1. Introduction

More than ten years after the Treaty of Amsterdam the Treaty of Lisbon has brought a solution to the 'left-overs' of Amsterdam on the institutional reform the European Union needed after its enlargement. Lisbon provides the Union with the instruments for functioning appropriately. A simplified structure of the Treaties, clear legal capacity of the Union, new institutional arrangements, new powers and procedural provisions for more effective and democratic decision-making etc. not only provide it with more personality and visibility but also better instruments to meet the challenges of crisis in a changing world. This includes mechanisms for flexibility and the dynamic development of primary law by *passerelle* and other clauses for simplified treaty amendments. Much has already been said on these improvements at this most stimulating gathering, and we have discussed the positions taken by several national Constitutional Courts on the Treaty of Lisbon regarding the implementation of democratic principles, on the protection of fundamental rights and on the implementation of the new structures.

Let me not repeat what has already been discussed by others: Instead I will look to the future in assessing to what degree Germany can continue acting as one of the motors of European integration following the judgment of the German Federal Constitutional Court of June 30, 2009 in Karlsruhe[1]. I shall examine, whether, and if so, to what extent its government and parliamentary bodies are hampered in continuing to play its positive role because of clear restrictions laid upon them by certain statements we can find in this judgement. If Germany would turn out to be a brake for European policies and integration, this would not be a German problem only. As questions from several ambassadors of other EU Member States in Berlin confirmed, it is a concern of the EU as a whole and the dynamics of integration.

I had the honour of representing the German *Bundestag* in this case in Karlsruhe; therefore it is not primarily my role to comment on and criticise this judgment. Others have done so sufficiently[2]. My arguments for why

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1 German Federal Constitutional Court (FCC), Second Senate, - 2 BvE 2/08 – Judgment of 30 Juni 2009, 123 BVerfGE 267, online available at www.bverfg.de/entscheidungen/es20090630_2bve000208en.html. For a short summary in English see: Editorial Comments, 'Karlsruhe has spoken: „Yes" to the Lisbon Treaty, but …' (2009) 46 CMLRev 1023.

2 See eg R Bieber, 'An Association of Sovereign States' (2009) 5 European Constitutional Law Review 391, 396 et seq; T Giegerich, 'The Federal Constitutional Court's Judgment on the Treaty of Lisbon' (2009) 52 German Yearbook of International Law 9 et seq; D Thym, 'In the Name of Sovereign Statehood: A Critical Introduction to the Lisbon Judgment of the German Constitutional Court' (2009) 46 CMLRev 1795; C Tomuschat, 'Lisbon – Terminal of the European Integration Process? The Judgment of the German Constitutional Court of 30 June 2009' (2010) 70 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV) 251, 263 et seq (with references on positive reactions ibid note 37, critical comments note 38); F Schorkopf, 'Case Note Lisbon Judgment', (2010) 104 AJIL 259. In French with extracts of the judgment: A von Ungern-Sternberg, 'L'arrêt Lisbonne de la Cour constitutionnelle fédérale allemande, la fin de l'intégration européenne?' (2010) RDP 317; for a French view: J Ziller, 'Zur Europarechtsfreundlichkeit des deutschen Bundesverfassungsgerichtes. Eine ausländische Bewertung des Urteils des Bundesverfassungsgerichtes zur Ratifikation des Vertrages von Lissabon' (2010) 65 Zeitschrift für öffentliches Recht 157, 160; in Spanish: F Castillo de la Torre, 'La sentencia del Tribunal Constitucional Federal Alemán de 30.06.2009, Relativa a la aprobación del Tratado de Lisboa – Análisis y comentarios' (2009) 34 Revista de Derecho Comunitario Europeo 969. With an oversight on the first reactions to the judgment: P Häberle, 'Das retrospektive Lissabon-Urteil als versteinernde Maastricht II-Entscheidung' in id, (2010) 58 Jahrbuch des Öffentlichen Rechts der Gegenwart 317 et seq, with critical remarks: 'some light and lots of shadow' (ibid, p. 321 et seq). With a comparative analysis of the jurisprudence of constitutional courts of other Member States: A Weber, 'Die Europäische Union unter Richtervorbehalt? – Rechtsvergleichende Anmerkungen zum Urteil des BVerfG v. 30.6.2009 ("Vertrag von Lissabon")' (2010) 65 Juristenzeitung (JZ) 157, 161. From the immense German literature see only: C Calliess, 'Das Ringen des Zweiten Senats mit der Europäischen Union: Über das Ziel hinausgeschossen…' (2009) Zeitschrift für europarechtliche Studien (ZEuS) 559; C Ohler, 'Herrschaft, Legitimation und Recht in der Europäischen Union – Anmerkungen zum Lissabon-Urteil des BVerfG' (2010) 135 Archiv des öffentlichen Rechts (AöR) 153

the Treaty of Lisbon is in line with the spirit and the provisions of the German *Grundgesetz* are explained in my briefs in defence of the Treaty of Lisbon against all kinds of arguments trying to establish that ratifying this Treaty would put an end to the existence of Germany as a sovereign democratic state[3]. I explained that the Preamble of our *Grundgesetz* even requires steps like the Treaty of Lisbon to be taken for developing the European Union. It states that the German people in giving itself this *Grundgesetz*, was 'inspired by the determination to promote world peace as an equal partner in a united Europe[4]'. Nothing is said in the *Grundgesetz* about national sovereignty[5]. Indeed, the conditions of Germany in 1949 were not such as to allow the use of this questionable concept, and the drafters in the Parliamentary Council, conscious about the lack of sovereignty decided to draft a *Grundgesetz*, a provisional statute, instead of a Constitution[6]. A new approach of 'integrated statehood[7]' was chosen after the experiences of the Nazi-regime, the Holocaust and World War II, based upon European integration. And this approach allowed the unification of Germany under the European roof – just twenty years ago[8]. Yet, the FCC uses national sovereignty as the key element in the Lisbon-judgment for defining the national identity of Germany and seems to apply it among other devices with the possible effect of limiting, if not blocking, the development of the Union as the Treaty of Lisbon was intended to make it fit for[9].

What is it in the judgment to cause such serious concerns? Let me first mention and later explain in detail three important points:

- The Court defines a number of specifically sensitive taboo-areas where new policies shall not be developed except under very restrictive conditions, and sets 'red lights' even for future steps of European integration. This is a warning to German (and other) policy-makers not to touch key aspects of national sovereignty.

- For the same purpose, but also in order to preserve democracy and statehood against a competence-competence of the Union the application of both, the flexibility-clause of Article 352 TFEU and the passarelle-clauses of the Treaty would need prior authorization by a formal ratification law under Article 23 (1) of the German *Grundgesetz* (GG) or, at least, an enabling decision of the *Bundestag*.

- The FCC assumes itself the power to scrutinize, on the basis of individual constitutional complaints, whether or not any European measure or national act authorizing such measure, remains within the competences of the Union and respects the limits set by the principle of national identity.

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et seq Most recently: A Hatje and JP Terhechte (eds), *Europarecht Beiheft 1: Grundgesetz und europäische Integration. Die Europäische Union nach dem Lissabon-Urteil des Bundesverfassungsgerichts* (Baden-Baden, Nomos, 2010), with an extensive bibliography, ibid, 325-333.

3 For the documentation of the proceedings see: 'Der Vertrag von Lissabon vor dem Bundesverfassungsgericht – Verfahrensdokumentation', www.whi-berlin.de/documents/whi-paper0509.pdf (access: 29 November 2010).

4 cf in this sense the useful statements of the judgment FCC, above n 1, para 222: 'After the experience of devastating wars, in particular between the European peoples, the Preamble of the Basic Law emphasises 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 is lent concrete shape by the empowerments to integrate into the European Union (Article 23.1 of the Basic Law), to participate in intergovernmental institutions (Article 24.1 of the Basic Law) and to join systems of mutual collective security (Article 24.2 of the Basic Law) as well as by the ban on wars of aggression (Article 26 of the Basic Law). The Basic Law calls for the participation of Germany in international organisations, an order of mutual peaceful balancing of interests established between the states and organised co-existence in Europe.'

5 For an attempt to give the term a modern meaning see FCC, above n 1, para 223 et seq; for supporting this line of thought see also D Grimm, *Souveränität. Herkunft und Zukunft eines Schlüsselbegriffs* (Berlin, Berlin University Press, 2009), 9 et seq for the change of the concept with the change of the idea of the state, and ibid, 108 et seq, 123: sovereignty as protection of democracy (self-determination) – still related to the state, while ways for organising political self-determination in a democratic way in multilevel polity are not explored.

6 See G Leibholz and H von Mangoldt (eds), *Entstehungsgeschichte der Artikel des Grundgesetzes, Neuausgabe des Jahrbuchs des öffentlichen Rechts der Gegenwart Vol. 1*, (Tübingen, Mohr Siebeck, 2010) 15 et seq, 22-30, 34; see also P Häberle, 'Einleitung', ibid, V (XVIII).

7 See M Kaufmann, 'Integrierte Staatlichkeit als Staatsstrukturprinzip' (1999) Juristenzeitung (JZ) 814.

8 See also T Giegerich, 'The European Dimension of German Reunification' (1991) 51 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV) 384, 393 et seq, 404 et seq; see also I Pernice, 'Deutschland in der Europäischen Union' in J Isensee and P Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland Vol. VIII* (Heidelberg, Müller, 1995), § 191 note 3, 4, 6 et seq.

9 PC Müller-Graff, 'Das Karlsruher Lissabon-Urteil: Bedingungen, Grenzen, Orakel und integrative Optionen' (2009) 32 integration 331, 357 et seq, on the other hand, believes that the judgment remains so vague that it will have no (negative) effect on the European policies of Germany.

There is no specific concern, actually, about the protection of fundamental rights. The FCC has confirmed in its recent decision on the Data Retention Directive that it has no reason to change its *Solange*-jurisprudence. Thus, it will not review European measures with regard to German fundamental rights as long as the required level of protection of fundamental rights at the European level is not generally and evidently disregarded[10]. What it indicates, however, is how it understands the term 'constitutional identity':

> It is part of the constitutional identity of the Federal Republic of Germany that the citizens' enjoyment of freedom may not be totally recorded and registered, and the Federal Republic must endeavour to preserve this in European and international connections[11].

This is an important statement, given the clear announcement in the Lisbon-judgment that the FCC will exercise constitutional control not only on acts taken by the EU *ultra vires*, but also –and this is new– on measures allegedly intruding the constitutional identity of Germany as it sees it determined by Article 79 (3) *Grundgesetz* – that could re-open access to the FCC also in matters of fundamental rights[12].

2. 'Taboo-areas' of European legislation

The European Union is obliged, under Article 4 (2) TEU to respect the national identity of the Member States. Hand in hand with this provision, the FCC says, goes the guarantee in Article 79 (3) GG for the constitutional identity and the preservation of national sovereignty understood as an expression of democratic self-determination[13]. The FCC understands these boundaries to be applicable in what it qualifies 'a union of sovereign states' as opposed to a federal state for the foundation of which the *Grundgesetz* is not open, and for the establishment of which the German people would have to adopt a new constitution[14]. The summary of the judgment states in headnote 4 as follows:

> European unification on the basis of a treaty union of sovereign states may not be achieved in such a way that not sufficient space is left to the Member States for the political formation of economic, cultural and social living conditions. This applies in particular to areas which shape the citizens' living conditions, in particular the private sphere of their own responsibility and of political and social security, protected by fundamental rights, as well as to political decisions that rely especially on cultural, historical and linguistic perceptions and which develop within public discourse in the party political and parliamentary sphere of public politics[15].

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10 FCC Judgment of 2 March 2010, case 1 BvR 256/08, 1 BvR 263/08, 1 BvR 586/08 – Data Retention, para 182, English press release www.bundesverfassungsgericht.de/en/press/bvg10-011en.html (access: 30 November 2010).

11 ibid, judgment para 218.

12 For this see F Mayer, 'Rashomon in Karlsruhe' (2010) 63 Neue Juristische Wochenschrift (NJW) 714 et seq; id, 'Rashomon à Karlsruhe' (2010) 46 Revue trimestrielle de droit européen 77,79, concluding that in some way any problem of protection of fundamental rights could thus be treated as a problem of constitutional identity, too.

13 FCC, above n 1, headnote 5 and grounds para 240.

14 FCC, above n 1, para 228: 'Integration requires the willingness to joint action and the acceptance of autonomous common opinion-forming. However, integration into a free community neither requires submission removed from constitutional limitation and control nor the forgoing one's own identity. The Basic Law does not grant powers to bodies acting on behalf of Germany to abandon the right to self-determination of the German people in the form of Germany's sovereignty under international law by joining a federal state. Due to the irrevocable transfer of sovereignty to a new subject of legitimation that goes with it, this step is reserved to the directly declared will of the German people alone.' And para 232: 'In accordance with the powers granted with a view to European integration under Article 23.1 in conjunction with the Preamble, Article 20, Article 79.3 and Article 146 of the Basic Law, there can be no independent subject of legitimation for the authority of the European Union which would constitute itself, so to speak, on a higher level, without being derived from an external will, and thus of its own right.' For the distinction see also ibid, para 334: 'It follows from the continuing sovereignty of the people which is anchored in the Member States and from the circumstance that the states remain the masters of the Treaties, that - in any case until the formal foundation of a European federal state and the change of the subject of democratic legitimation which must be explicitly effected with it - that the member states may not be deprived of the right to review compliance with the integration programme.' This is not the only possible understanding of the relevant provisions of the German Basic Law as it is shown by U Fastenrath, 'Verfassungsrechtliche Perspektiven und Grundgesetz: Offenheit, Bedingungen und Grenzen der Beteiligung Deutschlands an Neuerungen der Europäischen Union' in PC Müller-Graff (ed), *Deutschlands Rolle in der Europäischen Union* (Baden-Baden, Nomos, 2008) 207, 212 et seq.

15 FCC, above n 1, headnote 4; see also grounds paras 249 et seq.