

■ ARTICLES

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German Constitutional Law and European Integration in the Wake of Lisbon

I. INTRODUCTION

For the German constitutional lawyer it has become common ground that European landmark developments are accompanied by landmark decisions of the German Constitutional Court (*Bundesverfassungsgericht*) in Karlsruhe. Thus, the terms "Maastricht", "Euro" and now also "Lisbon" do not only refer to European Treaties or the European Currency. They also stand for the respective rulings which have developed the constitutional setting of Germany's participation in the European and the Currency Union. This crucial impact of the Constitutional Court as a gateway for all major European developments can be understood as a side effect of the traditional pro-European consensus within the German political establishment. European integration and German participation therein being regarded as a rational and moral imperative by all major political parties, so far, any substantial opposition had to turn to the legal argument, i.e. to Karlsruhe.¹ One cannot really say that, in this situation, the Constitutional Court has resorted to judicial activism, giving in to the temptation of actively reshaping the European Union and policies. None of the challenged Treaty amendments have been quashed by the Court. Nonetheless, it has decidedly opted to accept the role as a guardian of the German Constitution where it is potentially affected by European integration. By using – some scholars would say: misusing – the electoral right in Art. 38 para 1 of the *Grundgesetz* (GG) as a tin opener for admissibility it has enabled any citizen to initiate legal proceedings against acts of European integration by way of a constitutional complaint.² On the merits it has established an effective degree of legal control derived from Art. 79 para 3 and 23 para 1 GG which lay down in very broad terms the conditions of German participation in the European Union. It is for this reason that the implications of constitutional law, and the prospects of what Karlsruhe would ultimately accept or not accept, have become an increasingly important aspect in Germany's attitude towards European affairs. For the time being, the Lisbon-judgment of 30 June 2009 is the leading decision on the Court's view on these issues.

From the point of view of German constitutional law there are five major problems caused by European integration: The adequate protection of fundamental

1 Peter Graf Kielmansegg, 'Letzte Rettung' *Frankfurter Allgemeine Zeitung* (24 February 2011) p 8.

2 Maastricht-decision, *Entscheidungen des Bundesverfassungsgerichts* (BVerfGE) 89, 155 (171 et seq.).

rights; the outer limits of the transfer of powers to the EU and the remaining statehood of Member States; a sufficient degree of democratic legitimacy; the challenges of European integration for the internal structures of German federalism; and, finally, the judicial control of all these aspects. Fundamental rights protection and judicial control are stories of their own. The remaining aspects, however, are not only closely interconnected but have also received major attention in the European and German debates about the Treaty reform. The Treaty of Lisbon itself has consolidated and slightly expanded once more the powers of the European Union, albeit carefully avoiding the state-like rhetoric of the failed Constitutional Treaty. On the other hand a serious attempt has been undertaken in this Treaty to enhance the democratic legitimacy of the Union and its activities – both by further strengthening the European Parliament and by involving national parliaments in the enforcement of the principle of subsidiarity. Not surprisingly, the interests of subnational entities have found a less prominent echo in the Treaty, but nevertheless the regional level in the system of European governance has gained slightly more weight.

The legal proceedings brought against the German ratification of the Treaty of Lisbon were, by and large, not successful. The Constitutional Court has held that German participation in the remodeled European Union is still compatible with the *Grundgesetz*. However, in the footsteps of its earlier Maastricht-decision of 1993, it has left little doubt that the *Grundgesetz* does not authorize Germany to go along the road of integration very much further. Moreover it has stipulated a more substantial role for the German parliament as an indispensable anchor of democratic legitimacy. The key term of the whole decision is "*Integrationsverantwortung*"³ – the "responsibility for integration" which can neither be delegated exclusively to Brussels nor to the Federal Government. While each of the German constitutional institutions has its share in this responsibility the essential decisions on the further development of the EU remain – as much as in national affairs – a prerogative of the first chamber, i.e. the *Bundestag*. Parts of the German implementing legislation were quashed because they did not meet these standards. By contrast, the aspect of federalism and the position of the German constituent states (*Länder*) has not been specifically dealt with by the judgment (and rarely by the Court's earlier case law),⁴ not least because these matters cannot be raised in a constitutional complaint.

In response to the Lisbon-judgment, the German implementing legislation was speedily adapted to the requirements of the Court in order to clear the path to ratification. The outcome is a rather complex and confusing set of regulations.⁵ Since 1992/1993, the distribution of powers and the interinstitutional procedures in European affairs between the Federal Government, the two chambers of parliament and the constituent states have been outlined by Art. 23 GG and,

3 Lisbon-judgment, BVerfGE 123, 267, para 236. English version available on http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html.

4 Andreas von Arnould 'Parlamentarismus und Föderalismus in der EU' in: Andreas von Arnould and Ulrich Hufeld (eds), *Systematischer Kommentar zu den Lissabon-Begleitgesetzen* (Nomos, Baden-Baden 2011), p 62.

5 Martin Nettesheim 'Die Integrationsverantwortung – Vorgaben des BVerfG und gesetzgeberische Umsetzung' [2010] *Neue Juristische Wochenschrift* (NJW) 177.

more specifically, by two statutory acts: The "Act on the Cooperation between the Federal Government and the German *Bundestag* in Matters of the European Union" (EUZBBG),⁶ and the "Act on the Co-operation between the Federation (*Bund*) and the Constituent States (*Länder*) in Matters of the European Union" (EUZBLG).⁷ Both Acts were accompanied by interinstitutional agreements spelling out the details of the co-operation.⁸ In 2009, both acts were modified, in particular by incorporating the agreements into the statutory acts themselves.⁹ More importantly, an additional third statutory act was adopted, the so-called *Integrationsverantwortungsgesetz* (Act on the Responsibility for Integration, IntVG). This act had originally been designed to operationalize the new parliamentary powers introduced by the Treaty of Lisbon.¹⁰ In the wake of the Lisbon-judgment this draft was thoroughly amended and extended so as to implement all those requirements established by the Constitutional Court as specific parliamentary responsibilities. The very fact that the Court's key term "*Integrationsverantwortung*" reappears in the title of the Act indicates that the approach of the Court has been followed very closely by the legislator.

The following article will have a closer look on this judicial and statutory approach. What does it mean, from the point of view of Germany's participation, for the remaining potential of the process of European integration? And what are the consequences for the internal balance of powers in these matters? Three major reservations derived by the Court from German constitutional law and mirrored in the above-mentioned implementing legislation deserve to be highlighted: The reservations of statehood, of democracy, and of federalism.

II. THE RESERVATION OF NATIONAL STATEHOOD

The most fundamental finding of the Lisbon-judgment is the reservation of sovereign national statehood. To avoid misunderstandings it should be stressed that the Court has not questioned that the *Grundgesetz* is open for the

6 Gesetz über die Zusammenarbeit von Bundesregierung und Deutschem Bundestag in Angelegenheiten der Europäischen Union of 12 March 1993, Bundesgesetzblatt (BGBl.) I 311.

7 Gesetz über die Zusammenarbeit von Bund und Ländern in Angelegenheiten der Europäischen Union of 12 March 1993, BGBl. I 313.

8 Agreement of 28 September 2006, between the German *Bundestag* and the Federal Government on the Co-operation in Matters of the European Union, BGBl. I 2177; Agreement of 29 October 1993, between the Federal Government and the Governments of the *Länder* on the Co-operation in Matters of the European Union. The latter was preceded by an earlier *Bund-Länder-Agreement* of 1987.

9 The modified versions of both the EUZBBG and the EUZBLG still allow for further details to be regulated in an interinstitutional agreement. Indeed, a new though much shorter *Bund-Länder-Agreement* has been concluded on 10 June 2010, see Áron Horváth 'Vereinbarungsvorbehalte' in: Arnould/Hufeld (n 4), pp 426 et seq. No new agreement, however, has been concluded between the government and the *Bundestag*.

10 Draft Act of 11 March 2008, on the Exercise of the Rights of *Bundestag* and *Bundesrat* following from the Treaty of Lisbon, Bundestags-Drucksache (BT-Drucks.) 16/8489, Art. 1. Originally, this Act had already been drafted with a view to the Constitutional Treaty.

participation in a far-reaching process of European integration. However, this participation reaches its ultimate limits where it would result in the abandonment of Germany as an independent entity with the quality of a sovereign state and with its own constitutional identity.¹¹ The *Grundgesetz*, argues the Court, does not authorize the entry into a European federal state. This is the constitutional red line which the process of European integration cannot cross.

This conclusion of the Court did not come unexpectedly. The Maastricht-decision of 1993 had shown a similar tendency. There, however, the whole reasoning was based on the concept of democratic legitimacy, and its force remained limited to this context.¹² In the first place, the Court had observed that the EU – as it was envisaged by the Maastricht-Treaty – did neither have nor claim a state-like quality but remained an association of states. "*Staatenverbund*" was the term coined by the Constitutional Court for this unparalleled phenomenon. Therefore, democratic legitimacy of the Union had to be generated to a very substantial degree on the level of Member States and their peoples, in particular by way of involving national parliaments. Secondly, the Court went on to argue that the EU could not go beyond the concept of a mere *Staatenverbund* because on the European level the structural and sociological prerequisites of an effective democracy were lacking. Yet it also admitted that these extra-legal conditions of democratic government might evolve in the future. Whether or not in this case the *Grundgesetz* would be open for German membership in a European federal state was explicitly left open in the Maastricht-decision.

At this point the Lisbon-judgment left the ground already cultivated by its predecessor. Indeed, the expansion of the Union's competences since Maastricht as well as the recent conceptual ambitions of the Constitutional Treaty made it difficult to escape the fundamental question of how far the process of European integration can go. Therefore it is understandable that the Court seized the opportunity to look beyond Lisbon and to address questions which, strictly speaking, have not yet been raised by the current Treaties.¹³ This time the Court did not restrict its argument to the requirements of democratic legitimacy. Rather it developed the preservation of sovereign statehood as an independent limit in its own right.¹⁴ In the Court's opinion, the authorization in Art. 23 para 1 GG to participate in the European Union refers to the EU as a *Staatenverbund*. It does not include the step into a European federal state which would absorb its (former) Member States as mere subentities. In the Court's own words: The constituent power and state sovereignty are inalienable,¹⁵ apparently irrespective of the democratic qualities of the EU.

Not surprisingly, this conclusion raised serious objections in the academic echo of the Lisbon-judgment.¹⁶ The value of sovereignty and statehood as legal

11 Lisbon-judgment (n 3), paras 219 et seq.

12 BVerfGE 89, 155 (182 et seq.).

13 Dieter Grimm 'Das Grundgesetz als Riegel vor einer Verstaatlichung der EU' (2009) 48 Der Staat 475, 492 et seq.

14 See in particular para 247 of the judgment (n 3).

15 Lisbon-judgment (n 3), para 247.

16 For critical reviews see e.g. Armin von Bogdandy 'Prinzipien der Rechtsfortbildung im europäischen Rechtsraum' [2010] Neue Juristische Wochenschrift (NJW) 1; Christian Calliess 'Unter Karls-

arguments is widely doubted. The critics regard these notions as left-overs of the 19th century state theory which cannot adequately describe the modern patterns of interdependence, integration and multi-level governance characterizing the European Union. Certainly, they do not appear in the wording of the relevant provisions of the constitution. Art. 23 para 1 GG provides for the participation in the development of the EU under the condition that it "is committed to democratic, social and federal principles, to the rule of law, and to the principle of subsidiarity". No absolute bar of the kind construed by the Court is expressly mentioned here or elsewhere. To conclude, as it is implied by the judgment, that the unalterable guarantee clause in Art. 79 para 3 GG includes sovereign statehood as part of the constitutional identity is therefore very doubtful.¹⁷ Nor can it easily be taken as an unwritten rule underlying the constitution. When the *Grundgesetz* was drafted in 1948/49 the European idea was approaching its heyday. For a while, the United States of Europe seemed to be in reach and enjoyed widespread public and political support. This is particularly true for West Germany which more than anyone else needed and exploited the European unification as a chance for re-admittance among civilised nations. Thus, from an historical point of view, it is not at all evident that the *Grundgesetz* was designed to give national statehood preference to the option of joining a European federal state.

In fact, the Lisbon judgment remains conspicuously silent about the reasons for this proposition. Interestingly, however, the Court has not argued that the preservation of national statehood and sovereignty constitutes an indefinite imperative and that, therefore, a federalization of the EU is *per se* impossible. It has merely concluded that such a fundamental and irrevocable step could not be decided by the *Bundestag* or any other institution but only by the German people itself. In other words: Not the *pouvoir constitué* but only the *pouvoir constituant* possesses the legal and legitimate power to abandon its very status as an independent political entity.¹⁸ This is an important distinction. It can be traced back to the more general premise that only the sovereign is legally able to dispose of his very sovereignty. In a democracy, the sovereign is the people, the *demos*. Delegated powers, by contrast, cannot comprise the competence to exchange the delegating person. Democratic government is empowered to act on

ruher Totalaufsicht' *Frankfurter Allgemeine Zeitung* (27 August 2009), p 8; Peter Häberle 'Das retrospektive Lissabon-Urteil als versteinerte Maastricht II-Entscheidung' (2010) 58 *Jahrbuch des Öffentlichen Rechts* 317; Daniel Halberstam and Christoph Möllers 'The German Constitutional Court says "Ja zu Deutschland!" (2010) 10 *German Law Journal* 1241; Armin Hatje 'Demokratische Kosten souveräner Staatlichkeit in der europäischen Union nach dem Urteil des Bundesverfassungsgerichts zum Vertrag von Lissabon' (2010) 45 *Europarecht* (Beiheft) 123; Martin Nettesheim 'Die Karlsruher Verkündung' (2010) 45 *Europarecht* (Beiheft) 101; Christoph Schönberger 'Die Europäische Union zwischen Demokratiedefizit und Bundesstaatsverbot' (2009) 48 *Der Staat* 535; Jürgen Schwarze 'Die verordnete Demokratie' (2010) 45 *Europarecht* (EuR) 108. A more positive view is offered e.g. by Frank Schorkopf 'Die Europäische Union im Lot' [2009] *Europäische Zeitschrift für Wirtschaftsrecht* (EuZW) 718; Grimm (n 13), p 475.

17 Halberstam and Möllers (n 16), p 1255 ; Matthias Jestaedt 'Warum in die Ferne Schweifen wenn der Maßstab liegt so nah? Verfassungshandwerkliche Anfragen an das Lissabon-Urteil des BVerfG' (2009) 48 *Der Staat* 497, 505 et seq.

18 Lisbon-judgment (n 3), paras 218, 228 u. 347.

behalf of the *demos* but not to replace it by a different sovereign, including a different *demos*. It is precisely this what happens if a smaller political entity is absorbed by a larger one and if a European people – even in a fully democratic EU – supersedes the peoples of the Member States as the ultimate subject and source of legitimation. From this point of view, democratic theory offers good reasons to reserve such a step directly to the *demos* itself. The question remains, however, whether the clauses providing for the participation in the process of European integration – Art. 23 para 1, until 1992 Art. 24 para 1 GG – may be understood as an exception to this rule. The Court has denied this with reference to Art. 146 GG: The step of joining a European federal state goes beyond constitutionally authorized integration policy – it is the enactment of a new constitution and therefore, as indicated in Art. 146, reserved to the *pouvoir constituant*.

Be that as it may, in the end the finding of the Court is sufficiently authoritative to determine the limits of German integration policy in the future. The proposition that the EU has to remain a *Staatenverbund*, i.e. an association of sovereign states whose peoples form separately the ultimate subjects and sources of democratic legitimation, necessarily results in the conclusion that certain powers and subject matters resist integration. The structural limits derived from this basis are well-known from the Maastricht-decision:¹⁹ The Member States as masters of the Treaties with the unilateral right to withdraw from the Union and with the exclusive power to amend the Treaties; the principle of conferral, restricting the Union to those tasks and powers transferred to it by the Treaties; and a design of competences which corresponds to these principles in that it avoids blanket authorizations or legal bases which effectively would come close to a system of self-authorization. However, the Lisbon-judgment went beyond these rather formal criteria and established an additional substantive restraint. The Court could hardly evade the crucial question how far the scope of EU competences could further expand without crossing the constitutional red line. And, given its own premise, it had to take account of the substantive effect of the transfer of powers to the Union. In less abstract terms, the preservation of sovereign statehood, or perhaps better: of the identity of the sovereign *demos*, means the preservation of self-determination and self-rule. It is therefore not only the formal structure but also the substance of the competences transferred to the EU which matters. If the preservation of a meaningful self-determination of the German people is regarded as a constitutional imperative, this proposition essentially means that it must retain meaningful powers of its own.

On the other hand it is fairly obvious that the process of a gradually eroding substance of state powers does not offer any tangible borderline between national self-rule and European amalgamation. Concerning the distribution of substantive competences this is a question of degree. Therefore, it was a virtually impossible mission for the Court to lay down precise criteria for the distinction between constitutional integration and unconstitutional surrender of sovereignty. As a broad guideline the Court concluded that the EU Member States – besides the autonomous determination of their own fundamental order – must

19 BVerfGE 89, 155 (182 et seq.); Lisbon-judgment (n 3), paras 231 et seq.

"not lose their ability to politically and socially shape living conditions on their own responsibility."²⁰ At this point, however, the judgment loses much of its conceptual clarity. In the course of its theoretical elaboration of the statehood argument it does not come back to this statement and offers no further specification of this general conclusion. It does so, though, with very similar words in the following section devoted to the principle of democracy (see below). Finally, when it comes to applying the abstract legal conclusions to the substantive aspects of the Lisbon Treaty, the arguments of democracy and of sovereign statehood appear widely intermingled.²¹ This irritating treatment leaves the actual scope and potency attributed by the Court to the latter noticeably uncertain and has created some confusion among commentators.

III. THE RESERVATION OF DEMOCRACY

1. The principle of democracy as outer limit for the transfer of powers

The second reservation upheld by the Court relates to the principle of democracy.²² As we have seen, this principle has already played a crucial role as an argument for the reservation of sovereign statehood discussed above. There, however, it has been relevant from a very specific point of view: the democratic legitimacy of the national decision to create or join a European federal state and thus to give up the independent identity of the (until then) sovereign *demos*. Yet the main impact of the democratic principle concerns another question: the democratic legitimation of the policies and activities exercised within the framework of the European Union. This is also the obvious requirement which follows directly from the wording of Art. 23 para 1 and 79 para 3 GG: Whether on the national or the European level, public functions must be allocated and exercised in accordance with the principle of democracy.

The Court insists, as it has already done in the Maastricht-decision, that genuine democratic legitimation requires more than an adequate institutional setting and the respect of formal rules.²³ It rests on certain structural and sociological premises that allow for the common perception of factual issues and political alternatives, for a viable public opinion and, ultimately, for the formation of a meaningful majority will which can serve as the legitimising basis for public policy decision. Although the Court acknowledges the progress in the development of a common European polity, it argues that these premises are, as a matter of fact, still linked to the nation-state. Moreover, there is no indication in the Lisbon-judgment that the Court expects any fundamental change of this situation in the foreseeable future.

20 Lisbon-judgment (n 3), paras 226 and 229.

21 Antje von Ungern-Sternberg 'L'arrêt Lisbonne de la Cour constitutionnelle fédérale allemande, la fin de l'intégration européenne?' (2010) 126 *Revue Du Droit Public* 171, 174.

22 *Ibid.*, paras 244 et seq.

23 *Ibid.*, paras 250 et seq.

As much as the Court's reliance on sovereignty and statehood it has been this insistence on a nexus between the nation-state and democracy which has provoked criticism. Here is not the place to discuss the complex theoretical dimension of this question. Suffice it to say that for various reasons it is indeed doubtful whether in the short or medium term conditions will evolve that allow for a European democratic government which effectively comes close to the standards of democracy in the traditional framework of the nation-state.²⁴ It is equally plausible to argue that Art. 23 para 1 and 79 para 3 GG do not authorize integration at the costs of a far-reaching sacrifice of substantive democratic standards. Therefore, the approach of the Court should not all too easily be rejected as an out-dated state-centric view.²⁵ It is not so much the state-focused rhetoric which matters but the analysis of the difficulties to obtain an adequate degree of democratic legitimation within a political entity which is in political, cultural, historic and linguistic terms as diverse as the EU.

In any event, in the reasoning of the Court the reservation of democracy results no less in an absolute limit of integration than the reservation of sovereign statehood. Because a full-scale democratic legitimation is unattainable on the European level alone, it has to be substantially provided on the national level. Therefore, the Court argues, as a matter of German constitutional law "sufficient space [must be] left to the Member States for the political formation of the economic, cultural and social living conditions."²⁶ Like the parallel conclusion reached from the perspective of sovereign statehood this constitutes a red line which neither government nor parliament are authorized to cross. However, there is no simple formula for the location of this red line. With good reasons the Court has stressed that it is not a specific type or number of competences as such which turns the balance.²⁷ Nor is it simply the conferral of certain powers upon the EU but also the remaining national influence in the EU decision making procedure that matters. Thus, whether or not the integration process has left sufficient substance for national policy decisions can only be evaluated on the basis of an overall view. To make this vague principle somewhat more operational the Court has undertaken to highlight five policy fields which it regards as particularly sensitive components of democratic government on the national level: Criminal law; the use of force by the police or the military; public revenue and expenditure decisions; the shaping of living conditions in a social state; and decisions of particular cultural importance like family law, the school and education system and the relationship to religious communities.²⁸

The Court has held that the Treaty of Lisbon – or technically speaking: the German Act of Approval – still is compatible with these constitutional requirements

24 This is widely acknowledged in political science at least as regards the model of parliamentary democracy, see e.g. Arthur Benz and Jörg Broschek, *Nationale Parlamente in der europäischen Politik* (Friedrich Ebert Stiftung, 2010, www.fes.de/ipa), p 2.

25 Similarly Norbert Ohler 'Herrschaft, Legitimation und Recht in der Europäischen Union' (2010) 135 *Archiv des öffentlichen Rechts* (AöR) 153, 179 et seq.

26 Lisbon-judgment (n 3), para 249. Indicated already in the Maastricht-decision, BVerfGE 89, 155 (186).

27 Lisbon-judgment (n 3), paras 248 u. 351.

28 *Ibid.*, paras 252 et seq.

following from the inalienability of sovereign statehood and from the principle of democracy.²⁹ But it has also made clear that the leeway for an ongoing federalization and a further shift of powers to the EU is limited. In structural terms it has emphasized the inadmissibility of blanket authorizations or other legal techniques seriously compromising the principle of conferral.³⁰ Similarly the judgment indicates that the Court would critically observe any significant strengthening of the Commission³¹ or of the Union Citizenship³². Especially in those policy fields mentioned above the Member States must keep substantial regulatory powers for themselves while the Court also attaches particular importance to the test of necessity inherent to the subsidiarity principle: "In these areas, it is particularly necessary to draw the limit where the coordination of cross-border situations is factually required."³³ Most of all the Court has stressed these limits with regard to the field of criminal law. It has accepted the new legal bases introduced by the Treaty of Lisbon only under the condition of a restrictive interpretation, relating to serious crime of cross-border relevance. In this field the Lisbon-judgment leaves virtually no room for any further steps of integration which go beyond intergovernmental cooperation.³⁴ A second, equally strong reservation excludes potential legal obligations to take part in military operations within the context of ESDP or under the new mutual assistance clause in Art. 42 para 7 TEU.³⁵ Other safeguarded aspects of national sovereignty addressed in the Lisbon-judgment are the administration of justice and the national membership in the WTO or other international organizations.³⁶

One of the problems with these conclusions is the uncertainty of the precise nature of the legal argument which we have already observed. In the reasoning of the Court, the inalienability of sovereign statehood and the reservation of democracy appear to overlap to a large extent. Yet they have different consequences. The argument of sovereignty is neutral as to the internal structures of the EU while the argument of democracy is neutral as to the governance level on which it is achieved. Therefore, the first one results in a static limit while the second one is of a dynamic kind because it evolves with the democratic potential of the EU. Even if one accepts the skeptical position of the German Constitutional Court, it is difficult to deny that this potential is open to development. And the more democratic legitimation can be generated on the European level, the more integration is permissible under this principle. For the inalienability of sovereign statehood, by contrast, the democratic structure or potential of the EU is irrelevant. As the Lisbon-judgment remains quite nebulous as to the relationship between the two arguments it does not become clear to what extent its findings constitute a dynamic or a static limit of European

29 Ibid., paras 274 et seq.

30 Ibid. paras 236 and 328.

31 Ibid., para 297.

32 Ibid., para 350.

33 Ibid., para 251.

34 Ibid., paras 253 and 352 et seq.

35 Ibid., paras 254-255 and 381 et seq.

36 Ibid., paras 367 et seq. and 372 et seq.

integration, i.e. to what extent they have to be reconsidered should the democratic potential of the European Union increase.³⁷

2. The principle of democracy and the role of the German Bundestag

a) *The strengthening of national parliaments in the Treaty of Lisbon*

Besides its effect as an outer limit of integration, the principle of democracy also has a second and more imminent impact: It requires an adequate institutional and procedural setting. It has been one of the major aims of the Treaty of Lisbon to improve the architecture of the EU in this respect, in particular by further strengthening the position of the European Parliament but also – more importantly in our context – by enhancing the involvement of national parliaments. For the first time they are directly addressed by EU law as policy actors.³⁸ This new attention is visible in Art. 10 para 2 subpara 2 TEU which stresses the accountability of Member States' representatives in the Council or European Council to their national parliaments, as well as in Art. 12 TEU entirely devoted the contribution of national parliaments to the good functioning and democratic legitimation of the Union, in the substantially revised Protocol No. 1 on the role of national parliaments in the European Union, and – most significantly – in their new role with respect to the enforcement of the subsidiarity principle.

The powers currently accorded to national parliaments by EU primary law can be divided in three different categories: genuine decision making powers, powers of control and rights to information. Their decision making powers comprise those steps which are subject to ratification or approval by the Member States "in accordance with their respective constitutional requirements": Treaty amendments under Art. 48 TEU, a number of specially provided Treaty modifications, and Accession Treaties. Of course it is ultimately a matter of each Member State's constitutional law whether such a ratification or approval falls within parliamentary powers but normally this will be the case. A slightly weaker position is granted to national parliaments with regard to some of the so-called bridging or passerelle clauses. These clauses enable the European Council or the Council to proceed for certain subject matters from unanimity to majority voting or from a special to the ordinary legislative procedure. Two of them provide for an involvement of national parliaments³⁹ but in these cases their burden of decision making has been reversed. No positive approval is required but they retain the power to veto the shift by way of a negative decision within six months.

Entirely new are the control powers accorded to national parliaments. They relate almost exclusively⁴⁰ to the enforcement of the subsidiarity principle as a

37 For the puzzlement of commentators faced with this ambivalence of the reasoning see e.g. Matthias Laas 'Materielle Bindungen' in Arnould/Hufeld (n 4), pp 402 and 408 et seq.

38 Arnould (n. 4), p 77.

39 The general bridging clause in Art. 48 para 7 TEU and Art. 81 para 3 subpara 2 TFEU on matters of family law.

40 In addition, under Art. 88 TFEU national parliaments are involved in the political control of Europol.

potentially crucial instrument to confine the loss of competence suffered by national parliaments in the process of integration. However, these control powers, laid down in Protocol No. 2 on Subsidiarity, are relatively modest. They comprise both an *ex ante* early warning mechanism and an *ex post* legal control mechanism. On the one hand, they give national parliaments the right to comment on each draft legislative act with a reasoned opinion arguing that it does not comply with the principle of subsidiarity. If a certain quorum is met, the Commission is obliged to review but not necessarily to amend the draft. On the other hand, Art. 8 of the Protocol provides national parliaments with the right to initiate legal proceedings before the European Court of Justice on the grounds of an infringement of the subsidiarity principle. Thus, strictly speaking, the control powers accorded to national parliaments in this context constitute no more and no less than the competence to trigger a control mechanism in which the last word remains ultimately reserved to the ECJ. It is quite likely that its practical impact will not come up to the theoretical interest and political hopes it has attracted. So far, German institutions have initiated the early warning mechanism in two instances: The *Bundesrat* in the case of a draft directive on the European Protection Order,⁴¹ and the *Bundestag* as well as the *Bundesrat* against the draft directive on deposit-guarantee schemes.⁴² At least the latter initiative found little resonance in other countries and clearly failed to meet the necessary quorum.

Finally, the revised version of Protocol No. 1 as well as a number of Treaty provisions⁴³ expand and formalize the obligation of EU institutions to forward all relevant documents to national parliaments – again carefully devised as a direct link of communication without inference by the national governments. This guaranteed and timely access to information about all kinds of legislative activities in the EU is of eminent practical importance. However, given the sheer mass and complexity of documents which have to be communicated this achievement is both a blessing and a curse for national parliaments.

b) Parliamentary prerogatives established by the Lisbon-Judgment

Bearing this in mind, the Treaty of Lisbon has confronted German domestic law and constitutional theory with two challenges. In a rather technical sense, the novel parliamentary rights and options provided by European law had to be implemented and operationalized. On a more substantive level the question arose of whether these reforms fully meet the minimum requirements of the constitutional principle of democracy. The German Constitutional Court has answered this second question partly in the negative. In the Court's view, the new institutional recognition and involvement of national parliaments by the

41 Bundesrats-Drucksache (BR-Drucks.) 43/10(B) of 26 March 2010.

42 BR-Drucks. 437/10 of 24 September 2010 and BT-Drucks. 17/3239 of 6 October 2010. In a third instance, the parliamentary group of the Green Party notified the Council of their failed attempt to have the *Bundestag* vote on a reasoned opinion about the draft directive on child sexual abuse, see Council document 14023/10 of 10 March 2011.

43 Art. 48 para 2 (proposals for treaty amendments) and 49 para 1 TEU (applications for accession); Art. 70, 71 and 85 TFEU in the context of the area of freedom, security and justice; Art. 352 para 2 TFEU and Art. 4 of Protocol No. 2 with regard to the subsidiarity control.

Treaties, as described above, cannot compensate for the lack of an independent democratic legitimation of the European public authority.⁴⁴ Nor does it comprehensively secure an adequate legitimation of national policy decisions within the context of European integration. Therefore, on the level of domestic law the Court has demanded additional powers of the *Bundestag* with regard to the determination of German integration policy. Based on the principle of democracy the Court has effectively safeguarded the position of the *Bundestag* in two ways: Indirectly – as we have seen above – by reserving a minimum substance of policy making powers to the nation state and its sovereign people, thereby necessarily benefiting national parliaments.⁴⁵ And directly by strengthening the role of the *Bundestag* in the domestic institutional balance vis-à-vis the Federal Government when it comes to the exercise of certain German membership rights within the EU. This is what the Court has called the parliamentary *Integrationsverantwortung* – a persistent responsibility of the *Bundestag* to determine the essential features of German integration policy.

aa) Treaty amendments and bridging clauses

The core of this responsibility for integration as it has been conceptualized in the Lisbon-judgment and implemented by the *Integrationsverantwortungsgesetz* (IntVG) relates to the evolution of the Treaty framework. For formal Treaty amendments and Accession Treaties it has always been beyond doubt that their ratification requires a prior parliamentary consent under Art. 59 para 2 GG. Moreover, following Art. 23 para 1 GG (and formerly Art. 24 para 1 GG) any transfer of public authority to the EU has to be effected by way of a federal statute. Both functions are performed in the same time by the Act Approving the Treaty or Treaty amendment.⁴⁶ The Lisbon-judgment and the IntVG confirm that the same applies to those Treaty clauses which do not explicitly require ratification but nevertheless an approval by the Member States "in accordance with their respective constitutional requirements".⁴⁷ They include the simplified Treaty revision under Art. 48 para 6 TEU, the move to a "common defense" (Art. 42 para 2 TEU), the expansion of the concept of EU citizenship (Art. 25 para 2 TFEU), the agreement on the accession of the EU to the European Convention on Human Rights under Art. 218 para 8 TFE as well as the decisions on a uniform election procedure for the European Parliament (Art. 223 para 1 TFEU), on the jurisdiction of the ECJ on European intellectual property disputes (Art. 262 TFEU) and on the system of own resources of the Union (Art. 311 para 3 TFEU). All these clauses contain limited Treaty modifications and are constitutionally treated as such, i.e. they require a statutory approval under Art. 23 para 1 GG.

44 Lisbon-judgment (n 3), para 293.

45 In fact, due to the peculiarity that the admissibility of the action was based on the right to vote the institutional powers of the *Bundestag* actually serve as the starting point of the whole reasoning in the Lisbon-judgment, see para 210.

46 Rudolf Streinz 'Art. 23' in Michael Sachs (ed), *Grundgesetz-Kommentar* (5th edn Beck, München 2009), para 61.

47 Lisbon-judgment (n 3), paras 309 et seq. and 412; IntVG, §§ 2 and 3.

This conclusion has been nothing of a surprise. More remarkable and of greater practical significance is the fact that this mechanism has also been expanded to numerous other Treaty clauses which do not indicate any involvement of national parliaments in the decision making process. The Court and the IntVG have designed the parliamentary responsibility for integration as a general pattern referring to all instances of dynamic treaty development.⁴⁸ This affects all bridging clauses which allow for certain subject matters a transition from unanimity to majority voting or – with the same effect – from a special to the ordinary legislative procedure. This transition is to be decided by the European Council or the Council, usually with the consent or consultation of the European Parliament. In the eyes of the Court, the right of national parliaments to reject such a proposal, as it is provided for in two of these clauses,⁴⁹ is not an adequate degree of participation. All the more the other bridging clauses which do not involve national parliaments at all fail to meet this standard.⁵⁰ Consequently, under the IntVG the German representative in the Council or the European Council is bound to veto such a transition unless there has been a positive vote of the *Bundestag* on the matter.⁵¹ The same applies to a number of clauses which enable the Council or the European Council to expand the scope of EU competences, in particular to the option under Art. 83 para 1 (3) TFEU to identify additional areas of crime which shall be open to a minimum harmonization by EU law.⁵² Finally, and of particular importance, this pattern also includes the so-called flexibility clause in Art. 352 TFEU, which incorporates the implied powers-doctrine into EU law. Still accepted in the Maastricht-decision,⁵³ the Court took this time a more critical stance due to the fact that the scope of the clause has become broader, not being limited to objectives in the context of the Common Market anymore. Therefore, the Court concluded, it effectively comes close to a blanket authorization and must not be used without prior approval by the *Bundestag*.⁵⁴

In all these cases parliamentary responsibility for integration has not been, and could not be, handed over with the approval of the Treaty.⁵⁵ It remains persistent with a view to all those clauses which open the Treaty framework to a

48 Lisbon-judgment (n 3), paras 236 et seq. and 409 et seq.

49 See above n 39.

50 Lisbon-judgment (n 3), paras 317 et seq., 413-414 and 416.

51 § 4 IntVG with regard to the general bridging clause (Art. 48 para 7 TEU) and to the one on family law issues (Art. 81 para 3 TFEU); similarly §§ 5, 6 IntVG relating to the bridging clauses on CFSP-decisions (Art. 31 para 3 TEU), the multiannual financial framework (Art. 312 para 2 TFEU), labour law (Art. 153 para 2 TFEU), environmental law (Art. 192 para 2 TFEU) and enhanced cooperation (Art. 333 paras 1 and 2 TFEU).

52 Lisbon-judgment (n 3), paras 363 and 419; § 7 para 1 IntVG. Other clauses of this type addressed in § 7 IntVG and in the Lisbon-judgment are Art. 86 para 4 (extension of the powers of the European Public Prosecutor's Office) and 308 para 3 TFEU (amendments of the Statute of the European Investment Bank); cf. also Lisbon-judgment para 369 with regard to Art. 81 para 3 subpara 1 TFEU on the potential expansion of EU competences in family law. In addition, § 3 para 3 IntVG extends the same mechanism to the decision on a "common defence" of the EU under Art. 42 para 2 TEU.

53 Admittedly under the condition that it had to be applied in a restrictive manner, BVerfGE 89, 155 (210).

54 § 8 IntVG; Lisbon-judgment (n 3), paras 328 and 417.

55 See, in particular, Lisbon-judgment (n 3), para 245.

dynamic development, i.e. those clauses which effectively allow amending the scope and content of EU primary law and therefore threaten to overstretch the principle of conferral. That gives the *Bundestag*, compared with other national parliaments in the EU, an extraordinary position.⁵⁶ As a matter of constitutional law, Germany will not be legally bound by any act in application of these clauses unless it has been approved by the *Bundestag*. Where the Treaties do not provide themselves for such a reservation, the German representative in the Council or the European Council is not entitled to give his consent to any such act before being empowered to do so by the *Bundestag*. Normally this parliamentary approval has to be adopted by way of a statutory act under Art. 23 para 1 GG, in some cases even with a 2/3 majority.⁵⁷ For most of the special bridging clauses the Court and the IntVG settle for a simple decision of the *Bundestag* because in these cases the subject areas concerned are precisely determined and less sensitive.⁵⁸ The consequence, however, is ultimately the same. The obvious intention of the Treaties to facilitate a flexible and dynamic evolution of European primary law is clearly undermined by the systematic requirement of parliamentary consent by the *Bundestag*.⁵⁹

bb) Veto rights, emergency brake and subsidiarity control

A similar tendency of strengthening parliamentary responsibility for the integration process can be observed with regard to Treaty clauses which serve as a counterbalance against the integration process. An example is the above mentioned right of national parliaments to reject the initiative for an application of certain bridging clauses.⁶⁰ Originally, the German implementing legislation was designed so as to split up this right between *Bundestag* and *Bundesrat*, depending on whether the respective subject matter falls within federal or state jurisdiction. The Court quashed this rule because it compromised the overall responsibility for integration vested in the *Bundestag*.⁶¹ Consequently, under § 10 IntVG the right of the *Bundestag* to reject such initiatives is not anymore curtailed by considerations of internal competences. A second instance of this tendency concerns the so-called emergency brake procedures. Treaty clauses of this kind allow a Member State to invoke fundamental aspects of national interest in order to suspend the normal legislative procedure and refer the matter to the European Council. For

56 Philipp Kiiver 'German Participation in EU Decision-Making after the Lisbon Case' (2010) 10 German Law Journal 1287, 1290 and 1294; Stefan Martini 'Parlamentsbeteiligung im EU-Rechtsvergleich' in Arnould/Hufeld (n 4), pp 124 et seq.

57 §§ 2-4 and 7-8 IntVG.

58 Lisbon-judgment (n 3), para 320; §§ 5 and 6 IntVG, see already above n 51.

59 Cf. Ulrich Hufeld 'Europäische Integration und Verfassungsänderung' in Arnould/Hufeld (n 4), pp 27 et seq.

60 See above n 39. The importance of this negative veto right is, however, greatly reduced since the Court demands a positive parliamentary approval for the application of these clauses anyway.

61 Lisbon-judgment (n 3), para 415.

three such clauses relating to particularly sensitive policy fields⁶² the IntVG provides the *Bundestag* with the constitutional right to instruct the German representative in the Council to initiate this mechanism.⁶³ Again, the emphasis is that the *Bundestag* has to keep the ultimate control of all dynamic treaty developments with a profound effect on the democratic sovereignty of the German people.

The same notion characterizes, finally, the domestic implementation of the novel parliamentary subsidiarity control. It has been subject of the only substantive amendment of the *Grundgesetz* in reaction to the Lisbon Treaty. In accordance with Art. 8 of Protocol No. 2, the new Art. 23 para 1a GG gives the *Bundestag* the right to initiate the subsidiarity infringement procedure in its own responsibility, the Federal Government merely notifying the action on its behalf.⁶⁴ More significantly, this action is designed as a minority right which can be initiated by one quarter of the Members of the *Bundestag*.⁶⁵ This independence from the government supporting majority significantly adds to the practical availability of this instrument. Moreover, the Court has indicated that it expects the scope of the action to be broadly interpreted so as to include the crucial question of whether the challenged act falls within an EU competence in the first place⁶⁶ – a view explicitly adopted by the *Bundesrat* in the meantime.⁶⁷

c) Parliamentary involvement in European policy decisions

aa) Parliamentary positions and mandates

As we have seen, the core of parliamentary responsibility for integration relates to the dynamic evolution of primary law, i.e. to all developments affecting the procedural or substantive framework of EU decision making. When it comes to policy making within this framework, however, the matter looks different. There is only one instance of concrete policy decisions in the EU context for which the Lisbon-judgment has established the definite condition of the *Bundestag's* positive approval: The out of area deployment of German troops.⁶⁸ This aspect of

62 Art. 48 para 1 TFEU (social security rights); Art. 82 para 3 and 83 para 3 TFEU (harmonisation in criminal and criminal procedural law).

63 § 9 IntVG. This provision is based on paras 365, 400 and 418 of the Lisbon-judgment (n 3). Astonishingly, the wording of the judgment goes the other way round and demands that the representative in Council may exercise this right *only* on the instruction of the *Bundestag*. This, however, makes little sense and is possibly just an unfortunate phrasing. See also Birgit Daibler 'Die Umsetzung des Lissabon-Urteils des Bundesverfassungsgerichts durch Bundestag und Bundesrat' [2010] *Die Öffentliche Verwaltung (DÖV)* 293, 298; Halberstam and Möllers (n 16), p. 1244.

64 Accordingly, also the conduct of the case is left to parliament, see § 12 paras 3 and 4 IntVG.

65 Confirmed by the Lisbon-judgment (n 3), paras 403-404. Note that this constitutional rule applies only to the right to bring an action before the ECJ but not to the reasoned opinion under Art. 6 of Protocol No. 2. However, sentence 3 of Art. 23 para 1a GG allows to extend the same principle, by an act of parliament, to all parliamentary rights granted by the Treaties.

66 Lisbon-judgment (n 3), para 305.

67 BR-Drucks. 43/10(B) of 26 March 2010.

68 See already above n 35.

the ruling is certainly open to criticism.⁶⁹ The principle that any such deployment of the *Bundeswehr* requires (national) parliamentary approval has been developed by the Constitutional Court in earlier decisions⁷⁰ but without any clear basis in the constitution. To elevate this judge-made principle to a core element of the *Grundgesetz* absolutely safeguarded against amendment and integration is an extremely questionable way of petrifying the Court's own case law. As the TEU does not claim any binding availability of national armed forces for ESDP-operations, this reservation has no imminent consequences. Nevertheless, it imposes limits on all current attempts to enhance the efficiency of European military structures by way of an increasing technical integration and specialization of national forces and capabilities.⁷¹

Beyond this, however, the Constitutional Court has not established any general claim that policy decisions and, in particular, the adoption of secondary law by the EU require the approval of the *Bundestag*. The concept of responsibility for integration is not meaningless for this dimension.⁷² But it is only a soft responsibility, to be exercised by political means and not by a legal reservation of consent. In this respect the Lisbon-judgment has not changed the legal situation. Already since 1992, under Art. 23 para 3 GG the Federal Government has had to provide the *Bundestag* with an opportunity to state its position on legislative initiatives of the EU. This position has to be taken into account by the government during the negotiations in the Council, but it is not binding. A somewhat more detailed regulation was laid down in an interinstitutional agreement between *Bundestag* and Federal Government, based on the EUZBBG.⁷³ In 2009, in reaction to the Lisbon-judgment, this regulation was incorporated into the EUZBBG itself. In substance, however, little has changed. § 9 EUZBBG provides that the government has to take the parliamentary position as a basis for the negotiations. If essential elements of this position cannot be realized, the government must inform the *Bundestag* and endeavor to come to an understanding before the final decision is taken in the Council. However, § 9 EUZBBG explicitly reserves the government's right to deviate from the parliamentary position for important reasons of foreign or integration policy. Thus it becomes clear that parliamentary involvement in European matters does not reduce the government's position in the Council to an imperative mandate. This may be justified by the consideration that parliament is an ill-suited actor in the complex and subtle negotiations in the EU law making process and that, therefore, a binding mandate would effectively reduce the German and the *Bundestag's* influence on the outcome.⁷⁴ Nevertheless it is sometimes recommended to strengthen its

69 Cf. Daniel Thym 'Integrationsziel europäische Armee?' (2010) 45 *Europarecht* (Beiheft) 171, 175.

70 BVerfGE 90, 286 (381).

71 For these efforts see e.g. Protocol No. 10 on Permanent Structured Cooperation, including Art. 2 lit. c with the obligation to review national decision-making procedures.

72 Daibler (n 63), p 301.

73 See above n 6 and 8.

74 Benz and Broschek (n 24), p. 5; Halberstam and Möllers (n 16), pp 1253 et seq.; Martini (n 56), p 158; Annette E. Töller, *How European Integration Impacts on National Legislatures* (Center

position. Indeed, in some other Member States, government is kept on a shorter leash. This shows that the Lisbon-judgment has not generally catapulted the *Bundestag* to the forefront of national parliamentary scrutiny of EU matters. While the new prerogatives relating to dynamic Treaty evolution appear to be unique, the *Bundestag's* involvement in the ordinary decision making process remains rather modest compared with other EU countries.⁷⁵

bb) Information and committee structures

In order to enable the *Bundestag* to exercise its rights and prerogatives, Art. 23 para 2 GG obligates the Federal Government to keep parliament informed "comprehensively and at the earliest possible time". This obligation has been specified by the EUZBBG and the interinstitutional agreement annexed to it. In the 2009 reform the regulations of the agreement have been transferred into the statute, their substance further extended and formalized.⁷⁶ In essence, under these rules the Federal Government has to provide the *Bundestag* with all possibly relevant documents, regularly combined with comments and an evaluation of the compatibility of EU initiatives with the principles of subsidiarity and proportionality. In CFSP- and ESDP-affairs, these standards are somewhat reduced. Altogether, the formal rules on the flow of information leave little to be desired. In practice, of course, there remain difficulties. In particular, the handling of the Euro crisis and the so-called European Competitiveness Pact have provoked parliamentary criticism that the *Bundestag* was insufficiently informed and involved by the Federal Government.⁷⁷

The main problem, however, is not anymore the availability of the relevant information but the *Bundestag's* capacity to handle it. The current rules rather threaten parliament with an overload of information, all the more as meanwhile European and domestic law provide for two largely overlapping communication channels in the same time. Both the European institutions and the Federal Government are under the obligation to provide the *Bundestag* with all relevant documents. Observers therefore widely agree that external control powers and enhanced information alone are not sufficient to strengthen the role of national parliaments. Much depends on adequate internal structures, procedures and attitudes.⁷⁸ Traditionally, the *Bundestag* has shown a rather modest inclination to supervise European law making and to do so, if necessary, in conflict with the Federal Government.⁷⁹ This is also reflected by its committee structures. The

for European Integration, Working Paper Series 06.2 (2006), <http://www.ces.fas.harvard.edu/publications/docs/pdfs/toller.pdf>, p 20.

75 Cf. Benz and Broschek (n 24), pp. 16 et seq.; Kiiver (n 56), pp 1290 and 1294 et seq.; Martini (n 56), pp 124 et seq.

76 §§ 3-8 EUZBBG. Equivalent rules are laid down in § 13 IntVG.

77 *Süddeutsche Zeitung*, 11 March 2011.

78 Arnauld (n. 4), p. 78; Benz and Broschek (n 24), pp 5 et seq.; Isabell Hoffmann, *Bundestag auf Europäisch* (Bertelsmann Stiftung, Spotlight Europe 2010/08, www.bertelsmann-stiftung.de/spotlight), p 5; Alexander Koch, 'Grundsätze der Mitwirkung' in Arnauld and Hufeld (n 4), p 323; Martini (n 56), p 159; Töller (n 74), pp 19 and 21 et seq.

79 Benz and Broschek (n 24), pp 10 et seq.; Martini (n 56), p 134; Daniel Thym 'Parliamentary Control of EU-Decision-making in Germany. Supportive Federal Scrutiny and Restrictive

Committee on European Affairs (*Ausschuss für Angelegenheiten der Europäischen Union*), established under Art. 45 GG, is primarily focused on the more fundamental aspects of European integration. It also plays an important role in the coordination and evaluation of the incoming EU-related information. But it has not been delegated the powers to act consistently as the main forum for determining policy reactions on EU legislation and for exercising the formal rights accorded to the *Bundestag* in this context.⁸⁰ Rather, it has to share these functions with the subject-based standing committees. This medium degree of concentration of EU matters in the hands of the EU Committee has not been significantly changed since Lisbon. Accordingly, under the revised rules of procedure, the decision to make use of the new subsidiarity control mechanism normally has to be taken by the plenary, usually on the initiative of the competent standing committee.⁸¹

IV. THE RESERVATION OF FEDERALISM

The third constitutional reservation relevant in our context is the reservation of federalism, or more precisely: the respect for the internal federal system established under the German constitution. To protect the *Länder* from being effectively consumed by the proceeding shift of powers to the EU has been one of the major German concerns in the negotiations about the Constitutional Treaty and the Lisbon-Treaty. And although this aspect has not been specifically addressed in the Lisbon-judgment, both the Treaty and the judgment, followed by the German implementing legislation, have contributed to strengthening the formal protection of this principle.

While in substantive terms the focus of these efforts has been on the principle of subsidiarity and the delimitation of competences, the procedural aspect calls for an adequate participation of the *Länder* in the decision making process. Within the EU, the Committee of the Regions offers only very limited influence. Therefore, it is the national level of decision making that matters. The relevant rules dealing with this challenge have already been enacted in 1992/1993: Art. 23 paras 4 to 7 GG, complemented by the EUZBLG and an agreement between the Federal Government and the *Länder* governments.⁸² Except for the almost complete incorporation of the agreement into the EUZBLG⁸³ the 2009 reform has brought only minor changes to the substance of these provisions.

Regional Action' in: Olaf Tans, Carla Zoethout and Jit Peters (eds), *National Parliaments and European Democracy* (European Law Publishing, Groningen 2007), pp 61 et seq; Töller (n 74), pp 14 and 19.

80 This relative weakness of the EU Committee in the daily European affairs is often regarded as an obstacle for a more efficient role of the *Bundestag*. For an analysis, criticism and international comparison of the current situation see Arnould (n 4), p. 78; Benz and Broschek (n 24), pp 11 et seq. and 21; Hoffmann (n 78), pp 4 et seq.; Martini (n 56), pp 134 and 156; Töller (n 74), pp 13 et seq.

81 For the details see the rules of procedure of the *Bundestag*, §§ 93-93d.

82 See above n 7 and 8.

83 Now Annex to § 9 EUZBLG.

Within this framework, the *Länder* participation in European affairs is essentially realized through the *Bundesrat*, the second chamber in the German constitutional system. Both under Protocol No. 1 to the Lisbon-Treaty and under domestic law, the *Bundesrat* has essentially the same extensive right to be informed as the *Bundestag*.⁸⁴ Due to its function of representing the constituent states its active involvement is – in comparison with the *Bundestag* – more limited in scope but (partly) more forceful in its legal effect. Generally speaking, the *Bundesrat* is to participate in the national decision making process on European matters either if it would have to be involved in the case of an equivalent federal legislation⁸⁵ or if the subject matter falls within the domestic *Länder* competence. Like the opinion of the *Bundestag*, the *Bundesrat's* position has to be taken into account by the Federal Government in the EU negotiations. However, it has a somewhat stronger effect if the matter primarily affects the legislative powers of the *Länder* or their administrative structures and procedures.⁸⁶ In this case, Art. 23 para 5 GG requires the Federal Government to give "the greatest possible respect" to the position of the *Bundesrat*. Whether this can result in a strictly binding mandate, as the implementing statutory act assumes,⁸⁷ is not quite clear, but by all means the Federal Government is under a particularly strong duty to give reasons for any deviation. Moreover, if it is the core competences of the *Länder* which are affected – school education, culture or broadcasting – the Federal Government even has to delegate the exercise of German membership rights in the Council to a *Länder* representative which is designated by the *Bundesrat* and bound to follow its instructions. Even though the Federal Government has to be kept involved and the overall responsibility of the Federation to be respected, these rules secure a noticeable influence of the *Länder* via the *Bundesrat* on shaping the German approach to European legislative initiatives, in particular as far as their own jurisdiction is affected.

Beyond this well established position, Lisbon has brought about two further improvements. The first one is the subsidiarity control mechanism under Protocol No. 2 to the Treaty. The possibility to initiate this mechanism by giving a reasoned opinion or bringing an action before the ECJ is granted to second chambers no less than to first chambers of parliament.⁸⁸ Moreover, Art. 8 para 2 of Protocol No. 2 extends the legal standing to bring such actions to the Committee of the Regions, thus opening a second channel for regional concerns to be brought before the ECJ. It should be added, however, that this access to the ECJ is not entirely new. Already since 1993, domestic law has provided that, upon request of the *Bundesrat*, the Federal Government is bound to bring an action before the

84 Art. 8 of Protocol No. 1; Art. 23 para 2 GG; EUZBLG, Annex para II.

85 This is in fact a catch-all condition because the *Bundesrat* is comprehensively involved in federal legislation, though in different ways. Cf. Streinz (n 46), para 103.

86 Art. 23 paras 5 and 6 GG; §§ 5 and 6 EUZBLG.

87 § 5 para 2 EUZBLG provides that the government is bound to adopt the *Bundesrat's* opinion if it has been reaffirmed by a two-thirds majority.

88 Consequently, Art. 23 para 1a GG and § 11 IntVG make no difference in this respect between *Bundestag* and *Bundesrat*, apart from the reduced quorum which merely applies to the *Bundestag*, see above n 65.

ECJ if EU activities affect the *Länder* in areas of their exclusive legislative jurisdiction.⁸⁹

The second improvement is a consequence of the Lisbon-judgment. Though the Constitutional Court has not been specifically concerned with the position of the *Bundesrat*, all the above-mentioned parliamentary prerogatives established by the judgment refer to both chambers. Where the Court demands a parliamentary approval by way of a statutory act,⁹⁰ this act requires according to Art. 23 para 1 GG the consent of the *Bundesrat*. And where a simple decision of the *Bundestag* is sufficient, the Court and the IntVG demand an additional *Bundesrat* approval if that would be necessary for an equivalent federal legislation or if the legislative competences of the *Länder* are affected.⁹¹ Under similar conditions the parliamentary right to reject the application of bridging clauses or to initiate an emergency brake clause has been extended to the *Bundesrat*.⁹² Thus, to a large extent the *Bundesrat* benefits from the strengthening of the *Bundestag's* position based on the considerations of democratic sovereignty. As the *Bundesrat* traditionally has been much more active in European affairs than the *Bundestag* and, moreover, may be dominated by different majorities than the Government, this federal side effect of the judgment might prove to have the greater impact.⁹³

It should be noted, however, that in the German executive federalism it is the *Länder governments* which are represented in the *Bundesrat* and, therefore, benefit from its institutional powers. The *Länder parliaments (Landtage)*, by contrast, remain in a much weaker position at the very end of the chain. They are essentially limited to supervising the activities of their governments in the *Bundesrat*, and only to the extent provided for by the respective internal *Länder* law. Here the situation is not uniform. Usually, the *Länder* governments are under an obligation to inform their parliaments at least on EU matters of specific importance; it is also their responsibility to involve them in the consultation process of the new subsidiarity control mechanism. In some cases they have to take parliamentary positions into account. However, neither can the *Länder* parliaments directly initiate the subsidiarity control nor are their governments subject to an imperative mandate in EU affairs.⁹⁴ This fundamental weakness has not been cured by Lisbon.

V. SUMMING UP

Lisbon has not been a revolution – neither the Treaty nor the judgment of the German Constitutional Court. But it has resulted in a shift in the relationship between European integration and German constitutional law. The Treaty has cautiously sought to reinforce its roots in national democracy and to upgrade the

89 § 7 EUZBLG.

90 See above n 57.

91 §§ 5 para 2 and 6 para 2 IntVG. See above n 58.

92 §§ 9 para 2 and 10 para 1 IntVG. Cf. already above n 61 and 62.

93 Cf. Benz and Broschek (n 24), p 10; Kiiver (n 56), p 1295; Martini (n 56), pp 134 et seq.

94 Arnauld (n. 4), pp 87 et seq.

involvement of national parliaments in the institutional overall framework of the Union. This has been achieved by a stronger and more visible verbal recognition, by extended standards of communication between EU institutions and national parliaments and by the establishment of a few parliamentary veto rights. The essential novelty, however, is the direct involvement of national parliaments in the new subsidiarity control mechanism.

Domestic law, on the other hand, has not confined itself to taking up these reforms and implementing the necessary institutional and procedural rules for their realization. The German Constitutional Court has seized the opportunity to clarify its view on the constitutional conditions and limits of European integration. Building, in particular, on its earlier Maastricht-decision it has deployed the principles of sovereign statehood and democracy as constitutional guidelines and red lines for German participation in the integration process. It has concluded that it is indispensable for the EU to remain substantially based on the legitimation provided by the living national democracies within its Member States. The steps taken by the Lisbon Treaty in this direction are helpful but they do not, and cannot, resolve the fundamental tension between European integration and nation-based legitimation. Neither Germany as a Member State nor, in particular, the German parliament are constitutionally entitled to hand over their "*Integrationsverantwortung*", i.e. the final responsibility to determine and control the character and further development of the integration process.

Thus, although the Court has endorsed the European Treaties in their current state, it has equally made clear that, at least in some respects, the process of integration approaches its outer limits. Blanket authorizations, future steps from intergovernmental to supranational decision making or further shifts of substantive powers to the EU must not result in the establishment of a European federal state. But it is not this formal and somewhat crude antithesis which ultimately matters. In the view of the Court, the *Grundgesetz* does not authorize an integration which goes as far as to reduce the Member States and their parliaments formally or effectively to subordinated entities lacking the essential powers of democratic self-rule. This legal reservation will noticeably limit Germany's readiness to engage in future Treaty amendments.

For the same reason, the Court has trimmed down those Treaty clauses which allow for a dynamic evolution of primary law without a formal amendment procedure. Although the judgment ultimately accepts these clauses, it does so under the condition that domestic law subjects their application to the approval of the German *Bundestag*. This requirement has been diligently implemented by the domestic legislation accompanying the ratification of the Lisbon-Treaty in 2009. With this compromise the Court has put the *Bundestag* in place as a brake for all government- or bureaucracy-driven tendencies of further expanding or deepening integration. As far as the Treaties favors such tendencies, the Lisbon-judgment keeps them in the parliamentary arena where they are subject to public discussion and decision. Moreover, as a side effect, the regular involvement of the *Bundesrat* in this mechanism also reaffirms the federal dimension of the *Grundgesetz*.

As a result, we are able to distinguish three different levels in the attitude of German constitutional law to the integration process as it has emerged in the wake of Lisbon. First of all, the step from an association of sovereign states

(*Staatenverbund*) to a European federal state, or any equivalent consumption of democratic self-rule on the national level, constitute the absolute outer limit of integration which cannot be crossed on the basis of the *Grundgesetz*. Secondly, the formal or informal evolution of the Treaty framework is a parliamentary prerogative and, therefore, a relative limit. This decision to maximize the formal parliamentary control of integration policy is the most characteristic trait of the Lisbon-judgment. Finally, the participation in decision making within the established Treaty framework remains largely the legitimate function of the Federal Government with a relatively moderate degree of parliamentary control.

Of course, one may question the theoretical premises which led the Court to its conclusions. But even if they are taken for granted there remains the problem that none of these three categories can easily be distinguished from the others. In particular, despite all efforts of the Court the outer limits of integration remain fuzzy. Inevitably, there are smooth transitions between the concepts of a *Staatenverbund* and a federal state. Neither the inalienability of sovereign statehood nor the principle of democracy, as understood by the Court, offer a tangible delineation between admissible integration and inadmissible disempowerment. This is additionally aggravated by the judgment's obscurity as to the relationship between the two arguments of sovereign statehood and democracy. Accordingly, it remains unclear to what extent the outer limits of substantive integration sketched in the judgment are static or flexible, i.e. open to development along with the democratic standards attainable on the European level. The leeway left by the *Grundgesetz* for future steps of integration is therefore still a matter of substantial uncertainties.

Similarly, the distinction between dynamic treaty evolution and the regular application of Treaty-based law making powers is less evident than it seems. It is difficult to see why the challenge for sovereign democracy should be fundamentally greater in the case of some of the narrower bridging clauses than in the case of the sometimes rather broad legal bases for secondary legislation such as the internal market clause in Art. 114 TFEU. Therefore, it may well be asked if the scope of the parliamentary prerogatives established by the Lisbon-judgment and the IntVG is really convincing. But that is a theoretical question. For practical purposes this matter has been decided. As a result, on the domestic level Lisbon has clearly improved the position of *Bundestag* and *Bundesrat* in European affairs. How much effect this improvement will have on the European level remains to be seen.

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