

The German Federal Constitutional Court between National Constitutional Identity and Regional Integration

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A. Introduction

On 30 June 2009, the German Federal Constitutional Court (Bundesverfassungsgericht) has decided on one of the most important cases regarding the European integration: It has declared the Lisbon Treaty constitutional pursuant to the German Constitution¹⁾, i.e. the *Grundgesetz* of 1949.

But how come, that a national constitutional court decides on such an important **political** issue? And how come, that an international treaty, such as the Lisbon Treaty can be reviewed under the constitution of a Member State, the German Basic Law (Grundgesetz)?

We remember too well the attempt to transform the European Communities into a Union with a formal constitution through the Treaty establishing a Constitution for Europe.²⁾ This treaty was stopped by the referenda of the Dutch and the French people.³⁾ From a political point of view, it seems certainly legitimate to ask the people whether they agree to a transformation of their sovereign state. This is an expression of the right to self-determination, a right that enjoys *jus cogens* status under international law.⁴⁾

But what about a constitutional court? Can a court decide on such highly political matters in international relations? *Prima facie*, it seems a bit odd that a court with a jurisdiction primarily in domestic constitutional matters decides on the question of constitutionality of international treaties.

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1) BVerfGE 123, 267; see for the English translation: [http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html] visited on 17 Feb 2014.

2) OJ 2004 C 310/1.

3) Cf. e.g. [<http://www.theguardian.com/world/2005/jun/02/eu.politics>] visited on 17 Feb 2014.

4) Cf. Oeter, 'Self-Determination' in: Simma et al (eds), *The Charter of the United Nations – A Commentary* (3rd edn 2012) MN 1.

We will have a very brief look into German constitutional law regarding the competence of the *Bundesverfassungsgericht*. In particular, I will draw your attention to the legal basis of scrutiny of treaties and will not go further into procedural details. Then, we will have a very brief overview of the existing jurisprudence of the Federal Constitutional Court regarding the European Integration. And finally, in analysing the Lisbon Treaty Judgment, we will focus on the tension of the Court between its role as a guardian of the Basic Law and as a responsible state organ for a successful European integration.

B. Treaties under Scrutiny of the Federal Constitutional Court according to the *Grundgesetz*

To answer the question, how international treaties can be brought before a constitutional court, we have to determine precisely what kind of legal instrument we are dealing with in the case at hand. The Treaty of Lisbon or more precisely the (German) Act on the Treaty of Lisbon⁵⁾ is an instrument amending treaties already in force establishing the European Union and transferring new sovereign powers to the EU. Art 23 para 1 Basic Law⁶⁾ provides for such legal instruments. Transfers of sovereign powers are accomplished by formal acts of parliament and such acts may be scrutinized by the Federal Constitutional Court as any other act of parliament. Therefore, the Federal Constitutional Court has jurisdiction for review of the constitutionality of the enactment on the Treaty of Lisbon – strictly speaking the domestic acts approving it by the German Parliament.

Thus, *de facto*, the Federal Constitutional Court has reviewed the constitutionality of the Treaty of Lisbon; – creating certain tension with the jurisdiction of the Court of Justice of the European Union that has the exclusive competence to interpret European Union Law.⁷⁾

C. Genesis of Judgments by the German Federal Constitutional Court regarding the European Integration: - from *Solange I* to *Lissabon*

The jurisprudence of the Federal Constitutional Court regarding Europe has already

5) Gesetz vom 8 Oktober 2008 zum Vertrag von Lissabon vom 13 Dezember 2007, BGBl. 2008 II 1038; Please note that *Gesetz zu Änderung des Grundgesetzes (Artikel 23, 45 und 93) vom 8 Oktober 2008* (BGBl. 2008 I 1926) and *Gesetz über die Ausweitung und Stärkung der Rechte des Bundestages und des Bundesrates in Angelegenheiten der Europäischen Union* (BT-Drucks. 16/8489) which have also been under scrutiny by the Court in the same procedure will not be dealt with in this contribution.

6) “With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union [...]. To this end the Federation may transfer sovereign powers by a law with the consent of the Bundesrat. [...]”

7) Cf. Art 267 TFEU.

begun in the 60s, but the first landmark judgment was the *Solange I Decision*⁸⁾ of 1974. *Solange I* (meaning “as long as”) declared cases admissible before the Federal Constitutional Court as long as the European legal framework is lacking a safeguarding system of a catalogue of fundamental rights on the primary law level comparable to that of the German Basic Law.⁹⁾ *Solange I* also confirmed the principle of primacy¹⁰⁾ of Community Law (now: Union Law) over German constitutional law; primacy of EC/EU Law was only recognized with respect to ordinary law until then. It was the first time the hierarchy between European norms and the German constitution was clarified by the Federal Constitutional Court.

In 1986, in its following *Solange II*-decision,¹¹⁾ the Federal Constitutional Court acknowledged the development of protection of human rights in the jurisprudence of the ECJ and declared the protection of fundamental rights as practically equal to the system of the Basic Law. Therefore the Federal Constitutional Court declared that as long as the European system can safeguard an **effective fundamental rights protection**, the Court will not make use of its jurisdiction regarding European Community Law (now: European Union Law).¹²⁾

In 1993, the Federal Constitutional Court found the Act Adopting the **Treaty of Maastricht** in conformity with the Basic Law.¹³⁾ With this treaty **Art 23** was introduced to the Basic Law as new transfer provision in matters regarding the European Union. Art 23 Basic Law was in particular introduced to accommodate new transfers of sovereign rights to the EU¹⁴⁾ (monetary Union¹⁵⁾). It further uses the **expression “Staatsverbund” (association of sovereign States)**.¹⁶⁾ With this expression the Federal Constitutional Court underlined the importance of the peoples of the Member States as basis of democratic legitimation. Furthermore, the Court considers an entry of the German State into a legal entity of a

8) BVerfGE 37, 271.

9) Cf. BVerfG (n 1) para 191 (transl.).

10) Also regarded as principle of supremacy; cf. Craig/de Burca, EU Law (5th edn 2012) 344 ff.; ECJ 6/64 *Costa v ENEL* [1964] ECR 1964 I-585.

11) BVerfGE 73, 339.

12) BVerfG (n 9): “...merely as long as the EU guarantees an application of fundamental rights which in substance and effectiveness is essentially similar to the protection of fundamental rights required unconditionally by the Basic Law...”

13) BVerfGE 89, 155; English translation: 33 ILM 1994, 388 ff.

14) Gesetz zur Änderung des Grundgesetzes vom 21 Dezember 1992 (BGBl. 1992 I 2086).

15) Arts 127-144 TFEU (then: Arts 105-124 TEC).

16) BVerfG (n 13) Headnote 8; note that the translation in ILM is a bit different: “inter-governmental community”; the Court defines this term in its decision, (n 1) para 229 (transl.): “...a close long-term association of states which remain sovereign, a treaty-based association which exercises public authority, but whose fundamental order is subject to the decision-making power of the Member States and in which the peoples, i.e. the citizens, of the Member States, remain the subjects of democratic legitimation.”

European federal state, but assesses that there is politically no intention to this end.¹⁷⁾

In 2004, the Federal Constitutional Court applied substantially the principle of **“openness to International Law”** for the first time and explained its influence on German constitutional law in great detail.¹⁸⁾ It was a landmark decision for this principle¹⁹⁾ in which, however, the Federal Constitutional Court reserved sovereignty rights of the German State.

Finally, we arrive at the decision of 2009 on the Treaty of Lisbon.

D. Identity Control as Guardian of the (National) Constitution

The Federal Constitutional Court has a self-understanding as guardian of the constitution²⁰⁾ in particular the constitutional identity of the German constitution.²¹⁾ Crucial is the question what is to be understood as ‘Identity Control’?

Starting point for answering the question is Art 38 para 1 s1 Basic Law which guarantees “general, direct, free, equal and secret elections” to the Bundestag as standard for review.²²⁾ This right is understood not only as an essential element of the German understanding of democracy but as a universal principle when the Court says in para 211:

“The right to free and equal participation in public authority is the fundamental element of the principle of democracy. The right to free and equal participation in public authority is enshrined in human dignity (Art 1 para 1 Basic Law).“

The principle of electoral democracy is a universal one, regardless of States following different voting systems of representative democracy (e.g. UK “first-past-the-pole” system; France: presidential system).²³⁾ It is the individual not the State that plays the principal role in such an electoral democracy. The sovereign are the citizens not the State. This right to

17) BVerfG (n 13) 189; Engl. transl.: 424.

18) BVerfGE 111, 307, 317 ff. (*Völkerrechtsfreundlichkeit*); Engl. transl. at para 33 (“commitment to international law”) available at [http://www.bverfg.de/entscheidungen/rs20041014_2bvr148104en.html] visited on 17 Feb 2014; the Court already used the term “tendency to openness to international law” (*„Tendenz zur Völkerrechtsfreundlichkeit“*) in earlier decisions, e.g. in BVerfGE 31, 58, 75.

19) Cf. Streinz ‘Art 24’ in: Sachs (ed.), *Grundgesetz Kommentar* (6th edn 2011) MN 6; Tomuschat, *HbStR VII* (1992) § 172 MN 23.

20) BVerfGE 1, 184, 195: *„Hüter der Verfassung“*; cf. Sturm/Detterbeck, ‘Art 93’ in: Sachs (ed.), *Grundgesetz Kommentar* (6th edn 2011) MN 4.

21) BVerfG (n 1) Headnote 4 (in the transl. erroneously indicated as Headnote 5) and para 340.

22) BVerfG (n 1) para 211 (transl.); cf. Schorkopf 20 *EuZW* 2009, 719.

23) BVerfG (n 1) para 215 (transl.); cf. Schorkopf *ibid.*

vote is even interconnected to human dignity,²⁴⁾ the highest value expressed in the Basic Law²⁵⁾ and also acknowledged by the European Union in Art 1 EU Charter of Fundamental Rights.²⁶⁾ The Court goes even further and declares (*ibid*):

“[The right to participation] forms part of the principles of German constitutional law established as inviolable by Art 20 para 1 and para 2 in conjunction with Art 79 para 3 Basic Law.”

Art 79 para 3 Basic Law enshrines the so-called eternity clause, meaning that amendments touching upon Arts 1 or 20 Basic Law are inadmissible regardless of its form.²⁷⁾

The Court continues with examining the elements that form a sovereign statehood in the context of the Treaty of Lisbon: It enumerates essential functions²⁸⁾ of a sovereign state that are “particularly sensitive for the ability of a constitutional state to democratically shape itself” (para 252):

1. substantive and formal criminal law,
2. civil and military monopoly on the use of force,
3. fundamental fiscal decisions on revenue and expenditure,
4. social policy and
5. decisions of cultural importance, such as family law, education system and decisions on dealing with religious communities.

Finally, the Court even goes as far as to express a commitment (para 216):

“The Basic Law thus not only presumes sovereign statehood for Germany but guarantees it.”

At some point, the Court considers a possible final outcome of further integrational steps of the EU as a sovereign entity or nation state.²⁹⁾ For the Court as guarantor of the sovereign statehood of Germany, it is clear in this regard that a sovereign Union Germany would enter into (and give up its statehood) is not possible under the current constitution.³⁰⁾ It does not say

24) Cf. Schorkopf, *ibid*.

25) Art 1 para 1 reads: “Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.”

26) “Human dignity is inviolable. It must be respected and protected.”

27) Cf. Herdegen, ‘Art 79’ in: Maunz/Dürig (eds), *Grundgesetz-Kommentar* (69. EL 2013; loose leaf edition) MN 72 ff; this includes even constitutional amendment acts.

28) Critical of this enumeration and with historical references to the doctrine of *Staatsaufgabenlehre* in Germany, Halberstam/Möllers, ‘The German Constitutional Court says “Ja zu Deutschland”’ 10 GLJ 2009, 1249 ff.

29) BVerfG (n 1) paras 226 ff. (transl.).

30) BVerfG (n 1) paras 232 ff. (transl.).

that it is not possible in general. It asserts that even constitutional amendments will no longer suffice as Art 20 Basic Law and with it Art 79 para 3 Basic Law, hence the constitutional identity would be affected; finally, in a certain differentiation to the *Maastricht* Judgment,³¹⁾ the Court sees the only legitimate way to enter such a sovereign union in giving a new constitution to Germany by way of Art 146 Basic Law.³²⁾ In other words, an entry into an entity like the United States of Europe may not happen as long as the Court exists as guarantor of Germany's statehood, the constitutional identity secured by the eternity clause of Art 79 para 3 Basic Law.

With identity control strongly interconnected is the well-known *ultra vires* control by the Federal Constitutional Court that has long been developed over the years of jurisprudence regarding EU matters (*Solange-Maastricht-Lissabon*).³³⁾ However, the *ultra vires* control experiences with the Lisbon judgment something like a *renaissance*.³⁴⁾ This control is not any longer under the premise of *Solange* in terms of concerning fundamental rights only. It has rather gained its scope of application in convergence to an *ultra vires* control understood in international institutional law.³⁵⁾ Additionally, the principle of conferral³⁶⁾ presupposes that the EU cannot have a competence over its competence (*Kompetenz-Kompetenz*).³⁷⁾ With *Lissabon*, the Federal Constitutional Court makes it clear that it will be alerted to control as soon as an institution acts without appropriate competences.³⁸⁾

In brief, the constitutional identity may be understood as the core of the "statehood of a constitutional state",³⁹⁾ that is delimited in the case of the German state by Art 79 para 3 Basic Law. The eternity clause guarantees this core of the German constitutional identity. Identity control ensures that this border line will not be crossed as this would mean a violation of the constituent sovereign – the people.⁴⁰⁾

31) Cf. n 17.

32) Which reads as follows: "This Basic Law, which since the achievement of the unity and freedom of Germany applies to the entire German people, shall cease to apply on the day on which a constitution freely adopted by the German people takes effect."

33) Cf. Streinz, "The Lisbon decision of the Federal Constitutional Court of Germany" in: Huber (ed.), *The EU and National Constitutional Law* (2012) 18 f.; Halberstam/Möllers, (n 28) 1245 f.; Schorkopf (n 22) 722.

34) Similarly Schorkopf (n 22) 721 f.

35) BVerfG (n 1) para 237 (transl.).

36) Tomuschat, 'Lisbon – Terminal of the European Integration Process?' 70 *ZaöRV* 2010, 259 f.; Streinz, 'Das Grundgesetz: Europafreundlichkeit und Europafestigkeit' 56 *ZfP* 2009, 480.

37) Tomuschat, (n 36) 259; Streinz (n 33) 18.

38) BVerfG (n 1) para 240 (transl.).

39) BVerfG (n 1) para 226 (transl.).

40) Cf. Grimm, 'Das Grundgesetz als Riegel vor einer Verstaatlichung der EU' 48 *Der Staat* 2009, 481; Streinz (n 33) 18.

E. “Openness towards European Law” as Responsibility for European Integration

The responsibility for integration is an answer to the problem of international treaties that can have dynamic developments in terms of a creation of secondary norms. The same is true for interpretations enlarging the scope of application of the treaty and beyond (cf. ECtHR decisions).⁴¹⁾ As such developments have a certain degree of uncertainty it is important to give way to the idea of “responsivity of democracy”.⁴²⁾ In other words, the question of responsibility certainly remains nevertheless sovereign power has been transferred to another entity, as the Court states, that

“[a] permanent responsibility for integration is incumbent upon the German constitutional bodies.”⁴³⁾

This principle is now introduced also in the scope of application of the EU as “... it is aimed at ensuring that, seen overall, the political system of [...] Germany as well as that of the EU comply with democratic principles within the meaning of Art 20 para 1, para 2 and Art 79 para 3 Basic Law.”⁴⁴⁾

Called to responsibility are all main (constitutional) State organs such as the Federal President, the Federal Government, the Parliament and the Federal Constitutional Court.⁴⁵⁾ At this point, one might ask what the role of “openness towards European Law” is in this context. This is particularly true while reading the judgment on the Treaty of Lisbon as it is the first time the Court parallels this concept with its principle of openness towards international law.

The principle of openness carries the other side of the coin of the before mentioned responsibility for integration. Not only are State organs responsible to safeguard sovereign statehood but at the same time to ensure the common application of the harmonizing efforts of Union Law. The openness in the application of secondary norms, in particular the application with taking into account a certain (European Union) way of interpretation is the way to go.

41) Cf. Nußberger, *HbStR X* (2012) § 209 MN 45 f. with further references and case law of the ECtHR.

42) For the term used, cf. Schorkopf (n 22) 723.

43) BVerfG (n 1) para 245 (transl.).

44) Ibid.

45) Cf. Maurer, *Staatsrecht I* (6th edn 2010) § 12 MN 23.

F. Conclusion

Many critiques of the judgment say that it is an expression that the Federal Constitutional Court fears to gradually lose its quite prestigious position and its importance in the relation to other European Courts.⁴⁶⁾ Regarding the length of the judgment alone, an explanation might be given into two directions:

First, the Federal Constitutional Court has taken the question very seriously and wanted to answer it as comprehensively as possible covering all possible aspects for the time to come.

Second, it tried to prevent possible interpretations of its jurisprudence that might result into a disadvantage for the Court.

Uncontested is the fact that the judgment read in conjunction with the consistent jurisprudence of the Federal Constitutional Court, it has some weaknesses: First of all, one is reminded to cite JHH Weiler who said the Federal Constitutional Court “has a well-earned reputation of the **Dog that Barks but does not Bite.**”⁴⁷⁾ This expresses quite well the opinion of many authors doubting or just being disappointed at certain review of the Court regarding acts in external matters. Indeed, the Federal Constitutional Court has so far waded through all acts regarding the EU. The idea that the court gives in to political pressure might pop up. However, more convincing is to conclude that the German constitution has even under strict scrutiny allowed such transfer of sovereign powers and paved the way for integration. This is at the same time another critique: The Federal Constitutional Court in *Lisbon* does not emphasize the meaning of its very own proclaimed principle of “openness towards European Law”⁴⁸⁾ enshrined in the wording of the Preamble of the Basic Law as well as in Art 23 para 1 Basic Law. Rather to the contrary, the Court in taking Art 38 para 1 s1 Basic Law as the legal basis for its identity control test and in lowering the admissibility requirements on the procedural side has pushed the door wide open for constitutional complaints by anyone enjoying the right to vote aiming at acts regarding the European integration;⁴⁹⁾ the scope of application of the jurisdiction of the Federal Constitutional Court has been declared as very wide.⁵⁰⁾ Some even suggest that a scrutiny performed by the

46) Cf. Grosser, ‘The Federal Constitutional Court’s Lisbon Case: Germany’s “Sonderweg” – An Outsider’s Perspective’ 10 GLJ 2009, 1263; Murkens, ‘Identity Trumps Integration’ 48 *Der Staat* 2009, 534.

47) JHH Weiler, ‘Editorial’ 20 EJIL 2009, 505.

48) BVerfG (n 1) Headnote 4 (in the transl. erroneously indicated as Headnote 5); paras. 221, 225, 240 (transl.).

49) Cf. Pache, ‘Das Ende der europäischen Integration?’ 36 *EuGRZ* 2009, 296; Selmayr, ‘Endstation Lissbon? – Zehn Thesen zum „Niemals“-Urteil des Bundesverfassungsgerichts vom 30. Juni 2009’ 12 *ZEuS* 2009, 668 ff.; Tomuschat (n 36) 264 ff.

50) Cf. Abels, *Das Bundesverfassungsgericht und die Integration Europas* (2011) 5.

Federal Constitutional Court might become a regular requirement before ratification.⁵¹⁾ The present judgment might serve as a stepping stone to this; some even see it almost as an invitation by the Federal Constitutional Court for applications of this kind.⁵²⁾ Regarding the enumeration of essential elements for a sovereign State, I have some difficulties to take this assessment seriously. It somewhat rather appears as an enumeration not determined by importance, but by the powers exclusively left with the Member States, that the Federal Constitutional Court wants to keep exclusively domestic.⁵³⁾

Finally, looking at the analysis of the judgment of the Federal Constitutional Court, we can firstly conclude that the Court not only has reviewed the transformation acts, but also – at least indirectly – the Treaty of Lisbon itself. There is no doubt that the Court did so, a good question is if the Court may have done so in its scope of application of its jurisdiction.⁵⁴⁾ Even going further, the Court has examined scenarios that either have not taken place or are not in detailed planning.⁵⁵⁾ The judgment rather indicates “the constitutionally right way to full European integration” than to judge the constitutionality of a terminated act. This can certainly be regarded as judicial activism by the Federal Constitutional Court.⁵⁶⁾ If it really serves the purpose might well be doubted.

However, as long as the Federal Constitutional Court acts as the guardian of the German constitution it will adjudicate on the constitutionality issues of acts. One might be calling the *Lisbon* judgment as judicial activism with a negative connotation that the Court has somewhat acted outside its mandate. However, I find it far more convincing to regard this judicial activism rather as a precautionary step by the Court and as an admonishment towards the responsible organs.⁵⁷⁾

The structure, length and wording suggest admittedly that the Federal Constitutional Court might have some fear to get lost in the plurality and competition of different (European) courts. Nevertheless, the Federal Constitutional Court has shown clearly that at the present status of the integration level, Member States have to remain the “masters of the treaties”.⁵⁸⁾ Moreover, the final step of the integration process - although this could even

51) Cf. Pache (n 49) 285, 287, 296.

52) See Terhechte, ‘Souveränität, Dynamik und Integration – making up the rules as we go along?’ 20 *EuZW* 2009, 726.

53) Cf. Halberstam/Möllers (n 28) 1249 ff.

54) Cf. Murkens (n 46) 518.

55) Cf. Abels (n 50) 26; Pache (n 49) 298; Selmayr (n 49) 643; even terms such as “absolute supervision” of further integration steps is used; cf. Calliess, ‘Das Ringen des zweiten Senats mit der Europäischen Union: Über das Ziel hinausgeschossen’ 12 *ZEuS* 2009, 582.

56) Cf. Tomuschat (n 36) 282.

57) Cf. Grimm (n 40) 495; Streinz (n 33) 23; Tomuschat (n 36) 282.

58) Cf. BVerfG (n 1) paras 231, 235, 298, 334.

mean the end of the German Federal Constitutional Court - cannot be approached with the attitude 'go as always', but the Court declares it as conceivable and possible - to create a United States of Europe - a nation State.