Davor Jancic

Caveats from Karlsruhe and Berlin: whither democracy after Lisbon?

Article (Published version) (Refereed)

ARTICLES

CAVEATS FROM KARLSRUHE AND BERLIN: WHITHER DEMOCRACY AFTER LISBON?

Davor Jančić[*]

This Article analyzes the evolution of the reasoning about E.U. democracy that the German Federal Constitutional Court (BVerfG) has been shaping starting with the Solange I *and* II, Maastricht, *and* European Arrest Warrant *cases and culminating with the* Lisbon Treaty *case. The BVerfG's reasoning has often taken the form of caveats, whereby the BVerfG "warned" the European Union of its assessments of the state of democracy in the Union. This Article argues that the BVerfG's view of the primary source of the Union's democratic legitimacy has gradually shifted away from the European towards the German Parliament. Never before has the BVerfG highlighted the role of national parliaments in buttressing E.U. democracy with such clarity. In what can be called "democracy solange," the BVerfG ruled that as long as the European Union is an association of sovereign states, two consequences ensue: (a) the democratic legitimacy provided by national parliaments and governments, and complemented by the European Parliament, is sufficient; and (b) E.U. democracy cannot and need not be shaped in analogy to that of a state. As a corollary, the German system of parliamentary involvement in E.U. affairs has significantly been overhauled to enhance the legal position of the German Parliament vis-à-vis the Federal Government. The initial academic reactions to the BVerfG's* Lisbon *judgment have failed to credit the BVerfG's role in this important development.*

[*] PhD candidate, Institute of Constitutional and Administrative Law, Utrecht University, the Netherlands. This Article was finalized while I was a visiting researcher at the Department of Law of the London School of Economics and Political Science in 2009. I have also profited from a seminar discussion held at LSE on the *Lissabon-Urteil* in November 2009. An earlier, substantially different version of the paper was prepared for the E.U. law panel of the 2009 International Symposium "Kopaonik School of Natural Law" in Serbia. The author wishes to thank Leonard Besselink, Trevor Hartley, Jo Murkens, David Haljan, and Brecht van Mourik for providing invaluable feedback on several earlier drafts of this Article.

I. INTRODUCTION[1]

This Article analyzes the evolution of the reasoning of the German Federal Constitutional Court (Bundesverfassungsgericht or the BVerfG) regarding the democratic legitimacy of European integration by juxtaposing the BVerfG's previous case law on the European Union (E.U. or the Union),[2] including the *Solange I* and *II, Maastricht,* and *European Arrest Warrant* cases, with its judgment on the Lisbon Treaty (*Lissabon-Urteil*). The BVerfG's reasoning has often taken the shape of caveats, whereby the BVerfG has "warned" the European Union of its assessments of the state of democracy in the Union. Each of the cases is examined as

[1] The English language versions of the case law used and the paragraphs cited in this Article are taken from the sources referred to in the footnotes. This is important because the version, translation, and paragraphing done by the German Federal Constitutional Court may differ from those published in the Common Market Law Reports (C.M.L.R.). All the provisions cited in this Article refer to their new numbering according to the Lisbon Treaty, unless otherwise specified.

[2] The creation of the European Union by the Maastricht Treaty (signed on February 7, 1992, and entered into force on November 1, 1993) added intergovernmental cooperation in Common Foreign and Security Policy (CFSP) and in Justice and Home Affairs (JHA) to the supranational cooperation of the European Community (E.C.), which was established by the Treaty of Rome in 1957. These three policy clusters—the E.C., CFSP, and JHA—each consisted of different policy fields and were commonly referred to as "pillars" despite the fact that none of the founding treaties has ever used the term. The E.C. was the First Pillar, CFSP was the Second Pillar, and JHA was the Third Pillar. The Amsterdam Treaty (signed on October 2, 1997, and entered into force on May 1, 1999) transferred the JHA policies related to visas, asylum, immigration, and other policies related to free movement of persons from the Third Pillar to Title IV, Part III of the First Pillar. The remainder of the Third Pillar was then renamed Police and Judicial Cooperation in Criminal Matters (PJCCM). Together with the Schengen *acquis*, the new Title IV of the First Pillar and the PJCCM served to fulfill a new Union objective enshrined by the Amsterdam Treaty: to establish an area of freedom, security, and justice. The Lisbon Treaty (signed on December 13, 2007, and entered into force on December 1, 2009) marred the contours of the pillars by merging the policies falling under the E.C. and PJCCM into one treaty, the Treaty on the Functioning of the European Union ("E.C. Treaty"), thereby subjecting these two pillars to the same rules. CFSP remains in a separate treaty, the Treaty on European Union ("E.U. Treaty"), and continues to be subject to separate rules. Therefore, there are now two pillars—the CFSP and the rest.

Since the rules governing the operation of the pillars have not changed profoundly, it is useful to recall the key characteristics of the two pillars that remain after the Lisbon Treaty. In the post-Lisbon First Pillar (E.C. & PJJCM), the legislative initiative rests solely with the Commission; the European Parliament legislates together with the Council (as a rule following the "ordinary legislative procedure," formerly known as "codecision"); the regulations thus made are directly applicable and prevail over past and future legislation of the Member States (not necessarily over their constitutional law); directives are, as a rule, not directly applicable and need to be transposed into national law; and the European Court of Justice (E.C.J.) has jurisdiction to give preliminary rulings on the interpretation and validity of the law made under this pillar. In the pre-Lisbon Third Pillar, the Commission was only associated with decision-making; the European Parliament was consulted; and the jurisdiction of the E.C.J. was more reduced than in the First Pillar and was subject to acceptance by the Member States by means of a declaration. In the post-Lisbon Second Pillar (CFSP), the initiative to adopt legal acts is shared between the Member States, the Commission, and the High Representative of the Union for Foreign Affairs and Security Policy (although in practice it is the Member States that exercise this initiative in the vast majority of cases); then the European Parliament is merely consulted; and finally the jurisdiction of the E.C.J. is excluded. For further information, see recent analyses in EUROPEAN CONSTITUTIONALISM BEYOND LISBON (Jan Wouters et al. eds., 2009); THE LISBON TREATY: EU CONSTITUTIONALISM WITHOUT A CONSTITUTIONAL TREATY (Stefan Griller & Jacques Ziller eds., 2008); STEVE PEERS, EU JUSTICE AND HOME AFFAIRS LAW (2006); EILEEN DENZA, THE INTERGOVERNMENTAL PILLARS OF THE EUROPEAN UNION (2002).

a step in which the BVerfG offers its caveats on democracy. The sequence of these caveats through the decades exhibits a tendency towards intensification as the integration deepens.

This Article argues that there has been a gradual shift in the emphasis that the BVerfG has placed on European versus national parliamentary institutions as pillars of E.U. democracy. The source of democratic legitimacy has moved away from the European and towards the German and other national parliaments. As a corollary of this trend, the German system of parliamentary involvement in E.U. affairs has undergone a far-reaching overhaul that has considerably enhanced the legal position of the German Parliament (*Bundestag* and *Bundesrat*) vis-à-vis the Federal Government (*Bundesregierung*). New instruments of parliamentary scrutiny have been established, existing ones broadened, and abeyant ones revived. From more diversified information to approval requirements to the parliamentary reserve, reforms abound. The initial academic reactions to the *Lissabon-Urteil* have failed to credit the BVerfG's role in this important development.

Further, the relevance of the present analysis lies in the fact that, although the principle of democracy has almost always been an explicit or implicit litmus test of the BVerfG, the significance of this principle reached its apex with the *Lissabon-Urteil*. Unlike in its previous case law, the BVerfG unambiguously and conclusively refused to endorse the European Parliament as a primary institution of E.U. democracy.

In this judgment, the BVerfG employed essentially the same reasoning as in its *Maastricht* judgment (*Maastricht-Urteil*).[3] Sovereignty is still the guiding explanatory doctrine and national parliaments are now more than ever the central institutions of the Union's democracy. Yet the BVerfG not only restated its old reasoning but also refined it by formulating a "democracy solange." It thereby set the legal boundaries for the European Union's development as a constitutional construct.[4] It did so by assuming that (parliamentary) democracy exists only in the Member States. Since the Union is not a state but an association of states (*Staatenverbund*), the European Union cannot and need not fulfill the national democratic criteria. The Basic Law (*Grundgesetz*)[5] does not even permit the European Union to become a state. The relinquishment of German sovereignty to an international or supranational organization beyond an association of sovereign states

---

[3] *See also* Editorial, *Karlsruhe Has Spoken*, 46 COMMON MKT. L. REV. 1023, 1030 (2006).

[4] *See also* Roland Bieber, *Comments on the German Constitutional Court's Decision on the Lisbon Treaty: "An Association of Sovereign States,"* 5 EUR. CONST. L. REV. 391, 393 (2009).

[5] Although bearing the name "Basic Law" (*Grundgesetz*), this document is the Constitution of Germany. At the time of the drafting of this document, the term "constitution" (*Verfassung*) was deliberately avoided. The Herrenchiemsee Convention, which was set up in August 1948 at the Western Allied Powers' request that a democratic constitution be adopted for the three Western occupation zones, regarded *Grundgesetz* as provisional, so that, once reunified, Germany could adopt a *Verfassung*. In May 1949, the Parliamentary Council, presided over by Konrad Adenauer, adopted the final text of the Basic Law. Following the approval of the occupying powers, the Basic Law was promulgated on May 23, 1949, and came into effect the following day as the Constitution of West Germany (Federal Republic of Germany or *Bundesrepublik Deutschland*). Upon reunification with East Germany (German Democratic Republic or *Deutsche Demokratische Republik*) in October 1990, the Basic Law became the constitution of the reunified Germany. Marten Burkens, *The Federal Republic of Germany*, *in* CONSTITUTIONAL LAW OF 15 EU MEMBER STATES 311, 312 (Lucas Prakke & Constantijn Kortmann eds., 2004).

is prohibited. It would only be permitted if the German people, acting jointly as *pouvoir constituant*, decided so by adopting a new constitution pursuant to Article 146 of the Basic Law.[6] Therefore, as long as the current Basic Law is in force, the national parliaments of the Member States will remain the primary source of the Union's democratic legitimization and the European Parliament the secondary one. To fortify this, the BVerfG ordered the enactment of a series of safeguards for the German Parliament. In September 2009, three statutes were passed to that effect, the most innovative provisions of which will be analyzed in greater detail.

II. THE *SOLANGE I* CASE: LET THERE BE A EUROPEAN PARLIAMENT. . .

On May 29, 1974, in what has become widely known as the *Solange I* judgment,[7] the German Federal Constitutional Court clarified the relationship between Community law and the Basic Law by deciding that it could and would review their mutual compatibility regarding the protection of fundamental rights as long as the Community failed to guarantee the same level of protection as that guaranteed by the Basic Law. In doing so, the BVerfG made two important appraisals of the state of democracy in the Community at that time:

> As long as the integration process has not progressed so far that Community law also receives a catalogue of fundamental rights *decided on by a parliament* and of settled validity, which is adequate in comparison with the catalogue of fundamental rights contained in the Constitution, a reference by a court in the Federal Republic of Germany . . . is admissible . . . .[8]
>
> The Community *still lacks a democratically legitimated parliament* directly elected by general suffrage which possesses legislative powers and to which the Community organs empowered to legislate are *fully responsible* on a political level . . . .[9]

However, the BVerfG reached these findings two years before the Council adopted the decision providing for the election of the European Parliament by direct

---

[6] Article 146 of the Basic Law reads: "This Basic Law, which since the achievement of the unity and freedom of Germany applies to the entire German people, shall cease to apply on the day on which a constitution freely adopted by the German people takes effect." GRUNDGESETZ [GG] [Constitution] art. 146. This also reflects the "provisional" character of the Basic Law, as opposed to the "permanent" character of an imaginary future *Verfassung*.

[7] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 29, 1974 (*Solange I*), 2 C.M.L.R. 540 (F.R.G.). The plaintiff, a German export/import undertaking, requested that the BVerfG review the decision of the Administrative Court in Frankfurt am Main (*Verwaltungsgericht*) whereby some 17,000 Deutsche Marks paid by the plaintiff as a deposit for an intended business transaction were forfeited pursuant to two contested regulations of the then-European Economic Community, which required appropriate licenses to import and export certain products into and from the Community. These licenses were issued by competent national administrative authorities upon the deposit of a certain amount of money as a guarantee that importation or exportation would be performed. The plaintiff failed to perform the required importation or exportation and therefore had its deposit forfeited. In other words, the Community imposed conditions in the form of licenses and deposits that are directly applicable to the legal persons established in the Member States that wish to engage in trade in goods with non-E.E.C. Member States. The BVerfG found that the contested Community legislation did not infringe the freedom of trade and occupation established by Article 12 of the Basic Law.

[8] *Id.* ¶ 35 (emphasis added).

[9] *Id.* ¶ 23 (emphasis added).

universal suffrage (1976)[10] and five years before the first members of the European Parliament were actually elected (1979). Nowadays, the European Union has a directly elected parliament, but whether it lives up to the national democratic standards and whether any such comparison is valid at all is a point of contention that the BVerfG tackled keenly in the *Lissabon-Urteil*.

The significance of these claims lies in the following. First, the BVerfG created a link between the democratic quality of Community institutions and the validity of Community law to the extent that the involvement of a parliamentary body directly representing the citizens was deemed a prerequisite for satisfactory protection of fundamental rights. Yet the decision was not unanimous on this point. The dissenting judges Rupp, Hirsch, and Wand argued that:

> [T]he protection of fundamental rights and the democratic principle are not interchangeable inside a democratically constituted Community based on the idea of freedom; they complement one another. While the achievement of the democratic principle in the E.E.C. would cause the legislator and the executive to be more deeply concerned with fundamental rights, this would not make the judicial protection of fundamental rights superfluous.[11]

Second, the BVerfG utilized national democratic criteria to assess the European Parliament, which it would use consistently in all the subsequent case law under review.

III. THE *SOLANGE II* CASE: . . . UNLESS THERE IS ALREADY ONE . . .

On October 22, 1986, in a follow-up judgment, dubbed *Solange II*,[12] the BVerfG ceased the exercise of review of the constitutionality of Community law against the catalogue of fundamental rights laid down in the Basic Law, because it concluded that the conditions defined in *Solange I* had been met. It reached this conclusion by applying the *Solange I* tests concerning the catalogue of fundamental rights and the participation of a parliamentary body in the elaboration of such a catalogue. In performing the latter test, the BVerfG found that the democracy principle was respected principally due to three assessments. First, all Member States had acceded to the European Convention on Human Rights and Fundamental Freedoms (E.C.H.R.) which was duly approved by their national parliaments.[13] Second, the

---

[10] Council Decision 76/787/ECSC, EEC, Euratom: Decision of the Representatives of the Member States Meeting in the Council Relating to the Act Concerning the Election of the Representatives of the Assembly by Direct Universal Suffrage, 1976 O.J. (L 278) 1. *See infra* text accompanying notes 103–14.

[11] *Solange I*, 2 C.M.L.R. 540, ¶ 62.

[12] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 22, 1986 (*Solange II*), 3 C.M.L.R. 225 (F.R.G.). The applicant's allegation of the unlawfulness of the refusal to be issued a license to import preserved mushrooms from non-E.U. Member States into Germany, which competent national authorities were permitted to do under several contested Community regulations if such importation or exportation would lead to serious disturbances in the Community market, was left unanswered. Instead, the BVerfG upheld the decision of the Federal Administrative Court (*Bundesverwaltungsgericht*) dismissing the applicant's appeal against the decision of the Administrative Court in Frankfurt, which in the applicant's view disregarded its procedural and substantial constitutional rights.

[13] *Id.* ¶ 45.

European Parliament was one of the signatories of the joint declaration of April 5, 1977, which attached prime importance to the protection of fundamental rights as flowing from the constitutions of the Member States and the E.C.H.R.[14] The declaration was accepted as "sufficient parliamentary recognition of a formulated catalogue of effectively operating fundamental rights." Third, the European Council adopted a declaration on democracy on April 7–8, 1978, solemnly affirming that the "respect for and maintenance of representative democracy and human rights in each Member State are essential elements of membership of the European Communities."[15]

The BVerfG nonetheless retained its jurisdiction to review secondary Community law as regards fundamental rights, should the circumstances so require.[16] The caveats by the dissenting judges in *Solange I* cannot have fallen on deaf ears, because this time the BVerfG severed the causal link between the state of democratic development of the European Union and its own right to decide on the exercise of the power of review. The BVerfG addressed the basis for the *Solange I* finding about the deficiencies of the European Parliament as follows:

> [C]learly the consideration that protection of fundamental rights has to begin as early as the stage of law-making and parliamentary responsibility provides a suitable protective arrangement for that purpose. There was no intention however of laying down a constitutional requirement that such a position must have prevailed before there could be any possibility of the withdrawal of the Federal Constitutional Court's jurisdiction over derived Community law . . . .[17]

Though the BVerfG was not negative towards the European Parliament as a provider of democratic legitimacy in the European Union, this was the first indicator of the shifting balance that would only unravel later.

IV. THE *MAASTRICHT TREATY* CASE: . . . WHICH MAY NOT SUPPLANT THE NATIONAL PARLIAMENT . . .

On October 12, 1993, in its landmark *Maastricht-Urteil*,[18] the German Federal Constitutional Court reaffirmed its subsidiary protection of fundamental rights and

---

[14] *Id.* ¶ 42.

[15] *Id.* ¶ 43.

[16] This is implicit in two passages: (a) in the "solange" (the German word for "as long as") formula itself, whereby the BVerfG claimed that it "will no longer exercise *its* jurisdiction to decide on the applicability of secondary Community legislation," and (b) in the BVerfG's emphasis that "[w]hat is decisive . . . is the attitude of principle which the BVerfG maintains *at this stage*," thus reserving for itself the possibility potentially to exercise its jurisdiction again in the future. *Id.* ¶¶ 44, 48 (emphasis added).

[17] *Id.* ¶ 45.

[18] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 12, 1993 (*Maastricht-Urteil*), 1 C.M.L.R. 57 (F.R.G.). The judgment sparked a particularly animated debate both in Germany and throughout the Union. *See* Steve Boom, *The European Union After the Maastricht Decision: Is Germany the "Virginia of Europe"?* (NYU Sch. of Law, Jean Monnet Working Paper No. 5/95, 1995), *available at* http://centers.law.nyu.edu/jeanmonnet/papers/95/9505ind.html; Julio Baquero Cruz, *The Legacy of the Maastricht-Urteil and the Pluralist Movement*, 14 EUR. L.J. 389 (2008); Ulrich Everling, *The Maastricht Judgment of the German Federal Constitutional Court and Its Significance for the Development of the European Union*, 14 Y.B. EUR. L. 1 (1994); Jochen Frowein, *Das Maastricht-Urteil und die Grenzen der Verfassungsgerichtsbarkeit*, 54 HEIDELBERG J. INT'L L. 1 (1994); Dieter Grimm, *The European Court of Justice and National Courts: The German Constitutional Perspective After the*

thoroughly examined the role of the Bundestag in the process of far-reaching European unification brought about by the Maastricht Treaty. The only admissible constitutional complaint (*Verfassungsbeschwerde*) was the one that challenged the German Act of Accession to the Treaty on European Union by alleging an infringement of the rights guaranteed in Article 38 of the Basic Law, which provides for mandatory direct election of the members of the Bundestag by Germans entitled to vote.[19] The complaint was ruled unfounded.

At the outset, the BVerfG found that the fundamental democratic content of the right to vote contained in Article 38 is an "individually assertable right to participate in the election of the Bundestag and thereby to cooperate in the legitimation of state power by the people at federal level and to have an influence over its exercise."[20] The BVerfG furthermore stressed that Article 38:

> [E]xcludes the possibility, in matters to which Article 23 applies,[21] of reducing the content of the legitimation of state power and the influence on its exercise provided by the electoral process by transferring powers to such an extent that there is a breach of the democratic principle in so far as it is declared unassailable by Article 79(3) in conjunction with Article 20(1) and (2).[22]

Maastricht Decision, 3 COLUM. J. EUR. L. 229 (1996); Matthias Herdegen, *Maastricht and the German Constitutional Court: Constitutional Restraints for an "Ever Closer Union,"* 31 COMMON MKT. L. REV. 235 (1994); Doris König, *Das Urteil des Bundesverfassungsgerichts zum Vertrag von Maastricht—Ein Stolperstein auf dem Weg in die europäische Integration?*, 54 HEIDELBERG J. INT'L L. 17 (1994); Kevin D. Makowski, *Solange III: The German Federal Constitutional Court's Decision on Accession to the Maastricht Treaty on European Union*, 16 U. PA. J. INT'L BUS. 155 (1995); Karl M. Meessen, *Hedging European Integration: The Maastricht Judgment of the Federal Constitutional Court of Germany*, 17 FORDHAM INT'L L.J. 511 (1994); Christian Tomuschat, *Die Europäische Union unter der Aufsicht des Bundesverfassungsgerichts*, EUROPÄISCHE GRUNDRECHTE-ZEITSCHRIFT 489 (1993); DAS MAASTRICHT-URTEIL DES BUNDESVERFASSUNGSGERICHTS VOM 12 OKTOBER 1993 (Ingo Winkelmann ed., 1994); Joachim Wieland, *Germany in the European Union—The Maastricht Decision of the Bundesverfassungsgericht*, 5 EUR. J. INT'L L. 259 (1994).

[19] Article 38 of the Basic Law reads:

> (1) Members of the German Bundestag shall be elected in general, direct, free, equal and secret elections. They shall be representatives of the whole people, not bound by orders or instructions, and responsible only to their conscience. (2) Any person who has attained the age of eighteen shall be entitled to vote; any person who has attained the age of majority may be elected. (3) Details shall be regulated by a federal law.

[20] *Maastricht-Urteil*, 1 C.M.L.R. 57, ¶ 4.

[21] Article 23 of the Basic Law regulates Germany's participation in the European Union. Paragraph 1 thereof, to which the BVerfG referred in this passage, reads:

> With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law. To this end the Federation may transfer sovereign powers by a law with the consent of the Bundesrat. The establishment of the European Union, as well as changes in its treaty foundations and comparable regulations that amend or supplement this Basic Law, or make such amendments or supplements possible, shall be subject to paragraphs (2) and (3) of Article 79.

[22] *Maastricht-Urteil*, 1 C.M.L.R. 57, ¶ 5.

The BVerfG thus affirmed as central the constitutional principle that all state authority is derived from the people and is exercised by them through the legislative, executive, and judicial bodies.[23]

Most significantly, the BVerfG's reasoning about the function of the German Parliament within the European constitutional order stems from its ultimate stance that Germany is one of the Masters of the Treaties (*Herren der Verträge*),[24] which it previously heralded in the *Kloppenburg* case.[25] The European Union is a *Staatenverbund*,[26] a federation of states and not a federal state.[27] The implications of this can be divided into three groups.[28]

In the first place, the BVerfG highlighted that democratic legitimation within the Union cannot be produced in the same way as within a national order,[29] because the exercise of sovereign power in the European Union is primarily determined governmentally, i.e., it is based on authorizations from the Member States.[30] The immediate corollary thereof is that the Bundestag, and thus also the citizens entitled to vote, "necessarily lose some influence on the processes of political will-formation and decision-making."[31] Majority voting in the Council of Ministers aggravates this, because a Member State's representative in the Council[32] does not have the right of veto and might thus be outvoted. Whenever the representative does indeed defend the parliament's position in the Council but is outvoted, the national mechanism of political responsibility of the Government to the Parliament, which remains

---

[23] GRUNDGESETZ [GG] art. 20(2).

[24] *Maastricht-Urteil*, 1 C.M.L.R. 57, ¶ 55. *See also* Karen Alter, *Who Are the "Masters of the Treaty"?: European Governments and the European Court of Justice*, 52 INT'L ORG. 121 (1998).

[25] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 8, 1987 (*Kloppenburg*), 3 C.M.L.R. 1 (F.R.G.). The constitutional complaint (*Verfassungsbeschwerde*) brought before the BVerfG sought the annulment of the decision of the German Federal Supreme Finance Court (*Bundesfinanzhof*) that held that the applicant could not rely on the Sixth VAT Directive—which Germany had not duly implemented within the specified time limit—to secure an exemption from VAT for her credit and mortgage agency. The BVerfG allowed the complaint and set aside the decision of the *Bundesfinanzhof* arguing that the European Court of Justice (E.C.J.) did not claim for the Community a new legislative power but that it only defined in detail the legal effects of an existing power. *Id.* ¶ 17. In effect, the E.C.J. created a new category of sanction against the Member States for the non-implementation of directives by enabling private individuals to invoke such unimplemented Community directives before the courts. *Id.* ¶ 18. Having conceded that, the BVerfG asserted that "[t]he Community has not been given adjudicative power by the E.E.C. Treaty to extend its jurisdiction limitlessly. The Community is not a sovereign state within the meaning of international law, . . . [and] the Member States are now, and always have been, the masters of the Community treaties . . . ." *Id.* ¶ 19.

[26] This term was coined by Paul Kirchhof, the reporting judge in the *Maastricht-Urteil*, in an article published in 1992. *See* DER STAATENVERBUND DER EUROPÄISCHEN UNION (Peter Hommelhoff & Paul Kirschof eds., 1994).

[27] The BVerfG used this concept thriftlessly. *See Maastricht-Urteil*, 1 C.M.L.R. 57, ¶¶ 33, 38, 43, 46, 51, 55, 94, 104. However, describing the European Union as a "federation" of states is misleading because a federation is a type of state.

[28] For a more theoretical account, see Neil MacCormick, *The Maastricht-Urteil: Sovereignty Now*, 1 EUR. L.J. 259 (1995).

[29] *Maastricht-Urteil*, 1 C.M.L.R. 57, ¶ 36.

[30] *Id.* ¶ 46.

[31] *Id.*

[32] A Member State's representative in the Council will typically be the competent government minister. In Germany, in a vast majority of the cases this will be the competent minister of the Federal Government. Only in certain, precisely defined cases will it be possible for Germany to be represented in the Council by a representative of the *Länder* designated by the Bundesrat. *See infra* Part VII.A.3.

otherwise applicable, is eviscerated because the representative fulfilled what the Parliament demanded. Yet the BVerfG ruled that majority voting is not only acceptable but also necessary because of the principle of openness, i.e., friendliness, towards European law, which is expressly stated in the Basic Law.[33]

A second implication of the BVerfG's reliance on sovereignty as a sole theoretical explanation of the Union is "it is first and foremost the national peoples of the Member States who, through their national parliaments, have to provide the democratic legitimation."[34] Crucially, the BVerfG ruled that "a legitimation and an influence proceeding from the people" is a precondition for membership.[35] Because such legitimation:

> [N]ecessarily comes about through the feedback of the actions of the European institutions into the parliaments of the Member States . . . , it is decisive that the democratic bases of the European Union are built up in step with integration, and that as integration proceeds a thriving democracy is also maintained in the Member States.[36]

In other words, "sufficient functions and powers of substantial importance must remain for the German Bundestag,"[37] which the BVerfG found was fulfilled through elections to the Bundestag, which—jointly with the Bundesrat—*may*, but need not, adopt a statute approving the accession to a community of states such as the European Union, and thus open the German constitutional order to the application of European law. By means of such a statute, both the existence of the European Union itself and its power to take majority decisions are democratically legitimized.[38] Hence, any competence claimed by the Union that is not covered by an approving statute renders the acts based on such a competence *inapplicable* (but not invalid)[39] in Germany, because they exceed the express authorization of the Bundestag.

It is paramount for a proper assessment by the German Parliament of whether it should adopt such a statute that the rights and duties resulting from Germany's membership in the European Union be defined in the founding treaties with sufficient certainty and in a predictable manner.[40] These are achieved by the Union's

---

[33] *See infra* Part VI.G.

[34] *Maastricht-Urteil*, 1 C.M.L.R. 57, ¶ 39.

[35] *Id.* ¶ 38.

[36] *Id.* ¶ 43.

[37] *Id.* ¶ 45.

[38] *Id.* ¶ 37.

[39] The difference between the validity and applicability of E.U. law stems from the German legal doctrine that the legal orders of the European Union and of Germany are separate. Due to this separateness, the E.C.J. is competent to decide on the validity of Community law, and the BVerfG is competent to decide on the validity of German law. These two courts decide on the validity of the legal acts made within their own legal order. For that reason, the BVerfG found that it could not invalidate an act that had been made outside its legal order and thus outside of the purview of its constitutional jurisdiction. What it could nonetheless do is render an E.U. legal act inapplicable in Germany, if it falls outside the ambit of the statute approving Germany's accession to the Union. The inapplicability therefore derives from the doctrine that E.U. law is applicable in Germany exclusively by means of such an approving statute, or what is known as *Rechtsanwendungsbefehl*, i.e., Germany's order to apply E.U. law domestically. *See also* Dieter Grimm, *Comments on the German Constitutional Court's Decision on the Lisbon Treaty: Defending Sovereign Statehood Against Transforming the European Union into a State*, 5 EUR. CONST. L. REV. 353, 354 (2009).

[40] *Maastricht-Urteil*, 1 C.M.L.R. 57, ¶ 49.

adherence to what the BVerfG refers to as the principle of "limited individual empowerment,"[41] which is more commonly known as the principle of conferral,[42] as well as by the principles of subsidiarity and proportionality.[43]

---

[41] *Id.* ¶¶ 33, 52, 59, 61, 77, 98, 100.

[42] The principle of conferral governs the existence and limits of E.U. competence. Its meaning is threefold: (a) the European Union may only act in the areas conferred upon it by the Member States; (b) it may only do so to attain the objectives set out in the founding treaties; and (c) the competences not conferred remain with the Member States. Treaty on European Union, arts. 4(1), 5(2), May 9, 2008, 2008 O.J. (C 115) 13 [hereinafter E.U. Treaty].

There are three main categories of E.U. competence. First, in the fields of *exclusive E.U. competence* only the European Union may act freely, and the Member States may act only if empowered by the Union or for the implementation of Union acts. Treaty on the Functioning of the European Union, art. 2(1), May 9, 2008, 2008 O.J. (C 115) 47 [hereainafter E.C. Treaty]. Within the exclusive E.U. competence, the Union may act in two ways. On the one hand, it may legislate in the following five fields: customs union; competition; monetary policy for the Eurozone; conservation of marine biological resources under the common fisheries policy; and common commercial policy. On the other hand, it may conclude international agreements where that is provided for in a Union legislative act or is necessary to enable the Union to exercise its internal competence. E.C. Treaty art. 3.

Second, in the fields of *shared competence*, both the European Union and the Member States may act. Yet while the Union may act freely, the Member States may only act to the extent that the Union has not exercised its competence or has decided to cease exercising it. E.C. Treaty art. 2(2). Furthermore, if the Union decides to act in a certain field of shared competence, such E.U. action refers only to the specific element of the field in which it acted and not to the entire field. Protocol No. 25 on the Exercise of Shared Competence annexed to the founding treaties. In the remaining elements of the fields where the Union acted, and in the fields where it did not act at all, the Member States may act freely. There are three groups of shared competence. The first group is listed *exempli causa*: internal market; certain aspects of social policy; economic, social and territorial cohesion; agriculture and fisheries; environment; consumer protection; transport; trans-European networks; energy; area of freedom, security and justice; and certain aspects of common safety concerns in public health matters. E.C. Treaty art. 4(2). The second group of shared competence is residual and encompasses any area that does not fall either under exclusive or under supporting, coordinating, or supplementing competence. E.C. Treaty art. 4(1). The third group of shared competence empowers the Union to carry out certain activities which do not prevent the Member States from exercising their own competence: (a) in the fields of research, technological development, and space, in order to define and implement programs; and (b) in the fields of development cooperation and humanitarian aid, in order to conduct a common policy. E.C. Treaty arts. 4(3)–(4).

Third, the European Union has the competence to *support, coordinate, or supplement* the Member States' action, without thereby superseding their competence or harmonizing their laws or regulations, in the following fields: protection and improvement of human health; industry; culture; tourism; education, vocational training, youth, and sport; civil protection; and administrative cooperation. E.C. Treaty arts. 2(5)–(6).

Two categories of E.U. competence have, for political reasons, been placed outside this threefold classification. The first is the E.U. competence to adopt certain measures with respect to Member States' policies in the fields of economy, employment, and social policy. E.C. Treaty arts. 2(3)–(5). The second is the E.U. competence to define and implement a common foreign and security policy, including the progressive framing of a common defense policy. E.C. Treaty art. 2(4). *See also* Paul Craig, *The Treaty of Lisbon, Process, Architecture and Substance*, 33 EUR. L. REV. 137 (2008); Paul Craig, *Competence: Clarity, Conferral, Containment, and Consideration*, 29 EUR. L. REV. 323 (2004); Stephen Weatherill, *Competence Creep and Competence Control*, 23 Y.B. EUR. L. 1 (2004); Stephen Weatherill, *Pre-emption, Harmonisation and the Distribution of Competence to Regulate the Internal Market*, *in* THE LAW OF THE SINGLE EUROPEAN MARKET: UNPACKING THE PREMISES 41 (Catherine Barnard & Joanne Scott eds., 2002).

[43] The principles of subsidiarity and proportionality govern the use of E.U. competence. *Subsidiarity* requires that:

> [I]n areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at

However, since the adoption of a statute on accession to the European Union is a sovereign decision of Germany, placed in the hands of the democratically elected Bundestag, it may also be revoked. There is nothing that the Union could do to prevent Germany from revoking its adherence to the founding treaties, because "common authority . . . is derived from the Member States and can only have binding effects within the German sovereign sphere by virtue of the German instruction that its law be applied."[44] The instruction to apply E.U. law in Germany (*Rechtsanwendungsbefehl*) is the mentioned statute approving Germany's accession to the Union. Any E.U. act that falls outside the ambit of this statute is *ultra vires*; it "breaks out" from this statute and from the instruction contained therein (*ausbrechender Rechtsakt*), and may therefore not be applied in Germany.[45] The BVerfG thereby laid claim to the *constitutional Kompetenz-Kompetenz*, i.e., to the ultimate authority to decide about the distribution of competences between the Union and Germany. The BVerfG recognized the *judicial Kompetenz-Kompetenz* of the European Court of Justice (E.C.J.), i.e., its ultimate authority to decide about the extent of the competences conferred on the Union, only insofar as the E.C.J. did not interpret the conferred competences in a way that would drastically exceed the limits contained in the German approving statute and that would thus in effect create a new power of the Union.[46] It is this shift away from the fundamental rights paradigm towards the scrutiny of the question of whether the E.U. law at hand is covered by the German approving statute that brought the German Federal Constitutional Court into conflict with the E.C.J.[47]

Nevertheless, the BVerfG decided that the casting of a ballot during elections to the Bundestag does not suffice if democracy is not to remain a merely formal principle of accountability. Democracy also involves the presence of certain factual, pre-legal conditions, which include: (a) a continuous free debate between opposing

---

regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

E.U. Treaty art. 5(3). *Proportionality* requires that "the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties." E.U. Treaty art. 5(4). These two principles are further elaborated upon in Protocol No. 2 on the Application of the Principles of Subsidiarity and Proportionality annexed to the founding treaties. *See* Tor-Inge Harbo, *The Function of the Proportionality Principle in EU Law*, 16 EUR. L.J. 158 (2010); N.W. Barber, *Subsidiarity in the Draft Constitution*, 11 EUR. PUB. L. 197 (2005); George Bermann, *Proportionality and Subsidiarity*, *in* THE LAW OF THE SINGLE EUROPEAN MARKET: UNPACKING THE PREMISES 75 (Catherine Barnard & Joanne Scott eds., 2002); Christoph Henkel, *Allocation of Powers in the European Union: A Closer Look at the Principle of Subsidiarity*, 20 BERKELEY J. INT'L L. 359 (2002); Gráinne de Búrca, *Reappraising Subsidiarity's Significance After Amsterdam* (Harvard Jean Monnet Working Paper No. 7/99, 1999), *available at* http://centers.law.nyu.edu/jeanmonnet/papers/99/990701.html; George Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331 (1994).

[44] *Maastricht-Urteil*, 1 C.M.L.R. 57, ¶ 55.

[45] Mattias Kumm, *Who Is the Final Arbiter of Constitutionality in Europe?: Three Conceptions of the Relationship Between the German Federal Constitutional Court and the European Court of Justice*, 36 COMMON MKT. L. REV. 351, 364 (1999).

[46] For the distinction between constitutional and judicial *Kompetenz-Kompetenz*, see MONICA CLAES, THE NATIONAL COURTS' MANDATE IN THE EUROPEAN CONSTITUTION 606–10 (2006); Juliane Kokott, *Report on Germany*, *in* THE EUROPEAN COURT AND NATIONAL COURTS—DOCTRINE AND JURISPRUDENCE: LEGAL CHANGE IN ITS SOCIAL CONTEXT 77, 92–107 (Anne-Marie Slaughter et al. eds., 1997).

[47] Kokott, *supra* note 46, at 82.

social forces, interests, and ideas, in which political goals are clarified and changed; (b) the creation of a public opinion, which shapes political intentions; and (c) the possibility for the citizens to communicate with organs exercising sovereign powers in their own language.[48] Although these were held not to be in existence within the institutional framework of the Union yet, they can develop over the course of time.[49]

A third implication of the BVerfG's sovereignty thesis is that the European Parliament is merely an additional, supplementary source of democratic support for the policies of the Union, yet a necessary one because of the broadening of Community powers. Similarly, Union citizenship was also found to be of supplementary nature. It is "a legally binding expression of the degree of *de facto* community already in existence," which at that moment did not meet the conditions necessary for it to become a subject of democratic legitimation of the Union, but the BVerfG did not exclude the possibility of that occurring in the future.[50] According to Ress, this possibility could also be inferred from the BVerfG's starting point that the complainant's right under Article 38 of the Basic Law can be deemed violated "if the exercise of the powers of the Bundestag is transferred to an organ of the European Union or the European Communities *formed by the governments*," which might mean that such a transfer to an organ formed by the citizens—the European Parliament—would not lead to the said violation.[51] Moreover, the European Parliament "could become stronger if it were to be elected by equivalent electoral rules in all the Member States" and "if its influence on the policies and legislation of the European Community were to increase."[52]

A fourth implication lies in the BVerfG finding that the conditions attached to the role of the German Parliament were fulfilled, because "the means of formation of political intentions laid down by the Treaty do not *at present* have the effect of reducing the content of the decision-making and supervisory powers of the Bundestag to an extent which infringes the democratic principle."[53] This was so chiefly for three reasons: (a) the requirement of a *statute* guarantees sufficient involvement of the Bundestag and thus also of the German citizens in the processes of concluding a new Treaty or amending the existing ones;[54] (b) the *rights of participation* allow the Bundestag to be involved in the exercise of German membership rights within the European institutions;[55] and (c) the Bundestag influences the European policy of the Government through the latter's *political responsibility* to the Bundestag.[56]

---

[48] *Maastricht-Urteil*, 1 C.M.L.R. 57, ¶ 41.

[49] *Id.* ¶ 42.

[50] *Id.* ¶ 40.

[51] Georg Ress, *Decision Concerning the Maastricht Treaty of October 12, 1993*, 88 AM. J. INT'L L. 539, 548 (1994) (emphasis in original).

[52] *Maastricht-Urteil*, 1 C.M.L.R. 57, ¶ 43.

[53] *Id.* ¶ 33 (emphasis added).

[54] *Id.* ¶ 56.

[55] *Id.*

[56] *Id.* ¶ 57. The BVerfG refers to Articles 63 (appointment of the Federal Chancellor) and 67 (vote of no confidence) of the Basic Law. Article 68 (vote of confidence) establishes another means for the Bundestag to oust the Federal Chancellor by rejecting his or her motion of confidence. Both the vote of no confidence and the vote of confidence must be "constructive," which means that the Bundestag must at the same time appoint a new Chancellor. This is meant to avoid a vacuum in the work of the executive.

Finally, the BVerfG espoused the dualist approach to the German Parliament's role in E.U. decision-making. By placing the Bundestag and the Bundesrat at the legal frontier between Germany and the European Union, it assigned them the role of gatekeeping, epitomized in the approval of Germany's accession to the Union. This has a twofold meaning. On the one hand, the German Parliament's central function is to decide on Germany's accession to the Union and to legitimize the transfer of powers. On the other hand, once Germany becomes an E.U. Member State, the national parliamentary rights of participation are limited to the German legal order and directed at the control of the Government. The BVerfG did not foresee the Bundestag's independent role in the process of elaboration of the Union's secondary law once the transfer has taken place. Hence, the BVerfG fell short of piercing the veil of the European constitutional order.

V. THE *EUROPEAN ARREST WARRANT* CASE: . . . AND MAY NOT AFFECT ITS DUTY OF TRANSPOSITION . . .

On July 18, 2005, the BVerfG annulled in its entirety the German law transposing the Framework Directive on the European Arrest Warrant (the EAW Act).[57] The constitutional complaint was filed by Mamoun Darkazanli, a citizen of Germany and Syria, in order to obtain the annulment of his extradition to Spain pursuant to the European arrest warrant issued by competent Spanish authorities because of his alleged involvement in the terrorist activities of Al-Qaida.

The BVerfG ruled that the EAW Act infringed the complainant's fundamental right not to be extradited to a foreign country.[58] Although the Basic Law—after the constitutional amendment of November 29, 2000—permits extraditions of German nationals to E.U. Member States,[59] the BVerfG found that the proviso requiring such extraditions to observe the rule of law was not satisfied, because the German Parliament was under a *duty to exhaust the margin of appreciation*[60] given to it by

---

See also Veith Mehde, *Political Accountability in Germany*, *in* POLITICAL ACCOUNTABILITY IN EUROPE: WHICH WAY FORWARD? A TRADITIONAL CONCEPT OF PARLIAMENTARY DEMOCRACY IN AN EU CONTEXT 101 (Luc Verhey et al. eds., 2008).

[57] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jul. 18, 2005 (*Darkazanli*), 1 C.M.L.R. 16 (F.R.G.). *See* Simone Mölders, *European Arrest Warrant Act is Void—The Decision of the German Federal Constitutional Court of 18 July 2005*, 7 GERMAN L.J. 45 (2005); Alicia Hinarejos Parga, *Bundesverfassungsgericht (German Constitutional Court), Decision of 18 July 2005 (2 BvR 2236/04) on the German European Arrest Warrant Law*, 43 COMMON MKT. L. REV. 583 (2006); Nicolas Nohlen, *Germany: The European Arrest Warrant Case*, 6 INT'L J. CONST. L. 153 (2008); Sebastian Wolf, *Demokratische Legitimation in der EU aus Sicht des Bundesverfassungsgerichts nach dem Urteil zum Europäischen Haftbefehlsgesetz*, 38 KRITISCHE JUSTIZ 350 (2005); Florian Geyer, *The European Arrest Warrant in Germany—Constitutional Mistrust Towards the Concept of Mutual Trust*, *in* CONSTITUTIONAL CHALLENGES TO THE EUROPEAN ARREST WARRANT 101–24 (Elspeth Guild ed., 2006); Jan Komárek, *European Constitutional Pluralism and the European Arrest Warrant: In Search of the Limits of "Contrapunctual Principles,"* 44 COMMON MKT. L. REV. 9 (2007); Joachim Vogel, *Europäischer Haftbefehl und deutsches Verfassungsrecht*, 60 JURISTENZEITUNG 801 (2005).

[58] GRUNDGESETZ [GG] art. 16(2) (first sentence).

[59] GRUNDGESETZ [GG] art. 16(2) (second sentence).

[60] The challenged E.U. legal act was a framework decision. Under the former Article 34(2)(b) E.U., framework decisions did not have direct effect and had to be transposed, i.e., implemented, into national law. They were binding upon the Member States as to the result to be achieved but left choice of form and method to the national authorities. This choice thus left the implementing organ a certain degree of discretion. In this judgment, the duty to exhaust the margin of appreciation meant, above all, that the

the Framework Decision.[61] The duty of the German Parliament to give due consideration to the encroachment of fundamental rights was corroborated by the BVerfG's perception of Third Pillar[62] law: it is "still an incomplete legal system . . . intentionally characterized as a part of international law"[63] and "a way to preserve national identity and statehood in a single European judicial area."[64]

Significantly, the German Parliament bears a "particular responsibility" for correct transposition because the measure at hand falls under the Third Pillar, whereas such an elevated degree of parliamentary responsibility for transposition does not arise in the case of Community directives.[65] Due to the nature of this responsibility, the legitimation of Third Pillar law is incumbent primarily on national parliaments and not on the European Parliament:

> The European Parliament, sole source of legitimacy of European Law, is merely "heard" in the legislative process . . . , which complies with the requirements of the principle of democracy in the context of the "Third Pillar," because the legislative bodies of the Member States retain their political power to shape legislation when it comes to transposition of the instrument, or if necessary through a *refusal of transposition*.[66]

The wide room for maneuvering reserved for the German Parliament in transposing Third Pillar measures is thus consonant with the BVerfG's *Maastricht* reasoning. The role of the German Parliament in Third Pillar law is envisaged only *ex post*—that is, in transposing and not in creating it—even though involvement *ex ante* could provide greater opportunity to shape legislation. In reaching the same conclusion, Christian Tomuschat, who was an authorized representative of the German Federal Government in the *Lissabon* proceedings, rightly claimed that as long as the defining act of democratic legitimization is viewed in the approval of the treaties by national parliaments, it does not matter whether the transfer of powers leaves no room whatsoever for national parliaments or whether they can still discharge modest functions of transposition. However, he argued somewhat too readily that through the channels of information instituted by the German laws, "the parliamentarian bodies *can* exert influence, regardless of whether the draft measures are located in the field of Community law or in the 'third pillar.'"[67] Parliamentary

---

German Parliament was obliged to achieve the result laid down in the Framework Decision in such a way that any unavoidable limitation of the fundamental right of German citizens not to be extradited was proportionate. *See Darkazanli*, 1 C.M.L.R. 16, ¶¶ 80, 96, 112, 113, 176.

[61] Member States are allowed to refuse extradition to another Member State in seven cases. Council Decision 2002/584/JHA, On the European Arrest Warrant and the Surrender Procedures Between Member States, art. 4, 2002 O.J. (L 190) 1. One of them is when the European arrest warrant relates to offenses committed in whole or in part in the territory of the executing Member State or in a place treated as such, or where the offenses have been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offenses when committed outside its territory. The contested provision of the EAW Act was the one transposing this ground for refusal.

[62] *See supra* note 2.

[63] *Darkazanli*, 1 C.M.L.R. 16, ¶ 81.

[64] *Id.* ¶ 75.

[65] *Id.* ¶ 80.

[66] *Id.* ¶ 81 (emphasis added).

[67] Christian Tomuschat, *Inconsistencies—The German Federal Constitutional Court on the European Arrest Warrant*, 2 EUR. CONST. L. REV. 216, 216–17 (2006) (emphasis added).

influence is not only determined by the mere possession of information but also by a vast multitude of other internal and external, as well as legal and political, factors.

The dissenting judges seem to have shared the same concern. Judge Lübbe-Wolff urged that "there are good grounds to resist drawing the conclusion from the limited role of the Parliaments in the multilevel legislative process at issue that the European Arrest Warrant Law . . . is unconstitutional because it infringes the principle of democracy,"[68] and that:

> Deficits . . . should not necessarily be attributed to the Union level and resolved at that level. In particular, where legislation at the European level requires unanimity in the Council . . . as in the case of Framework Decisions . . . , the development that remains to take place before we achieve a better democratic foundation can and must also result from strengthening the law and practice at the national level concerning parliamentary influence on the voting behavior of the government representatives in the Council.[69]

Judge Lübbe-Wolff further reproved the majority opinion on the German Parliament's right to refuse transposition: "[i]f democratic legitimation must be sought in the freedom of Parliament to infringe Union Law, something is seriously wrong."[70] In addition, in his dissenting opinion Judge Broß argued that the principle of subsidiarity obliges the German Parliament "to give comprehensible reasons for the 'integrational added value' of a legislative proposal in the context of the Third Pillar,"[71] thereby ascribing considerable responsibility to the German Parliament for enactments in this field.

At any rate, the BVerfG clarified that with regard to Third Pillar law, the German Parliament prevails over the European Parliament. Given that the Lisbon Treaty subjects the whole of the former Third Pillar to the ordinary legislative procedure, formerly known as co-decision, it is interesting to see whether the BVerfG will accordingly change its view in the future.

VI. THE *LISBON TREATY* CASE: . . . AND IS NOT AND NEED NOT BE LIKE THE NATIONAL PARLIAMENT

In the *Lissabon-Urteil*[72] of June 30, 2009, the BVerfG examined the constitutionality of the Lisbon Treaty and the three related statutes: (a) the Act Approving the Lisbon Treaty (the Approving Act),[73] (b) the Act Amending the Basic

---

[68] *Darkazanli*, 1 C.M.L.R. 16, ¶ 178.

[69] *Id.* ¶ 180.

[70] *Id.* ¶ 177.

[71] *Id.* ¶ 149.

[72] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jun. 30, 2009 (*Lissabon-Urteil*), 123 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 267 (F.R.G.). Six applications were consolidated for joint adjudication: 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, and 2 BvR 182/09. The version used is the one available at the BVerfG's website in the English language at http://www.bundesverfassungsgericht.de/entscheidungen/ es20090630_2bve000208en.html. *See* Christian Wohlfahrt, *The Lisbon Case: A Critical Summary*, 10 GERMAN L.J. 1277 (2009).

[73] Zustimmungsgesetz zum Vertrag von Lissabon [Law Approving the Lisbon Treaty], Oct. 8, 2008, BGBl. II at 1038 (F.R.G.).

Law (the Amending Act),[74] and (c) the Draft Act Extending and Strengthening the Rights of the Bundestag and the Bundesrat in European Union Matters (the "Draft Extending Act").[75] In this case, the BVerfG made three key decisions.

First, the BVerfG confirmed the constitutionality of the Lisbon Treaty itself. Second, it declared the Draft Extending Act unconstitutional due to the insufficiently elaborated rights of participation of the German Parliament in the process of European unification. Third, the BVerfG withheld Germany's ratification of the Lisbon Treaty by prohibiting the Federal President from depositing the ratification instrument until new legislation was enacted to give sufficient rights to the German Parliament to participate in E.U. affairs.

The salience of the principle of democracy in the *Lissabon-Urteil* lies inter alia in the fact that the only two admissible claims were those invoking:[76] (a) a violation of the right to participate in the election of members of the Bundestag guaranteed by Article 38(1) of the Basic Law, and (b) a violation of the Bundestag's competence to decide on the deployment of the German Armed Forces (*Bundeswehr*), developed by the BVerfG as a constitutional principle.[77] The BVerfG reiterated that the right to participate in national parliamentary elections is an individually assertable right equivalent to a fundamental right: it guarantees not only the right to cast a ballot but also the fundamental democratic content of that right.[78]

A. The Reassertion of Sovereignty: The Maastricht Legacy Endorsed

The cornerstones of the *Lissabon-Urteil* are the BVerfG's well-known concepts of sovereignty, *Staatenverbund*, Member States as *Herren der Verträge*, and citizens as subjects of democratic legitimization. From these concepts, the BVerfG inferred that the following conditions were necessary for a far-reaching transfer of German sovereign powers to the European Union: (1) sovereign statehood must be maintained on the basis of the *integration program*; (2) the principle of *conferral* must be respected; (3) the Member States' *constitutional identity* must be respected; and (4) the Member States must not lose their ability to *politically and socially shape* living conditions, which are their own responsibility.[79]

---

[74] Gesetz zur Änderung des Grundgesetzes [Law Amending the Basic Law], Oct. 8, 2008, BGBl. I at 1926, arts. 23, 45, 93 (F.R.G.).

[75] Entwurf eines Gesetzes über die Ausweitung und Stärkung der Rechte des Bundestages und des Bundesrates in Angelegenheiten der Europäischen Union [Draft Act on the Extending and Strengthening the Rights of the Bundestag and the Bundesrat in Matters Concerning the European Union], Bundestags-Drucksache 16/8489 [hereinafter Draft Extending Act] (Mar. 11, 2008).

[76] *Lissabon-Urteil*, BVerfGE 123, 267, ¶ 167.

[77] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jul. 12, 1994 (*Bundeswehreinsatz*), 2 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 4 (F.R.G.). The BVerfG ruled that the Basic Law obliges the Federal Government to obtain prior affirmative consent of the Bundestag for a deployment of the German Armed Forces. In March 2005, the Parliamentary Participation Act (Gesetz über die parlamentarische Beteiligung bei der Entscheidung über den Einsatz bewaffneter Streitkräfte im Ausland, short name: Parlamentsbeteiligungsgesetz) was passed requiring the agreement of the Bundestag for the deployment of the German Armed Forces outside the scope of application of the Basic Law.

[78] *Lissabon-Urteil*, BVerfGE 123, 267, ¶¶ 172, 173, 174.

[79] *Id.* ¶ 226 (emphasis added).

The Member States constitute the primary political area of their polities, whereas the European Union is the secondary one, derived from those of its Member States and performing only those tasks that are expressly conferred on it by the Member States.[80] Therefore, "there can be no independent subject of legitimization for the authority of the European Union which constitutes itself . . . on a higher level."[81] The BVerfG explained this in the following terms:

> [T]he source of Community authority, and of the European constitution that constitutes it, are the peoples of Europe with their democratic constitutions in their states. The "Constitution of Europe," the law of international agreements or primary law, remains a derived fundamental order. It establishes a supranational autonomy which is quite far-reaching in political everyday life but is always limited factually.[82]

Furthermore, the BVerfG peculiarly approached sovereignty as a divisible and quantifiable concept whose elements can be enumerated. First, Germany must retain sufficient space for the political formation of the economic, cultural, and social circumstances of life. This applies particularly to political decisions that depend on "previous understanding as regards culture, history and language and which unfold in discourses in the space of a political public that is organized by party politics and Parliament."[83] Second, the following fields were singled out as "especially sensitive": criminal law, use of force, fiscal decisions, social policy, decisions on family law, education systems, and religion.[84] Such an approach was criticized by Schönberger as a "strange patchwork concept of statehood that owes nothing to state theory and everything to political contingency," which he substantiated with the argument that the right to coin money was not included in this "sovereignty list."[85] Halberstam and Möllers agreed and considered the BVerfG's enterprise "an unnecessary theory of necessary state functions" that "makes no sense."[86]

The BVerfG underscored that European integration is a process of "reversible self-commitment," and that the German Parliament may decide to revoke its act of transfer of powers and thus bring an end to Germany's membership in the Union:

> According to the constitution, such steps of integration must be factually limited by the act of transfer and must, in principle, be revocable. For this reason, withdrawal from the European union of integration (*Integrationsverband*) may, *regardless of a commitment for an unlimited period* under an agreement, not be prevented by other Member States or the autonomous authority of the Union. This is not a secession from a state union (*Staatsverband*), which is problematical under international

---

[80] *Id.* ¶ 301. Elsewhere, the BVerfG describes the nature of the Union's powers as "an autonomy to rule which is independent but derived," which is unfortunate because autonomy is always of narrower scope than independence. Therefore, while independence always includes autonomy, autonomy never includes independence.

[81] *Id.* ¶ 232.

[82] *Id.* ¶ 231.

[83] *Id.* ¶ 249.

[84] *Id.* ¶ 252.

[85] Christoph Schönberger, *Lisbon in Karlsruhe: Maastricht's Epigones at Sea*, 10 GERMAN L.J. 1201, 1209 (2009).

[86] Daniel Halberstam & Christoph Möllers, *The German Constitutional Court Says "Ja zu Deutschland!,"* 10 GERMAN L.J. 1241, 1249 (2009).

> law . . . , but merely the withdrawal from a *Staatenverbund* which is founded on the principle of the reversible self-commitment.[87]

Since Article 50 E.U. envisages the right of the Member States to withdraw from the Union, this finding by the BVerfG might mean that the German Parliament would not even be obliged to follow the withdrawal procedure, which includes the notification of the intention to withdraw to the European Council and the conclusion of a withdrawal agreement.

Finally, the BVerfG emphasized that only the constituent power, that is, German citizens entitled to vote, may decide the "ultimate limit of the participation of the Federal Republic of Germany in European integration . . . and not the state authority founded on the constitution."[88] Hence, no state institution founded on the basis of the Basic Law may of its own motion abandon the sovereign rights of the German people. The BVerfG therefore reiterated its *Maastricht* finding that the transfer of *Kompetenz-Kompetenz* by German state institutions is prohibited.[89] This means that the German Parliament may not relinquish the right of "democratic self-determination" pertaining to the German citizens by virtue of the constitutionally guaranteed, inviolable, and unamendable principle of democracy. In this sense, the BVerfG solemnly declares: "The Basic Law thus not only assumes sovereign statehood but guarantees it."[90]

B. The "Democracy Solange": The European Parliament's Supplementary Status Anchored[91]

The BVerfG formulated two critical new caveats regarding the principle of democracy and the participation of the people in the exercise of public power:

> As long as, and to the extent to which, the principle of conferral is adhered to in an association of sovereign states with marked traits of executive and governmental cooperation, *the legitimization provided by national parliaments and governments, which is complemented and carried by the directly elected European Parliament is, in principle, sufficient.*[92]

> As long as the European order of competences according to the principle of conferral in cooperatively shaped decision-making procedures exists taking into account the states' responsibility for integration, and as long as a well-balanced equilibrium of the competences of the Union and the competences of the states is retained, the *democracy of the European Union cannot, and need not, be shaped in analogy to that of a state.*[93]

Put simply, as long as the Member States are the Masters of the Treaties, E.U. democracy cannot and need not resemble national democratic patterns. The BVerfG

---

[87] *Lissabon-Urteil*, BVerfGE 123, 267, ¶ 233 (emphasis added).

[88] *Id.* ¶ 179.

[89] *See also id.* ¶¶ 218, 228, 233, 236.

[90] *Id.* ¶ 216.

[91] I have previously discussed this in Davor Jančić, *The German Lisbon Treaty Judgment: Towards "Democracy Solange,"* 58 PRAVNI ŽIVOT 71 (2009). *See also* Daniel Thym, *In the Name of Sovereign Statehood: A Critical Introduction to the Lisbon Judgment of the German Constitutional Court*, 46 COMMON MKT. L. REV. 1795, 1813 (2009).

[92] *Lissabon-Urteil*, BVerfGE 123, 267, ¶ 262 (emphasis added).

[93] *Id.* ¶ 272 (emphasis added).

explicitly claimed that the Basic Law permits "a different shaping of political opinion-forming" at the E.U. level.[94] This could result in "derogations from the organizational principles of democracy applying on the national level," which means that "structural congruence" regarding the composition and representation of the European Parliament need not be achieved.[95] However, if legislative powers were exercised mainly at the E.U. level, and if an imbalance arose between the Union's exercise of the transferred powers and their democratic legitimation, Germany could withdraw from the Union.[96]

As in *Maastricht*, the European Parliament is understood as an institutional supplement. The crucial novelty is that this supplementarity is now part of the *solange* "lock," which means that the BVerfG is not likely to change its attitude towards the European Parliament unless the European Union becomes a state. The German Federal Constitutional Court seems to have adopted the stance that the Union has reached its *finalité*,[97] which, in this author's view, goes beyond what the editorial comment of the Common Market Law Review referred to as merely a temporary unreadiness of the BVerfG to accept the European Parliament as a truly democratically legitimized institution, which it otherwise rightly criticized as "unnecessarily inflexible."[98] It is even more surprising that the BVerfG formulates a "democracy solange" in a time when the European Parliament is gaining unprecedented powers of codecision pursuant to the Lisbon Treaty. This could be explained by the BVerfG's zero-sum approach to European democracy, according to which the European and national parliaments cannot contemporaneously perform the same function with the same degree of legitimacy. In the BVerfG's opinion, the legitimacy furnished by national parliaments is primary, and that furnished by the European Parliament secondary. The only way to change this equation is to do away with the principle of conferral, which would mean that the European Union could exercise not only the powers conferred on it by the Member States but also those created by the Union itself. In other words, the European Parliament's claim to primary provision of legitimacy in the Union could only materialize in a Union that could decide its own powers (*Kompetenz-Kompetenz*), and which would therefore exhibit the characteristics of a state. Yet such a shift of the *Grundnorm*[99] from the Member States to the Union has thus far not happened. Trevor Hartley describes this aptly:

> Community legislation and the judgments of the European Court owe their validity to the Treaties, and the Treaties owe their validity to

---

[94] *Id.* ¶ 219.

[95] *Id.* ¶¶ 227, 266.

[96] *Id.* ¶ 264.

[97] *See* Editorial, *On the Lissabon-Urteil: Democracy and a Democratic Paradox*, 5 EUR. CONST. L. REV. 341, 342 (2009).

[98] Editorial, *supra* note 3, at 1033.

[99] The concept of *Grundnorm* (basic norm) or *Ursprungsnorm* (original norm) has been developed by the Austrian legal theorist and philosopher Hans Kelsen to refer to the highest legal norm of a legal system from which all other legal norms derive. A *Grundnorm*, as a single supreme legal rule, an ultimate norm for norm-setting, a founding constitution, does not derive its own validity from any other higher legal norm; its validity is presupposed. Bert van Roermund, *Authority and Authorisation*, 19 L. & PHIL. 201, 205 (2000); N.W. Barber, *Sovereignty Re-examined: The Courts, Parliament and Statutes*, 20 OXFORD J. LEGAL STUD. 131, 134–35 (2000).

> international law and the legal systems of the Member States. The Community legal system, and everything built on it, is not, therefore, *self-sustaining*: it is dependent on other legal systems and owes its validity to them. The Treaties constitute the foundation of the Community legal system, but the Treaties themselves have their foundation in international law. To use other terminology, the Treaties do not constitute an independent *Grundnorm*. A *Grundnorm* may be defined as a legal rule on which all other rules in the system depend, but which does not itself depend on any other legal rule. Its validity depends on non-legal considerations. The Constitution of the United States is a *Grundnorm,* the basic Treaties of the European Union are not.[100]

The fear that the new flexibility clause gives the Union carte blanche to act and thereby affect the nature of the Union is only justified insofar as this clause might provoke envisioning the self-empowerment of the Union. Since the flexibility clause is meant to be an exception, its actual use could hardly of itself transform the Union into a state. Yet even if the European Union were to become a state, the BVerfG ruled that it would be legally permissible under the condition that the Basic Law be replaced with a constitution freely adopted by the German people on the basis of Article 146 of the Basic Law.[101]

Moreover, in accordance with its *Maastricht* findings, the BVerfG maintained that, despite the existence of Union citizenship, the Lisbon Treaty does not alter the assessment that "the European Union lacks . . . a political decision-making body which has come into being by equal election of all citizens of the Union and which is able to uniformly represent the will of the people."[102] As a result, and especially due to the contingents of seats assigned to the Member States, the European Parliament does not represent a sovereign European people, but the peoples of the Member States. The European Parliament represents an institutional compromise between the international law principle of equality of states and the national law principle of electoral equality.[103] The BVerfG corroborated this with the argument that elections to the European Parliament are based on the voters' nationality of their Member States, a distinction otherwise absolutely prohibited in the Union.[104] A number of scholars have criticized the BVerfG for taking nationality, and not residence, as the correct basis of the right to vote for and be elected to the European Parliament. For

---

[100] Trevor C. Hartley, *The Constitutional Foundations of the European Union*, 117 L. Q. REV. 225 (2001).

[101] *See also supra* note 6.

[102] *Lissabon-Urteil*, BVerfGE 123, 267.

[103] *Id.* ¶ 284. The fact that electoral equality is not absolute and universal but assumes different forms in different states was well accounted for in Schönberger's and Tomuschat's criticism that neither Germany nor some other federal states (such as the United States or Switzerland) fulfill the condition of rigid electoral equality that disregards the peculiarities of federalism, and especially the formation of upper parliamentary chambers. Schönberger's criticism of the BVerfG's exclusive reliance on criteria of democratic legitimacy as applicable in states is less convincing, because his own analysis is based on state criteria. This however is not problematic, because using state criteria is inevitable in a world made up of states and is not necessarily erroneous in and of itself. Rather, and this is what Schönberger particularly insisted on, using *idealized* and *abstract* state criteria, and using them *excessively*, impedes the reaching of sound and defensible conclusions. Schönberger, *supra* note 85, at 1210, 1215; Christian Tomuschat, *The Ruling of the German Constitutional Court on the Treaty of Lisbon*, 10 GERMAN L.J. 1259, 1260-1261 (2009).

[104] *Lissabon-Urteil*, BVerfGE 123, 267, ¶ 287.

example, Halberstam and Möllers found this argument "flatly wrong,"[105] Bieber thought it was "incorrect,"[106] Murkens regarded it as one of the BVerfG's "inaccuracies and inconsistencies,"[107] and Lock thought it was simply "not true."[108] Both the BVerfG and its critics base their arguments on the first sentence of Article 22(2) E.C., which reads:

> [E]very citizen of the Union residing in a Member State *of which he is not a national* shall have the right to vote and to stand as a candidate in elections to the European Parliament in the Member State in which he resides, *under the same conditions as nationals* of that State.[109]

This provision gives the active and the passive right to participate in European elections to those E.U. citizens who are not resident in their home Member State but in another Member State. Member State residence is thus consecrated as *a* basis of European electoral rights. However, there is nothing in this provision that indicates that residence is *the only* basis of European electoral rights. This provision does not state that nationality is not or may not be a basis for acquiring European electoral rights, but that residence is and must be one of these bases. Since there is no uniform electoral law of the Union,[110] national parliaments may foresee nationality as a basis for the acquisition and enjoyment of European electoral rights. This means that national parliaments are free to decide whether or not to give their nationals resident outside the Union the right to participate in elections to the European Parliament in that Member State, and whether or not to subject the exercise of that right to certain conditions. If such a right were enacted in any Member State, it would mean that it is possible for nationals of the Member States resident outside the European Union to participate in European elections in their home Member State regardless of their residency status in an E.U. Member State. What national parliaments may not do is enact a law that would subject E.U. citizens resident in that Member State to conditions different than those applicable to nationals of that Member State. The italicized sections of this provision corroborate this argument. The argument is further supported by the Council Directive of 1993 laying down detailed arrangements for the exercise of European electoral rights, which provides that "[n]othing in this Directive shall affect each Member State's provisions concerning the right to vote or to stand as a candidate of its nationals who reside outside its

---

[105] Halberstam & Möllers, *supra* note 86, at 1249.

[106] Bieber, *supra* note 4.

[107] Jo Eric Khushal Murkens, *"We Want Our Identity Back"—The Revival of National Sovereignty in the German Federal Constitutional Court's Decision on the Lisbon Treaty*, PUBLIC LAW (forthcoming 2010).

[108] Tobias Lock, *Comments on the German Constitutional Court's Decision on the Lisbon Treaty: Why the European Union is Not a State: Some Critical Remarks*, 5 EUR. CONST. L. REV. 407, 418 (2009).

[109] Emphasis added.

[110] Elections to the European Parliament are regulated by Council Decision 76/787/ECSC, EEC, Euratom: Decision of the Representatives of the Member States Meeting in the Council Relating to the Act Concerning the Election of the Representatives of the Assembly by Direct Universal Suffrage, 1976 O.J. (L 278) 1, *amended by* Council Decision 2002/772/EC, Amending the Act Concerning the Election of the Representatives of the European Parliament by Direct Universal Suffrage, 2002 O.J. (L 283) 1. The matters falling within the ambit of these acts may be further *concretized* by national parliaments of the Member States. The matters falling outside the ambit of these acts may be *regulated* by national parliaments in accordance with national constitutional law.

electoral territory."[111] The same Directive also prohibits discrimination on the basis of residence: "Where, in order to stand as a candidate, nationals of the Member State of residence must have been nationals for a certain minimum period, citizens of the Union shall be deemed to have met this condition when they have been nationals of a Member State for the same period."[112] To illustrate all this, the example that was used by Halberstam and Möllers and later invoked by Lock is developed: it is true that "[a]n Italian citizen who lives in Lithuania votes for the Lithuanian contingent in the European Parliament."[113] But if that same Italian citizen moves to Russia and obtains residence there, he or she need not necessarily lose the right to vote in the European elections. He or she might still be entitled to vote, albeit in Italy, if Italian law permits this. Residence is not an absolute and exclusive basis of European electoral rights and the absence of residence in an E.U. Member State does not per se deprive the person of his or her European electoral rights. Nationality might as well grant it. Therefore, the aim of Article 22(2) E.C. is not to supersede nationality, but to account for voter mobility across the Members States within the E.U. borders.

The above analysis permits several conclusions on the BVerfG's "democracy solange." First, both the European Parliament and the national parliaments of the Member States are sources of E.U. democracy. Their representative functions are not mutually exclusive but complementary, which means in turn that neither the European Parliament nor national parliaments can alone shoulder the Union's democracy-related duties. Second, despite the complementarity of their representative functions, the European Parliament and national parliaments do not enjoy the same status in performing these functions: national parliaments are primary and the European Parliament is supplementary. Third, and perhaps most importantly, the BVerfG's view is that the European Parliament and national parliaments each operate at their own levels of governance: the former at the European level and the latter at the national level. The following section analyzes this last facet of "democracy solange" in greater detail.

C. The German Parliament and the European Union: A Distant but Harmonious Relationship

One of the novelties of the *Lissabon-Urteil* is the BVerfG's discussion of the position of the Bundestag and the Bundesrat with respect to the Union's secondary law. It is portrayed as a relationship between two realms that do not interact directly but also do not preclude each other. In establishing a link between the citizen and the European public authority, the BVerfG assessed the role of the German Parliament:

> Parliament has not only an abstract "safeguarding responsibility" for the official action of international or supranational associations but bears *specific responsibility for the action of its state.* The Basic Law has

[111] Council Directive 93/109/EC, Arrangements for the Exercise of the Right to Vote and Stand as a Candidate in Elections to the European Parliament for Citizens of the Union Residing in a Member State of Which They Are Not Nationals, art. 1(2), 1993 O.J. (L 329) 34.

[112] *Id.* art. 3(2). For more on the issues of electoral rights of non-E.U. nationals, see JO SHAW, THE TRANSFORMATION OF CITIZENSHIP IN THE EUROPEAN UNION: ELECTORAL RIGHTS AND THE RESTRUCTURING OF POLITICAL SPACE (2007).

[113] Halberstam & Möllers, *supra* note 86, at 1249; Lock, *supra* note 108, at 418.

> declared this legitimising connection between the person entitled to vote and state authority inviolable . . . .[114]

In this passage, the BVerfG made two notable claims: (a) that the German Parliament is responsible for the action of its state, i.e., that its competences as regards E.U. decision-making are restricted to the German constitutional order and thus to the control of the German representative in the Council; and (b) that such an interpretation of the German Parliament's "specific responsibility" does not stem from the founding treaties but from the Basic Law, which means that the European Union may not dictate what the German Parliament's constitutional competences will be.

This is substantiated by the following reasoning of the BVerfG: for the citizens' voting right to fulfill its function, the Bundestag must "retain a *formative* influence on the political development *in Germany*," which may be realized alternatively: (a) if the Bundestag itself retains responsibilities and competences of substantial political importance, *or* (b) if the Government can exert decisive influence on European decision-making.[115] Thus, the Bundestag's outreach is limited to Germany and to the formation and control of the Government. It is not necessarily required for the Bundestag to be able to influence E.U. decisions directly. The academic literature also reveals that the German Parliament performs the so-called "supportive scrutiny" of the Government, whereby the scrutiny of individual E.U. proposals is left to the European Parliament. Quite illustrative of this is the fact that in the debates preceding the Maastricht Treaty, the major political forces in the Bundestag demanded that "the democratic deficit shall be eliminated in particular by strengthening the European Parliament's legislative and control powers."[116] During the Amsterdam Intergovernmental Conference the Bundestag again called upon the Government not to institutionalize the role of national parliaments at the European level and instead unconditionally supported the European Parliament in becoming a co-legislator with the Council.[117]

D. The Bundestag as a Fulcrum of European Integration

The BVerfG upheld the Bundestag's pivotal institutional position regarding what could be referred to as *static development* of the Union, i.e., the development of the Union that is subject to national ratification procedures. Conversely, *dynamic development* of the Union is prohibited, because it circumvents the German Parliament. Some of the key contentious issues are explained below.

First, the Approving Act was found compatible with the Basic Law and with the principle of democracy principally because "the German people still decides on essential political issues in the Federation and in the *Länder*,"[118] "the German

---

[114] *Lissabon-Urteil*, BVerfGE 123, 267, ¶ 175.

[115] *Id.* ¶ 246.

[116] BTDrucks 11/7729, *noted in* BERTHOLD RITTBERGER, BUILDING EUROPE'S PARLIAMENT: DEMOCRATIC REPRESENTATION BEYOND THE NATION-STATE 182 (2005).

[117] Daniel Thym, *Parliamentary Control of EU Decision-Making in Germany: Supportive Federal Scrutiny and Restrictive Regional Action*, *in* NATIONAL PARLIAMENTS AND EUROPEAN DEMOCRACY: A BOTTOM-UP APPROACH TO EUROPEAN CONSTITUTIONALISM 49, 63 (Olaf Tans et al. eds., 2007).

[118] *Lissabon-Urteil*, BVerfGE 123, 267, ¶ 274.

Bundestag still retains sufficiently weighty responsibilities and competences of its own,"[119] and "the European Union does, even upon the entry into force of the Treaty of Lisbon, not yet attain a shape that corresponds to the level of legitimisation of a democracy constituted as a state."[120]

In line with these three findings, the BVerfG concluded that the "Bundestag as the body of representation of the German people is the *focal point of an interweaved democratic system.*"[121] While such an observation might be tenable for the Bundestag's role in the process of conferral of powers, this is hardly the case with secondary E.U. law. Similarly, bearing in mind that the BVerfG's yardstick was whether Germany retains "substantial national scope of action for central areas of *statutory regulation* and areas of life,"[122] the BVerfG's conclusion is at odds with frequent claims that over 80% of legislation in force in Germany is of European origin.[123]

Second, the BVerfG upheld the Amending Act regarding the question of whether the Bundestag's right to bring an action before the E.C.J. in case of an infringement by the Union of the principle of subsidiarity may be laid down as a right of the parliamentary minority—in this case, one fourth of the members of the Bundestag. This was found constitutional because the Bundestag's decision to petition the E.C.J. does not have regulatory effect but only provides the power to have recourse to a court.[124]

Third, the BVerfG found that the mandatory requirement of parliamentary approval for the deployment of the German Armed Forces abroad is "not amenable to integration"—the *Bundeswehr* remains a "parliamentary army."[125] The Member States' potential military contribution pursuant to a Council decision[126] is a political rather than a legal obligation.[127]

Fourth, although the Lisbon Treaty entrusts the competence for common commercial policy entirely to the Union and thereby makes national ratification obsolete, the BVerfG did not find this constitutionally objectionable, because the Union's participation alone in global trade negotiations does not negate the German mechanism of responsibility for integration (*Integrationsverantwortung*). In particular, when the Government informs the German Parliament of the rounds of world trade talks and of the negotiation directives that the Council gives the

---

[119] *Id.* ¶ 275.

[120] *Id.* ¶ 276.

[121] *Id.* ¶ 277 (emphasis added).

[122] *Id.* ¶ 351 (emphasis added).

[123] A study by the German Ministry of Justice compared the legal acts adopted by Germany between 1998 and 2004 with those adopted by the European Union in the same period and found that 84% came from Brussels and only 16% from Berlin. Roman Herzog & Lüder Gerken, *The Spirit of the Time: Revise the European Constitution to Protect National Parliamentary Democracy*, 3 EUR. CONST. L. REV. 209, 210 (2007). *See also* Tilmann Hoppe, *Die Europäisierung der Gesetzgebung: der 80–Prozent-Mythos lebt*, 20 EUROPAISCHE ZEITSCHRIFT FÜR WIRTSCHATSRECHT 168 (2009).

[124] *Lissabon-Urteil*, BVerfGE 123, 267, ¶¶ 403–04.

[125] *Id.* ¶¶ 254, 255, 381, 383.

[126] E.U. Treaty art. 43(2).

[127] *Lissabon-Urteil*, BVerfGE 123, 267, ¶ 387.

Commission,[128] this is done not only as a general task of providing information but also as a constitutional obligation of assuming joint responsibility for integration.[129]

Lastly, the BVerfG ruled that the institutional recognition of national parliaments in the Lisbon Treaty cannot compensate for the deficit surrounding the election of the European Parliament. Instead, the status of national parliaments is "considerably curtailed" by the reduction of the number of E.U. decisions that require unanimity and by the transfer of the Third Pillar to the First Pillar. The procedural safeguards are not an adequate substitute.[130] In that respect, the effectiveness of the monitoring of the principle of subsidiarity depends on whether the national parliaments' right to bring action before the E.C.J. will also encompass the question of the Union's competence for the specific proposal.[131]

E. Dynamic Treaty Development as a Constitutional Barrier to European Integration

One of the key reasons why the Draft Extending Act was annulled is that it did not provide for parliamentary safeguards against what could be called "dynamic treaty development," i.e., the amendment of the Union's primary law pursuant to the procedures that do not require ratification by the Member States.[132] In all these fields prior explicit consent[133] by both parliamentary chambers in the form of a statute is a prerequisite, because E.U. institutions may not "independently amend the foundations of the European Union under the Treaties and the order of competences vis-à-vis the Member States."[134] The Draft Extending Act must therefore be redrafted to accommodate the German Parliament's *Integrationsverantwortung*.[135] The provisions of the Lisbon Treaty where parliamentary approval was ruled necessary are as follows:

1. The Bridging (Passerelle) Clauses

a. General Bridging Clauses[136]

General bridging clauses represent two out of three procedures for the simplified revision, i.e., amendment, of the founding treaties. The first type of general bridging clause allows the European Council to authorize the Council of Ministers to act by *qualified majority instead of by unanimity* in all the fields falling under the E.C., the Union's external action, and Common Foreign and Security Policy (CFSP), except in the field of defense and in relation to other decisions with military implications.

---

[128] E.C. Treaty art. 218(2).

[129] *Lissabon-Urteil*, BVerfGE 123, 267, ¶ 375.

[130] *Id.* ¶ 293.

[131] *Id.* ¶ 305.

[132] *Id.* ¶¶ 406, 409. The term *Veränderung* (amendment) that the BVerfG uses here, as distinct from the term *Vertragsänderung* (treaty amendment), only strengthens this argument. It might even serve as the BVerfG's tool to ascertain which treaty amendments require ratification and which do not. Halberstam & Möllers, *supra* note 86, at 1254.

[133] *Lissabon-Urteil*, BVerfGE 123, 267, ¶ 413.

[134] *Id.* ¶ 306.

[135] *Id.* ¶ 239.

[136] E.U. Treaty art. 48(7).

Such an authorization may be given for a whole area or for a single case. The second type of general bridging clause allows the European Council to authorize the Council to act in accordance with the *ordinary legislative procedure instead of in accordance with the special legislative procedure* in all the fields covered by the E.C.

With respect to both of these types of general bridging clauses, each national parliament has the right to make known its opposition to a *passerelle* authorization within six months. The procedure established by the Draft Extending Act to operationalize this parliamentary right was found partly unconstitutional by the BVerfG. The challenged provision laid down that where an E.U. proposal falls under the ambit of concurrent legislation domestically, the Bundestag may only oppose the Union's intention to use a general bridging clause if the Bundesrat does not object.[137] The BVerfG ruled that the Bundestag's exercise of this right may not depend on the Bundesrat, because that would negate the Bundestag's *Integrationsverantwortung*.[138]

The third procedure of simplified treaty amendment was not problematic because the right of the European Council to amend all or part of the provisions of the E.C. dealing with Union policies and internal action is subject to approval by the Member States in accordance with their respective constitutional requirements and may not increase the Union's competences.[139]

b. Special Bridging Clauses

Special bridging clauses have the same function as the general ones and operate essentially under the same logic. The crucial difference is that special bridging clauses exclude the parliamentary right of veto. The only special bridging clause that provides for parliamentary veto is the one in the field of family law with cross-border implications and resembles the second type of general bridging clause. The remaining special bridging clauses exist in the fields of common foreign and security policy, social policy, environmental policy, multiannual financial frameworks, and enhanced cooperation.[140]

With regard to both general and special bridging clauses, the BVerfG found that the loss of German influence in the Council resulting from recourse to such clauses must be predictable at the time of ratification and, since that was not the case, the parliamentary approval of a later treaty amendment is not sufficiently democratically legitimized.[141] Even when special bridging clauses are "sufficiently" or "factually" determined, the German Parliament is still obliged to exercise its *Integrationsverantwortung* "in another suitable manner."[142] For that reason, Niedobitek argued that the BVerfG invented this term to justify the extension of the German Parliament's "interference in the government's action."[143] Still, the

[137] Draft Extending Act, *supra* note 75, art. 1(4)(3)(3).
[138] *Lissabon-Urteil*, BVerfGE 123, 267, ¶ 415.
[139] E.U. Treaty arts. 48(6)(2)–(3).
[140] *Lissabon-Urteil*, BVerfGE 123, 267, ¶ 315.
[141] *Id.* ¶ 318.
[142] *Id.* ¶ 320.
[143] Matthias Niedobitek, *The Lisbon Case of 30 June 2009—A Comment from the European Law Perspective*, 10 GERMAN L.J. 1267, 1272 (2009).

BVerfG's repulsion is directed towards dynamic integration rather than towards the Government's action.

2. The Flexibility Clause[144]

Under the current, post-Lisbon flexibility clause, the Council shall, acting unanimously on a proposal from the Commission and after obtaining the *consent of the European Parliament*, adopt appropriate measures *within the framework of the policies defined in the Treaties* if: (a) action by the Union proves necessary to attain one of the Treaty objectives; *and* (b) the Treaties do not provide the necessary powers for it. Compared to the previous, pre-Lisbon wording, several changes have been made. First, action may be taken not only in the field of the common market but also with respect to all other policies, except for CFSP.[145] Second, the European Parliament is no longer merely consulted but is asked to consent to the application of this clause. Third, the Commission shall draw national parliaments' attention to the proposals based on this clause. The BVerfG, however, found none of the parliamentary procedural safeguards sufficient because of the "undetermined nature of future cases of application."[146] Hence, both chambers must adopt an approving statute.[147] The consequence is that the use of the flexibility clause for the development of the common market, which has hitherto been unrestricted, is now subject to parliamentary approval. This has been criticized as overly onerous.[148]

3. The Emergency Brake in Criminal and Social Security Law[149]

A member of the Council of Ministers may use the emergency brake whenever he or she considers that a draft proposal in the field of criminal law with cross-border implications would affect fundamental aspects of the criminal justice system of his or her Member State. If that is the case, the matter is referred to the European Council, after which it is returned to the Council of Ministers for a final decision. Quite surprisingly, not only did the BVerfG subject the use of the emergency brake to parliamentary approval, but it also vested the initiative for it in the German Parliament. It may be used "only on the instruction" of the Bundestag, and if required, of the Bundesrat.[150] This is bewildering because, as the BVerfG itself claimed, the emergency brake is a "provision which accords a Member State *special rights* in the legislative procedure."[151] Thus, the emergency brake is neither a right of the Union nor a duty imposed on Member States. It is a means to protect the

[144] E.C. Treaty art. 352 (originally Article 308 of the Treaty Establishing the European Community).

[145] It has been argued that the reference to the common market in the previous, pre-Lisbon wording of the flexibility clause was not meant as an obstacle to the realization of new Community policies but merely as an indicator that priority needed to be given to the proper functioning of the common market. Contrarily, the Lisbon Treaty could be considered to restrict the application of the flexibility clause only to those policies that are defined in the Treaties, thereby barring the creation of new policies. Niedobitek, *supra* note 143, at 1275.

[146] *Lissabon-Urteil*, BVerfGE 123, 267, ¶¶ 326, 328.

[147] *Id.* ¶ 417. The procedure is the same as for the transfer of powers to the European Union.

[148] Halberstam & Möllers, *supra* note 86, at 1255.

[149] E.C. Treaty art. 83(3).

[150] *Lissabon-Urteil*, BVerfGE 123, 267, ¶ 365.

[151] *Id* (emphasis added).

Member States and as such cannot lead to a circumvention of the Member States' parliamentary approval. The BVerfG treated the emergency brake in the same way as the aforementioned bridging clauses, even though they have diametrically opposite functions: the bridging clauses deepen integration; the emergency brake hampers it. That is why the BVerfG's reasoning has rightly been described as curious or paradoxical.[152] The requirement of a statute applies to the field of social security *mutatis mutandis*.[153]

4. The Extension of the List of Particularly Serious Crimes with a Cross-Border Dimension[154]

The European Parliament and the Council may adopt directives establishing minimum rules concerning the definition of criminal offenses and sanctions in the areas of particularly serious crime with a cross-border dimension. The Lisbon Treaty lays down a list of areas of crime, which range from terrorism and human trafficking to computer crime. As this is sufficiently predictable for the legislature and is amenable to narrow interpretation at the time of application of these provisions, the BVerfG had no objection in this respect. The Council may however extend the list of the areas of crime on the basis of developments in crime. The BVerfG found that this provision is a "dynamic blanket empowerment . . . factually tantamount to an extension of the codified competences of the Union" and subjected it to approval by a statute adopted by both the Bundestag and the Bundesrat.[155]

5. The Extension of the Powers of the European Public Prosecutor's Office[156]

To combat crimes affecting the financial interests of the Union, the Council may establish a European Public Prosecutor's Office from Eurojust. If this is done, the European Council may extend the powers of the European Public Prosecutor's Office to include serious crime with a cross-border dimension. In relation to this, the requirement of a statute applies *mutatis mutandis*.[157]

---

[152] Not all criticism of the BVerfG's ruling is well placed, however. For example, Halberstam and Möllers point out that the BVerfG referred only to the German Parliament instructing the German representative in the *Council of Ministers* and that it said nothing of the German representative in the *European Council*, which in their opinion could result in the lifting of the emergency brake altogether when the matter is returned to the Council of Ministers. Halberstam & Möllers, *supra* note 86, at 1244. This is not tenable for two reasons. First, the German representative in the European Council may not "throw the matter back to the Council" of his or her own initiative, because there are twenty-six other Member State representatives with whom the German representative needs to reach consensus. Second, when the matter is indeed referred back to the Council of Ministers, which may not exceed the period of four months, the German Parliament is free to decide to instruct the German representative to pull the brake again. There is nothing in the Lisbon Treaty or in the BVerfG's judgment that indicates that the right to pull the emergency brake in the Council of Ministers is exhausted after a single invocation.

[153] E.C. Treaty art. 48(2).

[154] E.C. Treaty art. 83(1)(3).

[155] *Lissabon-Urteil*, BVerfGE 123, 267, ¶ 363.

[156] E.C. Treaty art. 86(4).

[157] *Lissabon-Urteil*, BVerfGE 123, 267, ¶ 419.

6. The Amendment of the Statute of the European Investment Bank[158]

The same applies to the possibility for the Council to amend the Statute of the European Investment Bank. The Statute is laid down in a protocol attached to the founding treaties and enjoys therefore the same legal status as the Treaties.

The requirement of explicit bicameral parliamentary approval for dynamic treaty development has been assessed as conservative when compared to the BVerfG's counterparts in other Member States.[159] The French *Conseil Constitutionnel* ruled that a single ratification sufficed; the Czech Constitutional Court found the transfer of powers sufficiently specific and otherwise reviewable; and the Dutch *Raad van State*[160] did not address the question at all. At least as regards the emergency brake, this assessment is justified, whereas the question whether the rest of the BVerfG's decision was a hasty reflex will best be elucidated by the practical application of the Lisbon Treaty. It must be countenanced that, although parliamentary approval might be time consuming, it provides a form of democratic legitimacy for the Union's intended action. Besides, the inconsistency of the BVerfG's reasoning in imposing parliamentary approval is certainly more striking than its conservatism, a dose of which has been present throughout and has hardly undergone metamorphosis.

F. The Pillars' Farewell: To Be or Not to Be?

An issue that may impact national parliamentary scrutiny of E.U. affairs is closely related to the BVerfG's understanding of the transformation of the Union's pillar structure brought about by the Lisbon Treaty.[161] In accordance with the opinion of Hans-Jürgen Papier, President of the German Federal Constitutional Court,[162] the BVerfG claimed that the pillars were abolished.[163] In the *Lissabon*

---

[158] E.C. Treaty art. 308(3).

[159] Philipp Kiiver, *German Participation in EU Decision-Making After the Lisbon Case: A Comparative View on Domestic Parliamentary Clearance Procedures*, 10 GERMAN L.J. 1287, 1290 (2009).

[160] *Raad van State* (Council of State) is not a constitutional court of the Netherlands and is thus not a counterpart to the *Bundesverfassungsgericht*. It is the institution that, among other competences, gives advisory opinions on proposals for the approval of treaties. *See* Grondwet voor het Koninkrijk der Nederlanden [Constitution of the Kingdom of the Netherlands], art. 73. Besides, not only is there no constitutional court in the Netherlands, but any other court is, pursuant to Article 120 of the Constitution, prohibited to review the constitutionality of acts of parliament and treaties.

[161] *See also supra* note 2.

[162] Papier argued that "the current pillar structure of Europe is to be dissolved," that "the current distinction between supranational Community law on the one hand, and Union law as a partial legal order characterized by international law on the other, thereby becomes obsolete," and that "[t]hrough the dissolution of the traditional pillar architecture, the Union gains a coordinated competence for the Common Foreign and Security Policy as well as for the whole of the Area of Freedom, Security and Justice." Hans-Jürgen Papier, *The Lisbon Treaty: The Irish "No." Europe's New Realism: The Treaty of Lisbon*, 4 EUR. CONST. L. REV. 421, 425 (2008). As I have argued elsewhere, such an appraisal might profit from another perspective. Though a useful shorthand, "pillars" have never been mentioned in the founding treaties but have instead been coined in academic and policy-making milieus. *See, e.g.*, Bruno de Witte, *The Pillar Structure and the Nature of the European Union: Greek Temple or French Gothic Cathedral?*, *in* THE EUROPEAN UNION AFTER AMSTERDAM—A LEGAL ANALYSIS 51 (Teunis Heukels et al. eds., 1998). The Treaties speak of "policies" or "fields" and the most important differentiating factors between them are: (a) the decision-making procedure, which essentially determines the degree of involvement of the European Parliament; (b) the voting requirement; and (c) the existence of the

proceedings, the Bundestag disagreed without further explaining its standpoint.[164] What is then the relevance of this finding for national parliamentary scrutiny of the draft E.U. proposals? While it might arguably imply that the function of a national parliament with respect to E.U. acts should be the same in all pillars, it should not conceal the fact that the unanimity requirement in the Second Pillar remains intact in the Lisbon Treaty, albeit that qualified majority remains by way of derogation applicable in four types of action.[165] The practical relevance of this argument for the national parliaments' involvement in E.U. affairs might be qualified by two antagonistic hypotheses:

1. Favorable to National Parliamentary Input

As unanimity must be reached in the Council for a measure to be adopted under the Second Pillar, every Member State preserves the right of veto. This presumably allows more forceful national parliamentary control to be exerted by tying the Member State's representative in the Council to achieving a certain result during negotiations and, subsequently, by holding him or her to account.[166] Also, as the European Parliament is merely consulted and informed of the main policy developments, national parliaments might be deemed a substitute or a complement to it.

2. Unfavorable to National Parliamentary Input

Acts adopted under the Second Pillar fall nationally under the foreign affairs portfolio, which is typically the prerogative of the executive branch and where parliamentary influence is reduced. Furthermore, Second Pillar acts are not of legislative nature,[167] which means that the legislative competence of national parliaments is undiminished.

Yet empirical evidence that national parliamentary scrutiny of draft E.U. proposals is sensitive to the Union's pillar structure remains scarce. In addition to other factors, the activeness or passivity of national parliaments is rather determined by the national interest at stake in a given draft proposal.

---

jurisdiction of the E.C.J. Therefore, the Lisbon Treaty abolishes the pillar structure only formally, while there are substantially still two pillars. Davor Jančić, *Germany's Important Lisbon Treaty Judgment*, EU OBSERVER, Mar. 26, 2009, *available at* http://euobserver.com/9/27855. *See also supra* note 2.

[163] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jun. 30, 2009 (*Lissabon-Urteil*), 123 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 267 (¶ 175) (F.R.G.).

[164] *Id.* ¶ 143.

[165] Article 31(1) E.U. reads: "Decisions under this Chapter shall be taken by the European Council and the Council acting unanimously, except where this Chapter provides otherwise." By way of derogation, paragraph 2 thereof designates a qualified majority as the applicable voting requirement in the Council when: (a) adopting a decision defining a Union action or position on the basis of a decision of the European Council relating to the Union's strategic interests and objectives; (b) adopting a decision defining a Union action or position, on a proposal which the High Representative of the Union for Foreign Affairs and Security Policy has presented following a specific request from the European Council; (c) implementing a decision defining a Union action or position; and (d) when appointing a special representative.

[166] Nevertheless, the effects of the mandating of the national representative in the Council need not always bring positive results. Two opposite examples are Austria and Denmark. *See infra* text accompanying notes 218-21.

[167] E.U. Treaty arts. 24(1)(2), 31(1)(1).

G. The Bundesverfassungsgericht's Review: Towards New Alleys of Democracy Protection?

Should any of the national powers, including those of the German Parliament, be usurped by the Union, two types of proceedings may be initiated before the BVerfG in order to assert the *Integrationsverantwortung*: (a) the *ultra vires review*, allowing the BVerfG to control whether the Union is expanding its powers beyond those expressly conferred; and (b) *identity review*,[168] allowing it to protect from possible infringement by the Union the inviolable and unamendable core content of the German constitutional identity entrenched in Articles 79(3), 1, and 20 of the Basic Law, as well as to control the Union's adherence to the principles enumerated in Article 23(1) of the Basic Law,[169] among which is the principle of democracy.[170] If violations are found in these proceedings, the challenged E.U. law is inapplicable in Germany.[171]

Curiously, the BVerfG claimed that the exercise of identity review follows the principle of openness, i.e., friendliness, towards European law (*Europarechtsfreundlichkeit*).[172] The German constitutional principle of *Europarechtsfreundlichkeit* is laid down in Article 23 of the Basic Law, which permits Germany's accession to the Union. It is also laid down in the Preamble, whose second recital reads: "[i]nspired by the determination to promote world peace as an equal partner in a united Europe . . . ."[173]

The BVerfG inferred the link between its identity review and *Europarechtfreundlichkeit* from the Union's duty under Article 4(2) E.U. to respect the fundamental political and constitutional structures of the Member States. By performing identity review the BVerfG "assists" the Union in fulfilling the latter's duty of respect for national constitutional orders, which brings identity review into harmony with the E.U. principle of sincere (or loyal) cooperation and renders it E.U.-friendly. However, this is befuddling because identity review may result in the rejection of any Union action that the BVerfG deems contrary to the German constitutional structure. That hardly exhibits an openness or friendliness to European law but rather reveals *Europarechtsfreundlichkeit* to be a volatile concept, whose sheer generality allows the BVerfG to tailor its substance to achieve different goals. It can be used to bolster integration but also to hamstring it. In effect, the BVerfG demonstrated that German openness to European law is neither unreserved nor finally determined but is instead limited and selective.

---

[168] *See also* Jo Eric Khushal Murkens, *Identity Trumps Integration: The Lisbon Treaty in the German Federal Constitutional Court*, 48 DER STAAT 517 (2009).

[169] *See also infra* Part VII.A.

[170] For the BVerfG's references to the American doctrine of implied powers and to the principle of *effet utile* in the law of international agreements, see *Lissabon-Urteil*, BVerfGE 123, 267, ¶ 237. For a criticism thereof, see Halberstam & Möllers, *supra* note 86, at 1245.

[171] *Lissabon-Urteil*, BVerfGE 123, 267, ¶ 241.

[172] *Id.* ¶ 240.

[173] *See also* Jacques Ziller, *The German Constitutional Court's Friendliness Towards European Law: On the Judgment of Bundesverfassungsgericht Over the Ratification of the Treaty of Lisbon*, 16 EUR. PUB. L. 53 (2010).

Furthermore, Schorkopf argued that, if measured against the backdrop of the *Solange* cases, it appears that the BVerfG "has given up on the suspension of national scrutiny reservations for community legislation," because ultra vires and identity review as resulting from the *Lissabon-Urteil* permit the BVerfG to review any European legal act for its conformity with the German constitution regarding "obvious" transgressions of the boundaries of competence and identity. In his view, this is a sign that "the BVerfG wants to play a more active role in European legal matters."[174] This is in stark contrast with some other authors' general perceptions of the BVerfG, such as the one describing it as an "uninvolved castigator on the sidelines."[175]

Lastly, the BVerfG seems keen on broadening its purview of control. This is implicit in the BVerfG's statement that an additional type of proceedings may be created by the legislature especially for these two types of constitutional review.[176]

VII. THE LISBON AFTERMATH: WHAT SAFEGUARDS FOR THE GERMAN PARLIAMENT?

As a consequence of the Lisbon Treaty and of the *Lissabon-Urteil*, the constitutional and statutory bases for the participation of the Bundestag and the Bundesrat in E.U. decision-making have accordingly been amended. They are examined below.

A. Constitutional Framework for the Participation of the German Parliament in E.U. Affairs

The provisions of Articles 23 and 45 of the Basic Law as amended in 2009[177] occupy a pivotal place in the regulation of German parliamentary involvement in E.U. affairs. We analyze them in turn.

To begin with, Article 23 of the Basic Law allows the Federation (not the *Länder*) to transfer sovereign powers to the European Union by a statute with the consent of the Bundesrat. Both chambers must adopt this statute by a majority of two-thirds of the votes of their Members.[178] Yet Article 23 also sets the limits for such a transfer. Namely, Germany is precluded from becoming or remaining a Member State of the Union if the following principles are not respected in the course of the Union's evolution: 1) the democratic principle; 2) the principle of social state; 3) the federal principle; 4) the rule of law; 5) the subsidiarity principle; 6) the protection of fundamental rights that is essentially comparable to that afforded by the Basic Law; 7) the participation of the *Länder* in the legislative process; and 8) the right of all Germans to resist anyone seeking to abolish the German constitutional order if no other remedy is available.[179]

---

[174] 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).

[175] Schönberger, *supra* note 85, at 1217.

[176] *Lissabon-Urteil*, BVerfGE 123, 267, ¶ 241.

[177] *See supra* note 74.

[178] GRUNDGESETZ [GG] art. 79(2).

[179] GRUNDGESETZ [GG] arts. 1, 20, 23(1), 79(2)–(3).

Further, Article 23 establishes the constitutional rights of information and participation of both chambers of the German Parliament in E.U. decision-making:

1. Information Rights

The Government is obliged to keep the Bundestag and the Bundesrat informed comprehensively and at the earliest possible time.

2. Participation Rights of the Bundestag

The Government is obliged to allow the Bundestag to state its position before the onset of the legislative procedure at the E.U. level and to take it into account during the negotiations in the Council. The Bundestag's position is not legally binding.

3. Participation Rights of the Bundesrat

Since Germany is a federal state in which competences are divided between the Federation and the *Länder*, the Bundesrat takes part in the formation of the national position on draft E.U. legislation insofar as it would be competent to do so in a comparable domestic matter, or insofar as the subject falls within the domestic competence of the *Länder*. Accordingly, there are three degrees of participation of the Bundesrat. The first is that the Government is obliged to *take into account* the position of the Bundesrat when the interests of the *Länder* are affected: (a) in an area within the exclusive competence of the Federation, and (b) in other matters, insofar as the Federation has legislative power. The second is that the position of the Bundesrat shall be given the *greatest possible respect* in determining Germany's position in the Council when a draft E.U. legislative proposal primarily affects the legislative powers of the *Länder*, the structure of *Land* authorities, and *Land* administrative procedures. The third, and the highest, is that the representation of Germany in the Council shall be *delegated to a representative of the Länder* designated by the Bundesrat when legislative powers exclusive to the *Länder* concerning matters of school education, culture, or broadcasting are primarily affected. This is also facilitated by Article 16(2) E.U.,[180] which permits distinguishing between different levels of authority in federal states by providing that "[t]he Council shall consist of a representative of each Member State at ministerial level, who may commit the government of the Member State in question and cast its vote." In the last two types of the Bundesrat's involvement, when the Federation and the *Länder* represent each other's interests in the Council, such representation must be exercised consistently with the responsibility of the Federation for the nation as a whole.[181]

[180] What is now Article 16(2) E.U. was formerly Article 203 of the Treaty Establishing the European Community.

[181] For more on the participation of the *Länder* in E.U. affairs, see ADAM CYGAN, NATIONAL PARLIAMENTS IN AN INTEGRATED EUROPE: AN ANGLO-GERMAN PERSPECTIVE 171–87 (2001); Juliane Kokott, *Federal States in Federal Europe: The German Länder and Problems of European Integration*, *in* NATIONAL CONSTITUTIONS IN THE ERA OF INTEGRATION 175 (Antero Jyränki ed., 1999); Tanja Börzel, *Restructuring or Reinforcing the State: The German Länder as Transnational Actors in Europe*, *in* GERMANY'S POWER IN INTERNATIONAL POLITICS 111 (Anne-Marie LeGloannec ed., 2006); Thomas

Moreover, the 2008 Amending Act established in Article 23 the right of the Bundestag and the Bundesrat to bring action before the E.C.J. against E.U. legislative acts that violate the subsidiarity principle. The Bundestag is obliged to submit such an action at the request of a quarter of its members.[182]

Finally, Article 45 of the Basic Law provides for the establishment in the Bundestag of a committee for E.U. affairs and allows the Bundestag to authorize this committee to act on its behalf vis-à-vis the Government. The 2009 amendment widens this possibility, as the Bundestag may now authorize this committee to exercise any power granted to the Bundestag by the founding treaties.

B. Statutory Framework of German Parliamentary Involvement in E.U. Affairs

The constitutional framework of the involvement of the German Parliament in E.U. affairs is further elaborated by the following three statutes: 1) Act on the Cooperation of the Federation and the *Länder* in E.U. Affairs of 1993 as amended in 2009;[183] 2) Act on the Cooperation of the Federal Government and the Bundestag in E.U. Affairs of 1993 as amended in 2009 (the Bundestag Cooperation Act);[184] and 3) Act on the Responsibility for Integration of 2009 (the Integration Responsibility Act).[185] This Article concentrates on the latter two statutes because of their immediate relevance for the present inquiry into the manner in which the principle of democracy has been woven into the German Parliament's participation in E.U. decision-making. With a special focus on the Bundestag, the new arrangements and instruments that have been placed at the German Parliament's disposal for the purpose of scrutinizing E.U. affairs will be examined below. These arrangements and instruments can be classified into four categories: parliamentary approval, information rights, "early warning mechanism,"[186] and accountability of the Government. Each will be examined in turn.

Christiansen, *The Länder Between Bonn and Brussels: The Dilemma of German Federalism in the 1990s*, 1 GERMAN POL. 239 (1992); Peter-Christian Müller-Graff, *The German Länder: Involvement in EC/EU Law and Policy Making*, *in* THE ROLE OF REGIONS AND SUB-NATIONAL ACTORS IN EUROPE 103 (Stephen Weatherill & Ulf Bernitz eds., 2005); Carlo Panara, *The German Länder in the Process of European Integration Between the Föderalismusreform and the Reform Treaty*, 14 EUR. PUB. L. 585 (2008).

[182] GRUNDGESETZ [GG] art. 23(1a).

[183] Gesetz über die Zusammenarbeit von Bund und Ländern in Angelegenheiten der Europäischen Union [Act on Cooperation of the Federation and the *Länder* in E.U. Affairs], Mar. 12, 1993, BGBl. I at 313, *amended by* Gesetz zur Änderung des Gesetzes über die Zusammenarbeit von Bund und Ländern in Angelegenheiten der Europäischen Union [Act Amending the Act on Cooperation of the Federation and the *Länder* in E.U. Affairs], Sept. 22, 2009, BGBl. I at 3031 (F.R.G.).

[184] Gesetz über die Zusammenarbeit von Bundesregierung und Deutschem Bundestag in Angelegenheiten der Europäischen Union [Bundestag Cooperation Act of 1993], Mar. 12, 1993, BGBl. I at 311, *amended by* Gesetz zur Änderung des Gesetzes über die Zusammenarbeit von Bundesregierung und Deutschem Bundestag in Angelegenheiten der Europäischen Union [Bundestag Cooperation Act of 2009], Sept. 22, 2009, BGBl. I at 3026 (F.R.G.).

[185] Gesetz über die Wahrnehmung der Integrationsverantwortung des Bundestages und des Bundesrates in Angelegenheiten der Europäischen Union [Integrationsverantwortungsgesetz] [Integration Responsibility Act], Sept. 22, 2009, BGBl. I at 3022 (F.R.G.). This statute is enacted as Article 1 of the Gesetz über die Ausweitung und Stärkung der Rechte des Bundestages und des Bundesrates in Angelegenheiten der Europäischen Union of Sept. 22, 2009 [Act on the Extending and Strengthening of the Rights of the Bundestag and the Bundesrat in European Union Affairs of Sept. 22, 2009].

[186] The so-called "early warning mechanism" operates before the E.U. legislative procedure and empowers national parliaments to monitor the Union's compliance with the subsidiarity principle by

1. Parliamentary Approval

Along with the instances of static treaty development, the Integration Responsibility Act subjects all instances of dynamic treaty development to parliamentary approval.[187] Depending on the type of E.U. action, three types of parliamentary approval are discernible: 1) approval by a *statute* (*Gesetz*) adopted by both chambers; 2) approval by a *decision* (*Beschluss*) of the Bundestag, with a possible consent of the Bundesrat where the legislative competences of the *Länder* are affected;[188] and 3) approval by both a decision and a statute in the case of common defense. The types of approval are classified in the table below, after which several remarks follow.

Static Treaty Develop.	***Statute***	1. Simplified treaty revision by the European Council–Art. 48(6)(2) E.U. 2. Union's accession to the E.C.H.R.–Art. 218(8)(2) E.C. 3. System of own resources of the Union–Art. 311(3) E.C. 4. Strengthening or widening of E.U. citizenship rights–Art. 25(2) E.C. 5. Election of MEPs by direct universal suffrage–Art. 223(1)(2) E.C. 6. E.C.J.'s jurisdiction in intellectual property disputes–Art. 262 E.C.
	Decision + ***Statute***	European Council's decision on common defense–Art. 42(2)(1) E.U.
Dynamic Treaty Develop.	***Statute***	1. General bridging clauses–Art. 48(7)(1)-(2) E.U. 2. Special bridging clause in cross-border family law–Art. 81(3)(2) E.C. 3. Extension of the list of serious cross-border crimes–Art. 83(1)(3) E.C. 4. Extension of powers of the European Public Prosecutor–Art. 86(4) E.C. 5. Amendment of the European Investment Bank Statute–Art. 308(3) E.C. 6. Flexibility clause–Art. 352 E.C.
	Decision	1. Special bridging clause on multiannual fin. framework–Art. 312(2)(2) E.C. 2. Special bridging clause in social policy–Art. 153(2)(4) E.C. 3. Special bridging clause in environmental policy–Art. 192(2)(2) E.C. 4. Special bridging clause in enhanced cooperation–Art. 333(1)-(2) E.C. 5. Emergency brake in social security–Art. 48(2) E.C. 6. Emergency brake in criminal law–Arts. 82(3)(1) & 83(3)(1) E.C.

These enactments mirror the BVerfG's decisions in the *Lissabon-Urteil* very precisely and cover all the fields of E.U. action where the BVerfG demanded parliamentary approval.

It is noteworthy that as regards the general bridging clauses and the special bridging clause in cross-border family law, both bicameral statutory approval and the right to make opposition known have been retained as instruments enabling the German Parliament to prevent the Union from amending the Treaties. There is, however, an important difference between the two parliamentary instruments: prior

sending reasoned opinions on draft proposals to the E.U. institutions involved in the legislative procedure (the Commission, the European Parliament, the Council). Under certain stringent conditions, this may lead to the blockage of E.U. legislation. For more information on the subsidiarity principle see *supra* note 43, and on the "early warning mechanism" see *infra* Part VII.B.3. and the accompanying notes.

[187] For the concepts of static and dynamic treaty development, see *supra* Part VI.E.

[188] The consent of the Bundesrat is required if the intended E.U. action refers to a field where: (a) there is no federal legislative competence; (b) the *Länder* have concurrent legislative powers and the Federation has not acted; (c) the *Länder* have concurrent legislative powers and the Federation has acted but the *Länder* are nonetheless entitled to act at variance with such federal laws; or (d) the consent of the Bundesrat is required for federal law. *See* Integration Responsibility Act, art. 5(2).

bicameral statutory approval is mandatory and must be given expressly (i.e. by statute), whereas making opposition known is optional and can be given tacitly (i.e. by not acting). In effect, this means that the German Parliament has two chances to resist the Union's recourse to these bridging clauses. The first time is when the initiative to use the bridging clauses is taken in the European Council. The German representative may then only give agreement if both the Bundestag and the Bundesrat have given their approval by a statute. The second time is when the initiative is adopted and the decision made by the European Council. Within six months, the Bundestag can—where exclusive legislative competences of the Federation are affected—make known its opposition. In all other cases, both chambers can do so.[189] Since by the time the initiative is adopted the German Parliament will already have passed an approving statute, it is not likely that the second chance for refusal will be used, unless there is a major change in the circumstances that led the German Parliament to approve the initiative.

The BVerfG's demand that the emergency brake[190] can *only* be initiated by the Bundestag, and where required by the Bundesrat, has been slightly watered down. The wording[191] of the *Lissabon-Urteil* implies that the Government would not only be under a positive duty to pull the emergency brake in the Council when the Bundestag decided so, but that it would also be under a negative duty not to act of its own initiative. The negative duty has now been omitted, so that the Government is indeed obliged to pull the brake if the Bundestag so decides but is not prohibited from doing so of its own initiative where the Bundestag's decision is missing.

Finally, the measure of involvement of the *Länder* differs as to the type of E.U. action and thus as to the type of parliamentary approval envisaged. To wit, the emergency brake and all special bridging clauses except the one in cross-border family law are subject to a decision by the Bundestag, which means that the consent of the Bundesrat is required only insofar as the legislative competences of the *Länder* are affected. All other instances of dynamic treaty development as well as

---

[189] Integration Responsibility Act art. 10(1).

[190] For an explanation of the emergency brake, see *supra* Part VI.E.3.

[191] The second sentence of paragraph 365 of the English version of the *Lissabon-Urteil* reads:

> From the perspective of German constitutional law, the necessary degree of democratic legitimization via the national parliaments can *only* be guaranteed by the German representative in the Council exercising the Member States' rights set out in Article 82.3 and Article 83.3 E.C. *only* on the instruction of the German Bundestag and, to the extent that this is required by the provisions on legislation, the Bundesrat . . . .

(Emphasis added).

The German version reads:

> Das notwendige Maß an demokratischer Legitimation über die mitgliedstaatlichen Parlamente lässt sich aus dem Blickwinkel des deutschen Verfassungsrechts *nur* dadurch gewährleisten, dass der deutsche Vertreter im Rat die in Art. 82 Abs. 3 und Art. 83 Abs. 3 AEUV genannten mitgliedstaatlichen Rechte *nur* nach Weisung des Deutschen Bundestages und, soweit die Regelungen über die Gesetzgebung dies erfordern, des Bundesrates ausübt . . . .

(Emphasis added).

In fact, the BVerfG mentioned the word "only" twice in both language versions (note emphases). Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jun. 30, 2009 (*Lissabon-Urteil*), 123 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 267 (¶ 365) (F.R.G.)

those of static nature are subjected to bicameral approval, which means that the consent of the Bundesrat is always obligatory.

2. Information Rights

The Integration Responsibility Act in general and the Bundestag Cooperation Act in particular have improved the German Parliament's rights of information on E.U. affairs. The Government informs both chambers "comprehensively, at the earliest possible moment, continuously, and as a rule in writing" about all E.U. projects within two weeks.[192] The novelty is the requirement of written form and of continuous provision of information, because comprehensiveness and provision of information at the earliest possible time have already been required since 1993.[193] The two-week deadline was taken over from the challenged Draft Extending Act.[194]

The Government must inform the Bundestag not only of the E.U. projects "that can be of interest to the Federal Republic of Germany," as has hitherto been the case,[195] but also of a wide range of other projects. Henceforth, besides draft E.U. legislation, the projects to be transmitted include, inter alia: the Commission's green and white papers; action plans, political programs, and inter-institutional agreements of the organs of the Union; negotiation mandates and guidelines given to the Commission in respect of the European Union's international treaties, common trade policy, and rounds of world trade talks; notice of the initiation of infringement proceedings before the E.C.J. insofar as they are related to Germany's failure to implement directives, as well as of any other proceeding before the E.C.J. to which Germany is a party; and, upon request, even unofficial preliminary papers of the Commission and of the Council (so-called "non-papers").[196]

Furthermore, the duty to inform does not only encompass documents related to E.U. institutions (the European Council, the Council, the Commission, the European Parliament, informal ministerial meetings), but also documents and reports on the meetings of COREPER[197] and Council working groups. Pertinently, information has

---

[192] Integration Responsibility Act art. 12(1), in conjunction with Article 7(1) of the Bundestag Cooperation Act of 2009. Article 3 of the latter statute enumerates what is to be considered under "E.U. projects."

[193] Bundestag Cooperation Act of 1993 art. 3.

[194] Draft Extending Act art. 2(1).

[195] Bundestag Cooperation Act of 1993 art. 3.

[196] Bundestag Cooperation Act of 2009 arts. 3(1), 4(4)(3)–(4), 5(3).

[197] COREPER is the French acronym for *Comité des représentants permanents* and is envisaged in Article 240(1) E.C.:

> A committee consisting of the Permanent Representatives of the Governments of the Member States shall be responsible for preparing the work of the Council and for carrying out the tasks assigned to it by the latter. The Committee may adopt procedural decisions in cases provided for in the Council's Rules of Procedure.

COREPER operates at two levels: (a) at the level of deputy permanent representatives (COREPER I), and (b) at the level of permanent representatives themselves, i.e., of ambassadors of the Member States to the Union (COREPER II). In the hierarchy of the machinery of the Council of Ministers, COPERER stands higher than the Council working groups and lower than the Council of Ministers itself in its various sectoral configurations. COREPER is an indispensable part of E.U. decision-making, because it has been estimated that up to 85–90% of E.U. decisions are not actually taken by the ministers in the Council but by the Council working groups (some 70%) and COREPER (some 15–20%).

to be provided on the convening, negotiations, and results of trilogues.[198] This is a significant development because, as the British House of Lords emphasized in 2009, "informal trilogues . . . make effective scrutiny of codecided legislation by national parliaments very difficult" chiefly because of the lack of transparency and inaccessibility of these negotiations to the government, which is then precluded from representing national parliamentary views.[199]

To enable the Bundestag to perform the so-called *comprehensive assessment*, the Government must submit—alongside the documents themselves—the Commission's, the other Member States', and its own assessment of the legal, economic, political, financial, and ecological consequences for Germany of a given E.U. project in terms of its regulatory content, alternatives, costs, and requirements of compliance and implementation.[200] The Government also sends its assessment of the conformity of the E.U. project with the principles of subsidiarity and proportionality, which is facilitated by the specification of the legal basis of the project.[201] Additionally, as an early notification, the Government informs the Bundestag about the current political developments and planned E.U. projects as a rule in writing.[202]

The measures adopted under the CFSP and Common Security and Defense Policy (CSDP) are expressly excluded from the list of E.U. projects.[203] Notwithstanding this exclusion, the Government still sends the Bundestag a summary of the forthcoming legal acts scheduled for deliberation and an assessment of the further course of deliberations, and orally informs it of all relevant developments promptly and comprehensively.[204] In these two fields, the Bundestag may also request documents of fundamental importance for the assessment of subsidiarity and proportionality together with the legal basis of a given draft legal act.

With regard to accession negotiations or those aimed at amending the founding treaties, the Government must point out to the Bundestag that it has the right to issue a position statement on these negotiations.[205] Before the final decision in the Council, the Government shall reach consensus on the matter with the Bundestag, but the Government retains the right to deviate from it for important reasons of foreign and integration policy.[206]

PHILIPPA SHERRINGTON, THE COUNCIL OF MINISTERS: POLITICAL AUTHORITY IN THE EUROPEAN UNION 46 (2000); Ramses Wessel, *The Constitutional Unity of the European Union: The Increasing Irrelevance of the Pillar Structure?*, *in* EUROPEAN CONSTITUTIONALISM BEYOND LISBON 283, 289 (Jan Wouters et al. eds., 2009).

[198] Bundestag Cooperation Act of 2009 art. 5(1)(1)-(3).

[199] HOUSE OF LORDS, EUROPEAN UNION COMMITTEE, CODECISION AND NATIONAL PARLIAMENTARY SCRUTINY, 2008-9, H.L. 125, at 20.

[200] Bundestag Cooperation Act of 2009 arts. 4(2), 7(2).

[201] *Id.* arts. 4(4)(2), 7(1), 6(1)(3).

[202] *Id.* art. 4(3).

[203] *Id.* art. 3(1)(2).

[204] *Id.* arts. 8(1), sentence 4, 8(3).

[205] *Id.* art. 10(1).

[206] *Id.* art. 10(2).

Lastly, the Government must make available to the Bundestag all the E.U. databases that are accessible to it in the framework of data protection and the Bundestag must respect the special confidentiality of the documents contained therein.[207]

3. "Early Warning Mechanism"

The above information rights facilitate the German Parliament's control of the conformity of draft E.U. legislative proposals with the subsidiarity principle. Under the Lisbon Protocol on subsidiarity, any national parliament or a chamber of it may, within eight weeks from the date of transmission of a draft proposal in the official languages of the Union, send to the Presidents of the European Parliament, the Council, and the Commission a reasoned opinion stating why the draft proposal in question does not comply with the principle of subsidiarity.[208] The reasoned opinions count as votes. Each national parliament has two votes. If the number of allocated votes reaches the threshold of simple majority and the Commission decides to proceed with the proposal, then the destiny of the proposal is decided by the "Union legislator," i.e., by the Council and the European Parliament. If a majority of 55% of the members of the Council *or* a majority of the votes cast in the European Parliament decide that the proposal infringes the principle of subsidiarity, the proposal falls. Therefore, this parliamentary power is predominantly negative. It is aimed at blocking E.U. legislation that seeks to regulate matters in which, in the opinion of national parliaments, action at the E.U. level is not justified.[209]

If the Bundestag or the Bundesrat issue a reasoned opinion, the Presidents of the respective chambers transmit the opinion to the said E.U. institutions and inform the Government thereof.[210] The procedure can be regulated in more detail in the Rules of Procedure of the chambers.

4. Accountability of the Government

For the first time, a clear mechanism of ex ante and ex post accountability of the Government to the German Parliament in E.U. affairs is foreseen beyond the general principle of political responsibility laid down in Articles 67 and 68 of the Basic Law.[211]

---

[207] *Id.* art. 11.

[208] Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Protocol no. 2 on the Application of the Principles of Subsidiarity and Proportionality), art. 6(1), Dec. 13, 2007, 2007 O.J. (C 306) 1.

[209] *Id.* art. 7. For further information, *see* George Bermann, *The Lisbon Treaty: The Irish "No." National Parliaments and Subsidiarity: An Outsider's View*, 4 EUR. CONST. L. REV. 453 (2008); Jean-Victor Louis, *The Lisbon Treaty: The Irish "No." National Parliaments and the Principle of Subsidiarity—Legal Options and Practical Limits*, 4 EUR. CONST. L. REV. 429 (2008); Ian Cooper, *The Watchdogs of Subsidiarity: National Parliaments and the Logic of Arguing in the E.U.*, 44 J. COMMON MKT. STUD. 281 (2006).

[210] Integration Responsibility Act art. 11(2).

[211] Bundestag Cooperation Act of 2009 art. 5(5). *See also supra* note 56.

a. Negotiation Strategy Exchange

Before the meetings of the European Council and the Council, the Government informs the Bundestag in writing and orally of each discussion point, which includes the essentials of the proposal, the state of negotiations, and the negotiation strategy. After the Council meetings, the Government informs the Bundestag of the results in writing and orally. The same mechanism applies in the fields of CFSP and CSDP.

b. Position Statements

In line with the constitutional requirement, the Government must give the Bundestag the opportunity to state its position on a given draft E.U. legal act before the onset of the decision-making procedure. The Government also informs the Bundestag when a position statement would be appropriate given the procedural time restraints.

If the Bundestag states its position, the Government shall use it as a basis for negotiations in the Council. The novelty is that the Government shall report to the Bundestag on the extent to which the latter's position has been asserted during the negotiations. It is also new that the Bundestag may modify or supplement its position during the course of the negotiations, in which case the Government shall take the amended position into account and report on it afterwards.

c. Parliamentary Reserve

As the most stringent instrument, Article 9(4) of the 2009 Bundestag Cooperation Act introduced a parliamentary reserve (*Parlamentsvorbehalt*), which is drafted in very similar terms as the parliamentary reserve that was crafted in 2006 in light of the European Constitutional Treaty but never entered into force because of the Treaty's failure.[212]

The parliamentary reserve operates as follows. When the Bundestag issues a position statement and the Government acting in the Council is unable to exact the main concerns expressed therein, the Government shall invoke the parliamentary reserve and inform the Bundestag of this immediately. This is done in a separate

[212] In 2005, the Act on the Extending and Strengthening of the Rights of the Bundestag and the Bundesrat in European Union Matters was passed, but it never entered into force because of the failure of the European Constitutional Treaty. One of the changes it was meant to make was to insert a clause into the 1993 Bundestag Cooperation Act to the effect that the cooperation between the Government and the Bundestag be regulated in more detail in an agreement (*Vereinbarung*) between the Government and the Bundestag. This agreement was indeed adopted on September 28, 2006, and published in the Federal Law Gazette. Vereinbarung zwischen dem Deutschen Bundestag und der Bundesregierung über die Zusammenarbeit in Angelegenheiten der Europäischen Union in Ausführung des § 6 des Gesetzes über die Zusammenarbeit von Bundesregierung und Deutschem Bundestag in Angelegenheiten der Europäischen Union [Agreement Between the German Bundestag and the Federal Government on Cooperation in European Union Affairs in Implementation of § 6 of the Act on Cooperation Between the Federal Government and the German Bundestag in the European Union Affairs], Sept. 30, 2006, BGB1. I at 2177 (F.R.G.). Since the 2005 Extending Act was still on the statute book, but could never enter into force, the new 2009 Extending Act was adopted after the *Lissabon-Urteil*. Article 1 thereof laid down the 2009 Integration Responsibility Act and Article 3 repealed the 2005 Extending Act. In the same time period, a separate 2009 Bundestag Cooperation Act was adopted, which took over many provisions from the 2006 Agreement.

report, which must be of such a form and substance as to enable the Bundestag to deliberate on it. Before the final decision in the Council is made, the Government shall endeavor to reach consensus with the Bundestag on the matter. Failing that, the Government may only deviate from the Bundestag's position for important reasons of foreign or integration policy. After the decision has been made in the Council, the Government informs the Bundestag of it immediately and in writing, and especially of the assertion of the Bundestag's position in Brussels. When not all of the Bundestag's concerns have been taken into account the Government must provide reasons, and, upon the Bundestag's request, this will be done in a plenary debate.

If observed from a comparative perspective, one might ponder the nature of these arrangements. Is the new German parliamentary reserve more akin to the scrutiny reserves of the British, French, or Dutch type, or does it rather resemble the mandating arrangements of the Austrian or Danish type?

The British scrutiny reserve is laid down in the resolutions of both the House of Commons and the House of Lords. It prevents the minister acting in the Council from giving agreement to any draft E.U. proposal that is still subject to scrutiny and/or needs to be further considered or debated.[213] It is not legally binding but if the minister overrides it, he or she should provide explanations for it. The main goal of the scrutiny reserve is to leave both Houses of Parliament enough time to reach an informed opinion on a draft proposal, upon which the opinion is communicated to the Government and the proposal cleared from scrutiny.[214] The French scrutiny reserve is based on the Government's own commitment not to agree on a proposal if the Parliament has not completed scrutiny.[215] As Siritzky asserts, this is a "political process rather than a legal one, as France does not recognize the practice of the 'negotiating mandate.'"[216] In the Netherlands, the Government must invoke a scrutiny reserve in the Council whenever one of the chambers finds a proposal to be of such particular political significance that it wishes the Government to inform it more specifically about it. Within the ensuing four weeks, the Parliament may hold

---

[213] *See* H.C. RES. SCRUTINY RESERVE, Nov. 17, 1998 (U.K.); H.L. RES. SCRUTINY RESERVE, Dec. 6, 1999 (U.K.). For more details on the United Kingdom, see Adam Cygan, *Democracy and Accountability in the European Union—The View from the House of Commons*, 66 MOD. L. REV. 384 (2003); Adam Cygan, *EU Affairs Before the United Kingdom Parliament: A Case of Scrutiny as Substitute Sovereignty?*, *in* NATIONAL PARLIAMENTS AND EUROPEAN DEMOCRACY: A BOTTOM-UP APPROACH TO EUROPEAN CONSTITUTIONALISM 75 (Olaf Tans et al. eds., 2008); ADAM CYGAN, NATIONAL PARLIAMENTS IN AN INTEGRATED EUROPE: AN ANGLO-GERMAN PERSPECTIVE (2001); ADAM CYGAN, THE UNITED KINGDOM PARLIAMENT AND EUROPEAN UNION LEGISLATION (1998).

[214] Interview with Lord Roper, Chairman of the E.U. Select Committee, and with James Whittle, Second Clerk of the E.U. Select Committee, in London, U.K. (Nov. 24, 2009).

[215] *See* Circulaire du 19 juillet 1994 relative à la prise en compte de la position du Parlement français dans l'élaboration des actes communautaires, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Jul. 21, 1994, *available at* http://www.franceurope.org/pdf/adapt/Cir190794.pdf. *See also* Circulaire du 13 décembre 1999 relative à l'application de l'article 88-4 de la Constitution, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Dec. 17, 1999, *available at* http://www.sante.gouv.fr/adm/dagpb/bo/1999/99-50/a0503387.htm.

[216] David Siritzky, *Ensuring Democratic Control of National Government in European Affairs: The French Model*, *in* NATIONAL PARLIAMENTS AND THE EUROPEAN UNION: THE CONSTITUTIONAL CHALLENGE FOR THE OIREACHTAS AND OTHER MEMBER STATE LEGISLATURES 433, 441 (Gavin Barrett ed., 2008).

consultations with the Government about the importance of, inter alia, the proposal, the state of negotiations, and the legislative procedure.[217]

In Austria and Denmark, the parliaments may give mandates to the ministers, but the respective mechanisms are mutually contrasting. On the one hand, the Austrian Nationalrat and the Bundesrat have a constitutional right to issue legally binding opinions on draft E.U. proposals in all pillars, but they have used this right only once, in relation to the very first binding opinion, and never again.[218] On the other hand, the Danish Folketing has neither a constitutional nor a statutory right to mandate the national representative in the Council, but does so pursuant to a convention that emerged in 1973 as a consequence of a political crisis.[219] The Danish parliamentary mandate operates as a "negative clearing procedure," whereby the negotiation strategy that the Government presents to the E.U. Committee is considered the negotiation mandate, unless there is a majority against it. As Fitzmaurice has rightly underscored, "the Minister is politically obliged to follow the opinion" of the Committee.[220] This is to a large extent determined by the political environment of minority governments in Denmark, which poses considerable constraints on the Government's freedom of action. Since such a political climate does not characterize any of the most influential Member States, Denmark is perhaps too easily touted as the prototype of effective national parliamentary involvement in E.U. affairs.[221]

---

[217] Rijkswet van 10 juli 2008, houdende goedkeuring van het op 13 december 2007 te Lissabon totstandgekomen Verdrag van Lissabon tot wijziging van het Verdrag betreffende de Europese Unie en het Verdrag tot oprichting van de Europese Gemeenschap [Dutch Act of Approval of the Lisbon Treaty], art. 4(1), Staatsblad [Official Journal] 301 (2008), *available at* https://zoek.officielebekendmakingen.nl/stb-2008-301.html. *See also* Leonard Besselink & Brecht van Mourik, *The Roles of the National Parliament and the European Parliament in EU Decision-Making: The Approval of the Lisbon Treaty in the Netherlands*, 15 EUR. PUB. L. 307 (2009).

[218] Articles 23(e)(2) and (6) of the Austrian Federal Constitution explicitly lay down the cases where the Federal Government is "bound in negotiations and voting by the position" of the Nationalrat or the Bundesrat. Barbara Blümel & Christine Neuhold, *The Parliament of Austria: A Large Potential with Little Implications*, *in* NATIONAL PARLIAMENTS ON THEIR WAYS TO EUROPE: LOSERS OR LATECOMERS? 313, 321 (Andreas Maurer & Wolfgang Wessels eds., 2001).

[219] Finn Laursen, *The Danish Folketing and its European Affairs Committee: Strong Players in the National Policy Cycle*, *in* NATIONAL PARLIAMENTS ON THEIR WAYS TO EUROPE: LOSERS OR LATECOMERS? 99, 104 (Andreas Maurer & Wolfgang Wessels eds., 2001).

[220] John Fitzmaurice, *National Parliaments and European Policy-Making: The Case of Denmark*, 29 PARLIAMENTARY AFF. 281, 288 (1976).

[221] This argument is nicely developed in the following assessment:

> If a stable majority came into power, the government would still be obliged to submit an oral mandate for negotiation to the committee. And the party groups in government would continuously have the possibility and, most likely, the need to act as a unitary actor, hence forming a majority behind the minister before the meetings in the committee. This would diminish the strength of the committee as an instrument in the hands of the party groups in opposition. Representatives from the opposition would still have the possibility of posing critical questions and point out weak spots in the government policy, but would not be able to block the minister.

Henrik Jensen, *A Model for the Strictest Scrutiny? The Danish European Affairs Committee in a Party Group Pespective*, *in* DEMOCRATIC GOVERNANCE AND EUROPEAN INTEGRATION: LINKING SOCIETAL AND STATE PROCESSES OF DEMOCRACY 207, 226 (Ronald Holzhacker & Erik Albæk eds., 2007).

In this constellation, the German parliamentary reserve is best placed half way between the Dutch and Austrian mechanisms. On the one hand, it does not resemble the British and French scrutiny reserves because there is a difference in their purpose: the German parliamentary reserve is not particularly oriented towards scrutiny but towards achieving a certain result in Brussels. Furthermore, although some key aspects of it are reminiscent of the Danish mechanism, such as the duty of the minister to base negotiations on the parliament's views (in Denmark through a mandate formulated negatively by not opposing the Government's plans or in Germany through the Bundestag's position statement), the political climate of party discipline in Germany does not warrant any further comparison.

On the other hand, the German parliamentary reserve is, like the Dutch one, aimed at consultations with the Government on the negotiation plans and at impressing the parliament's views on those European projects that it considers of great importance. Yet the German system goes beyond that, because it prohibits the Government from diverging from the Bundestag's position, except where important foreign or integration policy reasons to do so exist. If such reasons do not exist, the Government must assert the Bundestag's position in Brussels. In this respect, the German parliamentary reserve resembles the Austrian mandating system. It nonetheless falls short of establishing a legally binding duty on the part of the Government, which is formally under no parliamentary mandate in any field. However, the substance of the German parliamentary reserve encompasses almost all of the elements of the Austrian mandating system except for the "legally binding" shell. The existence of the "legally binding" aspect in Austria and its absence in Germany should not be overemphasized because the key to determining the true powers of the parliament does not necessarily lie in the legal norms as such, but in the way they are applied. Neither in Germany nor in Austria does the parliament have the power to legally chastise the Government, apart from the unlikely case that a certain proposal provokes such vehement disagreement with the government that the parliament loses confidence in it. The fact that the role of national parliaments is—as Sieberson correctly assessed—"largely consultative"[222] is hardly lamentable, given that the whole process of negotiating draft E.U. legislation is to a large extent informal and directed to lobbying rather than to using draconian measures of pressure, such as toppling the minister or the whole Government. Even in domestic affairs, such measures are in almost all Member States used with great caution.

For all of the above reasons, the refurbished German system of parliamentary participation in E.U. decision-making is, compared to the previous arrangements, rather wide-ranging in legal terms, but whether full use of the new instruments will be made remains to be seen. In any event, the new procedures related to the timing, form, and amount of information; to the exchange of opinions regarding the Government's negotiation strategy; and to the parliamentary reserve have the potential to pose substantial constraints on the Government's behavior in Brussels.

[222] Stephen C. Sieberson, *The Treaty of Lisbon and its Impact on the European Union's Democratic Deficit*, 14 COLUM. J. EUR. L. 445, 463 (2008). For the background to this assessment in his earlier article on the Treaty Establishing a Constitution for Europe, where he examined the role of the Member States and their parliaments in the European Union, see Stephen C. Sieberson, *The Proposed European Union Constitution—Will it Eliminate the EU's Democratic Deficit?*, 10 COLUM. J. EUR. L. 173, 236–41 (2004).

The German Parliament is at liberty to utilize them to hold the Government to account more rigorously.

VIII. CONCLUSION

Despite the theoretical pitfalls and the relapse into the sovereignty doctrine, the *Lissabon-Urteil*, charged with being "a black day in the history of Europe,"[223] "a political manifesto,"[224] "a strange combination of rhetoric and verbosity,"[225] "a negative assessment of the *status quo*,"[226] and a "rejection of European democracy,"[227] is not all that deplorable. If an isolated analysis might make the judgment appear verbose, a retrospective appraisal is quite telling. In the thirty-five years since *Solange I*, the BVerfG has consistently highlighted the centrality of democracy for the viability of the European Union as a political community and has, in various guises and to various degrees, insisted on its realization primarily through the parliamentary channel.

While the BVerfG showed full deference to a European parliament in the *Solange I* judgment, already in the *Solange II* judgment it denied that the European Parliament is a constitutionally binding parameter for assessing E.U. democracy. In the *Maastricht-Urteil*, the inquiry no longer concentrated on whether the European Parliament has acquired any powers but on whether the German Parliament retained the right to authorize their transfer. With the *European Arrest Warrant* case, the German Parliament's primary responsibility to legitimize Third Pillar law was affirmed.

In the *Lissabon-Urteil*, the BVerfG's emphasis on the democratic legitimization of the European Union by national parliaments reached its climax. This is part of a broader tendency to intensify the emphasis on national parliaments as European integration deepens and as competences are withdrawn from the purview of the national parliament. In the "democracy solange," the BVerfG denied the possibility for the European Parliament ever to surpass its supplementary character. To that end, the BVerfG utilized many tools: (a) it rejected dynamic treaty development; (b) it tailored the principles of *Integrationsverantwortung* and *Europarechtsfreundlichkeit* to the need of safeguarding the position of the German Parliament in the Union;[228] (c) it adhered to the dualist approach to European integration, according to which the

---

[223] Alfred Grosser, *The Federal Constitutional Court's Lisbon Case: Germany's "Sonderweg"—An Outsider's Perspective*, 10 GERMAN L.J. 1263 (2009).

[224] Tomuschat, *supra* note 103, at 1259.

[225] Halberstam & Möllers, *supra* note 86, at 1258.

[226] Thym, *supra* note 91, at 1813.

[227] *Id.* at 1812.

[228] For this reason, these two concepts hardly add anything new. Contrarily, Schorkopf and Niedobitek considered *Integrationsverantwortung* a new category, because the BVerfG used it to underpin the rejection of dynamic treaty development. Niedobitek, *supra* note 143, at 1272; Schorkopf, *supra* note 174, at 1221. However, while dynamic treaty development is indeed a new category in the Lisbon Treaty, *Integrationsverantwortung* is not. It is in its nature and in its effects precisely the same as the parliamentary responsibility for integration devised in the *Maastricht-Urteil*. The goal was and still is to prevent the flow of national powers to the Union without parliamentary endorsement. The German Parliament's duty to exhaust the margin of appreciation imposed in the *European Arrest Warrant* judgment carries the same rationale.

national and the European legal orders are separate; and (d) it asserted its own powers by burnishing the ultra vires and identity review.[229]

In doing so, the BVerfG practically refused to espouse the integration of the German Parliament into what some authors have described as a multilevel,[230] composite,[231] or pluralist[232] European constitution. In his latest account on multilevel constitutionalism in the Union, Ingolf Pernice, who was an authorized representative of the Bundestag in the *Lissabon* proceedings, rightly stated that "the formal constitutional status of national parliaments in the European decision-making processes is an important innovation."[233] Nonetheless, the BVerfG refuted his argument that the inclusion of national parliaments in dynamic treaty revision procedures together with the other newly acquired competences "*clearly* demonstrate that the national parliaments are becoming a constituent part of the multilevel European institutional system."[234]

Admittedly, the BVerfG did flirt with the idea that the guarantee of national constitutional identity under constitutional law and that under Union law go hand in hand in the European legal area,[235] as well as the idea that political orders need not be structured according to a strict hierarchy.[236] Thym saw this as a "prominent recognition of the composite responsiveness of national and European law"[237] and as an "implicit reference to the concept of multilevel constitutionalism."[238] Though these might be primordial signposts of the BVerfG's possible exploration of these concepts in the future, the fervor with which it expounded the preeminence of Germany's sovereignty and of its national parliament begs a different conclusion. At least at this point in time, the BVerfG's findings remain "the 'conservative' counterpoint to contemporary narratives of 'post-sovereign' statehood."[239] The following passage from the *Lissabon-Urteil* captures the essence of it succinctly:

> The Basic Law aims to integrate Germany into the legal community of peaceful and free states, but does not waive the sovereignty contained in

---

[229] The identity review can easily be traced throughout the case law analyzed in this contribution, whereby the dissimilarities in the BVerfG's approach were a matter of scope rather than that of reasoning.

[230] Ingolf Pernice, *Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited*, 36 COMMON MKT. L. REV. 703 (1999); Ingolf Pernice, *Multilevel Constitutionalism in the European Union*, 27 EUR. L. REV. 511 (2002).

[231] LEONARD BESSELINK, A COMPOSITE EUROPEAN CONSTITUTION (2007); Leonard Besselink, *National Parliaments in the EU's Composite Constitution: A Plea for a Shift in Paradigm*, *in* NATIONAL AND REGIONAL PARLIAMENTS IN THE EUROPEAN CONSTITUTIONAL ORDER 117 (Philipp Kiiver ed., 2006); Ingolf Pernice & Franz C. Mayer, *De la Constitution Composée de l'Europe*, 36 REVUE TRIMESTRIELLE DE DROIT EUROPÉEN 623 (2000).

[232] Neil Walker, *The Idea of Constitutional Pluralism*, 65 MOD. L. REV. 317 (2002); Neil Walker, *Big "C" or Small "c"?*, 12 EUR. L.J. 12 (2006); Neil Walker, *Post-Constituent Constitutionalism?: The Case of the European Union*, *in* THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM 247 (Martin Loughlin & Neil Walker eds., 2007).

[233] Ingolf Pernice, *The Treaty of Lisbon: Multilevel Constitutionalism in Action*, 15 COLUM. J. EUR. L. 349, 391 (2009).

[234] *Id.* (emphasis added).

[235] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jun. 30, 2009 (*Lissabon-Urteil*), 123 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 267 (¶ 240) (F.R.G.).

[236] *Id.* ¶ 340.

[237] Thym, *supra* note 91, at 1810.

[238] *Id.* at 1811.

[239] *Id.* at 1805.

> the last instance in the German constitution. There is therefore *no contradiction to the aim of openness to international law if the legislature, exceptionally, does not comply with the law of international agreements [i.e. primary E.U. law]*—accepting, however, corresponding consequences in international relations—provided this is the only way in which a violation of fundamental principles of the constitution can be averted.[240]

In the end, it is fair to conclude that Karlsruhe's caveats on democracy have not changed much. They have only become more pronounced. In fact, they were loud enough to sound an alarm in Berlin and provide an incentive, whether direct or indirect, for a major reform of the system of German parliamentary participation in E.U. affairs, ranging from the enhancement of information rights, to the introduction of the requirement of approval for dynamic treaty development, to the resurrection of the parliamentary reserve of 2006. Since the European Union will certainly not use any of the instruments of dynamic treaty development as a rule of action, but only in exceptional circumstances, the *Lissabon-Urteil* is in fact a remarkable success: the BVerfG did not frustrate the necessary institutional reform of the Union, while concomitantly contributing to a significant empowerment of Germany's national parliament in scrutinizing E.U. decisions. In this respect, the *Lissabon-Urteil* is commendable. It has fulfilled its objective more than one might have expected, and certainly more than the majority of academics have been willing to acknowledge.[241]

---

[240] *Lissabon-Urteil*, BVerfGE 123, 267, ¶ 340 (emphasis added). *See also supra* text accompanying note 87 (opinion of the BVerfG on the withdrawal from the European Union).

[241] As the editorial comment of the European Constitutional Law Review put it:

> But for the moment, who would deny that there is a loss of transparency, democratic accountability and electoral equality for German voters if competences are exercised by the Union rather than by German institutions? And aside from the legal merits of the judgment under German constitutional law: who cannot at least understand why the court, in the name of democracy, objects to the Union taking fundamental decisions on substantive and formal criminal law, on the employment of police and military forces, on the budget, on the welfare state, on family law and the school and education system and so forth in Germany, given the Union's present democratic state of affairs?

Editorial, *supra* note 97, at 344.