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The 'Law-Regulation Distinction' and European Integration : Reflections on the German Jurisprudence from the 1960s to the Present[1].

I. Some Initial Comparative Reflections

To speak of a *law-regulation distinction*, as my title does, is to use terminology that should be immediately familiar to the French reader. In fact, the phrase draws directly from Articles 34 and 37 of the French Constitution of 1958, perhaps the most formalized expression of the distinction in comparative constitutional law. I am referring, of course, to the constitutional allocation of normative power between the legislature and the executive in a modern administrative state. In France, Article 34 defines the normative power belonging to parliament (the realm of *la loi*), and Article 37 defines that belonging to the government (the realm of *le règlement*). Textually at least, these provisions seem to establish the government's regulatory power as *le pouvoir du droit commun*, whereas the constitutional realm of *la loi* is one of *attribution*, in principle exceptional or limited, operating against the background of the executive's otherwise autonomous normative power. The implication is that, in disputes over the scope of legislative and regulatory norm-production in France, a presumption is supposed to operate in favor of the government's power under Article 37 unless one can show that the norm falls within the domain constitutionally attributed to the legislature under Article 34. This was almost certainly the intent of the drafters of the Constitution of 1958, notably Michel Débré. But as French readers well know, the decisions of both the *Conseil d'État* and the *Conseil constitutionnel* have, over time, not conformed precisely to that original intent. The case law, rather, often suggests a continuing attachment to somewhat older understandings of the executive's normative power as still derived from, rather than fully autonomous of, enabling legislation adopted by parliament. The *Conseil d'État* and the *Conseil constitutionnel* have of course not ignored the import of Articles 34 and 37 (how could they?) even as they have deviated somewhat from this original intent. The judgments of these bodies acknowledge how the Article 34-37 distinction responds to a functional demand for increased regulatory freedom of the executive in the modern administrative state.

[1] This contribution is adapted from Peter L. Lindseth, *Power and Legitimacy : Reconciling Europe and the Nation-State* (Oxford University Press, 2010); reprinted with permission.

Given that functional demand, it should hardly surprise us that other systems have tried to strike a similar balance. On the one hand, they have recognized the need for increased executive power in an era of administrative governance; on the other hand, they have sought to reconcile that reality with older conceptions of separation of powers, in which the legislature still plays the preeminent role. In the United States, for example, we do not speak of a law-regulation distinction as such, though the distinction clearly exists in our law. Rather we speak of the *nondelegation doctrine* as an aspect of our constitutionally grounded system of separation of powers. This is a relatively weak doctrine, to be sure, in part because of the same, pervasive functional demands that gave rise to Articles 34 and 37 in France. But in the US concerns are still felt over the proper limits of delegation. In our understanding, the demands of constitutional separation of powers still constrain Congress's power to shift normative (rulemaking) power to non-legislative actors – the President, executive departments and agencies, as well as so-called independent agencies. We often trace the ideological origins of this constraint to John Locke's famous injunction in the *Second Treatise of Government* (1690) : "The power of the *legislative*, being derived from the people by a positive voluntary grant and institution, can be no other than what that positive grant conveyed, which being only to make *laws*, and not to make *legislators*, the *legislative* can have no power to transfer their authority of making laws, and place it in other hands." American courts, however, do not interpret this Lockean concern as a strict prohibition but rather as a loose parameter whose spirit is fulfilled if Congress adequate defines an *intelligible principle* or *standard* by which to guide executive and administrative rulemaking. In this way, our eighteenth century system of separation of powers is reconciled, however, imperfectly, with the functional requirements of delegation of regulatory power in the modern administrative state.

In German constitutional law – the principle focus of this contribution – several provisions of the Basic Law of 1949 reflect a similar drive to distinguish the normative power of the legislature with the regulatory authority that might lawfully be transferred to the executive. The German conceptual framework is perhaps closer to the American than the French model, owing in part to the influence of the Office of Military Government of the United States (OMGUS) over constitution drafting in the western zones of occupation at the end of the 1940s.[2] Article 80(1), for example, specifically authorizes the legislature to delegate regulatory power to the executive. But it also subjects that authorization to the constitutional requirement that parliament statutorily define the "content, purpose, and scope" (*Inhalt, Zweck, und*

[2] See generally Mößle, Wilhelm, *Inhalt, Zweck und Ausmaß : Zur Verfassungsgeschichte der Verordnungsermächtigung*, Berlin : Duncker and Humboldt, 1990, chap. 6. In the present contribution, all translations of cited material into English are my own unless otherwise indicated.

Ausmaß) of the executive's normative authority in the statute itself. Also important in the German context (particularly in view of the disaster of the National-Socialist dictatorship of 1933-1945) is Article 129(3). This provision declares "void" any purported grant to the executive of a power "to issue provisions in place of statutes." Finally, the so-called "eternity clause" of Article 79(3) permanently entrenches the separation of powers between the legislative and executive branches by, among other things, rendering the elements of the German constitutional system outlined in Article 20 (establishing West Germany as "a democratic and social federal state" with all public authority emanating from the "people" through elections, with powers separated between the executive, legislative, and judicial branches) as constitutionally unamendable.

The law-regulation distinction in Germany is further reflected in a number of doctrines articulated by the Federal Constitutional Court the *Bundesverfassungsgericht* in the postwar decades. These include the *Vorhersehbarkeitsformel,* which focuses on whether the content of any future regulation is foreseeable from the statute itself; the *Selbstentscheidungsformel,* which focuses on whether the legislature has itself decided the limits of the regulated area as well as the goals of the regulation; and the *Programmformel,* which focuses on whether the statute has defined with sufficient clarity the regulatory program.[3] If the answer to any of these queries is affirmative, then the delegation is generally understood to satisfy the separation-of-power demands of the Basic Law. The decisions of the *Bundesverfassungsgericht* have also worked to define the *Vorbehalt des Gesetzes*, or the notion that there are certain domains "reserved to legislation."[4] This operates in conjunction with the so-called *Wesentlichkeitstheorie* ("theory of essentialness") through which the Court has sought to protect what it views as the "essential" functions of the parliament in the adoption of any legislative norms that might have an impact on constitutionally guaranteed rights or some other fundamental aspect of public policy.

[3] See generally BVerfGE 55, 207, 225 44 (1980) (describing in detail the history and tradition that had developed since the 1950s in which the Court endeavored to find implicit limitations on legislative delegations which, on their face, open-endedly authorized the promulgation of regulations by the executive).

[4] For an interesting historical analogue in France, see Commission de la fonction publique, avis n° 60.497, 6 février 1953, in Gaudemet, Yves, Bernard Stirn, Thierry Dal Farra, and Frédéric Rolin (eds), *Les grands avis du Conseil d'État*, Paris: Dalloz, 1997, p. 64 (advisory opinion of the *Conseil d'État* stating that "certain matters are reserved to legislation"); see also Lindseth, Peter L., "The paradox of parliamentary supremacy : Delegation, democracy, and dictatorship in Germany and France, 1920s-1950s", *Yale Law Journal*, 2004, 113 (7), p. 1341-1415, p. 1402. The Italian analogue is the so-called *riserva di legge*. See, e.g., C. Cost., sent. n° 26/1966; further elaboration, see Pittaro, Paolo, "Sospensione delle garanzie fondamentali e diritti dell'uomo", *Annali della Facoltà di Scienze Politiche*, 1980, 2, p. 469-508, p. 479.

II. The Challenge of European Integration : the Example of Germany

I raise these comparative points by way of introduction because they are essential to understanding the core focus of this contribution : the German jurisprudence over the last two decades regarding the national constitutional underpinnings of European integration. What has been poorly understood about this jurisprudence (particularly the line initiated by the *Bundesverfassungsgericht* in its Maastricht decision of 1993)[5] is the depth of its grounding in the very same constitutional provisions that define the law-regulation distinction in the postwar administrative state. Certainly much of the legal commentary on these decisions in English has ignored these foundations, often displaying a deeply mistaken interpretation of the historical foundations of the Court's reasoning.[6] My aim in this contribution is to draw out the legal-historical underpinnings more explicitly.

After its establishment in 1949, the new Federal Republic of Germany (FRG) pursued a two-prong strategy of normalization after the horrors of dictatorship, war, and genocide. The first prong was the restoration of liberal, parliamentary institutions on the national level, in conjunction with a firm commitment to the protection of human rights. The second

[5] *Brunner v. European Union Treaty* (the "German Maastricht Decision"), Cases 2 BvR 2134/92 and 2159/92 of 12 Oct. 1993, BVerfGE 89, 155, [1994] 1 C.M.L.R. 57, reprinted in Oppenheimer, *The relationship between European Community law and national law*, *op. cit.*, vol. 1, p. 527-75; see also 33 I.L.M. 388 (1994). This contribution uses the I.L.M. translation because it is superior to the C.M.L.R. translation found in Oppenheimer, *The relationship between European Community law and national law*, *op. cit*.

[6] See, e.g., Weiler, J.H.H., "Does Europe need a constitution? Demos, telos, and the German Maastricht Decision", *European Law Journal*, 1995, 1 (3), p. 219-258, p. 222 (claiming instead that the Court based its Maastricht Decision on a conception of democracy derived from Carl Schmitt). For an extended critique of this interpretation, see Lindseth, Peter L., The "Maastricht Decision" ten years later : Parliamentary democracy, separation of powers, and the Schmittian interpretation reconsidered, Robert Schuman Centre for Advanced Studies/EUI Working Papers, RSC 2003/18, http://cadmus.eui.eu/dspace/bitstream/1814/1893/1/03_18.pdf (accessed February 9, 2009). For variants on the Weiler interpretation that are suggestive of its influence in English-language scholarship, see, e.g., Stone Sweet, Alec, *Governing with judges* : *Constitutional politics in Europe*, Oxford, UK : Oxford Univ. Press, 2000, p. 177 (stating that the decision "legitimizes the very source" of the purported democratic deficit in the Community : its "intergovernmental elements"); and Alter, Karen J., *Establishing the supremacy of European law* : *The making of an international rule of law in Europe*, Oxford, UK and New York : Oxford Univ. Press, 2001, p. 107 (lamenting the decision's seemingly "nationalist tone," and puzzling over how it "created a constitutional limit on the transfer of national political authority to the EC level based on the inviolability of German democracy"). But see also Claes, Monica, *The national courts' mandate in the European constitution*, Oxford, UK : Hart, 2006, p. 608, n. 189 ("[w]hat is disturbing is the tone, rather than the content" of the decision); see also Baquero Cruz, Julio, "The legacy of the *Maastricht-Urteil* and the pluralist movement", *European Law Journal*, 2008, 14 (4), p. 389-422, p. 391 ("[m]any years have passed and we may now be able to read the Maastricht-Urteil with more detachment and even learn something from it").

was an equally firm commitment to European integration as an agent of peace. Although it was poorly understood at the inception of integration in the early 1950s, however, these two elements in the German normalization strategy were in fact in legal tension.

As with other postwar constitutions in Western Europe, the West German Basic Law of 1949 was explicitly open to the delegation of power to international bodies, as part of its more general *Völkerrechtsfreundlichkeit*[7]. Article 24(1) provided : "The Federation may by legislation transfer sovereign rights [*Hoheitsrechte*] to interstate institutions [*zwischenstaatliche Einrichtungen*]." *Hoheitsrechte*, it must be noted, is a term of art in German constitutional law, referring to "the form in which sovereignty is exercised," which "should not be confused with sovereignty itself, for which the German language has the different term of *Souveränität.*" Thus, the Basic Law did *not* permit "the transfer of a *portion* of *Souveränität* which remain[ed], indivisibly, with the German people" embodied in its national institutions. But it did permit the attribution of *Hoheitsrechte* "to international institutions, just as they [could] be attributed to the *Länder* institutions."[8]

Article 24 was not the only constitutional provision of potential relevance to European integration in the Federal Republic, however. The others included the aforementioned Article 20 (which again, under the so-called "eternity clause" of Article 79(3), could not be amended); Article 129(3) (which again declared "void" any purported grant to the executive a power "to issue provisions in place of statutes"); and the formal requirements for delegation of legislative power under Article 80(1) (which again reserved the definition of the *Inhalt, Zweck, und Ausmaß* of a regulatory program to the legislature). Taken together, these provisions *potentially* (although not necessarily) raised delicate legal issues for German participation in the process of European integration. The problem, of course, was that integration entailed the extensive delegation of normative power to an institution dominated by national executives, the Council of Ministers. Even if the Basic Law authorized international delegation in the abstract, the question was whether the specific institutional structure of European integration, with its evident legislative empowerment of national executives through the Council, constituted a violation of the entrenched separation-of-powers provisions of the Basic Law.

[7] For an overview, see De Witte, Bruno, "Sovereignty and European integration : The weight of legal tradition", in *The European Court and National Courts—Doctrine and jurisprudence : Legal change in its social context*, ed. Anne-Marie Slaughter, Alec Stone Sweet, and J. H. H. Weiler, Oxford, UK : Hart, 1998, p. 282-86 (emphasis in original).
[8] *Ibid*., p. 303 (citations omitted).

By the late 1950s and early 1960s, there was in fact "a fierce discussion in [the] German legal literature as to whether German membership violated . . . German constitutional law."[9] The German judiciary entered this debate famously in 1963, in a decision by the tax court in Rhineland-Palatinate (*Finanzgericht Rheinland-Pfalz*).[10] The *Finanzgericht* began by noting that the delegation of normative power to the Community (*qua* "executive organ") did not comply with the requirements in Article 80(1) of the Basic Law, which governed legislative delegations to the executive within the national constitutional system.[11] In deciding to refer the matter to the *Bundesverfassungsgericht*, the tax court further stressed the entrenched separation-of-powers principles in the Basic Law :

> "Article 129(3) expressly prohibits the legislature from abdicating its legislative responsibility by excessively generous grants of power by allowing executive organs to alter or supplement statutes by regulation, or simply to issue regulations in the place of statutes. Articles 80 and 129 show the legislator's intention to restrict the law-making power, which is in practice indispensable to the executive, within the narrowest possible limits. Article 79(3) forbids infringement of the principle of separation of powers [through its reference to Article 20]. This emphasizes that the separation of powers is a principle of the highest importance, and that the limits of the exception contained in the Constitution itself [*i.e.*, Article 80(1)] cannot be extended. There can be no doubt that to allow an executive organ to issue statutes [as European integration purportedly allowed] violates Article 79(3). Thus the Federal legislature's right to share its power with supra-national organisations is faced with an insuperable obstacle, where its exercise involves violating a fundamental constitutional principle such as separation of powers."[12]

When the *Bundesverfassungsgericht* finally responded to the reference of the *Finanzgericht* in 1967, it relied heavily on Article 24 to uphold the constitutionality of supranational delegation of regulatory authority. "The Community itself is neither a state nor a federal state. It is a gradually integrating Community of a special nature, an 'interstate institution' in the sense of Article 24(1) of the Basic Law to which the Federal Republic of Germany like many other member states has

[9] Claes, *The national courts' mandate in the European constitution*, *op. cit.*, p. 504, citing Mann, Clarence J., *The function of judicial decision in European economic integration*, The Hague : Nijhoff, 1972. 418ff ; Hopt, Klaus, "Report on recent decisions", *Common Market Law Review*, 1966, 4, p. 93-101 ; and Alter, *Establishing the supremacy of European law*, *op. cit.*, p. 71 80.

[10] *Re Tax on Malt Barley*, Case III 77/63, FG (Rheinland-Pfalz), 14 Nov. 1963, [1964] C.M.L.R. 130.

[11] [1964] C.M.L.R. at 132-133.

[12] *Ibid.*, p. 135-136.

'transferred' certain sovereign rights."[13] The Court, in reaching this conclusion, also used terms suggesting a degree of autonomy for the Community that was the near polar opposite of the analysis of the *Finanzgericht* : "A new public authority was thus created which is *autonomous and independent* with regard to state authority of the separate member states. Consequently its acts have neither to be approved ('ratified') by the member states nor can they be annulled by them. The E.E.C. Treaty is as it were the *constitution of this Community.*"[14] The *Bundesverfassungsgericht* would never again describe the legal autonomy of the Community in such sweeping, seemingly constitutional terms.

Before the Court returned to the question of integration's relationship to the national constitutional order (in the famous *Solange I* decision of 1974),[15] another national high court the Italian *Corte costituzionale* entered the discussion in a way that would influence the subsequent development of the German case law. As in the Basic Law, the postwar Italian constitution contained a provision (Article 11) by which Italy agreed "on conditions of equality with other states, to the limitations of sovereignty necessary for an order that ensures peace and justice among Nations; it promotes and encourages international organizations having such ends in view."[16] In Italian constitutional law it was also well-settled that " 'limitation' of sovereignty cannot become 'loss' of sovereignty "[17], and that Article 11 only authorized a functional curtailment but not a complete or even partial "alienat[ion]" of sovereignty to bodies operating

[13] BVerfG decision, 1 BvR 248/63, 1 BvR 216/67 of 18 Oct. 1967, [1968] 1 EuR 134, 135 36, as translated in Alter, *Establishing the supremacy of European law*, *op. cit*., p. 78.

[14] [1968] 1 EuR 134, 135-36, as translated in Alter, *Establishing the supremacy of European law*, *op. cit*., p. 78 (emphasis added).

[15] *Internationale Handelsgeselchaft mbH v. Einfuhr- und Vorratstelle für Getriebe und Futtermittel*, Case 2 BvG 52/71, BVerfGE 37, 271; [1974] 2 C.M.L.R. 540, 551 [hereinafter *Solange I*].

[16] Camera dei Deputati, *Costituzione della Repubblica italiana* : *Deutsch, English, Español, Français, Italiano,* Roma : Segreteria generale, 1990, art. 11, p. 72.

[17] Cartabia, Marta, "The Italian Constitutional Court and the relationship between the Italian legal system and the European Union", in *The European Court and National Courts—Doctrine and jurisprudence* : *Legal change in its social context*, ed. Anne-Marie Slaughter, Alec Stone Sweet, and J. H. H. Weiler, Oxford, UK : Hart, 1998, p. 133, 134. The French *Conseil constitutionnel* has applied a similar formula to the interpretation of the authorization of "limitations" of sovereignty in the interest of international cooperation in Article 55 of the French constitution of 1958. C.C., dec. nº 76-71 of 29-30 Dec. 1976, *Parlement européen*, 74 I.L.R. 527, translated in Oppenheimer, Andrew (ed.), *The relationship between European Community law and national law* : *The cases*, 2 vols., Cambridge, UK and New York : Cambridge Univ. Press., 1994/2003, vol. 1, p. 315 ("Since the Preamble to the Constitution of 1946, re-affirmed by the Preamble to the Constitution of 1958, states that subject to principles of reciprocity France agrees to limitations of sovereignty which are necessary for the organization and defence of peace, no provision of a constitutional nature allows all or part of national sovereignty to be transferred to any international organization"). For further discussion, see Claes, *The national courts' mandate in the European constitution*, *op. cit.*, p. 472-73.

under the joint authority of the participating states.[18] In a series of cases interpreting Article 11 stretching from *Frontini* in 1973 [19] through *Granital* in 1984[20] and *Fragd* in 1989[21] the Italian Constitutional Court upheld supranational delegation against formalist challenges (notably the claim that the transfer of authority to the Community unconstitutionally invaded the *riserva di legge* Italy's analogue to the *Vorbehalt des Gesetzes*). [22] The Court also acknowledged that the Community legal order was separate from the national system, a political decision that Italian judges were bound to respect.[23] "The two legal orders are autonomous and separate," the Court stated in *Granital,* "even though there is co-ordination between them on the basis of the division of competences established and guaranteed by the Treaty."[24] But the *Corte costituzionale* also alluded to the existence of certain "counter-limits" (*controlimiti*) to supranational normative autonomy and supremacy.[25] In a famous passage from *Frontini* (reiterated in the later cases), the Italian Constitutional Court warned that any "aberrant interpretation" of the treaty by which Community institutions might claim "an unacceptable power to violate the fundamental principles of our constitutional order or the inalienable rights of man" would compel the Court to "control the continuing compatibility of the Treaty with the above-mentioned fundamental principles."[26]

The German Constitutional Court would later pick up on the notion of counter-limits in its two seemingly contradictory *Solange* decisions of

[18] De Witte, "Sovereignty and European integration", *op. cit.*, p. 285 (referring to the general "doctrinal compromise" in "post-1945 Western Europe," of which Article 11 is a part). Article 11 may also be understood as an expression of the separation of power from legitimacy that was central to the constitutionalization of delegation as a means of governance.

[19] Corte constituzionale, decision n. 183/73 of 27 Dec. 1973, *Frontini*, 18 Giur. Cost. I 2401; [1974] 2 C.M.L.R. 372; see also Oppenheimer, *The relationship between European Community law and national law*, *op. cit.*, vol. 1, p. 629-640.

[20] C. cost., decision n. 170/84 of 8 June 1984, *Granital*, Giur. Cost. I 1098; 21 *Common Market L. Rev.* 756 (1984) (with note by Giorgio Gaja); see also Oppenheimer, *The relationship between European Community law and national law*, *op. cit.*, vol. 1, p. 643-52.

[21] Corte costituzionale, decision n. 232/1989 of 21 Apr. 1989, *Fragd*, translated in Oppenheimer, *The relationship between European Community law and national law*, *op. cit.*, vol. 1, p. 653-662.

[22] *Frontini*, [1974] 2 C.M.L.R. at 383 84 (rejecting challenge to Community regulation because it failed to respect the *riserva di legge*, *i.e.*, that portion of the legislative power which can only be exercised by the parliament under the Italian constitution). On the role of the *riserva di legge* in postwar Italian constitutional law, see Lindseth, *Power and legitimacy*,*op. cit.*, chap. 2, n. 117 and accompanying text.

[23] *Frontini*, [1974] 2 C.M.L.R. at 385 87.

[24] *Granital*, as translated in Oppenheimer, *The relationship between European Community law and national law*, *op. cit.*, vol. 1, p. 647.

[25] See De Witte, "Sovereignty and European integration", *op. cit.*, p. 288-89; for further details on the origins of the *controlimiti*, see Claes, *The national courts' mandate in the European constitution*, *op. cit.*, p. 502-503.

[26] [1974] 2 C.M.L.R. at 389.

1974 and 1986.[27] *Solange I* suggested an aggressive, ongoing role for the Court in reviewing the decisions of the ECJ a direct attack not only on supranational supremacy but also, in some sense, on its legitimacy. The German Court stated that "as long as" the Community lacked "a democratically legitimated parliament," genuinely democratic oversight over the Council and Commission as executive-technocratic policy-makers, as well as, finally, "a codified catalogue of fundamental rights" on par with national protections,[28] the *Bundesverfassungsgericht* would need to retain jurisdiction to review whether Community norms satisfied national constitutional requirements.[29] A decade of scholarly criticism (as well as suggestions by the Court itself that it was willing to revisit this holding)[30] ultimately led the Court to retreat from the full-blown implications of *Solange I*. But in reversing itself in *Solange II* in 1986,[31] the Constitutional Court did not reject the underlying principle of its earlier decision (notably relating to the weak democratic legitimacy of supranational power). Rather, the Court found only that the protections of *individual rights* under Community law had advanced to the point that the Court would "no longer exercise its jurisdiction" in that regard.[32] But the Court also reiterated (alluding to "similar limits under the Italian Constitution") that the Basic Law could not permit Germany "to surrender by way of ceding sovereign rights to international institutions the identity of the prevailing constitutional order of the Federal Republic by breaking into its basic framework, that is, into the structure which makes it up."[33]

This is the essence of the constitutional concern of what I call the *postwar settlement of administrative governance*. It is a concern defined in light of the crisis of parliamentary democracy of the interwar period and the devolution of representative government into dictatorship[34]. Of course, European integration presented no threat of dictatorship, although it did significantly empower national executives and supranational technocrats in an otherwise highly complex and fragmented supranational regulatory process. Thus, for the time being,

[27] De Witte, "Sovereignty and European integration", *op. cit.*, p. 289.

[28] [1974] 2 C.M.L.R. at 551.

[29] *Ibid.*, 551 52.

[30] See the so-called *Vielleicht* ("maybe") decision of 1979, *Steinike und Weinling v. Bundesamt für Ernährung und Fortswirtschaft—Vielleicht*, BVerfGE 52, 187, [1980] 2 C.M.L.R. 531; for a discussion, see Alter, *Establishing the supremacy of European law*, *op. cit.*, p. 94.

[31] *Wünsche Handelsgesellschaft*, Case 2 BvR 197/83, BVerfGE 73, 339; [1987] 3 C.M.L.R. 225 [hereinafter *Solange II*].

[32] [1987] 3 C.M.L.R. at 265.

[33] [1987] 3 C.M.L.R. at 257, citing La Pergola and Del Duca (1985).

[34] See generally Lindseth, *Power and legitimacy*, *op. cit.*, chap. 2; see also and Lindseth, Peter L., "The paradox of parliamentary supremacy : Delegation, democracy, and dictatorship in Germany and France, 1920s-1950s", *Yale Law Journal*, 2004, 113 (7), p. 1341-1415.

German and Italian allusions to counter-limits remained vague reservations that might never be activated. Nevertheless, the distinction drawn by the *Bundesverfassungsgericht* in *Solange II* – deference on issues of rights-protection but not on supranational interference with national democracy – would reappear in that court's holdings of the 1990s and 2000s. In this sense, the approach of German Federal Constitutional Court would echo that of the United States Supreme Court to broad and perhaps constitutionally problematic delegations in the administrative state : When in the rare case such concerns have surfaced, rather than resorting to wholesale invalidation, U.S. judges have used these concerns as an interpretive constraint – that is, as a kind of counter-limit or "resistance norm" [35] – to avoid statutory constructions of administrative authority that amounted to "such a 'sweeping delegation of legislative power' that it might be unconstitutional."[36]

III. From Maastricht to Lisbon : *Kompetenz-Kompetenz* and the Postwar Constitutional Settlement

Both the German Maastricht Decision of 1993 and the corresponding Lisbon Decision of 2009 can be seen as bookends on an era, prompted by a nearly continuous political process of treaty reform stretching over two decades. It was this process of constitutional politics that forced many national high courts (not just the German) to focus on the national constitutional foundations of European integration and the limits of permissible supranational delegation.[37] At the forefront of this process

[35] Cf. Young, Ernest A., "Constitutional avoidance, resistance norms, and the preservation of judicial review", *Texas Law Review*, 2000, 78, p. 1549-1614. For more detail, see Lindseth, *Power and legitimacy*, *op. cit.*, Introduction, nn. 62-63 and accompanying text.

[36] Indus. Union Dep't v. Am. Petroleum Inst., 448 U.S. 607, 646 (1980), quoting A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 439 (1935); see also Sunstein, Cass R., "Nondelegation canons", *University of Chicago Law Review*, 2000, 67, p. 315-343, p. 316 ("Rather than invalidating federal legislation as excessively open-ended, courts hold that federal administrative agencies may not engage in certain activities unless and until Congress has expressly authorized them to do so. … As a technical matter, the key holdings are based not on the nondelegation doctrine but on certain 'canons' of construction.").

[37] Aside from the several decisions of the French *Conseil constitutionnel* over the course of the last two decades, see, e.g., in the Czech Republic, Pl. ÚS 19/08, 26 Nov. 2008, *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*, http://angl.concourt.cz/angl_verze/doc/pl-19-08.php (last visited June 11, 2009); in Denmark, *Carlsen and Others v. Rasmussen*, Case I-361/1997 of 6 Apr. 1998, 1998 UfR 800, reprinted in Oppenheimer, *The relationship between European Community law and national law*, *op. cit.*; in Spain, DTC 1/2004, http://www.tribunalconstitucional.es/es/jurisprudencia/restrad/Paginas/DTC122004en.aspx (last visited July 7, 2009); and in Poland, K18/04, 11 May 2005, *Polish Membership of the European Union (Accession Treaty)*, excerpted and translated in Craig, Paul, and Gráinne de Búrca (eds), *EU law : Text, cases, and materials*, 4th ed. Oxford, UK : Oxford Univ. Press, 2008, p. 371-72.

was, however, the German Federal Constitutional Court, in both its Maastricht and Lisbon decisions. I take up each of these rulings in turn.

A. The German Maastricht Decision of 1993

As part of the Maastricht ratification process, Germany inserted a new "Europe Article" into the Basic Law, Article 23, to augment national-parliamentary and *Länder* input into the supranational legislative process. Article 23(1) defined, as one commentator put it, "express substantive limits to European integration"[38] – that is, that German participation in integration depends on its continuing commitment to "democratic, social, and federal principles, to the rule of law, and to the principle of subsidiarity," as well as on its guaranty of "a level of protection of basic rights essentially comparable to that afforded by this Basic Law."[39] Moreover, Article 23(1) specified (in terms that would take on even greater significance in the German Lisbon Decision of 2009) that any future transfer of sovereign rights (*Hoheitsrechte*) to the EU had to be done by way of "a law" (*Gesetz*) – that is, by an act of the legislature; executive action alone, on the basis of the prior ratification of the treaties, could not suffice. Finally, Article 23 reiterated that German participation is also expressly subject to the rules regarding constitutional amendment in Article 79(2) as well as the "eternity clause" of Article 79(3), in order to prevent a situation where the original supranational delegation of *Hoheitsrechte* might be overtaken by subsequent developments (for example, ECJ interpretations expanding the scope of supranational authority).

In terms of the linkage to the postwar constitutional settlement, the most important aspect of the German Maastricht Decision of 1993 was the Court's emphasis on the national parliament's initial delegation of normative power to Community institutions through the treaty and the act of accession. From the Court's perspective, these acts provided the legitimating foundation upon which supranational norms could gain force in the domestic legal order. As with the delegation via an enabling act on the domestic level, the Court examined the shift in normative power to the supranational level using language that echoed its prior jurisprudence under Article 80(1) of the Basic Law. The Court thus asked whether the German parliament had defined powers of the EU "foreseeably" and had "standardized them to a sufficiently definable level."[40] The Court, however, explicitly took a more lenient approach to the question of supranational delegation as compared to purely national delegations. The Court noted that "a Treaty under international law has

[38] De Witte, "Sovereignty and European integration", *op. cit.*, p. 297.
[39] German Basic Law, art. 23(1).
[40] 33 I.L.M. at 422.

to be negotiated between the contracting parties," and thus "the demands placed upon the precision and solidity of the Treaty provisions cannot be as great as those which are otherwise prescribed for a law by the parliamentary reservation [*Parlamentsvorbehalt*]" (*i.e.*, the core of normative power that parliament cannot generally delegate under the Basic Law).[41] There would be no return, in other words, to the formalist approach to nondelegation of the *Finanzgericht Rheinland-Pfalz* in 1963.

The *Bundesverfassungsgericht* additionally noted that, once the delegation was made, the various national executives assembled in the Council of Ministers provided oversight for (and therefore an important degree of ongoing democratic legitimacy of) the Community's normative output just as hierarchical oversight mechanisms by the executive helped to legitimize administrative governance at the national level.[42] The Court acknowledged that the shift away from unanimity in the Council since the mid-1980s (something extended in the Maastricht Treaty) meant that "the German Federal Parliament, and with it the enfranchised citizen" that is, those bodies to whom the national executive was ultimately accountable "necessarily lose some of their influence upon the process of decision-making and the formation of political will."[43] But the Court again stressed that the democratic legitimation of Europe's normative output "cannot be effected in the same way as it can with a State regime which is governed uniformly and conclusively by a State constitution."[44] "The imposition of unanimity as a *general* requirement would, by definition, give the will of the individual state priority over that of the inter-governmental community and would therefore bring into question the very structure of such a community."[45] The Court was unwilling to demand such individualized State control, in effect acknowledging the basic institutional realities that had prevailed in the Community since the 1960s.[46] In part, the Court justified its acceptance of this degree of supranational normative autonomy by relying on rather conventional notions of technocratic expertise, as well as on the political incapacities of parliaments under electoral and interest group pressures all

[41] *Ibid*., at 422.

[42] See *ibid*., at 421-22 ("the exercise of sovereign powers is largely determined by governments. If Community powers of this nature are based upon the democratic process of forming political will conveyed by each individual people, they must be exercised by an institution delegated by the governments of the Member States, which are themselves subject to democratic control."). The Court stressed as well mechanisms for national legislative and *Länder* oversight that the constitutional amendments prompted by the Maastricht Treaty had added to the Basic Law. *Ibid*., at 425 26.

[43] *Ibid*., at 418.

[44] *Ibid*.

[45] *Ibid*., at 419.

[46] See generally Lindseth, *Power and legitimacy*, *op. cit.*, chap. 3.

common justifications for delegation under the postwar constitutional settlement.[47]

The Court's reasoning drew on the postwar constitutional settlement (and more particularly, on the law-regulation distinction) in one final, critical respect the national judicial enforcement of constitutional bounds of permissible delegation. In the Court's view, it was ultimately the constitutional duty of the national judiciary to ensure that the normative power remained within the "standardized" boundaries defined in the treaty and act of accession. If a supranationally produced norm fell outside those boundaries, it "would not be binding within German territory," because the requisite initial democratic legitimation of the norm would be lacking.[48] "Accordingly, the German Federal Constitutional Court must examine the question of whether or not legal instruments of European institutions or governmental entities may be considered to remain within the bounds of the sovereign rights accorded to them, or whether they may be considered to exceed those bounds."[49]

In applying this analytical framework, the Court upheld the Treaty of Maastricht, in important part because it found the treaty "regulat[ed] to a sufficiently foreseeable degree the procedures for future exercise of the sovereign powers granted based on the parliamentary accountability provided for by the Act of Accession."[50] In reaching this conclusion, however, the Court scrutinized quite closely several provisions that, if construed in ways the Court deemed unacceptable, could negate the limits of Community competence defined by the legislature. In a famous passage clearly directed at the ECJ, the *Bundesverfassungsgericht* stated :

> "If to date dynamic expansion of the existing Treaties has been based upon liberal interpretation of Art. 235 of the EEC Treaty ..., [as well as] upon considerations of the implied powers of the European Communities, [and] upon interpreting the Treaty in the sense of the maximum possible exploitation of the Community's powers ("effet utile") ..., [then] when standards of competence are being interpreted by institutions and governmental entities of the Communities in the future, the fact that the Maastricht Treaty draws a basic distinction between the exercise of limited sovereign powers and amendment of the Treaty will have to be taken into consideration. Thus interpretation of such standards may not have an effect equivalent to an extension of the Treaty; indeed, if

[47] 33 I.L.M. at 439 (discussing the independence of the European Central Bank).
[48] *Ibid.*, at 422-423.
[49] *Ibid.*, at 423.
[50] *Ibid.*, at 426.

> standards of competence were interpreted this way, such interpretation would not have any binding effect on Germany."[51]

Relatively quickly, the ECJ addressed the concern that the old Article 235 (Article 308 TEC/Article 352 TFEU) operated as a backdoor means to amend the treaty. In 1996, the Court of Justice issued an advisory opinion (*Opinion 2/94*) on whether the Community could accede, on the basis of Article 235, to the European Convention on Human Rights.[52] Like the *Bundesverfassungsgericht,* the ECJ stressed that the Community's ability to act was limited to only those "powers conferred upon it by the Treaty."[53] The ECJ then specifically stated that Article 235 "cannot serve as a basis for widening the scope of Community powers," and more particularly that it "cannot be used as a basis for the adoption of provisions whose effect would, in substance, be to amend the Treaty without following the procedure which it provides for that purpose."[54]

German concerns were not limited, however, to the potential misuse of the reserve legislative authority of the old Article 235. Indeed, the decision of the *Bundesverfassungsgericht* to interpret the EC Treaty independently, without recourse to a preliminary reference the European Court of Justice, which implied a limitation on the ECJ's claim to exclusive interpretative jurisdiction (in effect, supremacy) under the treaties.[55] In ruling on the constitutionality of the Treaty of Maastricht, the *Bundesverfassungsgericht* necessarily offered its own construction of the EC Treaty – a use, in the integration context, of the well-established principle of *verfassungskonforme Auslegung* – the preference for statutory interpretation consistent with the demands of the constitution. (This principle is not unlike the nondelegation canons used by the United States Supreme Court to counter potentially

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[51] *Ibid*., at 441.

[52] Opinion 2/94, 1996 E.C.R. I-1759. The Danish Supreme Court would later take cognizance of this decision in dismissing a similar challenge to the constitutionality of the Maastricht Treaty, although the Danish court also alluded to past instances when "this provision may have been applied on the basis of a wider interpretation." See *Carlsen and Others v. Rasmussen*, Case I-361/1997 of 6 Apr. 1998, 1998 *UfR* 800, as translated by the Danish Foreign Office, reprinted in Oppenheimer, *The relationship between European Community law and national law*, *op. cit.*, vol. 2, p. 189.

[53] 1996 E.C.R. at I-1787.

[54] *Ibid*., at I-1788.

[55] But see Claes, *The national courts' mandate in the European constitution*, *op. cit.*, p. 607-608 (claiming that the ECJ's exclusive interpretive authority is "not an issue of supremacy, but one of jurisdiction. The Court of Justice possesses this exclusive jurisdiction because the Member States have attributed it in the Treaties"); see also *ibid*., 609 (describing how the "*Bundesverfassungsgericht* thus denied the exclusive jurisdiction of the Court of Justice to decide whether a particular measure had been validly adopted or was invalid for lack of competence"). The refusal of the Constitutional Court to make a preliminary reference continues: see Baquero Cruz, "The legacy of the *Maastricht-Urteil* and the pluralist movement", *op. cit*., p. 396, discussing the Court's decision regarding the European Arrest Warrant, BVerfGE, 2 BvR 2236/04, judgment of 18 July 2005.

problematic interpretations of statutory authority in the American administrative state.)[56] This is an approach that the Court would take to a whole new level in its ruling on the constitutionality of the Treaty of Lisbon in 2009.

B. The German Lisbon Decision of 2009

The core requirement of the German Lisbon Decision of 2009 would concern democratic legitimation derived from the principle of treaty "conferral" (*begrenzte Einzelermächtigung*, or "limited specific empowerment," to translate the more evocative German). According to the Court, "conferral" – that is, *delegation* in the postwar constitutional settlement – provided the essential linkage between European public law and its national constitutional foundations.[57] To give effect to this principle, the Court followed the lead of its earlier Maastricht judgment, drawing directly from analytical formulas developed in the delegation jurisprudence of the postwar decades under Article 80(1) of the Basic Law. This included both the *Programmformel* as well as again the *Vorhersehbarkeitsformel*, which together are designed to ensure that the legislature defined the regulatory "program" in the enabling legislation in a sufficiently "predictable" or "foreseeable" manner.[58] The purpose of these doctrines is to preserve some semblance of democracy in a historically recognizable sense, even as actual regulatory power migrated elsewhere.

It was specifically as to the predictability requirement, in fact, that the Court found the basis to strike down elements of the legislation implementing the Treaty of Lisbon as unconstitutional (although not the Treaty of Lisbon itself). The Court was concerned that the provisions implementing the "simplified revision procedure" of Article 48(6) of the

[56] See above, n. 34 and accompanying text.

[57] German Lisbon Decision, BVerfG, 2 BvE 2/08, June 30, 2009 [provisional translation in English, hereinafter "German Lisbon Decision (2009)"], http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html (accessed July 3, 2009), para. 234 ("the principle of conferral under European law . . . [is] the expression of the foundation of Union authority in the constitutional law of the Member States.").

[58] The German Lisbon Decision stated that variously the "integration programme of the European Union must be sufficiently precise;" that there must be a "predetermined integration programme;" and that "the member states may not be deprived of the right to review adherence to the integration programme." German Lisbon Decision (2009), paras. 236, 238, and 334. The Court then added a requirement of predictability (*Vorhersehbarkeit*) in order to interpret the more specific demands on the legislature under Article 23 of the Basic Law. "The principle of democracy as well as the principle of subsidiarity, which is structurally demanded by Article 23(1)," together require, in the Court's view, that the transfer and subsequent exercise of sovereign powers in the European Union be "[substantively] restrict[ed] . . . in a predictable manner." *Ibid*., para. 251.

Treaty on European Union (TEU) post-Lisbon, as well as the "passerelle" clauses of Article 48(7) TEU post-Lisbon (along with several other more specific provisions) did not fulfill the requirement under Article 23(1) of the Basic Law that any transfer of sovereign powers must be undertaken through a specific "law" (*Gesetz*). The general ratification of the treaty itself would not suffice for democratic legitimation, precisely because of the lack of foreseeability in how these provisions of the Treaty of Lisbon might be used in the future.[59]

Indeed, in the Court's view, the predictability requirement "that the integration programme envisaged in the [treaties] can still be predicted and determined by the German legislative bodies"[60] provided the foundation for the more general prohibition against supranational *Kompetenz-Kompetenz*. This prohibition was not just directed against the interpretive authority of the ECJ (as in the German Maastricht Decision) but also, perhaps most importantly, against the Union's legislative process. Implicitly this meant the national executives assembled in the Council, who might seek to maximize their own power by marginalizing national parliamentary involvement. Here, too, the Court expressed concerns about the reserve legislative authority in the treaty, which becomes Article 352 TFEU post-Lisbon (the old Article 235 of the Treaty of Rome and subsequently Article 308 TEC). Because of "the undetermined nature of future cases of [Article 352's] application,"[61] the Court held that the German government may not support its use without seeking specific, prior statutory authorization from the legislature pursuant to Article 23 of the Basic Law. The treaty itself was constitutional, the Court ruled, but the preservation of democracy on the national level demanded an implementing law with significantly increased national parliamentary involvement.

The Court's sensitivity to national parliamentary prerogatives manifested itself in another line of reasoning as well : The claim that there are "[e]ssential areas of democratic formative action" whose transfer to supranational competence is particularly sensitive and potentially

[59] *Ibid*., para. 311 ("The implications" of changes in policies under the simplified revision procedure, the Court stated, "are hardly predictable [*kaum vorhersehbar*] for the German legislature. Article 48(6) TEU post-Lisbon opens up to the European Council a broad scope of action for amendments of primary law."). See also *ibid*., para. 415. The Court applied the same standard to the passerelle provisions, stating that "the exercise of the general and special bridging clauses must be predictable at the point in time of the ratification of the Treaty of Lisbon by the German legislature." *Ibid*., para. 318. Because the shift from unanimity to qualified majority voting constituted "a Treaty amendment under primary law," antecedent legislation was required before the German government could support such a shift in the Council. The sole exception would be in those cases of "special bridging clauses [that] are restricted to areas which are already sufficiently determined by the Treaty of Lisbon." *Ibid*., para. 319 20.

[60] *Ibid*., para. 322.

[61] *Ibid*., para. 328.

constitutionally problematic.[62] These domains included, according to the Court, criminal law, use of military or police force, control over the domestic budget, and family law, among others.[63] Echoing the Court's "theory of essentialness" (*Wesentlichkeitstheorie*) in the domestic administrative state, the German Lisbon Decision signaled that there are "content-related limits to the transfer of sovereign powers" analogous to the statutory reserve (*Vorbehalt des Gesetzes*) that applies nationally.[64] But in noting these limits, the Court again made clear that the existence of this reserve did "not mean *per se* that a number of sovereign powers . . . can be determined from the outset or specific types of sovereign powers must remain in the hands of the state. Political union means the joint exercise of public authority, including the legislative authority, which even reaches into the traditional core areas of the state's area of competence."[65] The Court acknowledged that the authority granted to supranational institutions is often capacious.[66] And in exercising that authority, German law accepts both that autonomy and even "implied powers."[67] Nevertheless, in those "[e]ssential areas of democratic formative action" there is a need for both interpretive constraint and heightened oversight, both by national representative institutions and the Court, consistent with the demands of "living democracy" on the national level.[68]

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[62] *Ibid*., para. 249.

[63] See, e.g., *ibid*., paras. 249–260, and 347–69. The Court's list is hardly beyond criticism. See Schönberger (2009), 1209; Halberstam and Möllers (2009), 1250. Moreover, this aspect of the decision emboldened a group of Czech senators, supported by President Vaclav Klaus, to ask the Czech Constitutional Court to define a similar list of domains, as part of their last-ditch effort to prevent the Treaty of Lisbon from entering into force. The Czech Court specifically demurred, stating "it does not consider it possible, in view of the role that it plays in the constitutional system of the Czech Republic, that it should create such a catalog of nontransferable competences and authoritatively define 'the substantive limits for the transfer of competence' as the petitioner requests." Pl. ÚS 29/09, para. 111, http://www.concourt.cz/clanek/GetFile?id=2150 (last visited Nov. 3, 2009), translated in Press Release, The Treaty of Lisbon Is in Conformity with the Constitutional Order of the Czech Republic and There Is Nothing to Prevent its Ratification, Brno, the Constitutional Court (3 Nov. 2009), http://www.usoud.cz/clanek/2144 (last visited Nov. 3, 2009).

[64] German Lisbon Decision (2009), para. 247.

[65] *Ibid*., para. 248.

[66] *Ibid*., para. 231 ("supranational autonomy . . . is quite far-reaching in political everyday life" even as it must "always [be] limited [substantively]").

[67] *Ibid*., para. 237 ("[t]his is part of the mandate of integration which is wanted by the Basic Law").

[68] *Ibid*., para. 351. The Court demanded, for example, a "narrow interpretation" of the EU's new competence in the area of criminal law in the interest of democratic and constitutional legitimacy, finding that, to the extent it might be interpreted as a "blanket empowerment" (*Blankettermächtigung*), antecedent legislation would be required for each unforeseen extension. *Ibid*., paras. 360 and 363; see also paras. 364–66.

There are undoubtedly many seemingly Eurosceptical aspects of the decision, particularly regarding Germany's purported inability to join a European "federal state" under the current Basic Law, or the EU's lack of autonomous democratic legitimacy, especially but not exclusively through the European Parliament.[69] Nevertheless, the Court's ultimate reasoning, like that of the Maastricht Decision before it, was in fact strongly deferential to the current realities of integration. Even if the Court alluded to the existence of an "inviolable" core of sovereignty and democracy protected by the national constitution,[70] the Court in turn gave these concepts such flexible interpretation that it is difficult to see how the vast bulk of integration activity to date might be affected by them in any significant way. Through this decision, the Court seemed to articulate a normative framework not of *validity* but of *resistance*, *i.e.*, "a 'soft limit' which may be more or less yielding depending on the circumstances."[71]

It would thus be wrong to regard the Court's analysis, as former German Foreign Minister Joschka Fischer described it soon after, as simplistically binary, "based on a fiction of two separate spheres, which almost hostilely face each other." To Fischer, this ignored "the real challenge for politics and constitutional law . . . the process of interpenetration of these two spheres, which characterizes European reality."[72] To the contrary, the ruling appeared deeply cognizant of that reality. As another German commentator argued (in part in response to Fischer), the decision entailed "a serious attempt to rethink democracy for the age of major supranational decisions" – that is, democracy still grounded nationally but nevertheless confronted by the delegation of significant regulatory power to the supranational level. "If the political arena is being relocated . . . from the nation-state to Brussels," this commentator continued, "then it is only logical that the sphere of responsibility of the [national] parliament, which is elected to control the executive, should relocate too. That is exactly what the Federal Constitutional Court is demanding."[73]

IV. Conclusion

In its two major rulings of the last two decades on European integration – the Maastricht Decision of 1993 and the Lisbon Decision of 2009 – the German Federal Constitutional Court has relied on a conceptual framework drawn ultimately from the postwar constitutional

[69] *Ibid.*, e.g., paras. 278–97.
[70] *Ibid.*, para. 216.
[71] Young (2000), 1594.
[72] Fischer (2009).
[73] Darnstädt, Thomas, "The future of European democracy", *Spiegel Online International*, July 17, 2009, http://www.spiegel.de/international/europe/0,1518,636706,00.html (accessed July 19, 2009).

settlement. The normative core of Court's reasoning is the notion of *delegation*, which in turn is grounded in the distinction between the proper realm of "law" belonging to the constitutional legislature and that of "regulation" belonging to the executive and administrative spheres. In important respects, the German jurisprudence has intuitively understood European integration as a supranational extension of the more general diffusion and fragmentation of normative power that characterizes modern administrative governance. Through that conceptual framework, the *Bundesverfassungsgericht* has sought to reconcile the reality of European integration *i.e.*, the progressive migration of regulatory power to the supranational level with Europeans' continued attachment to national institutions (notably parliaments) as the enduring expressions of democratic and constitutional legitimacy in the European system.

Whether the German Court can continue to reconcile European realities and national conceptions of constitutional democracy in this way remains to be seen. Certainly the euro crisis of spring 2010 presents a genuine test, and I do not have the space to consider all the possible ramifications here. Suffice it to say that what began as a sovereign debt crisis in Greece has now precipitated a broader crisis that threatens European financial stability and the future of the euro as a viable common currency. As of this writing (mid May 2010), it could not yet be determined whether, in this atmosphere of acute functional demand, the euro crisis would precipitate a new institutional settlement for integration. The "special purpose vehicle" established to manage the new mammoth bailout fund, along with proposals for increased supranational surveillance of national budgets, certainly suggest the possibility. But events are moving fast, and the crisis could still lead to an institutional transformation well short of, or even orthogonal to, some form of European "economic government."

One stumbling block in that direction, it must be acknowledged, could well be the German Federal Constitutional Court. As the *Bundesverfassungsgericht* stated in the Lisbon Decision :

> A transfer of the right of the *Bundestag* to adopt the budget and control its execution by the government … would violate the principle of democracy and the right to elect the German *Bundestag* in its essential content … if the determination of the character and the amount of the levies affecting the citizen were supranationalised to a considerable extent. The German *Bundestag* must decide in a manner that may be accounted for vis-à-vis the people, on the total amount of the burdens placed on the citizens.

> The same applies correspondingly as regards essential expenditure of the state.[74]

In the current crisis atmosphere surrounding the eurozone and the EU more generally, a number of proposals have surfaced for increased supranational surveillance of national budgets. However, as the just-quoted passage from the German Lisbon Decision of 2009 suggests, these proposals present delicate issues for German constitutional law. The idea, as many have argued, that Europe now needs "the equivalent of a budgetary federation in terms of control and oversight of the application of policies in matters of public finance"[75] may prove a step too far without careful attention to national (and particularly German) constitutional concerns.

In the process of resolving the current crisis, European leaders will need to reconcile, just as they have always had to reconcile, two key but contradictory features of integration. The first is the cultural persistence of national democratic and constitutional *legitimacy* in the European system of governance. The second is the functional and political requirements for greater denationalized regulatory *power* in pursuit of integration. The tension between these elements has characterized the integration project since its inception, profoundly shaping the contours of European public law over time.[76] And short of a complete breakup of the EU (something I do not foresee, although some kind of transformation looks increasingly unavoidable), I fully expect this tension will continue shaping European public law as the integration project proceeds into an uncertain future.

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[74] German Lisbon Decision (2009), para. 256.

[75] Jean-Claude Trichet, President of the European Central Bank, Interview in *Le Monde* (June 1, 2010), http://www.lemonde.fr/economie/article/2010/05/31/trichet-au-monde-nous-avons-besoin-d-une-federation-budgetaire_1365339_3234.html (last viewed June 1, 2010).

[76] See generally Lindseth, *Power and legitimacy*, *op. cit.*, on which this contribution is based.

Résumé : Dans ces réflexions, Peter L. Lindseth s'intéresse à l'importance du rôle de la distinction constitutionnelle loi-règlement dans la jurisprudence constitutionnelle allemande relative à l'intégration européenne. L'examen par la Cour de Karlsruhe des traités de Maastricht (2003) et de Lisbonne (2009) au regard de la Constitution montre que l'intégration européenne a été comprise comme une extension supranationale du pouvoir normatif qui caractérise la gouvernance administrative moderne. La notion de délégation est traditionnellement utilisée en Allemagne pour permettre l'autonomie du pouvoir réglementaire tout en préservant une garantie législative des droits individuels. La cour a usé d'un raisonnement analogue en matière de délégations de compétences à l'Union européenne.

Summary *: In those reflexions, Peter L. Lindseth explained the great importance of the law-regulation distinction in the German Constitutional Jurisprudence concerning the European Integration. The rulings of Karlsruhe Court on the Maastricht (1993) and Lisbon (2009) treaties demonstrate that European Integration has been understood as a supranational extension of the more general diffusion and fragmentation of normative power that characterizes modern administrative governance. The concept of a delegation of authority is currently used in Germany to reconcile autonomy of regulatory power and legislative protection of individual rights. The court used a similar reasoning about the délégations of powers to the European Union.*

Zusammenfassung : *Der Beitrag analysiert die Unterscheidung zwischen Gesetz und Verordnung in der Rechtsprechung des deutschen Bundesverfassungsgerichts zur europäischen Integration. Die jüngste Rechtsprechung zeigt, dass das Gericht — dem modernen Governance-Verständnis folgend — die europäische Integration als eine supranationale Ausdehnung der Rechtsetzungsbefugnis verstanden hat.*