Special Issue
The OMT Decision of the German Federal Constitutional Court

Beyond Symbolism: Towards a Constitutional *Actio Popularis* in EU Affairs? A Commentary on the *OMT* Decision of the Federal Constitutional Court

By Klaus Ferdinand Gärditz[*]

A. Introduction

In its OMT Decision of 14 January 2014, the *Bundesverfassungsgericht* (Federal Constitutional Court of Germany, hereinafter: BVerfG) made its first referral for a preliminary ruling[1] to the European Court of Justice (ECJ). This has been perceived by some commentators as an act of submission under the judicial sovereignty of the ECJ, and by some as a strategy to pass the ball to the ECJ and postpone further involvement[2], which the Court willingly entered into when it ordered its bold preliminary injunction.[3] These are questions of legal symbolism used in the political communication triggered by any major decision of a constitutional court. Kept in the right perspective, the Court merely followed the program laid down in Article 267 of the Treaty on the Functioning of the European Union (TFEU). It, thus, fulfilled an obligation that is, undoubtedly, binding on all national courts, including the BVerfG (as a court of last resort), which had—in its *Mangold*

[*] Prof. Dr. iur., Chair for Public Law at the University of Bonn. Email: gaerditz@jura.uni-bonn.de.

[1] *See* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 2728/13 (Jan. 14, 2014), https://www.bundesverfassungsgericht.de/en/decisions/rs20140114_2bvr272813en.html [hereinafter *OMT* Decision].

[2] *See, e.g.,* Lisa Nienhaus & Christian Siedenbiedel, *Richter Hasenherz*, FRANKFURTER ALLGEMEINE SONNTAGSZEITUNG, Feb. 9, 2014, at 19 (calling the judges in their acid—almost insulting—comment procrastinators (*Zauderer*) and cowards (*Hasenherzen*, *i. e.* rabbit hearts); Holger Steltzner, *Die Angst der Verfassungsrichter*, FRANKFURTER ALLGEMEINE ZEITUNG, Feb. 7, 2014, http://www.faz.net/aktuell/wirtschaft/kommentar-die-angst-der-verfassungsrichter-12790009.html.

[3] *Compare* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court of Germany], Case No. 2 BvR 1390/12 (Sep. 12, 2012) (A part of the proceedings were separated and continued with the reference for a preliminary ruling at hand), https://www.bundesverfassungsgericht.de/en/decisions/rs20140114_2bvr272813en.html; *and* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court of Germany], 2 BvR 1390/12 (Dec. 17, 2013) (separation decision).

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decision—[4]expressly announced that it would refer to the ECJ in appropriate circumstances.[5]

Furthermore, there is nothing new in the decision concerning the competences to which the BVerfG lays claim or exercises with regard to EU law. The Court retains its doctrine developed in the *Lisbon* and *Mangold* decisions to review whether acts of European institutions and agencies are based on manifest transgressions of powers (*ultra vires* control) or affect the area of constitutional identity (structural constitutional identity protection) governed by Article 79, section 3 *Grundgesetz* (Basic Law, German Federal Constitution, hereinafter: GG).[6] Pursuant to that provision—combined with Article 23, section 1, sentence 3—competences cannot be transferred to the EU[7] insofar as the transfer would cause structural changes within the German constitutional order that would negatively affect the principle of democracy (Article 20, sections 1-2 GG), the principle of *Rechtsstaat*[8] (Article 20, section 3 GG) or the fundamental guarantee of human dignity (Article 1, section 1 GG). Such a structural change is beyond the power of constitutional amendment and, thus, cannot be disavowed by a transfer to the EU either. Actually, with

[4] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 2661/06, BVERFGE 126, 286 (Jul. 6, 2010) ("This means for the ultra vires review at hand that the Federal Constitutional Court must comply with the rulings of the Court of Justice in principle as a binding interpretation of Union law. Prior to the acceptance of an ultra vires act on the part of the European bodies and institutions, the Court of Justice is therefore to be afforded the opportunity to interpret the Treaties, as well as to rule on the validity and interpretation of the legal acts in question, in the context of preliminary ruling proceedings according to Article 267 TFEU. As long as the Court of Justice did not have an opportunity to rule on the questions of Union law which have arisen, the Federal Constitutional Court may not find any inapplicability of Union law for Germany"), *available at* http://www.bverfg.de/entscheidungen/rs20100706_2bvr266106en.html.

[5] Udo Di Fabio, *Die Weisheit der Richter*, FRANKFURTER ALLGEMEINE SONNTAGSZEITUNG, Feb. 8, 2014, at 20 (Matter-of-fact style).

[6] *See* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court of Germany], Case No. 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09, BVerfGE 123, 267 (Jun. 30, 2009), http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html; *see also* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court of Germany], Case No. 2 BvR 987, 1485, 1099/10 (Sep. 7, 2011), https://www.bundesverfassungsgericht.de/entscheidungen/rs20110907_2bvr098710.html; *see also* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court of Germany], Case No. 2 BvR 1390, 1421, 1438, 1439, 1440/12, 2 BvE 6/12 (Sep. 12, 2012), https://www.bundesverfassungsgericht.de/en/decisions/rs20120912_2bvr139012en.html. For a detailed analysis, see Roman Lehner, *Die „Integrationsverfassungsbeschwerde" nach Art. 38 Abs. 1 S. 1 GG: prozessuale und materiell-rechtliche Folgefragen zu einer objektiven Verfassungswahrungsbeschwerde*, 52 DER STAAT 535 (2013), *available at* http://ejournals.duncker-humblot.de/doi/abs/10.3790/staa.52.4.535.

[7] *See OMT* Decision at §22.

[8] A semantically etatistic German version of the rule of law.

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regard to the material standards applied, the decision is a mere resumption of the *Lisbon* case—partially even with the same complainants.[9]

The complainants[10] in the case at hand challenge the participation of the German *Bundesbank* (German Central Bank) in the implementation of the Decision of the Governing Council of the European Central Bank (ECB) of 6 September 2012 on Technical Features of Outright Monetary Transactions (*OMT* Decision), which heralded the purchase of government bonds at secondary sovereign bond markets without any *ex ante* quantitative limits. Furthermore, they allege that the German Federal Government and the German *Bundestag* (Federal Parliament) failed to act with regard to the incriminated *OMT* Decision.[11] The complainants justify their constitutional claim with the allegation that the *OMT* Decision was not covered by the mandate of the ECB pursuant to the TFEU, as the ECB transgressed the field of monetary policy and actually exercised functions of general economic policy. In particular, the *OMT* Decision violated the prohibition of monetary financing of member states' budgets (Art. 123 TFEU) and the independence of the ECB.[12] Thus, the *OMT* Decision was a so-called *ultra vires* act that—under a disputed but by now well established doctrine under German constitutional law—is not binding on Germany as an EU member state (nor internally on its state organs) and, therefore, should be treated as invalid by all German authorities, including the *Bundestag* and the Federal Government.

The BVerfG referred the question whether the *OMT* Decision is consistent with EU law to the ECJ for a preliminary ruling. The Court leaves no doubt about that, from its (carefully justified) point of view, it would have to be considered as a manifest and structurally significant transgression of the ECB's mandate if the latter acted beyond the field of monetary policy, or if the prohibition of monetary financing of the budget was violated by the OMT program.[13] A referral under Article 267 TFEU is only admissible if the question referred to the ECJ is relevant in the pending case that the referring court has to decide. Thus, the BVerfG had to assess the complaints as admissible—because all EU law considerations would be irrelevant if the claims were already inadmissibly filed under national (constitutional) procedural law.

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[9] The complaints were filed by a colourful bunch of complainants. There are known politicians and political idealists, a collection of 11,693 joint-complaints (instigated by a pro-democracy group), as well as complainants whose outcry for democracy might rather result from an itching in the purse.

[10] There is also a parliamentary group who applied in an *Organstreit* proceeding, which is an action reserved to certain constitutional organs to defend their competences in competence disputes. I will not discuss this proceeding here, because its peculiarities would need further explanation.

[11] *See OMT* Decision, at § 1.

[12] See *Id*.

[13] *Cf. OMT* Decision at § 38.

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I do not comment on the question of whether the power of the Constitutional Court to exercise constitutional control over legal acts of EU organs is well founded or not—in principle, I would support the Court's position. Nor will I comment on the sophisticated question of whether the ECB's *OMT* Decision is consistent with EU primary law. I am confident that commentators far more qualified in these specific fields of legal expertise will focus on that question. Subsequently, I will merely address the antecedent issue of the complainants' access to court and standing (*Beschwerdebefugnis*) which—with wobbly arguments but unbending resolution—was affirmed by the majority and provoked dissenting opinions by Justice Lübbe-Wolff and Justice Gerhardt. The extreme generosity of the Court to grant a broad standing in EU affairs foreshadow far-reaching repercussions that might adversely affect the BVerfG's struggle for its own role in a competitive and complex field of European multi-level constitutionalism with a dwindling—albeit still vivid—weight of national constitutional law.[14]

B. The Constitutional Complaint and the Right to Democracy

Pursuant to Article 93, section 1, No. 4a GG, the BVerfG is competent to rule on constitutional complaints, which may be filed by any person alleging that one of his basic rights or, *inter alia*, his right under Article 38 GG, has been violated by public authority. Article 38, section 1 GG imparts a general citizens' right to vote at the federal level. Pursuant to this provision, members of the German *Bundestag*, who are representatives of the people as a whole, shall be elected in general, direct, free, equal and secret elections. The right to vote is as much an individual right—and as such a consequence of fundamental status equality[15]—as a procedural mechanism to implement the positive constitutional assignments in Article 20, section 1 and section 2, sentence 1 GG that the Federal Republic of German shall be a democratic state and that all state authority shall be derived from the people.

First and foremost, democracy affords formal mechanisms to endow the organs that wield public authority with democratic legitimacy. The general elections which create the *Bundestag* pursuant to Article 38, section 1 GG legitimize the parliament as representative organ with functions to legislate and to elect the Federal Government, which is—conversely—accountable to the *Bundestag*. Apart from this, according to now long

[14] *Compare* Rainer Wahl, *Die Rolle staatlicher Verfassungen angesichts der Europäisierung und der Internationalisierung in* DER EIGENWERT DES VERFASSUNGSRECHTS 355 (Thomas Vesting & Stefan Korioth eds., 2011), *with* Christoph Schönberger, *Der schleichende Bedeutungsverlust des Bundesverfassungsgerichts*, *in* VERWALTUNG, VERFASSUNG, KIRCHE: KONSTANZER SYMPOSIUM AUS ANLASS DES 80. GEBURTSTAGES VON HARTMUT MAURER, 55 (Martin Ibler ed., 2012) (in particular with regard to institutional consequences for the BVerfG).

[15] *See* Ute Sacksofsky, *Wer darf eigentlich wählen? Wahlberechtigung in den USA und Deutschland, in* DEMOKRATIE-PERSPEKTIVEN – FESTSCHRIFT FÜR BRUN-OTTO BRYDE ZUM 70. GEBURTSTAG 313, 314 (Michael Bäuerle et al. eds., 2013).

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established jurisprudence of the BVerfG, the individual's right to vote "has also a substantive content."[16] Quoting its *Maastricht* decision from 1993, the BVerfG, in the case at hand, states: "Germans entitled to vote are guaranteed a subjective right to partake in the election of the Bundestag and to thereby contribute to the legitimation of state authority by the people at the federal level and to influence the exercise of this authority."[17] With regard to the participation of Germany in the European integration process pursuant to Article 23 GG (EU integration clause), Article 38 GG forecloses that "the legitimation of state authority and the influence on its exercise which an election provides is depleted by a transfer of the *Bundestag's* responsibilities and powers to such a degree, that the democratic principle"—as far as Article 79 section 3 GG declares it inviolable—is violated.[18]

> This substantive content of what is guaranteed by the right to vote is violated only, but always so, if this right is in danger of being rendered ineffective in an area that is essential for the political self-determination of the people, *i.e.* if the democratic self-government of the people – through the German Bundestag – is permanently restricted in such a way that central political decisions can no longer be made independently […]. However, Article 38 section 1 sentence 1 GG does not extend this right any further and does not grant citizens a right to have the lawfulness of democratic majority decisions reviewed by the Federal Constitutional Court. The right to vote does not serve to monitor the content of democratic processes, but is intended to facilitate them.[19]

[16] *See OMT* Decision, at § 17 ("According to the established jurisprudence of the Federal Constitutional Court, the individual's right under Art. 38 sec. 1 sentence 1 GG to elect the German Bundestag is not limited to a formal legitimation of (federal) state power, but also entails the fundamental democratic content of the right to vote"); *See also id.* at § 51.

[17] *OMT* Decision, at § 17.

[18] See *id.* at § 17.

[19] *Id.* at § 19; *see, e.g.,* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court of Germany], Case No. 2 BvR 2134, 2159/92 (Oct. 12, 1993); *see also* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court of Germany], Case No. 2 BvE 2, 5/08, 2 BvR 1010, 1022, 1259/08, 182/09 (Jun. 30, 2009); *see also* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court of Germany], Case No. 2 BvR 987, 1485, 1099/10 (Sep. 7, 2011).

As a result, every citizen can file a constitutional complaint, based on the right to vote, against a competence transfer on the EU as far as the complainant successfully makes plausible that the power transfer can substantially erode the functioning of the democratic process[20] from the perspective of comparative constitutional law a rather inconvenient approach.[21] With regard to amendments of EU primary law, Article 38 GG is a mere subjective vessel to transport the objective-democratic components of Article 79, section 3 GG through the bottleneck of the constitutional complaint; the right to vote has no function as a standard for constitutional review.[22] The ratio behind the enhancement of the individual right to vote with substantive elements of the democratic-institutional process is that both freedom rights and democracy have a common root in the principle of individual self-determination.[23] "The citizens' right to determine in respect of persons and subjects, in freedom and equality by means of elections and other votes, public authority is the fundamental element of the principle of democracy. The right to free and equal participation in public authority is enshrined in human dignity".[24] When democracy is construed as a direct consequence of the freedom of the individual, it is at least feasible to acknowledge an individual right to democracy that can be utilized in a constitutional complaint.[25] Such a constitutional right—as other fundamental rights—can be enforced even against democratic majorities. A right to democracy as a constitutional guarantee—its existence assumed—is necessarily a right that can be invoked against a democratic self-abolishment of democracy. Against this background, the BVerfG takes some kind of "last-man-standing" perspective, enabling each single citizen to defend his/her individual right to live in a legal order where legislation is democratically legitimized and, thus, derived from the equal self-determination of all citizens, even if a vast majority votes for curtailing

[20] This was interpreted as some kind of *actio popularis* (*Popularverfassungsbeschwerde*) by Anna Baumann, *Die europäische Integration unter Wahrung der nationalen Verfassung – Die "Europa-Entscheidungen" des Bundesverfassungsrichts,* 121, 128 (Anna Baumann et al. eds., 2014).

[21] Critical *e. g*. Christoph Schönberger, *Erwiderung: Der introvertierte Rechtsstaat als Krönung der Demokratie? – Zur Entgrenzung von Art. 38 GG im Europaverfassungsrecht*, 65 JURISTENZEITUNG 1160 (2010).

[22] Daniel Thym, *Europäische Integration im Schatten souveräner Staatlichkeit – Anmerkungen zum Lissabon-Urteil des Bundesverfassungsgerichts*, 48 DER STAAT 579, 579 n.93 (2009).

[23] *See* Frank Schorkopf, *The European Union as An Association of Sovereign States: Karlsruhe's Ruling on the Treaty of Lisbon*, 10 GERMAN L.J. 1219, 1221 (2009); *see also* Christoph Schönberger, *Lisbon in Karlsruhe: Maastricht's Epigones At Sea*, 10 GERMAN L.J. 1201, 1204 (2009).

[24] *See* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court of Germany], Case No. 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09, BVerfGE 123, 267 (Jun. 30, 2009), http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html.

[25] *Cf.* Matthias Jestaedt, *Warum in die Ferne schweifen, wenn der Maßstab liegt so nah? Verfassungshandwerkliche Anfragen an das Lissabon-Urteil des BVerfG*, 48 DER STAAT 498, 503 (2009).

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democratic institutions or procedures.[26] This may be seen—and criticized—as another example for specific German legalism where *Rechtsstaat* trumps democracy,[27] but such caveats are inherent in the manifold safeguards expressing a structural distrust in the democratic process, the spearhead being the substantive and absolute limitation of the power to amend the constitution set out in Article 79, section 3 GG. It cannot be further discussed here whether the transformation of objective-institutional state law in individual rights is structurally compatible with the idea of democratic legitimacy as a process of collective self-determination.[28] At least one can observe that it is a striking peculiarity in the culture of German constitutionalism after World War II to restructure the whole legal system—including even organizational provisions[29]—on individual self-determination and fundamental rights;[30] institutional mechanisms of democracy were not spared. The legal artifice of the BVerfG since its Maastricht decision has been the utilization of the election clause in Article 38, section 1 GG, which is expressly shaped as an individual right that can underpin a constitutional complaint pursuant to Article 93, section 1, No. 4a GG. Thus, the institutional setting of the democratic process and individual fundamental rights were unavoidably interwoven.

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[26] *Compare* Reinhard Müller, *Wer hat das letzte Wort*, FRANKFURTER ALLGEMEINE ZEITUNG, Feb. 8, 2014, at 1 (The Court as a substitute for a practically inefficient opposition); *with* Jestaedt, *supra* note 25, at 504 (supposes that the BVerfG just sought a practical way to decide on the merits to ventilate discontent with the progress of European integration).

[27] *See* Christoph Möllers, *'We are (afraid of) the people': Constituent Power in German Constitutionalism, in* THE PARADOX OF CONSTITUTIONALISM 87, 94 (Martin Loughlin & Neil Walker eds., 2007); *see also* Roman Lehner, *Die "Integrationsverfassungsbeschwerde" nach Art. 38 Abs. 1 S. 1 GG: prozessuale und materiell-rechtliche Folgefragen zu einer objektiven Verfassungswahrungsbeschwerde*, 52 DER STAAT 535, 562 (2013) (The punch line of the integration control via the right to vote was overloaded with constitutional requirements regarding the European integration, thus, the voters do not need their vote anymore to show discontent with general integration policy), *available at* http://ejournals.duncker-humblot.de/doi/abs/10.3790/staa.52.4.535.

[28] *See* Holger Grefrath, *Exposé eines Verfassungsprozessrechts von den Letztfragen? – Das Lissabon-Urteil zwischen actio pro socio und negativer Theologie*, 135 ARCHIV DES ÖFFENTLICHEN RECHTS 221, 240 (2010).

[29] It is a strong German tradition to interpret even the assignment of competences between federation and constituent states as a means to protect individual freedom by establishing checks and balances. *See*, *e. g.,* Hartmut Bauer, *Entwicklungstendenzen und Perspektiven des Föderalismus in der Bundesrepublik Deutschland,* 55 DIE ÖFFENTLICHE VERWALTUNG 837, 838 (2002); Matthias Cornils, *Gewaltenteilung, in* VERFASSUNGSTHEORIE, 61 (Otto Depenheuer & Christoph Grabenwarter eds., 2010); CHRISTIAN HEITSCH, DIE AUSFÜHRUNG DER BUNDESGESETZE DURCH DIE LÄNDER 8 (2001); Josef Isensee, *Der Föderalismus und der Verfassungsstaat der Gegenwart, in* 115 ARCHIV DES ÖFFENTLICHEN RECHTS 248, 269 (1990); Paul Kirchhof, *Der materielle Gehalt der Kompetenznormen, in* EUROPA IM WANDEL: FESTSCHRIFT FÜR HANS-WERNER RENGELING 567, 568 (2008).

[30] *See* RAINER WAHL, HERAUSFORDERUNGEN UND ANTWORTEN: DAS ÖFFENTLICHE RECHT DER LETZTEN FÜNF JAHRZEHNTE 20–30, 35–38 (2006); *See also* Christoph Schönberger, *Verwaltungsrecht als konkretisiertes Verfassungsrecht*, *in* DAS BONNER GRUNDGESETZ – ALTES RECHT UND NEUE VERFASSUNG IN DEN ERSTEN JAHRZEHNTEN DER BUNDESREPUBLIK DEUTSCHLAND (1949–1969) 53, 58–75 (Michael Stolleis, ed., 2006).

C. From a Right to Democracy to an *Actio Popularis*

A potential violation of the right to vote—construed as a right to democracy—is still reasonable as far as a complainant seeks judicial protection against a competence transfer to the EU by constitutional amendment pursuant to Article 23, section 1, sentences 2–3, and Article 79 GG. "In order to safeguard their democratic influence in the process of European integration, citizens who are entitled to vote generally have a right, deriving from Article 38 section 1 sentence 1 GG", that "a transfer of sovereign powers" only takes place in the ways envisaged in the relevant Articles which limit the authorization to transfer sovereign power to the EU.[31] An amendment of EU primary law entailing a further competence transfer to the EU or change the institutional setting (like majority rules) can fundamentally—and practically irreversibly—harm the democratic process of legitimization and accountability. An infringement on the principle of democracy would inescapably affect each citizen, as an individual in his democratic status within both the national and European legal system.[32] Democratic decision-making engulfs every individual, not only as addressee of public authority but also as participant in the legitimating process of bringing forth legislation. As soon as an amendment of primary law enters into force, transferred competences are, in principle, irrevocably lost. That is why the BVerfG was always generous to receive constitutional complaints antecedent to the ratification of amendments of EU primary law.[33] Before the decision at hand, the concept of constitutional identity protection against structural damage via the right-to-vote-approach has never been transferred to the far more general concept of *ultra vires* control. The latter is not directed against unconstitutional authorization via transfer of power but is a latent mode to control the legality of EU organs' conduct with the aim to prevent arbitrary transgressions of the authorization transferred.

I. The Difference Between Constitutional Identity Protection and Ultra Vires *Control*

Although the BVerfG relies on its well-established jurisprudence on European integration law, the case at hand is different and demanded a different handling, which is acutely expounded in the dissenting opinion of Justice Lübbe-Wolff.[34] The relevant competence transfer—*i.e.* the establishment of the politically independent ECB and its authorization with monetary policy functions—has been completed long since and was not even a direct object of the constitutional complaints at hand. The complainants, in fact, indirectly

[31] *See OMT* Decision, at § 53.

[32] Compare for the specific problems of multi-level democratic status relations Christoph Möllers, *Demokratische Ebenegliederung*, *in* FESTSCHRIFT FÜR RAINER WAHL 759 (2011).

[33] *See OMT* Decision, at § 132.

[34] *See OMT* Decision, at § 12.

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attacked a measure taken by the ECB as an EU organ under current EU law as being *ultra vires*. Apparently, the ECB can neither be subjugated under German national law, nor can it be addressed by a potential decision of the Constitutional Court. Of course, it is a well-established doctrine of the Constitutional Court that it can identify manifest transgressions of EU competences and declare a legal act under EU law as being *ultra vires*. Nevertheless, the complainants can only attack the conduct or omissions of German state organs. "German authorities may not take part in the decision-making process and the implementation of ultra *vires acts* and are not entitled to participate in measures affecting the constitutional identity protected by Article 79 section 3 GG. This applies to all constitutional organs, authorities and courts."[35] Remarkably, the Court corroborates this with normative arguments exclusively derived from objective-institutional law, in particular from the constitutional principles of democracy and the rule of law (Article 20 section 3 GG), as well as from the integration clause in Article 23 section 1 GG.[36]

But does this alone make granting unlimited standing to the complainants tenable? I have some doubts about that. The concept of *ultra vires* control is not a specific legal remedy but, in fact, a substantive control standard exclusively applied by the BVerfG. It has never been translated into precise procedural requirements.[37] The Court claims to exert *ultra vires* control in any constitutional proceeding[38] as far as the validity of an act under EU law is legally relevant within the German legal order. Hence, there is no independent *ultra vires* control. Instead, an admissible claim under the constitutional procedural law is an indispensable requirement that cannot be substituted by advancing the argument that a legally relevant act was *ultra vires*. Even though disciplining the sovereign powers of all three branches is apparently an objective side effect of the mere existence of the constitutional complaint,[39] this extraordinary remedy is functionally a safeguard for individual rights granted by the constitution and not a trigger for ("objective") constitutional review in the public interest. Thus, the Court, in a constitutional complaint proceeding, can only *indirectly* exercise *ultra vires* control as far as an individual right would be violated if an act under EU law was treated as valid—a rather exceptional case, in

[35] *Id.* at § 30.

[36] *See Id.*

[37] *See* Klaus Ferdinand Gärditz/Christian Hillgruber, *Volkssouveränität und Demokratie ernst genommen – Zum Lissabon-Urteil des BVerfG* 64 JURISTENZEITUNG 872, 874 (2009).

[38] *Cf.* Gesetz über das Bundesverfassungsgericht [BVerfGG] [Federal Constitutional Court Act], Mar. 12, 1951,BUNDESGESETZBLATT [BGBl] 1473, as amended, § 13.

[39] *See* Gertrude Lübbe-Wolff, *Die Bedeutung der Verfassungsbeschwerde für die deutsche Verfassungskultur*, *in* VERFASSUNG IN VERGANGENHEIT UND ZUKUNFT: SECHS JAHRZEHNTE ERFAHRUNG IN DEUTSCHLAND UND ITALIEN 133, 135 (Dieter Grimm et al. eds., 2011).

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particular, with regard to the strict framework set out by the BVerfG in its *Mangold* decision.[40]

II. The Slippery Slope of De-Individualization

In the case at hand, individual rights of the complainants were not directly affected by the *OMT* Decision.[41] The objective obligation of all EU organs to comply with binding EU law cannot be reasonably individualized, even if—from the national perspective—the high standards of *ultra vires* control are met. The same holds true under national law, as Article 20, section 3 GG (rule of law) undisputedly does not create a general individual right to a lawful administration. In other words, the individualization of the democratic process via the vehicle of the right to vote—the identity control standard—and the concept of *ultra vires* control just do not match.[42] If we keep track of the—rather superficial—arguments the BVerfG advances to corroborate the admissibility of the complaint, the Court seems to rely on a rather far-fetched nexus between the individual right to vote and a violation of competences by an EU organ. The ratio might be that each *ultra vires* act is treated as a disturbance of the democratic process in general, in which the claimants have a right to participate, irrespective of their individual concern. This is nothing less than a democratic *actio popularis*.

Such an action is based on the idea that things that concern everyone (*erga omnes*) can be legally pursued by anybody,[43] which flatly contradicts the individualistic logic of the constitutional complaint.[44] The Court undertakes considerable efforts to individualize the democratic process just to end up with a remedy that is founded on a concept of strict de-individualization. Another structural gap in the Court's reasoning becomes visible: If a complaint, which is exclusively based on the right to vote and its inherent interest to participate in a functioning democratic progress, is admissible, why is this concept of

[40] *See* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court of Germany], Case No. 2 BvR 2661/06 (Jul 6, 2010).

[41] The European General Court in first instance quashed actions advanced by individual claimants against the *OMT* Decision because the latter did not have any direct effect on rights of the relevant plaintiffs. *See* Case T-492/12, von Storch and Others v. ECB, 2013 E.C.R. II-0000, n.35 et seq.

[42] Thus, Justice Lübbe-Wolff in her dissenting opinion in the *OMT* decision clearly distinguishes between preemptive constitutional identity control on the one hand and *ultra vires* control as substantive standard on the other hand, and rejects a right to vote-standing with regard to the latter. *OMT* Decision at § 53.

[43] For the reception in international law doctrine, compare *pars pro toto* ANDREAS PAULUS, DIE INTERNATIONALE GEMEINSCHAFT IM VÖLKERRECHT 363 et seq. (2001).

[44] *Compare* Grundgesetz für die Bundesrepublik Deutschland [Grundgesetz] [GG] [Basic Law], May 23, 1949, BGBl. I at Art. 93 § 1, No. 4a ; *with* Gesetz über das Bundesverfassungsgericht [BVerfGG] [Federal Constitutional Court Act], Mar. 12, 1951,BUNDESGESETZBLATT [BGBl] 1473, as amended, § 90, para. 1.

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democratic *ultra vires* control limited to EU affairs and not utilizable in purely national—and, thus, far more easily attributable—constitutional disputes?[45] For example, a citizen of Hamburg might have a democratic interest to challenge military operations of the *Bundeswehr* in Afghanistan that grossly transgressed the limits defined in the parliamentary decision approving the mission because this transgression devaluates his voice as a voter. As this is apparently indefensible under the current procedural framework set out in Article 93 GG, so is the independent *ultra vires* complaint.

III. Imprecise Legal Consequences

The lack of precision in defining the affected individual right and in connecting it with the relevant *OMT* decision is reflected by the vagueness of potential legal consequences:[46] "A citizen can therefore demand that the Bundestag and the Federal Government actively deal with the question of how the distribution of powers entailed in the treaties can be restored, and that they decide which options they want to use to pursue this goal."[47] What does "actively deal" mean, exactly? Is there a positive right that "something must be done"?

> It is derived from the responsibility with respect to integration that the German Bundestag and the Federal Government are obliged to safeguard compliance with the integration programme and, in case of manifest and structurally significant transgressions of powers by European Union organs, to not only refrain from any participation and implementation, but to actively pursue the goal to reach compliance with the integration programme.[48]

In combination with parliament's "responsibility with respect to integration," which the court constructed in its *Lisbon* decision and invokes repeatedly in the case at hand, every citizen has, not only a right to democracy, but an individual right that the democratically-elected organs actively defend the political self-determination of the people against harmful conduct of EU organs. Be that as it may, what legal options do national organs

[45] The Court expressly denies this but gives no further explanation on that issue. *See OMT* Decision at § 19 (Article 38 GG "does not grant citizens a right to have the lawfulness of democratic majority decisions reviewed by the Federal Constitutional Court.").

[46] *See Id.* at § 24 (Lübbe-Wolff's dissenting opinion).

[47] *Id.* at § 53.

[48] *Id.* at § 49.

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have, in particular, after they have transferred powers to a politically-independent and supranational organ whose actions are not attributable to Germany, namely the ECB? According to a rather disconcerting proposal of the BVerfG, German legislature "can retroactively legitimise the assumption of powers by initiating a corresponding change of primary law that adheres to the limits of Article 79 section 3 GG, and by formally transferring the exercised sovereign powers in proceedings pursuant to Article 23 section 1 sentences 2 and 3 GG."[49] This is a far-fetched conclusion. A constitutional complaint is a remedy enabling the individual to repel violations of fundamental rights, not a petition to legalize the violation by retroactively healing it with a majority able to amend the constitution.

The Court recognizes that this might not be a feasible option, of course, and, thus, vaguely refers to a general obligation of all state organs "within their respective powers, to pursue the reversal of acts that are not covered by the integration programme with legal or political means, and – as long as the acts continue to have effect – to take adequate precautions to ensure that the domestic effects remain as limited as possible."[50] As there seems to be no feasible legal means under EU law, all that remains of the bold attempt to discipline the ECB would be a cloudy obligation to use all political and diplomatic channels to push for a decision of EU organs to constrain ECB competences. Good luck! Or one could force the *Bundestag* to debate the case[51] and, perhaps, express its deepest regrets? That's nothing more than a constitutional right to soapbox oratory, backed up by the majestic inviolable constitutional identity pursuant to Article 79, section 3 GG.

As a result, from a procedural perspective, the Court—lacking a sufficient lever to impose practicable obligations on German authorities—could only bindingly declare the *OMT* Decision *ultra vires* and/or not applicable under the German legal system. The Court, thus, has to treat the constitutional complaint as a declaratory action (*Feststellungsantrag*).[52] Detached from any sufficiently concrete conduct or omission of German organs[53] and

[49] *Id.*

[50] *Id.*

[51] *Cf. id.* at § 22 (Lübbe-Wolff's dissenting opinion).

[52] The *Organstreit* application of the parliamentary group is merely a declaratory action, as the Constitutional Court can only declare that a specific conduct of a state organ violated the constitution. *Compare* BVerfGG, § 67 (first sentence); *with* BVerfGG, § 95, para. 1 (See the first sentence. Allows for a declaratory judgement, too, but only insofar as it can declare that an act of public authority violated a fundamental right. This provision does not match regarding the legal consequence of *ultra vires* control, but the Court has never treated its statutory procedural law with respect; instead, the Court would probably derive its competence directly from the *Grundgesetz*).

[53] *Cf. OMT* Decision at § 18 (dissenting opinion Lübbe-Wolff).

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open to everyone who has a right to vote under Article 38 GG, this would mean opening the floodgates for any action brought forth by the scattered multitude of citizens dissatisfied with the European process of law-making. Could, for example, a hypothetical primary school teacher from southern Germany file an admissible constitutional complaint against a provision—confirmed by the ECJ—in EU common agriculture and fisheries policy law, even though he never comes in close contact with agriculture or fisheries, just because he claims that this provision was manifestly *ultra vires* and he feels uncomfortable to live in a legal system that treats this act as binding? Taking as a basis the broad right-to-vote-approach of the Court in the case at hand, this seems far from unimaginable. Maybe the BVerfG just wanted to react to the immeasurable financial consequences, which would burden the future democratic process, thus allowing complaints under extraordinary circumstances. If this was true—which I doubt as the Court clarifies at the end of its decision that it did not assess "losses of the *Bundesbank* and ensuing effects on the federal budget,"[54] yet—the Court did not make plain the principles it might apply to contain the looming threat of an overflowing *ultra vires* control appropriately.

IV. Putting Legitimacy at Risk

Access to court and standing are not a mere technical problem of the admissibility of a remedy, but they inevitably entail questions of legitimacy. The access to constitutional courts is deeply linked to issues of democratic legitimacy, institutional balance, and division of powers. As US courts have put it recently: Standing, "which is built on the separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches."[55] The judiciary has no competence to autonomously seize jurisdiction over a case *proprio motu*, but it is dependent on a party that files an admissible claim, which guarantees neutrality, independence, and, thus, the specific legitimacy as a court. Triggering constitutional review means to authorize a constitutional court to assume highly political competences in a field of law that is typically governed by more or less open and vague principles, inevitable contingencies,[56] and—last but not least—the authorization to overcome decisions of democratic majorities in court proceedings that are structured to focus on the individual interests of the parties, not—like parliament—on the plurality of interests in society. Thus, "even access to constitutional

[54] *Id.* at § 103.

[55] *Clapper v. Amnesty Int'l USA Inc.*, 133 U.S. 1138, 1146 (2013);. *Compare DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341, 353 (2006); *with Summers v. Earth Island Inst.*, 555 U.S. 488, 492 (2009) (When a specific need for review in a concrete case is not at hand, "allowing courts to oversee legislative or executive action would significantly alter the allocation of power . . . away from a democratic form of government") (internal quotation marks omitted). Thus, access to judicial review is strictly limited to individual cases and controversies in concrete factual context. *See Schlesinger v. Reservists Commission to Stop the War*, 418 U.S. 208, 221 (1974); *Valley Forge College v. Americans United*, 454 U.S. 464, 471 (1982).

[56] *See OMT* Decision at § 7 (dissenting opinion Lübbe-Wolff): "creative elements".

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review of democratic procedures requires a special legitimacy."[57] Of course, legitimacy problems are always and unavoidably included in constitutional review as far as "general issues that inevitably acquire a political dimension" are affected,[58] but, nonetheless—disregarding normative democratic theory arguments[59]—positive constitutional law, such as the GG, often expressly transfers the power to review parliamentary decisions to constitutional courts. Article 93, section 1, No. 4a GG vests a vast power in the BVerfG, in particular, as the substantive and absolute limits of constitutional amendment—vaguely laid out in Article 79, section 3 GG—enable the Court even to quash legislation of a majority able to amend the constitution.

Even though the BVerfG, in principle, has the power to conduct constitutional review as far as a constitutional complaint is admissible, the legitimacy impact demands particular care in defining the requirements of access to court and standing. Any given court draws legitimacy not only from the abstract and general law it applies (here the GG), but also from the individual freedom rights for which enforcement on behalf of the conflicting parties courts are institutionalized as neutral, impartial, and politically independent bodies apart from the democratic paths of legitimization.[60] But this form of legitimacy partially fades as far as abstract and general questions are concerned, which afford the balancing of general interests that are not represented in court—after all, in the case at hand the very foundations of the political measures taken to contain the Euro crisis are affected. Thus, the definition of standing would require a democratically-sensitive, constitutionally-complex, and institutionally-sophisticated act of balancing. The BVerfG does not even regard it important enough to consider the institutional and legitimation connotations of the question of access to court and standing, although the issue must have imposed itself. The caustic comment in the dissenting opinion of Justice Lübbe-Wolff pinpoints this weakness of the Court's reasoning and accuses the majority to have overstepped the limits of constitutional review imposed on the Court by the principles of division of powers and democracy.[61] One may not share these concerns, but as the *ultra vires* control as an exceptional instrument is a sharp sword–political repercussions would be far-reaching—it should have been wielded with more cautiousness and consideration, taking into account

[57] CHRISTOPH MOELLERS, THE THREE BRANCHES – A COMPARATIVE MODEL OF SEPARATION OF POWERS 129 (2013).

[58] *See id*.

[59] It would, of course, be beyond the functions of any court to develop or rely on theoretical concepts of state, of legitimacy, or of integration. *See* Andreas Voßkuhle, *Die Staatstheorie des Bundesverfassungsgerichts, in* VERABSCHIEDUNG UND WIEDERENTDECKUNG DES STAATES IM SPANNUNGSFELD DER DISZIPLINEN 371, 372 et seq. (Andreas Voßkuhle et al. eds., 2013).

[60] *See* Christoph Möllers, *Individuelle Legitimation: Wie rechtfertigen sich Gerichte?, in* DER AUFSTIEG DER LEGITIMITÄTSPOLITIK 398 (Anna Geis/ et al., eds., 2012).

[61] *See OMT* Decision at §§ 2 et seq. (dissenting opinion Lübbe-Wolff).

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the institutional balance between the Court and the political organs of *Bundestag* and Federal Government, the real antagonists of Karlsruhe in the scenario at hand.

D. Antithetic Effects: Narrow Judicial Review in Administrative Law Versus Constitutional Review Profusion

Placing the ultra vires doctrine in the broader context of the impact of EU law on the German system of judicial review, there are even antithetic effects that deserve further consideration. Basically, judicial review of the executive branch under German law functions as a means to effectively protect individual rights, as guaranteed by Article 19, section 4 GG. Judicial review aims not, at least not primarily, at an objective control of the executive and is not a direct means to enforce the implementation of democratic law in the interest of the general public. Under procedural law, standing is deemed to be a direct consequence of the subjective autonomy of the individual as a bearer of rights.[62] The citizen defends his or her individual rights in court, but he or she is no agent of the public interest.[63] Thus, standing to bring suit under public law is traditionally narrowly defined, as illustrated in the paradigmatic provision of Section 42, Para. 2 *Verwaltungsgerichtsordnung* (Administrative Court Procedure Act). Only individual rights that are directly affected by public authority may be invoked. One of the almost sacred principles enshrined in German procedural law is to exclude any form of *actio popularis*.[64] Concepts of objective judicial review, in which the citizens act as mere agents of public interest,[65] are generally associated with EU administrative law,[66] although the ECJ has developed its own sophisticated concept of individual rights and never demanded an objective control by *actio popularis*.[67] Whenever EU law has demanded an opening of the narrow system of judicial review, like the EC/EU directives with provisions on public participation did and still

[62] *See* EBERHARD SCHMIDT-AßMANN, VERWALTUNGSRECHTLICHE DOGMATIK 109 (2013).

[63] *Cf.* THOMAS VON DANWITZ, EUROPÄISCHES VERWALTUNGSRECHT 24 (2008).

[64] *See, e.g.,* FRIEDHELM HUFEN, VERWALTUNGSPROZESSRECHT § 14, No. 56 (9th ed., 2013); WOLF-RÜDIGER SCHENKE, VERWALTUNGSPROZESSRECHT No. 490 (13th ed., 2012); THOMAS WÜRTENBERGER, VERWALTUNGSPROZESSRECHT No. 274 (3rd ed., 2011).

[65] An instrumental construal is that of the mobilization of the citizens as agents of indirect enforcement of EU law. *See* JOHANNES MASING, DIE MOBILISIERUNG DES BÜRGERS FÜR DIE DURCHSETZUNG DES RECHTS 196 et seq. (1998).

[66] Perhaps a little bit oversimplified but striking is the discussion in Oliver Lepsius, *Hat das Europäische Verwaltungsrecht Methode? Oder: Die zwei Phasen der Europäisierung des Verwaltungsrechts, in* DAS EUROPÄISCHE VERWALTUNGSRECHT IN DER KONSOLIDIERUNGSPHASE 179, 186 (Peter Axer et al. eds., 2010). For the development, *see* MARTIN BURGI, VERWALTUNGSPROZEß UND EUROPARECHT 57 et seq. (1996).

[67] *See* THOMAS DÜNCHHEIM, VERWALTUNGSPROZEßRECHT UNTER EUROPÄISCHEM EINFLUß 105 et seq. (2003); DIRK EHLERS, DIE EUROPÄISIERUNG DES VERWALTUNGSPROZEßRECHTS 48 et seq. (1999); FRIEDRICH SCHOCH, DIE EUROPÄISIERUNG DES VERWALTUNGSGERICHTLICHEN RECHTSSCHUTZES 34 (2000).

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do,[68] transformation problems have occurred.[69] Forms of representative action (*Verbandsklage*),[70] formerly—at least in principle—not established under German public law, are concepts introduced by EU law,[71] which were always treated as alien elements that rather triggered withdrawal reflexes, and were only reluctantly embraced by the courts.[72] The German legal culture, thus, became infamous for its rigid and narrowly-channeled access to court, at least as far as administrative law is concerned.[73] In contrast, the BVerfG developed an extremely broad access to constitutional review—exclusively in EU affairs—that is unparalleled in Europe. Although the admissibility of a constitutional complaint can only be founded on a violation of individual rights as well—constitutional complaints and administrative court actions are insofar uniformly structured—the Court in fact blazed the trail for an unlimited *actio popularis* as a specific instrument of constitutional review to fend off legal acts of the EU that prove to be *ultra vires*.

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[68] *See* Council Directive 2011/92/EU, art. 11, 2011 O.J. (L 26) 1 (EC) (on the assessment of the effects of certain public and private projects on the environment); Council Directive 2010/75/EU, art. 25, 2011 O.J. (L 334) 17 (EC).

[69] *See* Ass'n for Env't & Nature Conservation Germany, Nat'l Ass'n Nordrhein-Westfalen eV v. Arnsberg Dist., CJEU Case C-115/09, 2011 E.C.R. I-3673; Gemeinde Altrip (Municipality of Altrip), Gebrüder Hört GbR, Willi Schneider v. Rhineland-Palatinate, CJEU Case C-72/12, 2013 E.C.R. I-0000.

[70] A representative action can be filed by certain accredited groups—in particular environmental NGOs—by express statutory empowerment to enforce objective law that does not provide individual rights but exclusively protects public interests, like, for example, nature conservation law. *See* SABINE SCHLACKE, ÜBERINDIVIDUELLER RECHTSSCHUTZ 102 et seq. (2008).

[71] The basically useful concept to mobilize the citizen as an agent of public interest has been developed in administrative law to solve concrete deficits of law enforcement by decentralizing control. *Compare* MASING, *supra* note 65, at 231; SCHLACKE, *supra* note 70, at 484.

[72] Nonetheless, German administrative courts will apparently profit from tendencies of ECJ jurisprudence to expand, in particular, European fundamental rights, as the precedent of EU law empowers courts to evade a referral to the *Bundesverfassungsgericht* pursuant to Article 100, section 1 GG when quashing a parliamentary statute. *See* Daniel Thym, *Die Reichweite der EU-Grundrechte-Charta*, 32 NVwZ 889, 895 (2013).

[73] Ironically, one of the fiercest critics among German legal scholars, who has accused the narrow concept of subjective rights under the German legal doctrine to give undue preference to individual interests over public interest and, thus, demanded—as a counterbalance—forms of standing for the *citoyen* in court, was the same Justice at the Constitutional Court who delivered the effulgent dissenting opinion criticising the majority's permissiveness in granting the complainants standing. *See, e. g.,* Gertrude Lübbe-Wolff, *Europäisches und nationales Verfassungsrecht,* 60 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER 246, 278 (2000); Gertrude Lübbe-Wolff, *Instrumente des Umweltrechts - Leistungsfähigkeit und Leistungsgrenzen,* 20 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 481, 493 (2001) (It was outdated that the administrative law only took the citizens seriously while acting as *burgeois* pursueing selfish interest and ignored the citizen as altruistic *citoyen* acting on behalf of the public interest).

E. Perspectives

The BVerfG's referral to the ECJ for a preliminary ruling is accompanied by a message that the BVerfG is determined to enter into an open conflict with the ECJ by additionally activating the constitutional identity control, should the latter qualify the *OMT* Decision as being in conformity with EU primary law.[74] Uttering barely concealed threats is a questionable method of communication between the courts that keeps the elaborate and apocryphal machinery of European inter-court-cooperation working.

The ECJ, for the first time, has to decide on a referral that is furnished with an announcement that the referring court reserves a right to later disregard what it views as an unsuitable decision. There is a good chance that the ECJ will take up the gauntlet by backing up the ECB, rejecting the narrow interpretation of the *OMT* Decision offered by Karlsruhe, and declaring that the *OMT* Decision was within the competences set out in the TFEU. That would not necessarily mean that the BVerfG gets bogged down in the quagmire between economic and monetary policy decisions, even though it might be a discomfiting situation for the Court to keep its promise and effectively exercise *ultra vires* and/or constitutional identity control. Even if the BVerfG should qualify the *OMT* Decision as *ultra vires* or as a violation of German constitutional identity, there would be no apparent direct legal consequence. The latent power of *ultra vires* control is a useful instrument to counterbalance the growing interpretative power of the ECJ, who has not always been a reliable partner in guarding the limits of EU authorization transferred by the member states. But the BVerfG knows that its series of courageous decisions that delineated the constitutional limits of European integration were primarily directed against German political organs like the *Bundestag*, reminding them of their "responsibility with regard to integration." The Court is dependent on the (remaining) acceptance of its role as a calculable guardian of the European rule of law. The BVerfG will predictably refrain from any legal actions that might further adversely affect the Court's role as a player in EU policy. Thus, the BVerfG apparently would not force German state organs to initiate a withdrawal from the Monetary Union—and if it did, the political organs would probably rather curtail the competences of the Court than bow down to such a blatant usurpation of political power. Whatever the outcome, reactions from Karlsruhe will be tentative and, thus, will not go far beyond symbolism.

[74] *See OMT* Decision at § 103 ("At present, it is not foreseeable whether in addition to this, through individual implementation measures of the OMT Decision and with regard to possible losses of the *Bundesbank* and ensuing effects on the federal budget, consequences for the budgetary autonomy of the German Bundestag could arise in a way that affects Article 79 section 3 GG. If necessary, the Senate would have to examine this on the basis of the Court of Justice's interpretation of the OMT Decision without another question referred for a preliminary ruling, and it would have to determine the inapplicability of the respective act of implementation in Germany, because the identity review is not to be assessed according to Union law but exclusively according to German constitutional law").

The Court would—at the maximum—confine itself to declare the *OMT* Decision inapplicable in Germany, whatever this would mean, embarrassing the political scene in Berlin but leaving European policymaking unaffected. Likewise, the bold decision of the Czech Constitutional Court declaring EU law *ultra vires*[75] stands as a beacon of hope for those who regard strong national courts as a balancing factor in European legal architecture, but it has apparently not hampered the EU lawmaking process. The ECB, independent from direct political influence as it is, would continue to make decisions based on its own *opinio juris*, which would be deeply rooted in the jurisprudence of the ECJ. The state of the financial market crisis after a long proceeding before the ECJ and the unavoidable aftermath in Karlsruhe—let's say in four or five years—is unpredictable, so that no one knows whether a judgment of the Court on the merits will have any relevant effect at all. What remains is a symbolic struggle over the assignment of power between courts, governments, and parliaments.[76]

Nonetheless, from a legal point of view, the BVerfG would have done better if it had refrained from expanding the right to democracy approach—based on Article 38, section 1 GG, and created as a tool to protect the constitutional identity against harmful competence transfers—to the ubiquitous concept of *ultra vires* control. There remains a tangible risk that the sophisticated—and indeed, as the BVerfG has expressly emphasized,[77] still indispensable—concept of *ultra vires* control will decay into a permanent angry citizens' complaint. The *Grundgesetz* lacks direct democracy as a plebiscitary outlet, thus political discomfort as well as expectations of relief with regard to EU integration are distracted to Karlsruhe. The Court might soon be overburdened with the role it actively sought[78] and then will be forced to develop transparent normative criteria to escape the self-created pitfalls of scattered popular control. Karlsruhe will probably have a hard time banning the specter of *actio popularis* it ventured to conjure up. At the very least, the political organs could react and free themselves from the pressure of an aggressive popular remedy; if the parliamentary legislature is exhausted from permanent interference of recalcitrant citizens disturbing the legal integration process, it could simply delete Article 38 GG from the catalogue of rights enforceable by constitutional complaint,

[75] Nález Ústavního soudu ze dne 31.01.2012 (ÚS) [Decision of the Constitutional Court of Jan. 31, 2012], Pl. ÚS 5/12 (Czech).

[76] Reinhard Müller, *Wer hat das letzte Wort*, FRANKFURTER ALLGEMEINE ZEITUNG, Feb. 8, 2014, at 1.

[77] *See OMT* Decision at § 26.

[78] For commentary on the *Lisbon* case, see Frank Schorkopf, *The European Union as An Association of Sovereign States: Karlsruhe's Ruling on the Treaty of Lisbon*, 10 GERMAN L.J. 1219, 1232 (2009) ("The Court wants to play a more active role in European legal matters. Potential complainants and applicants will attentively take notice of this signal. How the Federal Constitutional Court will deal with the additional number of cases is one of the exciting follow up questions.").

thus, unscrambling democratic institutions and individual rights—even if such a bold political step would be not recommendable.

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