

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

### *Lisbon in Karlsruhe: Maastricht's Epigones At Sea*

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#### A. Introduction

On 30 June 2009, the Second Senate of the German Federal Constitutional Court handed down its long-awaited decision on the compatibility of the Treaty of Lisbon with the German Constitution, the Basic Law.<sup>1</sup> It was no surprise that the Court upheld the constitutionality of the treaty. Even the plaintiffs could not have imagined in their wildest dreams that the Court would actually say “no”. What is more than disturbing, however, is the tortuous way in which the Court’s vast and verbose opinion purports to be justifying the approval of the treaty. There is probably no other judgment in the history of the Karlsruhe Court in which the argument is so much at odds with the actual result. To the point of perplexity and bewilderment, the reader of the opinion is hardly able to find any reasons supporting the outcome of the case. At the moment when the Court approves the most far-reaching revision of the European founding treaties since Maastricht, it does not present any serious argument supporting the conclusion it has reached, except sketchy evocations of a principle of “openness towards European law” it finds enshrined in the Basic Law and brief solemn reminders of a murderous past. Instead, the main thrust of the argument is a ringing indictment of European integration based on a certain idea of egalitarian and majoritarian parliamentary democracy that the Court derives from the Basic Law. Unfortunately, this standard of democratic legitimacy can only describe certain centralized states; it is unable to account for federal States, including Germany, and cannot be made to fit the federal system of the European Union.

There are many possible motives that may have moved the eight judges to unanimously uphold the constitutionality of the treaty on these terms: the conviction that there was no political alternative to the approval, a certain respect for the consensus of the German political elites documented in the broad majorities of both the *Bundestag* (German Federal Parliament) and the *Bundesrat* (Federal Council of States), the fear of endangering the institutional position of the Court in the case of a rejection of the treaty, or even, maybe,

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<sup>1</sup> Lisbon Case, BVerfG, 2 BvE 2/08, from 30 June 2009, available at: <http://www.bverfg.de/entscheidungen/es20090630>.

among some of the judges, certain faint memories of certain positive aspects of the European integration. In any event, one motive is conspicuously absent from the interminable arguments of the Court: a serious, principled conviction that the deepening and strengthening of the European integration by treaty reforms complies with the words and the spirit of the German Constitution. As this principled conviction is wanting, the whole opinion, despite the apparent gravity of the reasoning, gives the impression of a certain lack of seriousness. If the judges actually mean what they say, they should never have approved the Treaty of Lisbon. But, as they do uphold the Treaty, they could not possibly justify their decision on the grounds they put forward. This lack of seriousness bodes ill for the future of the Court's difficult relationship with European integration.

## **B. The Tenor of the Judgment and the Main Lines of the Argument of the Court**

### *I. The Operative Part of the Judgment*

The Court concludes that there is no incompatibility between the Treaty of Lisbon and the Basic Law<sup>2</sup> and, therefore, the Federal Republic of Germany can, in principle, complete the ratification process. But according to the Court, the accompanying German statute on the rights of the *Bundestag* and the *Bundesrat* in European Union matters requires modification. The Court holds that those legislative bodies have not been accorded sufficient rights of participation in matters bringing about the transfer of greater powers to the EU institutions. This refers in particular to certain provisions of the Treaty of Lisbon that introduce a new simplified procedure for amending the European Treaties and the "passerelle" clauses pursuant to which the Member State governments will be able to give up their veto in the Council and move to qualified majority voting on certain matters without particular treaty amendments requiring ratification by the Member States. Here, the Court requires that the representative of the German government in the European Council may only approve the application of those clauses after a specific statutory assent of Germany's legislative bodies consistent with the normal situation of treaty ratification under German constitutional law.<sup>3</sup> Consequently, the ratification of the Treaty of Lisbon will not be completed in Germany until the domestic legislation is brought into line with these requirements.

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<sup>2</sup> *Id.* at para. 207.

<sup>3</sup> *Id.* at paras. 243, 309-328, 406-419.

*II. The Main Lines of Argument*

The argument of the Court is essentially based on the interpretation of Article 79 (3) of the Basic Law.<sup>4</sup> Under this so-called “eternity clause,” constitutional amendments affecting, among others, human dignity or the principle of democratic rule (*Demokratieprinzip*) are unconstitutional. Article 79 (3) of the Basic Law is the constitutional provision harboring the highest values of the constitutional polity that cannot be changed even if the normal amendment process is followed. The framers of Germany’s 1949 Constitution introduced this provision to prohibit a pseudo-legal slipping of constitutional democracy into a dictatorship as had occurred under the Weimar Constitution when Hitler came to power in 1933.<sup>5</sup> The Basic Law requires that European treaty revisions be approved by the same procedure as regular constitutional amendments – *i.e.* two-third-majorities of the *Bundestag* and the *Bundesrat* – and it also applies the general limits on constitutional amendments contained in the “eternity clause” to those treaty revisions.<sup>6</sup> The *Lisbon Case*, then, is above all a lengthy explication of the constitutional limits to the European integration the Court purports to derive from the “eternity clause.”

As it had already stated in its *Maastricht Case* of 1993,<sup>7</sup> the Court accepts constitutional complaints by any German citizen against European treaty amendments based on the guarantee of the right to vote with respect to the election of the *Bundestag*.<sup>8</sup> Such a complaint may be used to invoke a possible violation of democratic standards not only at the level of German national elections but also by all European treaty amendments that diminish the powers of the *Bundestag* and enhance the powers of the European institutions, including the European Parliament.<sup>9</sup> If powers are transferred to the European Union, the German citizens preserve an individual right under German constitutional law to a sufficient legitimizing connection between those entitled to vote and the European

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<sup>4</sup> Article 79 (3) of the Basic Law provides: “Amendments to this Basic Law affecting the division of the Federation into *Länder*, their general participation in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.”

<sup>5</sup> On the background, see Horst Dreier, *Art. 79 (3)*, in 2 GRUNDGESETZ paras. 4-7 (Horst Dreier ed., 2d ed. 2006). For an account of the debates in the Parliamentary Council see 1 JAHRBUCH DES ÖFFENTLICHEN RECHTS 579 (1951).

<sup>6</sup> See Art. 23 (1) [3] of the Basic Law: “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.”

<sup>7</sup> BVerfGE 89, 155 (171).

<sup>8</sup> Art. 38 (1) [1] of the Basic Law provides: “Members of the German Bundestag shall be elected in general, direct, free, equal and secret elections.”

<sup>9</sup> Lisbon Case, BVerfG, 2 BvE 2/08, from 30 June 2009, para. 176, available at: <http://www.bverfg.de/entscheidungen/es20090630>.

public authority.<sup>10</sup> In that way individual citizens can invoke a possible violation of Art. 79 (3) of the Basic Law by any new European treaty law transferring powers to the European institutions in a constitutional complaint before the Constitutional Court.

### 1. *The Paramount Importance of the Equal Right to Vote*

As this is the procedural basis for the constitutional complaints, the Court puts a particular emphasis on the right to vote. The free and equal right to vote is the basis of democratic rule. According to the Court, it is even an expression of human dignity. The Court further argues that the equal right to vote is an unalterable principle of German constitutional law, because the principle of democratic rule and human dignity are both specifically protected by the “eternity clause”.<sup>11</sup> The Court links this right to responsible parliamentary government, the majority principle and the existence of a parliamentary opposition.<sup>12</sup> The Court claims that the equal right to vote is universal and applies also in other electoral and governmental systems that differ from the German institutions.<sup>13</sup>

### 2. *The Openness of the Basic Law to European Law and its Limits*

According to the Court, the Basic Law is open to European integration and even enshrines a constitutional principle of *Europarechtsfreundlichkeit* (openness to European law).<sup>14</sup> But there are limits to this openness. The Member States remain sovereign and transfers of power to the European Union must remain limited and, in principle, revocable.<sup>15</sup> The primacy of application of Union law only applies by virtue of the national constitutional empowerment to that effect. The Court recognizes that a treaty which embarks on an integration process can only outline a programme for the future political development that cannot be determined in advance in every respect. However, dynamic treaty provisions must be curtailed and controlled by suitable national safeguards.<sup>16</sup> If the European Union transgresses the boundaries of its jurisdiction in an obvious way, then the Federal Constitutional Court may proceed to an *ultra vires* review. At the same time, the Court affirms its authority to review whether the inviolable core content of the constitutional

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<sup>10</sup> *Id.* at para. 177.

<sup>11</sup> *Id.* at para. 211.

<sup>12</sup> *Id.* at para. 213.

<sup>13</sup> *Id.* at paras. 214-215, 283.

<sup>14</sup> *Id.* at paras. 219, 225.

<sup>15</sup> *Id.* at paras. 231, 233.

<sup>16</sup> *Id.* at paras. 236-239.

identity of the Basic Law is respected.<sup>17</sup> The Court leaves open the question of which of its existing jurisdictional proceedings might be used for such a control and even suggests that future German legislation could introduce a special new proceeding before the Court for such an *ultra vires* and identity review.<sup>18</sup>

### 3. *The Constitutional Requirements as to Democratic Rule within the European Union*

With respect to the constitutional requirements on democratic rule, the Court distinguishes between the Member States and the Union.

As far as Germany as a Member State is concerned, the Court affirms that Germany’s state authority must retain sufficient space for the political formation of the economic, cultural and social circumstances of life.<sup>19</sup> It offers a long list of such reserved powers and enumerates, “*inter alia*,” citizenship, the civil and the military monopoly on the use of force, revenue and expenditure including the public debt and the realization of fundamental rights in matters like criminal law or the placement in an institution, cultural issues such as language, family and education, the freedom of opinion, of the press and of association and the freedom of religion.<sup>20</sup>

As to the constitutional requirements with respect to the European institutions, the Court recognizes that the standards of democratic legitimacy at the national level cannot be schematically applied to the European institutions. It assumes a link between those requirements and the extent and weight of the powers transferred to the European institutions.<sup>21</sup> As long as the Union remains a *Staatenverbund* – the neologism coined in the Court’s *Maastricht Case*<sup>22</sup> – with important elements of executive and intergovernmental cooperation, its democratic legitimacy remains sufficient. It is provided by national parliaments and governments while being complemented and shored up by the directly elected European Parliament.<sup>23</sup> The Court then goes on to explain that the European Union nonetheless suffers from a democratic deficit if it is compared to the state standard of democratic legitimacy. According to the Court this standard requires complete

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<sup>17</sup> *Id.* at para. 240.

<sup>18</sup> *Id.* at para. 241.

<sup>19</sup> *Id.* at para. 249.

<sup>20</sup> *Id.* (with specifications in paragraphs 252-260).

<sup>21</sup> *Id.* at paras. 261-262.

<sup>22</sup> BVerfGE 89, 155 (181, 184, 185). It might be translated approximately by “union of states” or “association of states”.

<sup>23</sup> Lisbon Case, BVerfG, 2 BvE 2/08, from 30 June 2009, paras. 262, 271, available at: <http://www.bverfg.de/entscheidungen/es20090630>.

electoral equality and majority government, but the European Union has neither.<sup>24</sup> Above all, the European Parliament still consists of Member States' contingents of seats; the weight of the vote of a citizen from a Member State with a low number of inhabitants may be about twelve times the weight of the vote of a citizen from a Member State with a large population.<sup>25</sup> Pointing to the equality of the Member States with respect to the composition of the Council, the Commission and the Court of Justice, the Court further argues that the European Union in general suffers from "excessive federalization."<sup>26</sup> It claims that the Treaty of Lisbon suffers from internal contradictions as the Member States are considered to have followed the construction pattern of the federal state, but could not create the basis for this in the form of equal election of a representative body and of a parliamentary European government.<sup>27</sup> However, if the threshold to a federal state were transgressed in the future, the level of democratic legitimacy would have to meet those state standards. Therefore, in a European federal state, a European Parliament, as the body of representation of a new federal people, would have to be the centre of the institutional system.<sup>28</sup> The Court affirms that, in Germany, such a transition to European federal statehood could not take place within the framework of the Basic Law but would require a free decision of the people as *pouvoir constituant* (constituent power). Therefore, an unacceptable structural democratic deficit would exist if the Union reached a level of powers corresponding to the federal level in a federal state, *e. g.* if the legislative powers were mainly exercised by the Union, without a formal transition to federal statehood. In the case of such an imbalance between powers and democratic legitimacy, Germany would have to work towards change and in the worst case even to refuse further participation in the Union.<sup>29</sup>

### C. Observations on the Judgment

The central theme of the *Lisbon Case* is the explication of the limits that German constitutional law, in the interpretation of the Court, poses to the further development of the European Union. For the purposes of this article, then, I do not specifically insist on the Court's procedural requirement that the German legislative bodies explicitly approve the application of all treaty clauses that allow for the transfer of greater powers to the European Union outside of the normal revision procedure. It is convincing that, under the Basic Law, all forms of European treaty changes constitutionally implicate the assent of the

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<sup>24</sup> See especially *id.* at para. 280.

<sup>25</sup> *Id.* at para. 284.

<sup>26</sup> *Id.* at para. 288.

<sup>27</sup> *Id.* at para. 296.

<sup>28</sup> *Id.* at para. 277.

<sup>29</sup> *Id.* at para. 264.

*Bundestag* and the *Bundesrat* with two-third-majorities. Even though this part of the judgment has attracted particular interest in Germany – as the Court has actually nullified a parliamentary statute here and as this may imply a certain deferral of the German ratification – the importance and the main thrust of the *Lisbon Case* lie elsewhere.

### *I. The Epigonous Nature of the Judgment*

To state the obvious, the *Lisbon Case* is epigonous. This is true in terms of content: many lines of argument have been already used in the Court's landmark *Maastricht Case* of 1993<sup>30</sup>, and the Court often only repeats or develops points that had already been made at that time. The insistence on Member State sovereignty, on national *ultra vires* review of European legislation or on the particular democratic legitimacy of the national Parliaments are well-known staples of Karlsruhe jurisprudence. This gives the reader a strong impression of *déjà vu* and of *vieux jeu*. What had been fresh, surprising and thought-provoking when the piece had its opening night, is less fresh, surprising or thought-provoking in the reproduction after sixteen years. While the Constitutional Court that decided the *Maastricht Case* had still been cautiously open to future developments of the European Union, the Court at work in the *Lisbon Case* is hermetically closed to any further evolution. The *Lisbon* opinion also is an epigone of *Maastricht* in terms of the Court's style. Where the *Maastricht* judgment had been short and crisp, the *Lisbon Case* is lengthy, repetitive, meandering and sometimes outright fuzzy. Finally, the *Lisbon Case* is epigonous in terms of the Court's self-assuredness that is evident in both judgments. Where the Court of 1993 had been a confident critical interlocutor of European integration, the decision of 2009 often seems to betray an angry acrimony, an uneasy posturing, which you would not expect in a confident and serene institution.

### *II. What's New?*

However, the judgment is not only a repetition of *Maastricht*. There are several new elements. The most important innovation is the Court's effort to flesh out the requirements of the "eternity clause" with respect to European integration. It tries to describe concretely, in a lengthy list, which legislative powers need to remain at the level of the Member States in order for their sovereign statehood to be preserved. For the first time, it gives a full-fledged account of its view of the democratic legitimacy provided to the Union by the European Parliament. And, also for the first time, it affirms that the Basic Law prohibits Germany from participating in the founding of a European federal state. All this is perceived through the prism of a certain model of state democratic legitimacy that the Court uses as a general yardstick throughout its opinion.

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<sup>30</sup> BVerfGE 89, 155.

*III. The Problem of the Application of the "Eternity Clause" to European Integration*

One of the central problems of the *Lisbon Case* lies in the application of the Basic Law's "eternity clause" to the European integration. Generally, this clause must be interpreted with particular care. It is highly problematic in a constitutional democracy for a Court to censure constitutional amendments adopted with high, qualified majorities. Consequently, in the history of the Federal Republic, the Court has never actually discarded a constitutional amendment; it has, rather, restrictively interpreted the "eternity clause."<sup>31</sup> The possibility for the Court to censure constitutional amendments must remain an extreme exception for elementary violations of the human personality or democratic rule. But when it comes to European integration the Court does not display its usual circumspection with respect to the clause. A provision that the framers of the Basic Law considered a last guarantee against the pseudo-legal transition to a dictatorship<sup>32</sup> becomes, in the interpretation of the Court, an instrument to potentially censure any further step towards European integration. But the Court does not provide any argument for putting both situations on the same level. Questions of the distribution of legislative powers, of electoral equality or parliamentary government in the European Union are serious ones, to be sure, but they do not bear any comparison to the erection of a dictatorship or the violation of human dignity. The Court's new and superfluous claim that the right to vote should be considered an expression of human dignity<sup>33</sup> shows that the judges themselves at least feel the necessity to demonstrate that the problems of democratic legitimacy in the European Union are somehow as urgent and fundamental as the violation of elementary human rights. But the "eternity clause" provides a specific protection to the principle of democratic rule and it would be a needless duplication to claim that problems of electoral equality always also affect human dignity. The Court fails to demonstrate why specific problems of the democratic organization of the European Union should trigger the ultimate barrier that is the "eternity clause."

Consequently, the affirmation by the Court that Germany could not participate in the *founding of a European federal state* under the current Basic Law is an unprecedented arrogation of power by the Court. The Court answers a question that it did not have to answer (and which the *Maastricht Case* wisely left open<sup>34</sup>). In one of the central fields of political orientation, the Court reduces the options available to huge political majorities in the legislative bodies. It is highly debatable whether the "eternity clause" can be

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<sup>31</sup> See, e.g., BVerfGE 30, 1; BVerfGE 94, 49 (103).

<sup>32</sup> See *supra* note 5.

<sup>33</sup> Lisbon Case, BVerfG, 2 BvE 2/08, from 30 June 2009, paras. 211, 217, available at: <http://www.bverfg.de/entscheidungen/es20090630>.

<sup>34</sup> BVerfGE 89, 155 (188).

interpreted to include a guarantee of German “sovereign statehood.”<sup>35</sup> In any event, there are many diverse forms of federal statehood even among the existing federal states and the question could only be answered seriously with respect to a specific constitutional design. Even if the founding of a European federal state, at present, is not a serious political option,<sup>36</sup> it is not up to the Court to constitutionally preclude this option – all the more so as the Court does not have any convincing concept of (federal) statehood<sup>37</sup>.

The Court is no more convincing when it claims to be able to list a catalogue of *specific areas with respect to which legislative powers must be reserved* to the Member States. Those are gratuitous affirmations that, in addition, often remain vague. One simple example reveals the problem. If the Court really wanted to argue in terms of “what has always (!) been deemed especially sensitive for the ability of a constitutional state to democratically shape itself,”<sup>38</sup> it surely should have mentioned the power to coin currency. But, in the European Union, this traditional state power has already been given up by the Member States. Therefore, the Court discreetly omits it from its long list. The Court’s description of reserved powers, then, is only one of pure political expediency – with the Court naming almost all fields where Member State jurisdiction is still exclusive or at least predominant – and not of principled constitutional interpretation. Instead of giving a general account of the legislative powers needed for “sovereign statehood,” the Court analogizes statehood with the contingent powers left to the Member States under the Treaty of Lisbon. This is a strange patchwork concept of statehood that owes nothing to state theory and everything to political contingency. The Court’s interpretation could lead to an almost complete petrification of the current distribution of legislative powers where political flexibility will be needed. For example, why should two-third-majorities of the German legislative bodies be constitutionally prohibited, in the future, from transferring certain legislative powers on nationality or tax law to the Union if all the Member States agree to do so? Who could foresee today the circumstances under which such a need might arise? The vagueness of the judgment’s seemingly sweeping affirmations shows that the Court itself is not truly convinced by its own argument. For instance, the Court mentions citizenship matters,<sup>39</sup> but does not elaborate. With respect to state revenue, the Court only wants to exclude that “the amount of levies affecting the citizen [is] supranationalised to a considerable extent.”<sup>40</sup> The apparent lack of conviction on the part

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<sup>35</sup> On the different positions, see Dreier, *supra* note 5, at paras. 55-57.

<sup>36</sup> See *infra* at Section V.

<sup>37</sup> See *infra* at Section IV 1b, 2.

<sup>38</sup> Lisbon Case, BVerfG, 2 BvE 2/08, from 30 June 2009, paras. 252, available at: <http://www.bverfg.de/entscheidungen/es20090630>.

<sup>39</sup> *Id.* at para. 249

<sup>40</sup> *Id.* at para. 256.

of the Court itself is more than justified. Fundamental decisions on the development of the European integration must be taken by political institutions, not by unaccountable courts, even if they are constitutional ones. Future transfers of powers to the European Union should, therefore, be left to the parliamentary majorities the Court itself cannot praise enough as the main expression of democratic legitimacy.

*IV. The Court's Problematic Yardstick: Egalitarian and Majoritarian Parliamentary Democracy*

The judgment is based on one yardstick that the Court purports to derive from the German Constitution: the Court's concept of egalitarian and majoritarian parliamentary democracy. This concept implies a Parliament created by equal election of all citizens and able to uniformly represent the will of the people as well as a system of political rule in which the will of the majority leads to the formation of the government after a genuine competition between majority and opposition in the election.<sup>41</sup> This yardstick serves different purposes that the Court does not clearly distinguish. First, the concept describes a supposed general standard of democratic legitimacy for states. Second, it is used to give an account of the institutional design within the Basic Law. Third, it serves to analyze the situation of democratic legitimacy of the European Union under the Treaty of Lisbon. Fourth, it is used to flesh out the concept of a European federal state that the Court considers to be prohibited by the "eternity clause".

The Court's manner of proceeding is somewhat strange because it uses its concept of state democratic legitimacy as a measuring stick throughout the judgment while asserting at the same time that it cannot be schematically applied to the European Union. This leads to a bewildering description of the legal situation. According to the Court the institutional design of the Treaty of Lisbon satisfies the somehow reduced requirements of the Basic Law in terms of the democratic legitimacy of the Union but it conspicuously fails to meet the general benchmarks of state democratic legitimacy. The Union, then, is trapped in a conceptual and constitutional limbo. The present state of Union law does not meet the general requirements of state democratic legitimacy. And it could only fulfill those requirements by formally becoming a federal State, but this transition is prohibited by the "eternity clause" and would require an intervention of the people as the constituent power. The Court's interpretation leaves the Union in an insoluble double-bind. With respect to the only standard the Court seems to know – state democratic legitimacy – the Union suffers from a democratic deficit. But all efforts to transcend this deficit by strengthening the position of the European Parliament come close to the forbidden threshold of federal statehood. The Union is wedged between its alleged democratic deficit and the prohibition against the transition to a federal state.

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<sup>41</sup> *Id.* at para. 280.

This reasoning is flawed in several respects. It cannot even account for the democratic legitimacy of the German national institutions and it presents a distorted picture of the problem of democratic legitimacy in the European Union:

*1. The Failure of the “State” Standard of Democratic Legitimacy to Account for German Parliamentary Government under the Basic Law*

In the first place, the Court’s standard of democratic legitimacy cannot even account for the German national institutions.

*a) The Idealization of a Purely Political Constellation*

In order to stress the contrast with the situation at the European level, the Court’s model of state democratic legitimacy combines the strictly legal principle of electoral equality with the purely political ideal of the possibility for voters to decide on the great political orientations of the country by having a clear choice between majority and opposition. The Basic Law provides for the former but cannot guarantee the latter. The only legal guarantee in terms of parliamentary government enshrined in the Basic Law is the election of the chancellor by the *Bundestag* and his responsibility towards the *Bundestag*.<sup>42</sup> Those provisions cannot ensure that federal elections turn into a *de facto* plebiscite on the great political orientations between majority and opposition parties. Whether federal elections enable voters to decide in fact on the political orientation of the future government depends, above all, on the structure of the party system and the electoral law. Rather, German electoral law with its marked system of proportional representation<sup>43</sup> goes in the opposite direction because it favors the emergence of a multi-party system. To be sure, the concentration of the German party system has been able to provide voters with a clear choice between great political orientations for several decades. But there are already many signs that this is rapidly changing and that a much more fragmented party system may emerge; the inconclusive federal election of 2005 that forced the great parties into a “grand coalition” may have been a harbinger of things to come. In any event, German constitutional law does not and cannot guarantee the situation of clear political choice between “majority” and “opposition” in the election of the *Bundestag*, which the Court considers to be a central element of “state” democratic legitimacy.

*b) The Fading Out of the Federal Character of the German State*

The second problem with the Court’s model of “state” democratic legitimacy is its blindness to the federal character of the German constitution. Even under the idealized

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<sup>42</sup> See Articles 63, 67, 68, 43 of the Basic Law.

<sup>43</sup> For a short presentation of proportional representation under German electoral law, see DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 192 (2d ed. 1997).

circumstances the Court implies for a federal election, the majority in the *Bundestag* will still often have to come to an arrangement with the *Bundesrat*, the Federal Council of States where the *Länder* are represented by representatives of their respective governments. Even after the recent federalism reform there are still many situations where federal legislation can only be passed with the approval of the *Bundesrat*.<sup>44</sup> Yet the democratic legitimacy of the *Bundesrat* is not based on the idea of strict electoral equality because smaller *Länder* have more votes in the *Bundesrat* than would correspond to the number of their citizens or the strength of their population. German federal legislation, then, is not alone based on the purely egalitarian democratic legitimacy which the Court wants us to consider as the general model of “state” democratic legitimacy. It is a mixture of the egalitarian legitimacy of the *Bundestag* and the federal legitimacy of the *Bundesrat*. The Court moans that “even for a European Parliament elected with due account to equality” the federal structure of the Union “would be a considerable obstacle for asserting a representative will of the parliamentary majority.”<sup>45</sup> But a similar lament could be formulated for the position of the parliamentary majority of the German *Bundestag* with respect to the obstacle of the *Bundesrat*.<sup>46</sup> If the Court believes that federal statehood is characterized by “assertive majority rule,”<sup>47</sup> then you might ask whether Germany meets the test. The federal character of the German state makes it impossible to fit it with the Court’s simplistic model of egalitarian and majoritarian democracy. This omission on the part of a “Federal” Constitutional Court is more than telling. Instead of giving a faithful account of the situation under German constitutional law, the Court offers a distorted description that only serves to overstate the contrast with the situation in the European Union. To this purpose, complex Germany with its proportional representation, coalition governments and federal constraints is described as a kind of Jacobin Westminster.

Had the Court considered this problem, it would have been confronted with the general question of democratic legitimacy in federal states. It would have had to acknowledge that its simplistic model of “state” democratic legitimacy cannot even account for those states. The Court casually mentions the role of second chambers in federal states,<sup>48</sup> but it does

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<sup>44</sup> For a list of the important number of bills still requiring approval of the *Bundesrat*, see Thomas Mann, Art. 77, in GRUNDGESETZ para. 14 (Sachs ed., 5<sup>th</sup> ed. 2009). For a general overview of the recent federalism reform, see Hans-Werner Rengeling, *Föderalismusreform und Gesetzgebungskompetenzen*, DEUTSCHES VERWALTUNGSBLATT 1537 (2006).

<sup>45</sup> Lisbon Case, BVerfG, 2 BvE 2/08, from 30 June 2009, para. 288, available at: <http://www.bverfg.de/entscheidungen/es20090630>.

<sup>46</sup> The classical account of this problem for the German context remains Gerhard Lehbruch’s seminal book on party competition in the federal state. GERHARD LEHMBRUCH, PARTEIENWETTBEWERB IM BUNDESSTAAT (1976).

<sup>47</sup> Lisbon Case, BVerfG, 2 BvE 2/08, from 30 June 2009, para. 277, available at: <http://www.bverfg.de/entscheidungen/es20090630> (“gestaltungskräftige[ ] Mehrheitsherrschaft”).

<sup>48</sup> *Id.* at para. 286.

not explain how it perceives their democratic legitimacy. This points to a fundamental problem that haunts the Court throughout its opinion. As the Court does not provide any reasoned explanation of the situation of democratic legitimacy in federal states, it lacks the conceptual tools to confront the situation in the European Union. Instead, it sticks with gratuitous assertions of an alleged general standard of “state” democratic legitimacy.

## 2. *The Distorted Picture of the Problem of Democratic Legitimacy in the European Union*

The Court’s reasoning prevents it from giving a convincing account of the situation of democratic legitimacy in the European Union. As the Court upholds the constitutionality of the Treaty of Lisbon, you would expect it to explain why the European institutional design meets the requirements of German constitutional law with respect to the European integration. But the logic of the Court is completely different.

### a) *The Court’s Affirmation of a European “Democratic Deficit”*

In the Court’s perspective, “true” democratic legitimacy can only exist in a (federal) state. This would require a federal parliament as representation of a federal people assuring majority rule and based on an equal right to vote.<sup>49</sup> But for the Court, such a European federal state would be incompatible with Art. 79 (3) of the Basic Law. Therefore, its argument is an argument of “not yet.” The European Union under Lisbon, the Court concludes, does “not yet attain a shape that corresponds to the level of legitimisation of democracy constituted as a state.”<sup>50</sup> In simple words, the European Union enjoys legitimacy precisely because it does not fulfill the requirements of “state” democratic legitimacy. The Court does not describe the European Union as it is, but as it is not and as it should not be. With this paradoxical reasoning the opinion avoids any positive description of the situation of democratic legitimacy in the Union in general and, above all, of the importance of the European Parliament. The *Maastricht Case* was still open to a cautiously positive analysis of the growing importance of the European Parliament: “Already at the present stage of development, the legitimation provided by the European Parliament has a supporting effect; this effect could become stronger if the European Parliament were elected by electoral rules consistent in all Member States ..., and if the Parliament’s influence on the policies and legislation of the European Community were to increase ...”<sup>51</sup> The *Lisbon Case*, however, only casually notes the important strengthening of the position of the European Parliament by the Treaty of Lisbon, which provides for parliamentary co-

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<sup>49</sup> *Id.* at para. 277.

<sup>50</sup> *Id.* at para. 276.

<sup>51</sup> BVerfGE 89, 155 (186).

decision in all central areas of legislation;<sup>52</sup> the opinion does not elaborate on the significance of these increased parliamentary powers in terms of democratic legitimacy. Instead, it insists over and over again on “the deficit of the European public authority that exists when measured against requirements of democracy in states.”<sup>53</sup>

This line of reasoning is indefensible in terms of constitutional law. As the Court itself acknowledges, the European Union of the Treaty of Lisbon meets the requirements set out in the Basic Law as to the democratic legitimacy of European integration;<sup>54</sup> otherwise, it would have had to reject the treaty. Under the Basic Law, then, the European Union *is* democratically legitimate. The Court’s alleged state standard of democratic legitimacy is not a standard provided by constitutional law – the Court itself insists that the Union is not constitutionally obliged to meet it – but a standard derived from the Court’s particular state theory. Instead of developing arguments of constitutional law, the Court muses on constitutionally irrelevant state theory. It responds to questions that the case does not raise with answers the Constitution does not provide. The affirmation that the European Union of Lisbon suffers from a democratic deficit is not an argument of constitutional law. It is, rather, the *Lisbon Case* that suffers from a constitutional law deficit that cannot be corrected with questionable state theory.

*b) The Court’s Blindness to the Peculiarities of Democratic Legitimacy in Federal States*

Due to its blindness to federalism, the Court’s argument also fails to hold water in terms of state theory. The judges stress several times the deviation of the electoral rule of the European Parliament from the “state” standard of democratic legitimacy and underscore the general “excessive federalization” of the European Union, *e.g.* in the equal representation of Member States in the Council.<sup>55</sup> As the Court lacks any conceptual tools for the analysis of the federal element of federal states, it is inevitable that all such elements can only be described as signs of “excessive federalization.” Take the example of the American Senate or the Swiss *Ständerat*. They are the second chambers of the federal parliament, any state has the same number of representatives and those chambers are constitutionally placed on an equal footing with the first chamber in legislative matters. In the perspective of the Karlsruhe Court, then, the United States and Switzerland are certainly excessively federalized because the citizens of small states are obviously over-represented in the second chamber of the Federal Parliament. Measured against the Court’s “state” standard of democratic legitimacy, federal states often suffer from

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<sup>52</sup> Lisbon Case, BVerfG, 2 BvE 2/08, from 30 June 2009, para. 288, available at: <http://www.bverfg.de/entscheidungen/es20090630288>.

<sup>53</sup> *Id.* at para. 289.

<sup>54</sup> See, *e.g.*, *id.* at paras. 219, 262, 267, 279.

<sup>55</sup> *Id.* at para. 288.

“democratic deficits” and “excessive federalization.” The Court notes the particularity of second chambers in federal states,<sup>56</sup> but it does not give any explanation of how they can be justified under the alleged general standard of “state” democratic legitimacy. Even for the election of the first chamber, some federal constitutions include specifically federal elements that do not meet the test of “one man, one vote.”<sup>57</sup> The U.S. Constitution, for instance, guarantees that each State shall have at least one Member in the House of Representatives.<sup>58</sup> For this reason, the small state of Vermont always has one seat in the House of Representatives which would not be justified by the strength of its population. Neither is the U.S. Presidential election based on the equal vote of all U.S. Citizens. The states decide on the nomination of their Electors in the Electoral College and small states always have at least three Electors without regard for their population.<sup>59</sup> In its indictment of the lack of formal equality of the election of the European Parliament the Court does not even consider such federal elements in federal state elections. It only offers schematic textbook accounts on “parliamentary” and “presidential” systems<sup>60</sup> or sweeping allegations of the universality of the equal right to vote.<sup>61</sup> The Court presents as a complete anomaly an element of electoral law that can be found in many federal states. To be sure, it can be debated if and to what extent smaller states should be privileged in federal parliamentary elections. But this can only be seriously discussed if it is acknowledged that such elements of electoral law are an expression of federal comity, an effort to accommodate the statehood of *all* Member States. A federal Union of States always requires that the big states take into due consideration the interests of smaller States. A constitutional argument that does not even see the problem – or erroneously claims that it could never arise in states – misses the point.

The general problem with the Court’s argument, then, is not only its obsession with state categories, but its blindness to the particularities of democratic legitimacy in *federal* states. In the perspective of the Court, the federal state is federal only by name; in fact it is a unitary national state with a unitary majoritarian parliamentary government. For the same reason, the Court only can imagine a European federal state as a unitary state with a

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<sup>56</sup> *Id.* at para. 286.

<sup>57</sup> See CHRISTOPH SCHÖNBERGER, UNIONSBÜRGER 503 (2005).

<sup>58</sup> U. S. CONST. art. 1 § 2 Cl. 3.

<sup>59</sup> On the strong federal elements in the U.S. Presidential election, see JUDITH BEST, THE CASE AGAINST DIRECT ELECTION OF THE PRESIDENT. A DEFENCE OF THE ELECTORAL COLLEGE (1975). For a critique, see, e.g., Note – *Rethinking the Electoral College Debate. The Framers, Federalism and One Person, One Vote*, 114 HARVARD LAW REVIEW 2526 (2001).

<sup>60</sup> Lisbon Case, BVerfG, 2 BvE 2/08, from 30 June 2009, paras. 215, 269, available at: <http://www.bverfg.de/entscheidungen/es20090630288>.

<sup>61</sup> *Id.* at paras. 271, 268, 217.

majoritarian parliamentary government based on one European people.<sup>62</sup> This model may bear some resemblance to late 19<sup>th</sup> century state theory (although this theory was usually somewhat more sophisticated). But in any case, most federal states do not fit the Court's description. The institutional design of federal states can be extremely diverse, and even a traditional federal democracy like Switzerland does not have majoritarian parliamentary government. Democratic legitimacy in federal systems is always a web of unitary and federal elements, and it is this specific mixture that must be described and assessed. Due to its blindness to federalism – which is all the more surprising for the highest Court of a country with a long and complex federal history – the Court lacks the categories to assess the particularity of democratic legitimacy in federal systems in general. Instead, it uses the concept of a European federal state simultaneously as a bogey and as a democratic standard that the European Union fails to meet.

*V. The Implications of the Judgment for the Court, the Union and German Politics*

With this judgment the Federal Constitutional Court seems to quit any serious debate on the future development of European integration. The decision lacks any prospective dimension. The Court withdraws into a purely defensive position and gives up any ambition to positively shape the European Union. This is sad. To be sure, the Court is jealous of Member State powers as would be expected from a national constitutional court. But in spite of or even because of this jealousy, the Court could still be an important critical interlocutor of the integration process. A good example of this interaction was the famous series of “so long as” decisions of the Court that hastened the development of human rights jurisprudence by the European Court of Justice by threatening to review European secondary legislation with respect to the fundamental rights of the German Constitution.<sup>63</sup> Yet the *Lisbon Case* shows that the Court has lost any interest in seriously engaging in the shaping of the Union. It does not face up to the institutional realities of European integration. This is risky for the European Union as well as for the Court. The Union risks being hampered by a Court that is anxious and pretentious at the same time. The Court, for its part, risks being taken away by its own rhetoric, which may compel it to become a mere nuisance factor. The dog who has barked too much may feel forced to bite at some point. Maybe the Court will actually find the courage to rule against European secondary legislation in certain cases. Maybe the European protagonists will believe in its readiness to do so and be sometimes deterred from extending their powers. In any event, the Court has nothing to gain from becoming an unpredictable troublemaker. The *Lisbon Case* reveals the German Federal Constitutional Court as an institution that is too weak to shape European integration but strong enough to be an encumbrance. The Court should have the utmost interest in remaining a serious partner in the integration process. Otherwise, it

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<sup>62</sup> *Id.* at paras. 277, 280.

<sup>63</sup> Solange I, BVerfGE 37, 271; Solange II, BVerfGE 73, 339. Solange II was confirmed by the Court in the Banana Market Case, BVerfGE 102, 147.

might become like the dwarf in Lawrence Sterne’s *Tristram Shandy*: “A dwarf who brings a standard along with him to measure his own size – take my word, is a dwarf in more articles than one.”<sup>64</sup> This would be regrettable and to the Court’s own detriment.

In political terms the *Lisbon Case* seems to be much more an expression of the past than of the future. The vision of federal statehood had widely vanished from the European political scene long before the Court reanimated its ghost only to claim that it was banned by the Basic Law. The Court is conceptually trapped in a perspective where the strengthening and deepening of the European Union can only be perceived as a further step on the slippery slope to federal statehood. But this is very much a pre-1989 view of the situation. Nobody seriously envisions the founding of a state in the terms of international law any more. The end of the Cold War and the enlargement of 2004 have completely changed the picture. The Union remains a peculiar blend of unitary and federal elements that is dynamically changing and will continue to do so. Its acceptance by the Union citizens, the peoples of the Member States, will probably remain shaky and uneasy. In this process, for the time being, the Karlsruhe Court has decided to be an uninvolved castigator on the sidelines.

This is a remarkable phenomenon. While openly Eurosceptic parties have no importance in the German political system and while the political elite traditionally has been the most pro-European of all the Member States, the Karlsruhe Court, since the *Maastricht Case*, has come to embody the Eurosceptic position. In other Member States, you usually find the opposite. While the highest courts dispassionately apply the law, Eurosceptic parties are a normal part of the political landscape. In Germany, however, politicians usually want to be the model pupils of the European integration while constitutional judges enjoy their stay in the brakeman’s cab.<sup>65</sup> It seems to be a German peculiarity to have dispassionate pro-European politicians and passionate Eurosceptic constitutional judges. Another combination would be preferable (and closer to the normalcy of a constitutional democracy): passionate politicians including outspoken critics of the European integration and dispassionate judges who do not feel their role is to vent diffuse anxieties that are not adequately represented in the political process. In any event, even if its Constitutional Court chooses the sidelines, Germany, as the most important Member State of European Union, cannot do the same. If the Court seems to have forgotten that active and responsible membership – and leadership – in the European Union is one of the core principles of German *Staatsräson* shared by all chancellors since Konrad Adenauer, most German parliamentarians still seem to remember. It is unlikely, then, that the future of the

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<sup>64</sup> LAWRENCE STERNE, *THE LIFE AND OPINIONS OF TRISTRAM SHANDY, GENTLEMAN*, Chapter 2.LX, p. 224 (2004).

<sup>65</sup> I borrow the metaphors from Thomas Oppermann, *Den Musterknaben ins Bremserhäuschen! – Bundesverfassungsgericht und Lissabon-Vertrag*, 20 *EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT* 473 (2009).

European Union will be significantly shaped by judgments from the former capital of the grand duchy of Baden. Instead, the challenges and crises of the future, the convictions and actions of elected politicians will be decisive – as they should be in the democratic polity the Court claims to cherish so much.