1964] ECR I-594.

Supremacy of EC law over national law both retroactively and prospectively,<sup>11</sup> entailed the supranational character of the Communities as the source of autonomous decisions *vis-à-vis* the authority of Member States. The ECJ even went as far as to claim that “the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure.”<sup>12</sup> In this last case, the Court hinted at the idea of supranational constitutional law.<sup>13</sup> It claimed that the absence of a written bill of rights contained in the Union’s primary law went hand in hand with an unwritten principle that ensures the protection of fundamental rights through a reference to “constitutional traditions common to the Member States.”<sup>14</sup>

The emphasis on the intrinsically dynamic character of European integration was part of a far-reaching process of “constitutionalization” as “the process by which the EC treaties evolved from a set of legal arrangements binding upon sovereign states, into a vertically-integrated legal regime conferring judicially enforceable rights and obligations on all legal persons and entities, public and private, within EC territory.”<sup>15</sup> By interpreting the grey areas and remedying any lacunae of the basic *Treaties* in a typically teleological and integrationist manner, the ECJ has sought to constitutionalize them and, ultimately, the Community’s legal system. Constitutionalization has evolved to the point where the *acquis communautaire constitutionnel* reflects the *acquis jurisprudentiel* carried out by the ECJ.<sup>16</sup> The European constitution was evoked by the Court both symbolically and functionally thanks to its fundamental power of control and guarantee of European citizens’ rights.

Decades before the debate became fashionable,<sup>17</sup> the European Court of Justice was already holding talks about a European constitution. In its 1986 *Les Verts* judgment, for the first time, the Court referred *expressis verbis* to the *Treaty* as a “constitutional charter,” concluding that the Community was “based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic

<sup>11</sup> *Amministrazione delle Finanze Stato v Simmenthal*, C-106/77, [1978] ECR I-630 at I-629.

<sup>12</sup> *Internationale Handelsgesellschaft mbH*, C-11/70, [1970] ECR I-1126 at I-1134.

<sup>13</sup> Koen Lenaerts, “Interlocking Legal Orders in the European Union and Comparative Law” (2003) 52:4 ICLQ 873.

<sup>14</sup> Agustín José Menéndez, “The European Democratic Challenge” (2009) 15:3 Eur LJ 277 at 304.

<sup>15</sup> Alec Stone Sweet, “Constitutional Dialogues in the European Community” in Joseph HH Weiler, Anne-Marie Slaughter, Alec Stone Sweet, eds, *The European Courts and National Courts - Doctrine and Jurisprudence* (Oxford: Hart Publishing, 1998) at 306.

<sup>16</sup> See Koen Lenaerts and Marlies Desormer, “Bricks for a Constitutional Treaty of the European Union: values, objectives and means” (2002) 27:4 Eur L Rev 377.

<sup>17</sup> The debate on the Constitution of Europe was officially launched at the 2001 Laeken Convention with the *Declaration on the Future of the European Union*. However, the “constitutionalisation without Constitution” issue is much older, to the point that ‘it is not an easy task to even identify at which point some scholars decided to take disparate legal doctrines, to baptize them as “constitutional”, and to put them together with the bold assertion that the whole was greater than the parts’, see Joseph HH Weiler, *The Constitution of Europe* (Cambridge: Cambridge University Press, 1999) at 226 [Weiler, *Constitution*].

constitutional charter, the Treaty.”<sup>18</sup> Again, in *Opinion 1/91*,<sup>19</sup> it used the same expression, confirming that unlike other international agreements (such as the one that established the European Economic Area, dealt with in this decision):

the EEC Treaty, albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a Community based on the rule of law. As the Court of Justice has consistently held, the Community treaties established a new legal order for the benefit of which the States have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only Member States but also their nationals. The essential characteristics of the Community legal order which has thus been established are in particular its primacy over the law of the Member States and the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves.<sup>20</sup>

Through doctrines of direct effect, supremacy, pre-emption and protection of human rights (none of which were included in any of the original treaties), the ECJ slowly but steadily transformed the Community’s legal order from an international to a constitutional one, based on a quasi-federal model. It provided for the most significant contribution to the European Communities legal order’s constitutionalization. Through a debate that became particularly intense in the last decade,<sup>21</sup> the ECJ argued that the European Union already had a *de facto* constitution. Based on the same premise, others concluded that Europe did not need the formal adoption of a constitution which would be both useless and even harmful to the integration process.<sup>22</sup> In very general terms, two other main arguments concerning the “constitution of Europe” consisted of Europe not having a constitution but needing one, and that general fundamental rules spread across treaties and derived from ECJ’s decisions required coherent codification. A third position held that the European Union could not adopt a constitution as long as one of the fundamental conditions for its conclusion, the existence of a European people (rather than peoples), was lacking. This is the well-known *no demos* argument that, as we will later see, is embraced by the German Federal Constitutional Court.

All the same, the objective transformation of the European Union from its

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<sup>18</sup> *Parti écologiste 'Les Verts' v European Parliament*, C-294/83, [1986] ECR I-1357 at I-1365 [Les Verts].

<sup>19</sup> *Opinion delivered pursuant to the second subparagraph of Article 228 (1) of the Treaty - Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area*, C-1/91, [1991] ECR I-6079 [*Opinion 1/91*]. See also *Opinion given pursuant to Article 228 (1) of the EEC Treaty*, C-1/76, [1977] ECR I-741 at I-758; *Order of the Court of 13 July 1990 in Zwartveld and others*, C-2/88, [1990] ECR I-3367 at I-3372 and *Judgment of 23 March 1993 in Beate Weber v European Parliament*, C-134/91, [1993] ECR I-1093.

<sup>20</sup> *Opinion 1/91*, *supra* note 19 at I-6102.

<sup>21</sup> Among others, see Jo Shaw, “Process and Constitutional Discourse in the European Union” (2000) 27:1 *JL & Soc’y* 4; Jean-Claude Piris, “Does the European Union have a Constitution? Does it Need One?” (1999) 24:6 *Eur L Rev* 557; Ingolf Pernice, “Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?” (1999) 36:4 *CML Rev* 703 and Paul Magnette ed., *La Constitution de l’Europe* (Brussels : Editions de l’Université de Bruxelles, 2002).

<sup>22</sup> See Weiler, *Constitution*, *supra* note 17.

initial stage as an international organization founded on treaties to its current status, much more deep and complex, was largely made possible by the sapient use of the preliminary ruling procedure.<sup>23</sup> It implied the active involvement of national judges, along with individual litigants and their lawyers, in cases originating in national courts and later brought before the ECJ whenever a question of interpretation of EC law arose.<sup>24</sup> In this regard, it is important to note that the Luxembourg Court has always seen itself as the only authority capable of ruling on the validity and applicability of European law. In fact, treaties (particularly art. 164 and art. 173 of the *EC Treaty*) assign the Court with the prerogative of resolving interpretative ambiguities concerning EC law. Thus, the institutionalization of judicial review on the Community level bars Member States from substituting their treaty-interpretations for that of the ECJ. The supremacy of the European legal order is based on an argument that the Court also invokes to justify its role as final arbiter: the necessity of ensuring uniformity and effectiveness in the application of EC law in the context of a coherent legal order attempting to effectively integrate Member States and their peoples. However, there is no provision in the treaties for what under German constitutional law is termed *Kompetenz-Kompetenz*: the issue of who shall have the ultimate authority to determine what comes within the sphere of application of federal, in this case Community law.

In the eyes of the ECJ, proof of the existence of a *de facto* European constitution lies both in the European system itself and in its relationship with the legal systems of Member States. Professor Weiler used the expression “dual character of supranationalism”<sup>25</sup> some thirty years ago to capture the way in which the development of EC law and its supremacy is the achievement of both Community institutions and its Member States.

The distinctive character of the European Union legal system requires that Member States fully cooperate in order to ensure that the European system functions. On one side, at the European level, the organization of public powers and the protection of individuals’ rights bear witness to the constitutional content of treaties and legislation. On the other, this same content is legitimized at the national level through formulas and European clauses found in national constitutions that have been interpreted as the basis for transfers of national sovereignty toward European institutions. Direct effect and supremacy of EC law over national law, even when it comes to norms contained in national constitutions, make up the very foundation of the supranational character of an integrated Europe. In the ECJ’s monist perspective, supremacy implies that Community norms should always take precedence over and be applied instead of any conflicting national legislation. This should be the case not only for Union law, but also for national legal orders. In fact, the latter are integrated into the European legal order, in a typically hierarchical manner. The only *caveat* is

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<sup>23</sup> Consolidated version of the Treaty establishing the European Community, 29 December 2006, [2006] OJ, C 321 E/144, art 234 (formerly art 177 of the *Treaty establishing the European Community*).

<sup>24</sup> See Karen Alter, *Establishing the Supremacy of Community Law* (Oxford: Oxford University Press, 2001).

<sup>25</sup> See Joseph Weiler, “The Community System: the Dual Character of Supranationalism” (1981) 1:1 YB Eur L 267.

that European law prevails over national law within the entire scope of Community law. Such a scope has grown exponentially over the years.

According to the Court's "European monism",<sup>26</sup> national judges should make no substantive decision on the legality of EC norms but should instead dismiss the action for lack of jurisdiction. Legality under European law is the only valid criteria for the application of European legislation to Member States and the ECJ alone has the authority to determine whether an act is in fact legal under European law. Even if a national Constitutional Court claimed jurisdiction and then decided to dismiss the case on substantive grounds, this assertion of jurisdiction alone would be *ultra vires*, incompatible with EC law. From the ECJ's perspective, its interaction with national judges has resulted in an ever-stronger common affinity related to fundamental principles and constitutional values both at European and national levels. The same synergy of intents also prevails in the progressive guarantee of the democratic principle and in common efforts to reduce the recognized EU democratic deficits. This strategy of democratization took the shape of both an increased protection guarantee of fundamental rights and a reinforcement of the role of the European Parliament. Since assuming that fundamental rights were enshrined in the general principles of Community law, the observance of which it ensured,<sup>27</sup> the ECJ has acted increasingly as a court of rights in an effort to strengthen the democratic legitimacy of the European Union in a mutually reinforcing perspective.

These developments have to be put into perspective with the *Lisbon Treaty*, the latest step toward the EU gaining more authority in the field of human rights. With the EU's accession to the *European Convention on Human Rights* and the legally binding force of the *2000 Charter of Fundamental Rights*, the protection of rights is absorbed by the European level. The EU has a catalogue of rights to be interpreted in light of national identities and constitutional traditions common to Member States.<sup>28</sup>

Finally, the ECJ was instrumental in strengthening the position of the European Parliament – the only institution directly elected by the people that evolved from an essentially consultative body of national parliamentarians to a legislative institution whose authority to act is not confined to acts of delegation by the Member States.<sup>29</sup> The legislative and representative role of the European Parliament contributed to making the European Union an independent and legitimized system. Landmark rulings helped define its political position within the European Communities and increased its importance as both a legislative and a democratic institution, described as "one of the most powerful elected assemblies in the world."<sup>30</sup>

<sup>26</sup> See Mattias Kumm, "Who is the Final Arbiter of Constitutionality in Europe?" (1999) 36:2 CML Rev 351.

<sup>27</sup> *Stauder v City of Ulm*, C-29/69, [1970] ECR I-419.

<sup>28</sup> *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community*, 13 December 2007, [2007] OJ, C 306/1, art 6 [*Lisbon Treaty*].

<sup>29</sup> Berthold Rittberger, *Building Europe's Parliament* (Oxford: Oxford University Press, 2005) at 2.

<sup>30</sup> Simon Hix, Abdul G Noury & Gérard Roland, *Democratic Politics in the European Parliament* (Cambridge: Cambridge University Press, 2007) at 3.



The reasoning in the 1980 *Isoglucose* case,<sup>31</sup> regarding the democratic significance of parliamentary involvement in decision-making, which “[...] reflects at Community level the fundamental democratic principle that the peoples should take part in the exercise power thought the intermediary of a representative assembly”,<sup>32</sup> has been reiterated in a series of cases in which the ECJ demonstrated its commitment to the promotion of the democratic principle within the European Union.<sup>33</sup>

The general idea confirmed in the following jurisprudence is that procedures of the EU are based on representative democracy, as the European Parliament is comprised of the representatives of the Union’s citizens. In the EJC’s perspective of a quasi-federal European system that relies on legal analogies of constitutional rather than international law, the European Parliament plays the crucial role of a fully-fledged legislature. It fulfills the classic role of parliament in a democratic system: acting as the representative body of the European people(s), creating legislation, and holding the executive (Commission) accountable. This has been made possible by the actions of Member States through successive treaty revisions that include the European Parliament’s direct election, the extension of its competencies, its more incisive control within the Commission and an increased co-decision procedure. In short, these are all the achievements that allow the *Lisbon Treaty* to affirm that the EU is founded on representative democracy.

## II. The Perspective of the German Federal Constitutional Court

Federal Constitutional Court [FCC] jurisprudence concerning the “European phenomenon” has a decades-long tradition from which its basic arguments can be retraced to milestones rulings like *Solange I* of 1974,<sup>34</sup> *Solange II* of 1986,<sup>35</sup> *Maastricht* of 1993,<sup>36</sup> the case of the organization of the *European Market of Bananas* of 2000<sup>37</sup> and the case regarding the *European arrest warrant* of 2005.<sup>38</sup> While dealing with different aspects of European integration, sometimes in a rather tense fashion due to the importance of the matters at stake (for example, the protection of fundamental rights), in none of these decisions did the Court manifest an openly hostile attitude toward European law or the *dicta* of the European Court of Justice. On

<sup>31</sup> *SA Roquette Frères v Council (Isoglucose)*, C-138/79, [1980] ECR I-3334.

<sup>32</sup> *Ibid* at I-3360.

<sup>33</sup> See *Les Verts*, supra note 18; *Commission v. Council*, C-165/87, [1987] ECR I-1493; *EP v Council (Chernobyl)*, C-70/88, [1990] ECR, I-2041.

<sup>34</sup> *Solange I - Internationale Handelsgesellschaft von Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, 2 BvG 52/71, BVerfGE 37, 271 [1974] 2 CMLR 540 (Federal Constitutional Court, Germany).

<sup>35</sup> *Solange II - Wünsche Handelsgesellschaft*, 2 BvR 197/83, BVerfGE 73, 339 [1987] 3 CMLR 225 (Federal Constitutional Court, Germany).

<sup>36</sup> *Brunner v The European Union Treaty*, 2 BvR 2134/92 & 2159/92, BVerfGE 89, 155 [1994] 1 CMLR 57 (Federal Constitutional Court, Germany) [*Maastricht*].

<sup>37</sup> *Bananas case*, 2 BvL 1/97, BVerfGE 102, 147 [2000] (Federal Constitutional Court, Germany).

<sup>38</sup> *Europäischer Haftbefehl*, 2 BvR 2236/04, BVerfGE 1, 203 [2005] 1 CMLR 16 (Federal Constitutional Court, Germany).

the contrary, in the latter two rulings, the Karlsruhe Court avoided friction with the ECJ, after the concerns raised by the *Maastricht* decision, where it expressed its discontent with the ECJ assertion of competence in monitoring the boundaries of EC and Member States law and claimed this power for itself.

In the *Lisbon Case* the FCC devotes ample space to recalling the fundamental bases of its own jurisprudence.<sup>39</sup> Never recognizing the superiority of the European system, but relying instead on a dualist approach, the Court qualifies the European Union as a union of states, a derived entity, as opposed to a sovereign one, whose legitimization relies on the national constitutional orders; it defines Member States as the masters of the *Treaty*; recognizes supremacy of EC law within the limits of the national order; insists on the conferred character of the powers transferred to the EU, which is denied the competence to decide on its own competence (*Kompetenz-Kompetenz*); and affirms the necessity of preserving the essential core of German constitutional identity, as prescribed by the “eternity clause” contained in Article 79 of the *Basic Law*.<sup>40</sup> Various studies have emphasized both the continuity and break of the *Lisbon case* with German jurisprudence.<sup>41</sup> However, in 2009, the Federal Constitutional Court took arguments employed in previous cases to a new level.

The Federal judges were asked to assess the constitutionality of the *Lisbon Treaty*,<sup>42</sup> in response to a number of constitutional complaints that challenged the German legislation approving the *Treaty*, on the grounds that it violated democratic rights. The concern was that the *Treaty* was sending the EU on its way to becoming a *de facto* super-state.

The FCC rejected every objection that challenged the compatibility of the

<sup>39</sup> *Lisbon Case*, *supra* note 1 at paras 229-224 and 240-241.

<sup>40</sup> Article 79.3 of the *German Basic Law* contains the so-called eternity clause which deems any constitutional revision attempting at the basic principles of the German state to be inadmissible. These principles include democracy, rule of law, the federal and social state, the Republic form, fundamental rights and human dignity, see *German Basic Law*, *supra* note 2, art 79.3.

<sup>41</sup> Dimitrios Doukas, “The Verdict of the German Federal Constitutional Court on the Lisbon Treaty: Not Guilty, but Don’t Do It Again!” (2009) 34:6 Eur L Rev 866; Christoph Schönberger, “Lisbon in Karlsruhe: Maastricht Epigones at Sea” (2009) 10:8 German Law Journal 1201; Frank Schorkopf, “The European Union as an Association of Sovereign States: Karlsruhe’s Ruling on the Treaty of Lisbon” (2009) 10:8 German Law Journal 1219; Daniel Halberstam, and Christoph Möllers, “The Federal Constitutional Court says Ja zu Deutschland” (2009) 10:8 German Law Journal 1241; ChristianTomuschat, “The Ruling of the German Constitutional Court on the Treaty of Lisbon” (2009) 10:8 German Law Journal 1259; M. Niedobitek, “The Lisbon case of 30 June 2009: A comment from the European Law Perspective” (2009) 10:8 German Law Journal 1267.

<sup>42</sup> In Germany, the *Lisbon Treaty* was approved by the Parliament in 2008, with an overwhelming majority. However a number of high profile constitutional complaints from parliamentary groups (*Die Linke*) and individuals MPs were made to the Federal Constitutional Court to assess the *Treaty*’s compatibility with the *German Basic Law*. More precisely the complaints challenged the Act of 8 October 2008 on the *Treaty of Lisbon* of 13 December 2007 (Federal Law Gazette 2008 II, p 1038), the Act Amending the Basic Law (Articles 23, 45 and 93) of 8 October 2008 (Federal Law Gazette 2009 I, p 1926) which at the time had already been promulgated, but not yet entered into force and the Act Extending and Strengthening the Rights of the *Bundestag* and the *Bundesrat* in European Union Matters (Bundestag document 16/8489) which had been adopted, but not yet signed and promulgated.

*Lisbon Treaty* with the *Basic Law*. On the contrary, it preserved the *Treaty* by discounting its value. With a drop of venom, the Court embraced the *Lisbon Treaty*, because it did not constitute a serious threat to German constitutional order.

In contrast, the FCC ruled that the national law of implementation that defined the participatory powers of German legislative bodies was not constitutional because it did not sufficiently strengthen those powers.<sup>43</sup> According to the Court, despite its declared goal, the law is incompatible with Article 38.1, when read in conjunction with Article 23.1, of the *Basic Law* because it did not sufficiently guarantee the involvement of the Parliament in European law-making and treaty-amendment procedures. Adding to the *Maastricht* decision, a ruling that emphasized the importance of national institutions' involvement in the transfer of powers to the EU, the Court provides the legislator with concrete guidelines. These indicate that whenever EU institutions wish to apply strategic decisions under the *Lisbon Treaty*, the German government may agree to them only after having obtained the German Federal Parliament (*Bundestag*) and the German Federal Council of States' (*Bundesrat*) approval.

The strategic decisions in question mainly concern potential *de facto* treaty amendment procedures by which EU institutions would be able to expand their competences or modify their decision. This, in effect, would lead to the creation of rules without having to resort to regular ratification procedures for new treaties. The most prominent example is the so-called *passerelle* clause (or simplified treaty revision procedure), allowing the European Council to unanimously decide to replace unanimous voting in the Council of Ministers with qualified majority voting in specified areas with the previous consent of the European Parliament, and move from a special legislative procedure to the ordinary legislative procedure. Thus, the Court adds an extra guarantee for the German bicameral legislature, as the *Treaty* stipulates that national Parliaments are to be informed six months in advance and each of them may cast a binding veto, but it does not require ordinary ratification in all Member States. Also, with regards to the application of the "flexibility clause" which allows for EU action to attain its goals in the absence of specific legal grounds, the Court requires prior parliamentary scrutiny (and approval) by both houses. This is to prevent that future treaty amendments are introduced by tacit consent, a practice which would undermine the prerogatives of the German legislature, and ultimately, sovereign statehood.

What at first might seem to be a typically internal matter has, in fact, much wider implications. With 421 paragraphs condensed in to 80 pages, the Federal Constitutional Court goes well beyond the questions raised by complainants<sup>44</sup> and

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<sup>43</sup> Following the Federal Constitutional Court ruling, in accordance with the request of "taking into account the provisos specified in this decision" (*Lisbon Case, supra* note at para 420), in September 2009 the Bundestag and Bundesrat adopted three new accompanying laws which ensure a better involvement of the Parliament in any possible future changes to the *Lisbon Treaty*.

<sup>44</sup> It is interesting to note that on the 421 paragraphs, only fourteen (paras 406-419) are actually devoted to justify the unconstitutionality of the ordinary legislation on the participation of the Bundestag and Bundesrat in European affairs.

takes the opportunity to examine the EU legal system in its entirety. It offers a reading which both departs from previous decisions and collides with the ECJ's approach.

The FCC does not confine its decision to the framework of constitutional aspects of German participation in the integration process, but analyses the EU by emphasizing its limits. Such an onset in EU content is based on the double assumption that Member States are still the master of the treaties (and can therefore condition the system they have voluntarily created) and that the German people are holders of a democratic right to a legislature that is endowed with the power to determine its destiny.<sup>45</sup> European integration itself is the expression of national sovereignty. Never before has the Federal Constitutional Court insisted on the alien character of the EU and never before has the core of the entire European construction been shifted to the national level. National constitutions are actually put at the centre of the system and become the very parameter of any developments in European integration.

According to the Federal Constitutional Court, the *Lisbon Treaty* is compatible with the *German Basic Law* because it does not lead to the creation of an EU State. Under the *Treaty*, the European Union would still remain an association of sovereign states to which the principle of conferral applies, and in any event, federal statehood for the Union could not be pursued on the basis of current integration clauses contained in the *Basic Law*. A few revealing points pervade the FCC's reasoning: an emphasis on international rather than the European order, very few references to the European Court of Justice (even though ECJ jurisprudence is recalled in the end), and a series of *obiter dicta* intended to reference future EU developments.

The FCC uses two types of arguments to support the idea that the EU continues to form a union based on international law, permanently maintained by the will of sovereign Member States. Firstly, the Court emphasizes German constitutional order (A). Secondly, it analyses the shortcomings of the EU regarding the democratic principle, one of the fundamental standards imposed by the *Basic Law* (B).

## A. Germany and the European Union

The Court acknowledges that openness towards international law is one of the cornerstones of the German constitutional system. It also confirms that "the *Basic Law* grants the legislature powers to engage in a far-reaching transfer of sovereign powers to the European Union."<sup>46</sup>

After experiencing devastating wars, in particular between European peoples, the Court recalls that the Preamble of the *Basic Law* emphasizes not only the moral basis of responsible self-determination, but also the willingness to serve world peace as an equal partner in a united Europe. This willingness has taken concrete

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<sup>45</sup> *German Basic Law*, *supra* note, art 38, on the election of the Bundestag.

<sup>46</sup> *Lisbon Case*, *supra* note 1 at para 226.

shape through combined intentions to integrate the European Union<sup>47</sup>, participate in intergovernmental institutions<sup>48</sup> and join systems of mutual collective security<sup>49</sup> as well as by the ban on wars of aggression.<sup>50</sup> In short, the *Basic Law* prescribes Germany's participation through mutual peaceful balancing of interests, established between the states and organized cooperation in Europe.

Here, the Court's effort to portray the EU as another example of international commitment, rather than a unique supranational actor, as previously described by the ECJ's interpretation, is quite evident. Even though it admits that "the development of the European Union, [...] also comprises a political union, in addition to the creation of an economic and monetary union [...] which means the joint exercise of public authority, including the legislative authority, [even] in traditional core areas of the state's competence",<sup>51</sup> in qualifying the EU as an association of states, the Karlsruhe Court emphasizes the centrality of the states by using a legal figure where the associative link is very weak. In fact the Court explains that Article 23 of the *Basic Law* grants participatory powers to develop a European Union that is described as an association of sovereign national states (*Staatenverbund*). The concept of *Verbund* covers a close long-term association of states that remain sovereign, an association that exercises public authority on the basis of a treaty, whose fundamental order, however, is subject to the discretion of Member States alone and in which its population, i.e. citizens, remain the subjects of democratic legitimization.

The movement toward an opening of state-system regulation to the peaceful cooperation of nations and European integration "is a voluntary, mutual *pari passu* commitment which secures peace and strengthens the possibilities of shaping policy by joint coordinated action."<sup>52</sup> The powers transferred to the EU, however, are "granted under the condition that the sovereign statehood of a constitutional state is maintained [...] and that at the same time the member states do not lose their ability to politically and socially shape the living conditions on their own responsibility."<sup>53</sup>

There is therefore no contradiction, the Court explains, between the principle of openness and the fact that the *Basic Law* does not grant German state bodies the right to transfer sovereign powers in such a way that their exercise can independently establish other competences for the EU. In other words the *Basic Law* prohibits the transfer of competence to decisions regarding on its own competence (*Kompetenz-Kompetenz*).<sup>54</sup>

Furthermore, the German Court distances itself from the ECJ's positions concerning the integration of national orders into the European one. In open contradiction with the basic exclusion of any national control over EC legislation in

<sup>47</sup> *German Basic Law*, *supra* note 2, art 23.1.

<sup>48</sup> *Ibid*, art 24.1.

<sup>49</sup> *Ibid*, art 24.2.

<sup>50</sup> *Ibid*, art 26.

<sup>51</sup> *Lisbon case*, *supra* note 1 at para 248.

<sup>52</sup> *Ibid* at para 200.

<sup>53</sup> *Ibid* at para 226.

<sup>54</sup> *Lisbon Case*, *supra* note 1 at para 233.

the name of uniform application, the Court goes as far as to affirm its own competence in reviewing “whether legal instruments of the European institutions and bodies keep within the boundaries of the sovereign powers accorded to them by way of conferred power.”<sup>55</sup> By affirming its own role in verifying whether “the inviolable core content of the constitutional identity of the Basic Law is respected,”<sup>56</sup> the Court brings the discourse within the domestic framework. It explains that the exercise of this review of competence, which is rooted in constitutional law, follows the *Basic Law*’s principle of openness toward European Law, and therefore is not in contrast with the principle of loyal cooperation as affirmed by Article 4.3 of the *Lisbon Treaty*. Because of expanding integration, the Court explains, fundamental political and constitutional structures of sovereign Member States (recognized by Article 4.2 of the *Lisbon Treaty*) cannot be safeguarded in any other way. By way of a sweetened reflection, the Court concludes that “the guarantee of national constitutional identity under constitutional and under Union law go *hand in hand* in the European legal area”<sup>57</sup> – a European area in which national authority is stronger than ever.

Here, there is a quite a distance from the prohibition of national review regarding EC acts. In the Federal Court’s theoretical approach, it is a question of setting the standards of European integration by making national constitutions its very parameter. The ECJ’s monist approach (of *Vand Gend en Loos* and *Costa/Enel*), which implies the integration of national level into the EU level, is completely overturned.

The German court’s perspective nationalizes the idea of the primacy of EU law itself. The supremacy of EU law – affirmed in Declaration no. 17 on Primacy annexed to the Final Act of the *Lisbon Treaty* – is emptied of any substantial meaning as it is examined through national and international eyes, not European ones. The Court affirms that “primacy of application of European law remains, even with the entry into force of the Treaty of Lisbon, an institution conferred under an *international agreement*, i.e. a derived institution which will have legal effect in Germany only with the *order to apply* the law given by the Act Approving the Treaty of Lisbon.”<sup>58</sup> It further explains that this connection of derivation is not altered by the fact that the primacy of application is not explicitly provided for in the treaties, but has been obtained in the early phase of European integration in the ECJ’s case-law, by means of interpretation. As a result of the continuing sovereignty of Member States, if the order to apply EU law is lacking, the inapplicability of such legislation to Germany is underlined by the Federal Court itself. This concern must also be formulated “if within or outside the sovereign powers conferred”,<sup>59</sup> there is a violation of German constitutional identity, which is inalienable pursuant to Article 79.3 of the *Basic Law*.

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<sup>55</sup> *Lisbon Case*, *supra* note 1 at para 339.

<sup>56</sup> *Ibid* at para 240.

<sup>57</sup> *Ibid*.

<sup>58</sup> *Ibid* at para 339.

<sup>59</sup> *Lisbon case*, *supra* note 1 at para 239.

This is a clear departure from the ECJ's interpretation of the EU as a "new original and independent system"<sup>60</sup> whose subjects are Member States and their nationals and whose authority relies on national sources. The very idea that primacy of EU law results from a self-imposed limitation of sovereignty by Member States, clashes with the German court's affirmation of its own competence in asserting the applicability of primacy (through the order to apply), based on the persisting sovereignty of member states.

The judges in Karlsruhe use the principle of conferral to thwart any ambition for a "Constitution of Europe". The latter "remains a derived fundamental order"<sup>61</sup> that establishes a supranational autonomy which is always limited factually. The concept of autonomy, the Federal Court explains (by recalling C. Schmid), can only be understood as "autonomy to rule", which is independent but derived – in other words, it is accorded by other legal entities. In contrast, "sovereignty under international law and public law requires independence of an alien will particularly for its constitutional foundations."<sup>62</sup> It is not decisive here whether an international organization has legal personality (as it is the case for the EU after *Lisbon*) – that is, whether it can bindingly act as a subject in legal relations under international law. What is crucial is how the fundamental legal relationship between the international organization and Member States that have created the organization and vested it with legal personality, is elaborated.<sup>63</sup>

## **B. The structural problem of the European Union**

In addition to the emphasis on the persisting centrality of national constitutional orders, the German Constitutional Court uses a second argument to support of the view that the European Union is another version of general international order. This argument is provided by the analysis of the EU itself. At the centre of its constitutionality review, the Court refers to the EU's structural problem, or its limitations with regards to the democratic principle.

Throughout its ruling the Court makes many references to the fundamental question of democracy. It describes the right to vote in "free and equal election of the body that has a decisive influence on the government and the legislation of the Federation"<sup>64</sup> as "the citizens' most important individually assertable right to democratic participation guaranteed by the Basic Law,"<sup>65</sup> and the source of human dignity and personal freedom. In the most solemn way, it declares that the principle of democracy is inviolable and not amenable to weighing with other legal interests and that amendments of the *Basic Law* affecting such a principle are inadmissible.<sup>66</sup>

<sup>60</sup> *Van Gend en Loos v Nederlandse Administratie der Belastingen*, *supra* note 6.

<sup>61</sup> *Lisbon Case*, *supra* note 1 at para 231.

<sup>62</sup> *Ibid.*

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid* at para 210.

<sup>65</sup> *Lisbon case*, *supra* note 1 at 210.

<sup>66</sup> The Court further explains that the "so-called eternity guarantee takes the disposal of the identity of the free constitutional order even out of the hands of the constitution-amending legislature. The constituent

The FCC focuses on the connection between the democratic system prescribed by the *Basic Law* and the level of independence that has been attained by the European Union. According to the Court, the extent of the EU's freedom of action has steadily and considerably increased, not least by the *Lisbon Treaty*, to the point that in some fields of policy the EU has a shape analogous to that of a federal state. In contrast, internal decision-making and appointment procedures remain predominantly committed to a pattern of international law. In addition, the primary responsibility for integration is in the hands of national constitutional bodies that act on behalf of the peoples. As long as no uniform European people can express its majority's will in a politically effective manner, the Court concludes, the peoples of the European Union, represented by their respective Member States, are the decisive holders of public authority, including EU authority.

An analysis of European institutions helps to corroborate this argument. At this stage of integration, the Court explains, the Council is not a second parliamentary chamber, the Commission is not a real European government, as it is not accountable either to the European Parliament (let alone the European people), and the latter only represents the people(s) of Member States. The European Parliament's shortcomings are weighed against democratic requirements existing in states: the equal right to vote, the majority principle and the existence of a parliamentary opposition. Neither as regards to its composition nor its position in the European competence structure is the European Parliament sufficiently prepared to take representative and assignable majority decisions as uniform decisions on political direction. Furthermore, its election does not take due account of equality (here the Court touches the old issue of underrepresentation of the German people in European instances) and it is not competent to take authoritative decisions on political direction. Because it represents peoples of the Member States and not the European people (*Unionsvolk*), the EU cannot support a parliamentary government. Regarding the system of government and opposition party-politics, the EU cannot manage itself in such a way that a decision on political direction taken by the European electorate could have a politically-costly effect. The institution that the ECJ contributed to developing into an accomplished legislature (at least in the first pillar) is dismissed by the German Court through the assertion that it is a body that fails to comply with the democratic criteria (equal right to vote, majority principle, the existence of a parliamentary opposition, spelled out in § 213) it has set up.<sup>67</sup> According to the Court, the gap between the decision-making power of the EU's institutions and the citizens' democratic power of action in Member States is only reduced, but not completely compensated for, by the increased competences of the European Parliament. The structural democratic deficit affecting all European institutions and decision-making procedures is not substantially changed by the *Lisbon Treaty*, which "does not lead to a new level of development of democracy"<sup>68</sup> and legitimization can only be in the hands of the Member States' citizens. This is the "*no demos*, no Constitution" argument.

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power has not granted the representatives and bodies of the people a mandate to change the constitutional principles which are fundamental pursuant to Article 79.3 of the Basic Law". See *Lisbon Case*, *supra* note 1 at 216.

<sup>67</sup> *Ibid* at para 213.

<sup>68</sup> *Lisbon Case*, *supra* note 1 at para 295.



The German Court envisions democracy as being first and foremost associated to the nation state.<sup>69</sup> In its view, the shortcomings of the EU, with regards to the democratic principle measured in opposition to German standards, require the involvement of the German parliament in the elaboration of any future development of European integration. Any new treaty would require German citizens to decide on its acceptance or rejection; any significant step toward the extension of the EU's competences (for example, the change from unanimity to qualified voting in the Council, or resorting to the general legislative clause of Article 352 of the *Lisbon Treaty*) must be approved by a parliamentary statute, as sole governmental consent does not meet the requirements of democratic legitimacy.<sup>70</sup>

In keeping with its approach, emphasizing the limits of the EU, the Federal Constitutional Court builds a line of defense against any possible infringements of German sovereignty, stating that certain fields must forever remain under German control.<sup>71</sup> These include "areas of the citizen's personal development and the shaping of living conditions by social policy as well as political decisions that rely especially on cultural, historical and linguistic perceptions."<sup>72</sup> Essential areas of democratic formative action comprise, *inter alia*: citizenship; the administration of criminal law; the civil and military monopoly on the use of force; fundamental fiscal decisions on revenue and expenditures; provisions governing the media; dealings with religious communities; and the shaping of citizens' lives via social policy and important decisions on cultural issues, e.g. the education system.<sup>73</sup> Because cultural differences in these areas prevented the creation of a homogenous political community as a source of democratic legitimization, the principles of democracy, as well as the principle of subsidiarity, require the transfer of sovereign powers to the EU to be restricted. It cannot be overlooked, the judges warn, that the public perception of factual issues and of political leaders remains connected to patterns of identification related to the nation-state, language, history and culture.<sup>74</sup> Despite a constant increase of EU competences, what matters in the Court's eyes is the guarantee that the Federal Republic maintains a substantial role in decision-making concerning crucial aspects of its citizens' life.

The general conclusion to this reasoning is no different to what is affirmed in § 264, which entertains the notion that Germany could refuse to further participate in the European Union if an imbalance between the character and extent of sovereign powers exercised and the degree of democratic legitimization arises in the course of European integration development.

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<sup>69</sup> Erik Ovar Eriksen & John Erik Fossum, "Bringing Democracy Back In" (2011) 17:2 Eur LJ 153.

<sup>70</sup> On the specific requirements concerning powers that should be attributed to the Parliament with regard to the ordinary and simplified revision procedures, the so-called bridging clauses and the flexibility clause, see *Lisbon Case*, *supra* note 1, at paras 306,309,312, 315, 319, 320, 323, 328, 400, 413-419.

<sup>71</sup> Armin Steinbach, "The Lisbon Judgement of the German Federal Constitutional Court: New Guidance on the Limits of European integration?" (2010) 11:4 German Law Journal 367.

<sup>72</sup> *Lisbon case*, *supra* note 1 at para 251.

<sup>73</sup> *Ibid* at para 249.

<sup>74</sup> *Ibid* at para 251

The possibility of withdrawal is contemplated as an unproblematic solution, as “the process of European integration is not irreversible”. The membership of the Federal Republic of Germany depends instead on its lasting and continuing will to be a member of the European Union. The legal boundaries of this intent depend on the *Basic Law*.<sup>75</sup> Regardless of a commitment made under agreement for an unlimited period, Germany’s withdrawal from the EU may not be prevented by other Member States or the EU’s autonomous authority. This, the Court explains, would not be secession from a state union, which is problematical under international law, but merely the withdrawal from an entity founded on the principle of the reversible self-commitment.

### III. Conclusion

In their approach vis-à-vis European integration, the European Court of Justice on one side, and the Federal Constitutional Court on the other, moved on two parallel plans and opposite directions. As much the first attempted to place the European phenomenon at the supranational level, the second engaged at bringing it back on a more intergovernmental one.

The distance between these two courts is mostly evident in the *Lisbon* case, where the spirit of collaboration implicit in the *Solange II* philosophy<sup>76</sup> and auspicated in *Maastricht*<sup>77</sup> was replaced by a more defensive, if not confrontational, approach. A few firsts in the *Lisbon* ruling, such as the definition of essential limits to further integration, the Federal Court’s role in monitoring *ultra vires* EU acts and the original analysis of the European Union itself, are deemed to greatly influence not only the role of Germany in the EU, but ultimately future developments of the EU itself.

The 1993 *Maastricht* ruling underscored the idea of limited transferable competencies, but refrained from specifying the core state functions which could under no circumstances be yielded to the European Union. Conversely, the 2009 unprecedented attempt to give shape to the scope of Member States’ essential fields of action that are not amenable to integration, essentially set limits to further integration in these areas. In fact, when the Federal Court authoritatively declared that it is imperative to preserve the “space for the political formation of the economic, cultural and social living conditions”<sup>78</sup> of the German state (and all Member States), it effectively shapes the future of post-*Lisbon* Europe.

At the same time, the Federal Court claims the role of highest supervisory

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<sup>75</sup> *Lisbon case*, *supra* note 1 at para 329.

<sup>76</sup> Whereby the Federal Constitutional Court would abstain from stepping into the protection of fundamental rights insofar the ECJ protects those same rights. This approach reversed the *Solange I* logic which was based on reservations about the standard of European fundamental rights protection.

<sup>77</sup> The Federal Constitutional Court affirmed that it shared with the European Court of Justice the mission of effectively protecting the fundamental rights of Germans, as the guarantee of those rights by the EC was substantially similar to the protection provided by the *Basic Law*.

<sup>78</sup> *Lisbon Case*, *supra* note 1 at para 249.

body with the view of preserving the very core of the German Constitution for itself. When it warns that “if obvious transgressions of boundaries take place when the EU claims competence”<sup>79</sup> it will call for a review in order to ensure the preservation of inviolable core-content of German constitutional identity, it actually places itself at the center of any future developments in European integration.

Although it formally invests the Parliament with the task of ensuring the respect of constitutional limits to integration, it *de facto* assumes the ultimate responsibility of fulfilling this monitoring function. This implies not only control over *ultra vires* acts (already implicit in *Maastricht*, where the Court declared that European legislation exorbitant from the conferred powers is not applicable in Germany), but also a guarantee that European Union acts respect German constitutional identity. Thus, the identity clause, which inhibits the participation of Germany in a process that would eventually relinquish its sovereignty in favor of the European Union, becomes part of the *Basic Law* eternity clause. However, in *Maastricht*, the guarantee of national identity as a limit to the expansion of European Union competences was based on Article F of the *Maastricht Treaty*. This implied the recognition of the European Court of Justice’s competence. Here, that same guarantee is rooted in the *Basic Law*, which becomes the very parameter enabling the control by the Federal Court, in open contempt of the treaties that exclusively reserve such a role for the ECJ (confirmed by Article 267 of the *Lisbon Treaty*). In relation to the latter, the German Court imposes itself as an alternative, rather than a synergic partner, and implicitly reserves for itself the right to the last word in any possible conflict regarding the progress of integration (that would impact the *Basic Law*). While generally putting pressure on EU institutions to carefully act within the limits of the competencies conferred by the treaties in accordance with the subsidiarity principle, the German judges send a tacit appeal to the ECJ, requiring an appropriate level of caution in dealing with national legal orders and a careful exercise of self-restraint, necessary for the respect of treaties and the constitutional traditions of Member States.

The impact of the ruling at the national level is no less important. In *Maastricht*, the Federal Court generally ruled that the Bundestag has to retain a formative influence on German political development. Here, it gives details on how the relationship between the Parliament and the Federal government, which it answers to politically, should be organized. Not only does the Court declare the accompanying legislation unconstitutional, but it also requests the constitutional organs to elaborate a new legislation in accordance with the judgment, seemingly ignoring, or discounting as insufficient, the fact that the *Lisbon Treaty* already provides for the participation of national Parliaments.<sup>80</sup>

The detailed guidelines regarding the adoption of new legislation that grant better involvement of the German Parliament in European affairs not only entails a possibly cumbersome – and time-consuming – national decision-making process when concerning the European Union, but it also shows little confidence in the

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<sup>79</sup> *Ibid* at para 240.

<sup>80</sup> *Lisbon Treaty*, *supra* note 28, art 48.

capacity of the Parliament and Government to organize reciprocal roles and functions when dealing with European integration. Moreover, the Court reduces the Government's maneuver room, in that no matter the national position of the Council of Ministers, decisions are subject to the standards established by the Court.

In doing so, the Federal Court also offers a new reading of the *Basic Law* and, in particular Article 23, approved following the *Maastricht Treaty*. The interpretation of the "European article" that symbolically replaced Germany with Europe in the national aspirations once the reunification achieved, is that Germany, not Europe, lies in the Federal Republic's future.

While it is true that things have changed since 1993 and that disillusion (such as the cost of enlargements, the failure of the Constitution and the crisis of the Euro, among others) have altered the reality of a reunited Germany and a post-communist Europe, the 2009 ruling goes beyond the general decline of enthusiasm for European unity.

Even though it does not openly say it, the German Court implies that with the *Lisbon Treaty* European integration has reached its ultimate stretch. In this sense, the 2009 ruling draws the end of an era where developments in European integrations were conceived as automatic and ineluctable. The Federal Court firmly opposes the method through which EU developments have occurred without citizen involvement. The policy of *fait accompli*, of small steps leading to endless advancements that are imperceptible to public opinion, is over.

At any rate, even the often-invoked dialogue between courts (for example, the use of preliminary ruling by the constitutional judge before the ECJ) should not replace European leaders' responsible political choices or be a surrogate for political initiatives that should be aimed at reinforcing the democratic EU model. If the EU must transform itself into a different actor, it should not be a consequence of technicalities, *petits pas* or through the initiative of judges. As the Federal Court indicates, only a free and responsible choice of the German people (a revolutionary act) can allow European integration to go beyond the limits established by the *Basic Law*. The guardian of these limits is no other than the Court itself.

Still, it is quite ironic that the same body that devoted so much of its argumentation to denouncing the EU's "undemocratic" character, would carve for itself the role of final deciding body of European developments, thus putting the destiny of a project that impacts the lives of 500 million Europeans in the hands of a few – although enlightened – judges in Karlsruhe.