Developments

Core of State Sovereignty and Boundaries of European Union's Identity in the *Lissabon – Urteil*

By Elisabetta Lanza[*]

Abstract

In the 2009 judgment dealing with the Treaty of Lisbon, the German Federal Constitutional Court urges to modify a domestic statute in order to guarantee the rights of the internal rule-making power and also provides a reasoning on the role of the European Union (EU) as an international organization, the principle of sovereignty and the relations between European Institutions and Bodies and the EU Member States. According to the German Court the Treaty of Lisbon does not transform the European Union into a Federal State (*Staatsverband)*, but into a Confederation of States (*Staatenverbund*). In spite of the 1993 landmark judgment, the so-called "Maastricht Urteil", the Court steps forward and focuses also the subject-matters that necessarily have to pertain to the Member States jurisdiction, the so-called "domain réservé". The German Federal Constitutional Court decision on the Lisbon Treaty arouses the reflection on the core of State sovereignty and on the boundaries of the EU legal system and focuses on the force of the right to vote of every citizen, the basis of democracy.

Furthermore, the decision of the German Federal Constitutional Court highlights the well-known issue of the EU's identity and the balancing between EU democracy and Member State sovereignty. In the light of the German Constitutional Court statements, the present work aims to understand which could be actually the EU's identity and how could be approached "democratic deficit" of the EU.

A. The "Lissabon" Decision of the German Federal Constitutional Court

On 30 June 2009 the German Federal Constitutional Court Second Senate (*Bundesverfassungsgericht*, hereinafter *BVerfG*), voted almost unanimously[1] in favour

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[1] Only one of the eight judges dissented.

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of a decision that, due to the procedure and the issue, could be termed *Lissabon-Urteil*[2] considering its significance reminiscent of the landmark decision on the Treaty of Maastricht, the so-called *Maastricht-Urteil*.[3] The *BVerfG* receives four direct constitutional remedies (*Verfassungsbeschwerden*) and two complaints deriving from conflict among bodies (*Organstreitverfahren*), dealing with the parliament ratifying confirmation (two-thirds majority) of the Treaty of Lisbon and all its connected acts. Considering the plurality of petitions, the German Court responds to the several constitutional complaints joined in the same adjudication.

The subject-matter of the *Organstreit* proceedings and constitutional complaints is the ratification of the Treaty of Lisbon amending the Treaty on European Union (TEU) and the Treaty establishing the European Community, signed in Lisbon on 13 December 2007. The proceedings challenged also the German Act Approving the Treaty of Lisbon and, to some extent, the accompanying laws to the Act Approving the Treaty of Lisbon: Articles 23, 45 and 93 of the "Act Amending the Basic Law", which has already been promulgated, but not yet entered into force, and the "Act Extending and Strengthening the Rights of the *Bundestag* (national Parliament) and the *Bundesrat* (Federal Council of the German States) in European Union Matters" and its connected acts, which, at the time of the decision, had been adopted, but not yet signed and promulgated.

In the 421 paragraphs of the decision the *BVerfG* not only states that the Lisbon Treaty is compatible with the country's basic law, but at the same time, the Court also calls for promulgation of a law guaranteeing the rights of the national parliament. In fact, the "Act Extending and Strengthening the Rights of the *Bundestag* and the *Bundesrat* in European Union Matters" infringes Article 38.1 in conjunction with Article 23.1 of the German Basic Law[4] (*Grundgesetz,* hereinafter GG), insofar as the *Bundestag* and the *Bundesrat* have not been accorded sufficient rights of participation in European law-making procedures and treaty amendment procedures.[5] Therefore, this statute had to be constitutionally reformulated before

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[2] Lisbon case, *BVerfG*, cases 2 BvE 2/08 and others from 30 June 2009, available at: http://www.BVerfG.de/entscheidungen/es20090630_2bve000208.html, last accessed 22 March 2010.

[3] Maastricht case, *BVerfGE* 89, 155, *BVerfG - Judgment of the Maastricht Treaty of 12 October 1993*, INTERNATIONAL LEGAL MATTERS (ILM) 395, 418 (1994).

[4] Official English translation available at: http://www.bundesregierung.de/static/pdf/GG_engl_Stand_26_07_02.pdf, last accessed 27 March 2010, Articles 38.1 and 23.1.

[5] Urteilsverkündung in Sachen "Lissabon-Vertrag", 29 BUNDESVERFASSUNGSGERICHT BverfGE Press Release number 55/2009 (May 2009) available at: http://www.bundesverfassungsgericht.de/pressemitteilungen/bvg09-055.html, last accessed 22 March 2010.

the ratification of the Treaty.[6] Furthermore the *BVerfG* declares the "Act Amending the Basic Law" which modified the Articles 23, 45 and 93 GG, constitutionally unobjectionable. The constitutional judicial review of Articles 23, 45 and 93 GG is implied, considering the objectives of these constitutional provisions: the strengthening of the German Parliament control of the subsidiarity principle[7] on the one hand, and on the other hand, giving the *Bundestag*'s minorities the opportunity to ask the *BVerfG* for the control of the compatibility of the Federal and *Länder* Law towards the Basic Law, pursuant to Article 93 GG.[8]

In the decision under analysis, the Court rules that *Bundestag* and *Bundesrat* have not been accorded sufficient rights of participation in matters bringing about the transfer of greater powers to the European Union Institutions. Hence, the judgment refers mainly to certain provisions of the Treaty of Lisbon introducing a new simplified procedure for amending the European Treaties[9] and the "bridging clauses"[10] 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.[11] The Court states that a "blank" authorization by the Member State is not enough and that it is essential that the *Bundestag* and the *Bundesrat* have to vote every time the European Union (EU) Council decides to activate a bridging-clause procedure.[12]

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[6] See, *supra*, note 2, paragraph no. 273.

[7] See, *supra*, note 4, Articles 23, 45, and 93 GG.

[8] See, Luisa Cassetti, *Il "sì, ma" del tribunale costituzionale Federale tedesco sulla ratifica del trattato di Lisbona tra passato e futuro dell'integrazione europea,* 14 FEDERALISMI.IT (2009), available at: http://www.federalismi.it, last accessed 22 March 2010.

[9] Treaty of the European Union (TEU), 7 February 1992, Article 48.6, vol. 51, 2008, 41, 42 (consolidated version after Lisbon Treaty).

[10] See, *supra*, note 9, Articles 31.3 and 48.7 TEU, Treaty on the Functioning of the European Union (TFEU), 25 March 1957, Articles 81.3 (2) (3), 153.2(4), 192.2(2), 312.2(2), 333.2, vol. 51, 2008, (consolidated version after Lisbon Treaty).

[11] See, *supra*, note 2, paragraph nos. 243, 309 328, 406 419.

[12] Article 4 of the Italian Legge Buttiglione 11/2005 of 15 February 2005 introduced a retention of Parliament reading (*riserva di esame parlamentare*). Pursuant to this provision, whenever the Italian government sustains that a European statute deals with important political, economic, social issues, it can put the retention of Parliament reading before the EU Council. According to Emilio Castorina, *Le "dimensioni" della rappresentanza politica (crisi della sovranità nazionale e nuovi percorsi istituzionali)*, 2 TEORIA DEL DIRITTO E DELLO STATO 279, 300 (2005) the retention aims to confer centrality to the national Parliament, as a consequence of the development of the vertical dimension of the political representation in the European legal system, in order to cast the national sovereignty outside the State borders.

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On this issue, the *BVerfG* asserts that the German government in the European Council may only approve a Treaty amendment brought about by the applying of the general bridging-clause and the special bridging-clause pursuant to Article 81.3(2) TEU Lisbon, if the German *Bundestag* and the *Bundesrat* have adopted, within a period yet to be determined, a law pursuant to Article 23.1 of the German Basic Law which takes the purpose of Article 48.7(3) TEU Lisbon as an orientation.[13] Consequently, the ratification of the Treaty of Lisbon could not have been completed in Germany until the domestic legislation has been brought into line with these requirements.[14] Therefore, the *BVerfG* ruled that the Federal Republic of Germany's instrument of ratification of the Treaty of Lisbon may not be deposited as long as the constitutionally required legal elaboration of the parliamentary rights of participation has not entered into force.[15] Accordingly, on 25 September 2009 the Treaty of Lisbon was ratified by Germany, after the *Bundestag* and *Bundesrat* enforcement of the suggested modifications.[16]

The common element to the several complaints is the alleged violation of Article 38.1 GG, stating, as grounds of every democracy, that the members of the Federal Parliament are elected in general, direct, free, equal, and secret elections. Pursuant to this provision, the German citizens can participate in the legislative process through their representatives in the *Bundestag* and *Bundesrat*. Moreover, the Court explained that "the constitutional requirements, imposed on the organizational structure and on the decision making procedures of the EU by the principle of democracy, depend on the range to which sovereign responsibilities are transferred

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Therefore, the retention procedure could be a solution aiming to fill in the "blank" authorization, even if its enforcement is dependant on the government decision.

[13] See, *supra*, note 2, paragraph no. 307.

[14] Christoph Schönberger, *Lisbon in Karlsruhe: Maastricht's Epigones At Sea*, 10 GERMAN LAW JOURNAL (GLJ) 1201, 1202 (2009), available at: http://www.germanlawjournal.com/index.php?pageID=11&artID=1155, last accessed 22 March 2010.

[15] Magdalena Suszycka-Jasch & Hans Christian Jasch, *The participation of the German Länder in formulating German EU-policy*, 10 GLJ 1215, 1216 (2009), available at: http://www.germanlawjournal.com/index.php?pageID=11&artID=1169, last accessed 22 March 2010.

[16] In order to achieve these purposes, on September 2009 the *Bundestag* and *Bundesrat* approved four statutes: *Gesetz über die Ausweitung und Stärkung der Rechte des Bundestages und des Bundesrates in Angelegenheiten der Europäischen Union* (about the enforcement and enhancement of the *Bundestag* and *Bundesrat* rights on European issues); *Gesetz zur Umsetzung der Grundgesetzänderungen für die Ratifizierung des Vertrags von Lissabon* (about the ratification of the Lisbon Treaty); *Gesetz zur Änderung des Gesetzes über die Zusammenarbeit von Bundesregierung und Deutschem Bundestag in Angelegenheiten der Europäischen Union* (about the collaboration between the Federal Government and the Parliament on the European issues); and *Gesetz zur Änderung des Gesetzes über die Zusammenarbeit von Bund und Ländern in Angelegenheiten der Europäischen Union* (about the collaboration between Federation and Länder on the European issues), available at: http://www.bundesrat.de/, last accessed 22 March 2010.

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to the Union and to the extent which political independence in the exercise of the sovereign powers is transferred."[17]

Indeed, the *BVerfG* does not state that the accession to the Treaty of Lisbon is inconsistent with the Basic Law, even if it provides some limits to the Parliament and indicates the consequent constitutional gaps of the "Act Extending and Strengthening the Rights of the *Bundestag* and the *Bundesrat* in European Union Matters."

B. The Main Subject-Matters of the Judgment

The reasoning of the German Constitutional Court can be chiefly traced out into three subject-matters: the control of the accomplishment of the constitutional requirements by the level of democratic legitimization of the EU; the German Federation sovereignty and the EU's identity; and the level of competences retained by the *Bundestag* (the so-called "domain réservé").
As a matter of fact, the judgment on the Treaty of Lisbon expresses not only the urge to modify a domestic statute in order to guarantee the rights of the internal rule-making power, but also, after the explanation of the European Union and Communities legislation historic development until the TEU Lisbon and its institutional and procedural reforms, it also provides reasoning on the role of the EU as an international organization, the principle of sovereignty and the relations between European Institutions and Bodies and the EU Member States.

I. The Level of Democratic Legitimization of the EU

In the first place, pursuant to the Federal Constitutional Court, the democratic legitimization through the European Parliament (EP) is limited, due to the allocation of seats of every Member State based on the regressively proportional composition that Article 14.2(1), sentence 3, TEU Lisbon, prescribes.[18] According to Article 14.2 TEU Lisbon, in the European Parliament the "representation of citizens shall be degressively proportional, with a minimum threshold of six members per Member State. No Member State shall be allocated more than ninety-six seats."

[17] See, *supra*, note 2, paragraph no. 262.

[18] See, *supra*, note 2, paragraph no. 284.

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Therefore, it is not the "European people" represented, but the peoples of Europe organized in their States.[19] Thus, even after the new formulation of Article 14.2 TEU Lisbon, and contrary to the claim that Article 10.1, TEU Lisbon, seems to provide ("the functioning of the Union shall be founded on representative democracy"), the Court holds that the European Parliament is not a representative body of a sovereign European people.

In fact, pursuant to paragraph 280 of the *BVerfG* Lisbon decision "the representation of the peoples in their respectively assigned national contingents of Members is not laid out as a body of representation of the citizens of the Union as an undistinguished unity according to the principle of electoral equality". The result of the regressive proportionality is that 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 high number of inhabitants.[20]

Considering the allocation of the EP seats and the high level of entrusted competences, the Union does not comply with the principle of electoral equality.[21] Therefore, to the *BVerfG* the democratic principle is identified with the weight of the fundamental right to vote of the citizen: through the right to vote the Court portrays the democratic – representative principle.[22]

II. State Sovereignty and EU's Identity

In the second place, dealing with the Germany's sovereignty and the EU's identity, Complainants re. III argued that only a Constitutional Act, pursuant to Article 146 GG and emanating from the German people, could transform the EU into a Federal State.[23] Moreover, the Lisbon decision clearly declares to refuse the creation of a European Federal State because the Basic Law does not proclaim that the representatives of the German people could have such a power to join a Federal State: only the German people will be able to decide it.[24] On the one hand, Article

[19] See, *supra*, note 2, paragraph no. 286.

[20] See, *supra*, note 2, paragraph no. 284.

[21] See, *supra*, note 2, paragraph no. 292.

[22] Pietro Faraguna, *Limiti e controlimiti nel Lissabon-Urteil del Bundesverfassungsgericht: un peso, due misure?*, 30 QUADERNI COSTITUZIONALI 75, 94 (2010).

[23] See, *supra*, note 2, paragraph no. 113.

[24] See, *supra*, note 2, paragraph no. 228.

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23.1 of the Basic Law underlines that the Federal Republic of Germany takes part in the development of an EU which is designed as an association of sovereign national States (*Staatenverbund*), and, on the other hand, Article 79.3 GG foresees that there are inadmissible amendments of the Constitution affecting the division of the Federation into States, the participation on principle of the States in legislation, or the basic principles laid down in Article 1 to 20 GG.

At paragraph no. 229 the *BVerfG* defines the *Staatenverbund* as "a close long-term association of States which remain sovereign, an association which exercises public authority on the basis of a treaty, whose fundamental order, however, is subject to the disposal of the Member States alone and in which the peoples, *i.e.* the citizens of the States, remain the subjects of democratic legitimization." The Court underlines that the Treaty of Lisbon neither transfers the constituent power nor abandons State sovereignty of the Federal Republic of Germany. Moreover, considering the standards of free and equal elections and the requirement of a viable majority rule, the European Union does not correspond to the federal level in a Federal State. Consequently, the *Bundestag* is still the focal point of an interweaved democratic system.[25]

Germany did not lose the State sovereignty because every Member State may withdraw from the EU and despite the will of the other Member States: this is not a secession from a Union of States (*Staatsverband*), problematical under international law, but just a withdrawal from an association of States (*Staatenverbund*), founded on the principle of the reversible self-commitment.[26] Indeed, pursuant to the opinion of the Court, the Treaty does not transform the European Union into a thorough Federal State (*Staatsverband*), but into a confederation of States (*Staatenverbund*).

III. "Domain Réservé"

Lastly, according to the arguments of the *BVerfG*, as highlighted at paragraph no. 275 of the Lisbon decision, the Treaty of Lisbon neither transfers constituent power, which is not amenable to disposition by the constitutional bodies, nor abandons State sovereignty of the Federal Republic of Germany. Hence, the German *Bundestag* still retains sufficiently weighty responsibilities and competences on its own: therefore, the level of legitimization of the EU still complies with

[25] See, *supra*, note 2, paragraph no. 277.

[26] See, *supra*, note 2, paragraphs nos. 233, 299, 329, 330.

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constitutional requirements to the extent that the principle of conferral is safeguarded to a degree beyond the measure provided for the Treaties.

In fact, the *Bundestag*, representing the people of Germany, and the Federal Government borne by it, has to retain a formative influence on political developments in Germany.[27] There are some sensitive areas that are necessarily reserved to the Member States competences. At paragraph no. 249 of the Lisbon decision, the Federal Constitutional Court runs through those areas that have to be retained by the Member State in order to achieve "the political formation of the economic, cultural and social circumstances of life."

The Court, at paragraph 250 of the Lisbon decision, identifies the most sensitive areas for the development of the public opinion:

(1) decisions on substantive and formal criminal law;
(2) decisions on the disposition of the police monopoly on the use of force towards the interior and of the military monopoly on the use of force towards the exterior;
(3) the fundamental fiscal decisions on public revenue and public expenditure;
(4) decisions on the shaping of circumstances of life in a social State;
(5) decisions which are of particular importance culturally, for instance as regards family law, the school and education system, and dealing with religious communities.[28]

The *BVerfG* explicitly lists which issues have to be handled within the boundaries of the Member State's domestic jurisdiction because they have to pertain to the essential core of any democratic State. These topics have to be ruled only by the Member States because they "are fundamental policy decisions which bear a strong connection to the cultural roots and values of every State. Family relations, issues of language, integration of the transcendental values into public life, organization of school and education particularly affect grown convictions and concepts of values which are rooted in specific historical traditions and experiences. Here, democratic self-determination requires that the respective political community that is connected by such traditions and convictions remain the subject of democratic legitimization".[29] In the Maastricht case, the Court stated quite generally that functions and powers of substantial importance have to remain for the German

[27] See, *supra*, note 2, paragraph no. 246.

[28] Matthias Niedobitek, *The Lisbon Case of 30 June 2009 – A Comment from the European Law Perspective,* 10 GLJ 1267, 1271 (2009), available at: http://www.germanlawjournal.com/index.php?pageID=11&artID=1160, last accessed 22 March 2010.

[29] See, *supra*, note 2, paragraph no. 260.

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Bundestag. Now the Lisbon case defines specific areas that have "always been deemed especially sensitive for the ability of a constitutional State to democratically shape itself."

As foreseen by international law in order to rule the relationship between international organizations and national States, *mutatis mutandis*, these democratic sensitive areas could be defined as the "domain réservé" (domestic jurisdiction) of the Member States.[30] Nevertheless, the proper subject entitled to shape the contents of the domestic jurisdiction, rather than a national constitutional court, is the group of framers of EU Treaties. However, as a matter of fact and not yet of law, it could be easily asserted that the subject-matters indicated by the German Constitutional Court in paragraph 249 have to be considered within the domestic jurisdiction.

C. EU Parliament and U.S. Senate: Equality and Proportionality

As already stressed in section B.*I.* of this article, Article 14.2, TEU Lisbon, states that the principle of degressive proportionality stands between the principle under international law of the equality of the States and the State principle of electoral equality. Comparing the EU Parliament model with the United States (U.S.) legal system, the States of the Union seats allocation system of one of the legislative Chambers, the Senate, is based on the static "two senators for each State" basis. Thus, according to the Amendment XVII of the U.S. Constitution,[31] the one hundred members of the U.S. Senate are apportioned among the States equally, without any consideration to population or territorial extension in order to guarantee the minorities representation. In the Federalist Paper no. 62 James Madison, examining the equality of representation in the Senate affirms that "if it is right that among a people thoroughly incorporated into one nation every district ought to have a proportional share in the government and that among independent and sovereign States, bound together by a simple league, the parties, however, unequal in size, ought to have an equal share in the common councils, it does not

[30] Pursuant to international law, the concept of domestic jurisdiction signifies an area of internal State authority that is beyond the reach of international law. Exactly, international law is what is left over after the State determines the boundaries of its domestic jurisdiction. The most common provision of domestic jurisdiction is contained in Article 2.7 of the United Nations Charter which establishes that the norms of international law would constitute the boundaries of domestic jurisdiction. See Anthony D'Amato, *Domestic Jurisdiction*, in ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1090 (1992).

[31] Although from 1787 until 1913, the U.S. Constitution specified that State legislatures would elect U.S. senators. Article 1, Section 3, read: "The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years […]". The XVII Amendment, introduced in 1913, giving the electoral power to the people, instead, states: "The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years […]."

appear to be without some reason that in a compound republic, partaking both of the national and the Federal character, the government ought to be founded on a mixture of the principles of proportional and equal representation."[32] Madison continues by stating that "the equal vote allowed to each State is at once a constitutional recognition of the portion of sovereignty. So far the equality ought to be no less acceptable to the large than to the small States; since they are not less solicitous to guard, by every possible expedient, against an improper consolidation of the States into one simple republic."[33] Therefore, the mixture of proportional and equal representation does not jeopardize the majoritarian democratic legal system, considering the "compound polity" of the EU in which the national and Federal character can be guaranteed by the regressively proportional EP seats allocation system.

On the contrary, the *BVerfG*, at paragraph no. 286 of the Lisbon decision, affirms that in a Federal State, such as the U.S., this marked imbalance is tolerated because it is applied only for the Second Chamber existing beside the Parliament. The Court points out that the election of the German members of EP opens up to the right to vote of the citizens of the Federal Republic of Germany a "complementary" possibility of participation in the system of European Institutions.[34] The concept of a "complementary" democratic legitimization is already found in the Maastricht case.[35] Under this point of view, the Lisbon case affirms the Maastricht case.[36]

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[32] James Madison, *Federalist Paper no. 62 ("The Senate")*, in ALEXANDER HAMILTON, JAMES MADISON, JOHN JAY, THE FEDERALIST PAPERS, 375 (Clinton Rossiter ed., 2003). However, according to the editors, it is unsure that the Federalist Paper no. 62 has been written properly by James Madison.

[33] *Id.*, 376.

[34] See, *supra*, note 2, paragraphs nos. 274 and 286.

[35] Exactly see, *supra*, note 3, the Court stated: "If the Federal Republic of Germany becomes a member of a community of States which is entitled to take sovereign action in its own right, and if that community of States is entrusted with the exercise of independent sovereign power (both of which the GG expressly permits for the realisation of a unified Europe, Article 23, paragraph 1, GG), then democratic legitimation cannot be effected in the same way as it can be within a State regime which is governed uniformly and conclusively by a State constitution. If sovereign rights are granted to supranational organisations, then the representative body elected by the people, *i.e.* the German Federal Parliament, and with it the enfranchised citizen, necessarily lose some of their influence upon the processes of decision-making and the formation of political will. Accession to an inter-governmental community has the consequence that any individual member of that community is bound by decisions made by it. Of course, a State, and with it its citizens, which is a member of such a community also gains opportunities to exert influence as a consequence of its participation in the process of forming political will within the community for the purpose of pursuing common (and with those, individual) goals. The fact that the outcome of these goals is binding upon all Member States necessarily assumes that each Member State acknowledges the fact that it is bound."

Nonetheless, this "moderate" equality mixed with a proportional criterion is the result of the recognition of the due portion of sovereignty of each Member State. Indeed, the EP seats allocation does not affect the democratic level of legitimization of the EU, because the electoral method balances the respect of the national sovereignty through the proportional element with the Federal flair through the regressive adaptation. At the most, it could be objected that, through the TEU Lisbon, the EP Members are no more designated as representatives of "the people of the Member States",[37] but as representatives of "the citizens of the Union", as stated by Article 14.2 TEU Lisbon.[38]

D. From the *Maastricht-Urteil* to the *Lissabon-Urteil*

In the frame of the development of the EU matter case-law, the decision of the German Federal Constitutional Court traces another landmark judgment, as the decision of the same Court, the so-called *Maastricht Urteil*, pursuant to which the Court stated the compatibility of the Treaty of Maastricht with the fundamental rights of the *Grundgesetz*. According to the 1993 *BVerfG* decision the EU, a union among the peoples of Europe, is an alliance of democratic States which seeks to develop dynamically. The decision asserted that the performance and the exercise of sovereign powers involve, in the first instance, the peoples of the individual States which must, through their national parliaments, provide democratic legitimation for such action.[39] Accordingly, the democratic legitimation derives from the interconnection between the action of European governmental entities and the parliaments of the Member States.

In the Lisbon judgment the Court confirms this model of *Staatenverbund* created by the *BVerfG* in 1993: the Member States belong to a union able to exert its own authority through a treaty amenable to the Member States provisions. Pursuant to this pattern the citizens are still the subjects owning the democratic legitimation and the States are the "Masters of the Treaties" (*Herren der Verträge*), as it could be confirmed by the principle of withdrawal, stated by Article 50 of the Treaty on European Union. In the opinion of the German Constitutional Court the accession to the Treaty is not irreversible[40] and the constitutional identity of the Federal

[36] Christian Wohlfahrt, *The Lisbon case: a critical summary,* 10 GLJ 1277, 1279 (2009), available at: http://www.germanlawjournal.com/index.php?pageID=11&artID=1161, last accessed 22 March 2010 .

[37] Treaty Establishing the European Community (TEC), Article 189, vol. 50, 2007.

[38] GIUSEPPE GUARINO, RATIFICARE LISBONA? 114 (2008).

[39] See *supra*, note 3, 419.

[40] See, *supra*, note 2, paragraph no. 233.

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Republic of Germany is insured by Article 23 GG, which safeguards the constitutional system.

In the 1993 Maastricht judgment the *BVerfG* not only ruled on the admissibility of the various challenges brought against the Treaty of Maastricht and defined its own role, as Constitutional Court, in order to protect the fundamental rights within the European legal system,[41] but the Court also raised two linked but distinct issues: on the one hand, the expansion of the EU competences through treaty amendment and interpretation; on the other hand, the potential existence of "absolute" limits to European integration.[42] In 1993 the Court considered the hypothetical future development of the EU, underlining that at the time, in any case, there was no intention to establish the "United States of Europe" comparable in structure to the United States of America.[43] Nevertheless, in 1993 the Federal Constitutional Court affirmed that, in view of the degree to which the nations of Europe are growing together, the transmission of democratic legitimation within the institutional structure of the EU by the EP elected by the citizens of the Member States must also be taken into consideration.[44]

The only claim considered by the *BVerfG* in 1993 was the complainant's assertion that the Treaty of Maastricht violated its constitutional rights guaranteed by Article 38.1 GG. The applicants in the decision of June 2009 declared that the Treaty violated the democratic participation through free and equal voting, the foundation of the democracy, pursuant to Article 38 GG. Thus, Article 38.1 GG represents a

[41] Thus, in the *Lissabon-Urteil* the *BVerfG* developed two bases for own constitutional review: the *ultra vires review* and the *identity review*. In the first place, the *ultra vires review*, whether legal instruments of the European Institutions and Bodies, adhering to the principle of subsidiarity, do not keep within the boundaries of the sovereign powers accorded to them by way of conferred powers. This is a remarkable change from the approach in *Solange I* judgment, 2 COMMON MARKET LAW REVIEW (CMLR) 540 (1974) and *Solange II* judgment, 3 CMLR 225 (1987), when the Court affirmed the well-known formula that the *BVerfG* would no longer examine the compatibility of European secondary law with German fundamental rights exists on the European level, comparable to the secured ones by the German Basic Law. Instead, in the Lisbon case the Court states that any European legal act can be scrutinized for its conformity with the German Basic Law regarding "obvious" transgressions of the boundaries of competences and identity, *id est* the so-called "domain réservé". See Frank Shorkopf, *The European Union as an association of sovereign States: Karlsruhe's ruling on the Treaty of Lisbon*, 10 GLJ 1219, 1232 (2009), available at: http://www.germanlawjournal.com/index.php?pageID=11&artID=1156, last accessed 22 March 2010. In the second place, the other type of review fixed by the Court is the *identity review*, whether the inviolable core content of the constitutional identity of the GG pursuant to Article 23.1, sentence 3, GG in conjunction with Article 79.3 GG is not respected.

[42] Steve J. Boom, *The European Union after the Maastricht decision: is Germany the Virginia of Europe?*, (1995) available at http://www.jeanmonnetprogram.org, last accessed 22 March 2010.

[43] See, *supra*, note 3, 424.

[44] See, *supra*, note 3, 395.

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linking element between the *Maastricht- Urteil* and the recent decision on the Treaty of Lisbon. As stated above, the "Act Extending and Strengthening the Rights of the *Bundestag* and the *Bundesrat* in European Union Matters" infringes Article 38.1 GG in conjunction with Article 23.1 of the Basic Law, insofar as rights of participation of the German *Bundestag* and the *Bundesrat* have not been elaborated to the constitutionally required extent, according to the new Treaty on the EU. If the Member States elaborate the European law laid down in the Treaties on the basis of the principle of conferral in such a way that an amendment of the Treaty law can be brought about solely or decisively by the Institutions of the EU - albeit under the requirement of unanimity in the Council - a special responsibility is incumbent on the national constitutional bodies in the context of participation. In Germany, this responsibility for integration must, on the national level, comply with the Article 23.1 GG constitutional requirements.[45]

Article 38.1 GG establishes the right to vote: it's the right to democratic self-determination and to free and equal participation to the State authority, pursuant to the democratic principle and human dignity. The democratic principle could not be amended, such as the fundamental rights.[46] As stated in *Maastricht-Urteil*, these provisions establish the so-called "eternity-guarantees" able to shape the constitutional identity of the German legal system[47] and are not amendable due to Article 79.3 GG (*Identitätskontrolle*). In the Maastricht case, the German Court set itself the role of "gatekeeper" with respect to jurisdictions, deciding case by case what is *ultra vires* for EU actions. With the Lisbon case, it asserts the absolute immutability of certain parts of the *Grundgesetz* with respect to European law.[48] Nevertheless, the principle of democracy allows the Federal Republic of Germany to be open to the international and European legal order, considering that the limits of State sovereignty, both in favour of international law and the European law, are founded on peacekeeping and refusal of every rivalry among the European Member States.[49]

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[45] See, *supra*, note 5.

[46] See, Article 1 to 20 GG.

[47] See, *supra*, note 2, paragraphs nos. from 208 to 210 and Francesca Liberati, *La sentenza del Tribunale costituzionale tedesco sulla compatibilità del Trattato di Lisbona con il Grundgesetz: una guida alla lettura*, 14 FEDERALISMI.IT (2009), available at: 14 http://www.federalismi.it, last accessed 22 March 2010.

[48] Stephan Leibfried & Karin van Elderen, *"And they shall Beat their Swords into Plowshares" – The Dutch Genesis of a European Icon and the German Fate of the Treaty of Lisbon*, 10 GLJ 1297, 1303 (2009), available at: http://www.germanlawjournal.com/index.php?pageID=11&artID=1163, last accessed 22 March 2010.

Accordingly, at paragraph no. 210 of the Lisbon decision, the Court stresses that "the principle of the representative rule of the people can be violated if in the structure of bodies established by the Basic Law, the rights of the *Bundestag* are essentially curtailed and thus a loss of substance of the democratic freedom of action of the constitutional body occurs which has directly come into being according to the principles of free and equal election". In the *Maastricht-Urteil*, the Court highlighted that "the democratic foundations upon which the Union is based are extended concurrent with integration, and that a living democracy is maintained in the Member States while integration proceeds. If too many functions and powers were placed in the hands of the European inter-governmental community, democracy on the level of the individual States would be weakened to such an extent that the parliaments of the Member States would no longer be able to convey adequately that legitimation of the sovereign power exercised by the Union".[50]

On this issue, Germany gives up a portion of own sovereignty rights to the EU on the grounds of an integration programme, respecting the principle of conferral and the constitutional identity of every Member State and insuring that the German State could exert its sovereign political and social powers. The Member States are still the "Masters of the Treaties" as solemnly declared in the *Maastricht-Urteil*. The Court underlines that the Member States permanently remain the Master of the Treaties because the EU empowerment to exercise supranational competences comes, however, from the Member States. Furthermore, under a functional point of view, the sources of EU authority are the peoples of Europe and their own democratic constitutions.[51] Thus, the Federal Constitutional Court clarifies that the Basic Law bans the transfer of competence to decide on its own competence, the so-called *Kompetenz-kompetenz*.[52] Nevertheless, the Lisbon case contains, but in contrast to the Maastricht case, the explicit refusal to create a European Federal State,[53] being understood that only a Constitutional Act, pursuant to Article 146 GG and emanating from the German people, could transform the EU into a Federal State.

As Weiler stated, in 1993 the German Federal Constitutional Court presented itself as a guarantor of the universal values of democracy rather than as a guarantor of German particularism.[54] Today, after the restrictive stance of the June 2009 decision,

[50] See, *supra*, note 3, 421.

[51] See, *supra*, note 2, paragraph no. 231.

[52] See, *supra*, note 2, paragraph no. 233.

[53] See *supra*, note 28, 1280.

[54] Joseph H. Weiler, *The State "über alles" Demos, Telos and the German Maastricht Decision*, (1995) available at: http://ww.jeanmonnetprogram.org, last accessed 22 March 2010.

the *BVerfG* casts some doubts about the lack of democracy of the EU and expresses the urge to solemnly map out the boundary of the Member States sovereignty, indicating, *inter alia*, the subject matters of their "domain-réservé". Indeed, the *BVerfG* shows the intention to outline the boundaries of the German State sovereignty.

E. The EU's Identity

I. The European Union Polity under the BverfG *Point of View*

Supranationalism is a phenomenon in search of a "mediating principle or principles" that will adequately account for the legitimate needs of international coordination and for the cultural persistence of the "sovereign" nation-state as "the primary political unit".[55] The present constitutional review deeply assesses the identity of EU and the supranationalism issues.

Analysing the TEU Lisbon, the *BVerfG* verified the consistency of the European competences, its principles and procedures to the German democracy model. In fact, on the one hand, in some policy fields the EU has a shape corresponding to a federal State; on the other hand, the internal decision-making and appointment procedures remain committed to the method of an international organization, ruled by international law.

The decision-making procedures of the EU, albeit working as a federal entity, are inspired by international organization model, based on the equality of the States. To the *BVerfG*, the EP does not adopt statutes able to represent a homogeneous political majority of a European people, because the European *demos* does not exist. The peoples of the EU Member States remain the decisive holders of public authority and, accordingly, of the constituent power. Thus, without a European *demos*, the EU lacks democratic legitimization: the power and the authority of the Union have to be justified by the national peoples, according to the principles of representative democracy.[56]

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[55] Peter L. Lindseth, *Democratic legitimacy and the administrative character of supranationalism: the example of the European Community*, 99 COLUMBIA LAW REVIEW 628, 738 (1999).

[56] In this direction Renzo Dickmann, *Costituzione e democrazia in Europa. Verso (e dopo) il referendum irlandese*, 18 FEDERALISMI.IT (2009), available at: http://www.federalismi.it, last accessed 22 March 2010. To Dickmann, the European Union could not become a (Federal) State because a people legitimizing its evolution as democratic and constitutional State does not exist, even if the institutional instruments could be apt to reach this purpose. Indeed, in the European Union could not be faced the constitutional issue as settled by the Member States, because the European Union is not a State and in Europe there is

Under the perspective of EU international organization profile, the *BVerfG* sets out the EU as a legal community (*Herrschaftsverband*) ruled by international law and founded and still supported by the will of the Member States. The consequences are, firstly, the improvement of competences and powers of the EU and, secondly, the due respect to the principle of conferral in order to guarantee the State sovereignty in all those subject-matters where the domestic public opinion is more sensitive.[57] Thus the judgment emphasized that Germany participation in European integration will be viewed through the lens of the constitution's provisions for international law.[58]

The *BVerfG* explains its own interpretation of the European Institutions' roles. The EP, although its powers have been strengthened by the Treaty of Lisbon, is not where the political representation of the European people is expressed. In fact, the further increase of the EP competences cannot completely fill the gap between the extent of the decision-making power of the Union's institutions and the citizens'democratic power of action in the Member States. The EP is a supranational body of representation of the peoples of the Member States. Considering that, pursuant to the Lisbon decision at paragraphs no. 284 and 285 of the Lisbon decision, the election of the EP does not duly consider the equality (see, *supra*, sections B and C) and it is not allowed to adopt authoritative decisions on political issues, the unique place where the citizens equally participate is the national Parliament, where the substantial democracy is protected, as stated by paragraph no. 260 of the Lisbon judgment. Moreover, the European Council is not a Second Legislative Chamber nor the Commission is an executive power next to the national ones. They are still nonmajoritarian bodies of a supernational organization.

According to the *BVerfG*, the EU's structural "democratic deficit" could not be resolved through the *Staatenverbund* and further integration could not be achieved weakening the Member States political power and the principle of conferral. Furthermore, with the present *status* of integration, the EU does not yet attain a shape corresponding to the level of legitimization of a democracy constituted as a State. It is not a Federal State, but remains an association of sovereign States in which the principle of conferral is applied.

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not a unitary people feeling the urge of a Constitution. Afterwards, there is no constituent power asking for a constitutional issue.

[57] Renzo Dickmann, *Integrazione europea e democrazia parlamentare secondo il Tribunale Costituzionale Federale tedesco*, 14 FEDERALISMI.IT (2009), available at: http://www.federalismi.it, last accessed 22 March 2010.

[58] Shorkopf (note 41), 1220.

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II. Another Perspective: EU Polity in fieri

Thus, the *BVerfG* adopts a static position on the identity of the EU, surmising that it is more likely that European integration will tend, in its form, towards an interstate association of sovereign States, a secondary political area.[59] Nevertheless the German Federal Constitutional Court underestimates some crucial elements that give to the European Union a shape more similar to the *Staatsverband* rather than the *Staatenverbund*, such as: the recognition of the efficacy of the EU Charter of Fundamental Rights pursuant to Article 6, the statements of the principle of democracy pursuant to Article 2 and Title II TEU, the procedure of Article 7 TEU[60] and, overall, the procedure ruled by Article 48 TEU, bearing in mind that the next institutional reforms, as soon as the Treaty will be ratified, will be activated by the Government of each Member State, the Commission or by the EP, and they will be approved only unanimously.[61] Besides, the involvement of the Regions in the shaping of the EU[62] not only enables to relieve the "democratic deficit" of the EU,[63] but it is also the recognition of a peculiarity of the European interstate legal system, considering the more and more impelling local interests engaged in the European policies.

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[59] *Id*., 1219, 1221.

[60] Pursuant to Article 7 TEU on a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities, referred to Article 2 TEU. According to the opinion of Stelio Mangiameli, *Integrazione europea e diritto costituzionale*, ANNUARIO DI DIRITTO TEDESCO 25, 71 (2000), Article 7 procedure, although is an example of a widespread praxis of the international organization, represents a certain sign of Federalization of the European Union legal system. In fact, the suspension is not an instrument targeted to the exclusion of the defaulter Member State, such as the procedures ruled by international law, but it is the corroboration of a provision aimed at the effective application of the principle of democracy and of the rule of law in the European Union.

[61] Antonio Padoa-Schioppa, *La Germania e l'Europa*, 4 L'UNITÀ EUROPEA 1 (2009). The scholar affirms also that the procedures, pursuant to Article 48 TEU Lisbon, give a further democratic element to the European Union, considering that the Parliament and the Convention represent the people and accordingly expression of democracy.

[62] For the role of the Member States Regions in the European integration process see, *supra*, note 60 (Mangiameli) 79.

[63] Nicoletta Parisi, *L'apporto delle regioni italiane al procedimento di elaborazione di politiche ed atti comunitari*, in REGIONI, COSTITUZIONE E RAPPORTI INTERNAZIONALI. RELAZIONI CON LA COMUNITÀ EUROPEA E COOPERAZIONE TRANSFRONTALIERA 161, 167 (Istituto Regionale di Ricerca per la Lombardia ed., 1995).

At any rate, the European polity could not be framed in the very same legal system of the national States, considering as well the weak liability structure of the European political parties system.[64] Article 12.2 of the Charter of Nice and Article 10.4 TEU Lisbon assert that the political parties at European level contribute to form European political awareness and to express the will of citizens of the EU. Nevertheless, the lack of any European collective sense of identity and a common language partly hinders two important requirements of a democracy: the public opinion and political debate. On this purpose, it could be useful to have a reform of the European electoral system in order to achieve the direct election of the President of the Commission at the same time of the EP election: in this way, the political awareness could fastly grow up and the election campaign for the EP could not be focused just on national issues but on proper European issues. Every European political party could shape its own identity and it would be no more a "copy and paste" of the sum of the several national parties ideologies.

Actually, the Treaty of Lisbon starts and crosses this path, foreseeing that "taking into account the elections to the European Parliament and after having held the appropriate consultations, the European Council, acting by a qualified majority, shall propose to the EP a candidate for President of the Commission. This candidate shall be elected by the EP by a majority of its component members. If he does not obtain the required majority, the European Council, acting by a qualified majority, shall within one month propose a new candidate who shall be elected by the European Parliament following the same procedure."[65] Article 17.7 TEU, indeed, links EP elections and individuation of the Presidency of the Commission candidate. This is a first step, but it is not the arrival for the underpinning of the European political parties role.

Further, in order to defeat the EP "democratic deficit," Article 224 TFEU affirms that the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, by means of regulations, shall lay down the regulations governing political parties at the European level and especially the rules regarding their fundings. This provision was already foreseen in the 2001 Treaty of Nice and, as a result, the EU adopted a new regulation dealing with the European parties statutes and fundings.[66] Thus, the EP modified its own internal rules and a new regulation changed the European political parties activities and

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[64] Agatino Cariola, *Responsabilità politica*, in DIZIONARIO DI DIRITTO PUBBLICO 5161, 5169 (Sabino Cassese ed., 2006).

[65] See, *supra*, note 9, Articles 14.1 and 17.7.

[66] Regulation EC No. 2004/2003 of 4 November 2003, O.J. 2003 L 297, dealing with the rules governing political parties at European level and the rules regarding their fundings.

financing system.[67] The regulation on the financing system of the EU political parties, for the first time, attempted to give a formal definition and a substantial characterization of the European political parties, in order to emancipate the poltical parties from the *status* of "federation" of national parties, reaching the goal to represent the voters as Europeans, not only as citizens of their own Member States.[68] Notwithstanding, under this point of view, the consolidation of the European democracy is not already accomplished, considering that the adoption of a common uniform electoral process still appears like a long-term objective,[69] such as the direct election of the President of the Commission.

Nevertheless, a possible approach to defeat the "democratic deficit" could be not only the improvement of the competences of the EP,[70] as the Treaty of Lisbon is aiming to reach, but also the launch of an electoral process by the European voters in order to force their national leaders to transfer sufficient powers and resources to a democratic and Federal union:[71] in such a way democracy and integration among the European multiple *demoi* could be compatible. But it is unmistakable that a launch of suchlike electoral process should be connected to the strenghtening of European political parties: it is like a spiral aiming to connect the European people(s) to European Institutions.

Considering the actual framework, it could be more consistent to the Lisbon Treaty framework to affirm that the EU is an organization of States *in fieri*, not already a Federation of States, and no more a Confederation of States. It is most likely a different legal system.

In the Treaty of Lisbon the European framers, even if they apportion differently the roles of the EU Bodies and national Governments in the legislative procedure, they still choose the principle of the institutional equilibrium linked to the EU Institutions' rigidity, rather than the principle of the separation of powers. Considering the different roles performed by the EU Institutions in the legislative

[67] Regulation EC No. 1524/2007 of 18 December 2007 (amending Regulation EC No. 2004/2003), O.J. 2007 L 343, dealing with the rules governing political parties at European level and the rules regarding their funding.

[68] About the close relationship between the political parties financing system and democracy see, BRUCE ACKERMAN, IAN AYRES, VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE (2002).

[69] Adriana Ciancio, *I partiti politici europei e il processo di democratizzazione dell'Unione*, 11 (2009) available at: http://www.lex.unict.it/cde/quadernieuropei, last accessed 22 March 2010.

[70] Cariola (note 64).

[71] Giandomenico Majone, *The Common Sense of European Integration*, 13 JOURNAL OF EUROPEAN PUBLIC POLICY (JEPP) 607 (2006).

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process, it seems to be that the EU legal system is more and more similar to the ancient legal system of "mixed polity", such as the Roman Republican age polity,[72] an alternative to the majoritarian democracy.[73] Within the mixed polity there is a collaboration, not a separation, among bodies and powers: as a matter of fact, the European legislative process is the result of the interaction among Council, Commission and Parliament. Consequently, the main criterion of organization is the representation of some interests in a condition of balance of powers and not of separation: there is not any univocal relation between political functions and European bodies.

F. CONCLUSION

By way of conclusion, the *BVerfG* decision on the Lisbon Treaty arouses the reflection on the core of State sovereignty and on the boundaries of the EU legal system. The German Federal Constitutional Court focuses on the force of the right to vote of every citizen, the basis of democracy: democracy is founded on representation, representation derives from citizens votes. The core of State sovereignty is filled by, according to the opinion of the *BVerfG*, the list of the "domain réservé" subject-matters (see, *supra*, section B.III), that shapes the self-determination of every constitutional and democratic State. Pursuant to these statements, as described in the previous sections, the German Federal Constitutional Court defines the EU as a secondary political area, the result of the association of sovereign States: no more, no less. As already stressed above, suchlike setting does not respond to the framework shaped by the Treaty of Lisbon and to the capability of EU: a still *in fieri* polity and not a "still" polity.

[72] In the opinion of Polybius the Roman Republic Constitution portrayed a balance of powers system among the public authorities so perfect to force them to a perfect collaboration also in dangerous conditions. See, POLYBIUS, THE HISTORIES, vol. III, Book VI, 18, 309 (W. R. Paton, transl., 1966).

[73] Giandomenico Majone, *Deficit democratico, istituzioni non-maggioritarie ed il paradosso dell'integrazione europea*, 67 STATO E MERCATO 3, 24 (2003). See, also ROBERT DAHL, DEMOCRACY AND ITS CRITICS (1989).