



Title of Thesis

Separation of Powers the 'German Way'? The relationship of the German Federal Government and Parliament in the EU context

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Summary of Thesis:

The thesis uses the doctrine of the separation of powers as the conceptual framework to analyse the jurisprudence of the German Federal Constitutional Court on EU matters from its early decisions to the latest cases on the European Stability Mechanism. The court's decisions have been widely discussed in terms of the impact of European integration on democracy and democratic participation at the national level. The aim of the thesis is to put the court's jurisprudence into a different context by reading it from the perspective of separation of powers in order to assess the impact of EU integration on the relationship between national institutions, specifically the German Federal government and parliament.

The analysis will show that while the decisions on the ESM have overall strengthened the position of the Federal parliament in the particular subject-matter of those cases (budgetary control), this should not necessarily be understood as a re-definition of the relationship between the Federal government and parliament in the context of EU matters as a whole.

By using the separation of powers as a framework for analysis, it becomes apparent that while the German constitutional system may seem to have acknowledged the different constitutional nature of the EU, the political institutions as well as the Federal Constitutional Court have yet to draw the necessary consequences for the relationship between the Federal government and parliament at national level: by treating EU matters merely as a 'special kind' of foreign affairs, the fundamental alteration of the balance of power between the executive and the legislative caused by European integration has gone unchecked by the German Federal Constitutional Court and has led to constitutional practices which arguably undermine not only the democratic accountability of the actions of the German Federal government but also the concept of separation of powers itself.

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Glossary

| | |
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| <i>Auswärtige Gewalt</i> | The term used in Germany for 'Foreign Affairs' - the word 'Gewalt' (= 'power') is commonly taken to have no connections whatsoever to the concept of separation of powers, the use is purely traditional |
| <i>Bundeskanzler</i> | The Federal Chancellor, the head of the German Federal Government |
| <i>Bundespräsident</i> | The Federal President, elected for five years by the Federal Assembly which consists of the members of the <i>Bundestag</i> and an equal number of representatives from the parliaments of the Länder (states, cf. below). |
| <i>Bundesrat</i> | Federal Council – upper house of the federal parliament, members are appointed by the governments (= executives) of the German Länder (states, cf. below). |
| <i>Bundesregierung</i> | Federal Government – appointed by the Federal president on the nomination of the Bundeskanzler (= Federal Chancellor, the head of the Federal Government) |
| <i>Bundestag</i> | Federal Diet – lower house of the federal parliament, directly elected every four years |
| <i>Bundesverfassungsgericht</i> | Federal Constitutional Court |
| <i>Gesetzesvorbehalt</i> | General statutory reserve: according to the <i>Rechtsstaat</i> principle (cf. below), public authorities need a statute/ statutory basis for any and all actions that may impact on human rights |
| <i>Gewaltenteilung</i> | The technical term used by German scholars for 'separation of powers' |
| <i>Grundgesetz</i> | Basic Law, the current German Constitution Please refer to the Annex for a compilation of provisions of the <i>Grundgesetz</i> in German and English as cited in the thesis |
| <i>Grundsatz der funktionsgerechten Organstruktur</i> | ' <i>principle of the function appropriate institutional structure</i> ' - a phrase coined in an attempt to replace the seemingly old-fashioned separation of powers. |
| <i>Land/ Länder</i> | The label used to refer to the federal states comprising the German federation. 'Land' is the singular, Länder the plural. |

***Rechtsstaat
principle***

The technical term used in the German legal system for its specific conceptualisation of the more general idea of the rule of law. As the concept differs substantially from the English notion of the 'rule of law', the German original will be used throughout the thesis.

| Abbreviation | Term |
|--------------|---------------------------------------|
| BVerfG | Bundesverfassungsgericht |
| EFSF | European Financial Stability Facility |
| ESM | European Stability Mechanism |
| GG | Grundgesetz |

Introduction

*“... For today there are practical problems of the control of government every bit as important and difficult as in the days of Locke, Montesquieu, or the Founding Fathers. [...] we cannot merely accept without question the view that the continued concentration of power into the hands of cabinets and presidents is inevitable and cannot be restrained. The concentration of **more** power into such hands, or of certain sorts of power, may be “inevitable”, given certain assumptions about the military, social, and economic needs of modern societies, but which powers, how much of them, and how they can be effectively limited, are the questions we should be asking. The detail of the theories of constitutionalism may be rejected as no longer applicable, but the **ethos** of constitutionalism remains; we still believe in “limited government”, but we do not yet see how the limits are to be applied in modern circumstances. ...”¹*

¹ MJC Vile, *Constitutionalism and the Separation of Powers* (2nd edn, Liberty Fund 1998) 11–12 emphasis in the original.

The 2008 financial crisis caught the EU and its members unprepared and tested their commitment to the 'project' that is European integration at a profound level. It also revealed some inherent weaknesses in the set-up of the currency union that the members of the Eurozone proceeded to fix. The results of those efforts were initially the so-called European Financial Stability Facility (EFSF, intended as a temporary relief) and then subsequently the so called European Stability Mechanism (ESM) and the Fiscal Treaty. In particular the latter was controversial, as many Member States felt that it interfered greatly with their budgetary autonomy.

In Germany, the EURO crisis and the creation of the above mentioned mechanism has given rise since 2010 to a series of so far more than eleven decisions that, for the first time, show a marked focus on the *Bundestag*² and its role and responsibilities when it comes to decision-making in the European context. The seven decisions that are the particular focus of this thesis were issued between September 2011 and March 2014 and dealt with the challenges brought partly against the ratification of the treaties in questions (in the tradition of the decisions on the Maastricht and Lisbon treaties) and partly against decisions of the *Bundestag* under the EFSF and the ESM, against the statute detailing the procedure as to how the *Bundestag* would be involved in decision making in this context as well as against the activities of the *Bundesregierung*³ in the run-up to the ratification of the ESM and the Fiscal Treaties. Taken together, the decisions provide a unique opportunity to track within the same treaty/ treaty system the impact of the Court's approach to the relationship between the *Bundesregierung* and the *Bundestag* in EU matters along the whole possible range of interaction:

- the behaviour in particular of the *Bundesregierung* during the negotiations prior to the ratification of a treaty,
- the content of the treaty - its compatibility with the *Grundgesetz*⁴ reviewed at the stage of ratification,

² Federal Diet, the elected lower house of the German federal parliament.

³ The German Federal Government.

⁴ The German Federal Constitution, the 'Basic Law' of 1949

- review of the domestic legislation providing the procedure to enable the implementation of the obligations arising from the treaty,
- and, lastly, the practice arising from the use of the *Bundestag*'s new participation rights laid down in that legislation in the 'day-to-day' activities of the international institutions created.

After the decision of September 2011 was issued, the *Bundestag* convened in order to revise the statutes concerning German participation in the EFSF framework. The leader of the CDU party group⁵, Volker Kauder, opened the debate by hailing the decision as a 'paradigm shift' in the relationship between the *Bundesregierung* and the *Bundestag* in matters of parliamentary scrutiny.⁶ And indeed, at first glance these cases appear to recast the relationship between the *Bundesregierung* and the *Bundestag*: the new parliamentary 'reserve' on matters of budgetary responsibility created by the *Bundesverfassungsgericht* requires the *Bundestag* to have a rather active role in the decision-making processes, something that the Court had so far considered as contrary to the intentions of the *Grundgesetz* regarding European matters and Foreign Affairs. For once, effective *ex ante* decision-making power in the European context seems to be within its reach.

A. Relevance of the thesis

This thesis will investigate whether the ESM cases of the *Bundesverfassungsgericht* constitute a shift in the Court's approach as to how it defines the relationship of the *Bundestag* and the *Bundesregierung* in the European context by using separation of powers as the analytical framework. This investigation will be valuable for the following three reasons.

⁵ Then as now the majority member of the government coalition.

⁶ debate of 29 September 2011; Gregor Gysi (then leader of the opposition party 'Die Linke') on the other hand heavily criticised the level of secrecy still involved under the new regime. Deutscher *Bundestag*, 'Protocol of the 130. plenary session of the 17th *Bundestag*' (2011) Plenary Protocol 17/130 15204 and 15213 respectively
<http://dipbt.bundestag.de/dip21.web/searchDocuments/plpr_search_result.do?selId=448&method=select&offset=0&anzahl=100&sort=4&direction=desc> accessed 30 May 2015.

1. A fresh outlook at the decisions of the *Bundesverfassungsgericht* in the European context

Firstly, this analysis will contribute to the debate on the impact of European integration on the legal and constitutional systems of the Member States by providing a fresh outlook on the cases of the *Bundesverfassungsgericht*.

Cases of the *Bundesverfassungsgericht* have always solicited the attention of academics dealing with European integration. In the past, that attention has primarily been focused on the Court's comments regarding the principle of democracy, sovereignty, limits to European integration and the Court's conceptualisation of the relationship between the European Union and its Member States, specifically Germany and its constitution. Those cases have contributed sometimes profoundly, sometimes provocatively, to the debate among academics. Most recently however, arguments have been made that the focus on democracy and sovereignty deadlocks the debate because it forces the participants to classify themselves along labels they may not subscribe to.⁷

Moreover, the ESM cases deal primarily with the relationship of the *Bundesregierung* and the *Bundestag* at the domestic level. In particular they deal with how much involvement the *Bundestag*, a.k.a. the parliament, *should* have. This points towards using the separation of powers as the framework for analysis, a theory that is embedded in the constitutional make-up of all Member States but has been neglected so far, in particular by lawyers.⁸ Using the separation of powers as the analytical framework will highlight that an important element of the impact of the *Bundesverfassungsgericht*'s previous as well as the most recent jurisprudence has been neglected and underestimated so far: the repercussions European integration has had on the relationship of the national parliaments and governments at the stage prior to EU level decision-making. The analysis here will thus complement the analyses already conducted with a view on democracy by enabling an analysis of the situation in one particular Member State and within the decision-making framework created by its particular constitution.

⁷ Anneli Albi, 'Erosion of Constitutional Rights in EU Law: A Call for "substantive Co-Operative Constitutionalism" - Part 2' (2015) 9 Vienna Journal of International Constitutional Law 291, 308 and 313.

⁸ Anneli Albi, 'From the Banana Saga to a Sugar Saga and Beyond: Could the Post-Communist Constitutional Courts Teach the EU a Lesson in the Rule of Law?' (2010) 47 Common Market Law Review 791, 793.

This in turn will enable a more detailed analysis of the role of the legislative and the executive, how they cooperate, how they may or may not compensate for the impact of European integration, and in particular how national constitutional courts influence and shape that relationship through their jurisprudence. This analysis will also reveal whether the principle of the separation of powers – considered a cornerstone of the constitutions of all Member States – should follow suit in the development already undertaken for the notions of democracy and sovereignty and be adapted to the particular institutional and organisational framework that is the European Union.

2. A legal analysis of the separation of powers

Secondly, the analysis in this thesis will be conducted deliberately from a legal perspective and with a particular focus on the jurisprudence of the *Bundesverfassungsgericht*. While political scientists have considered the separation of powers in the European context to a considerable degree, investigations by lawyers have been noticeably absent. As will be noted in Chapter II of this thesis, the impression for example among present-day German legal scholars is that the separation of powers may be a valuable subject to pursue as a theoretical exercise, but that it has very little impact in practice.⁹ However, by conducting an investigation into the jurisprudence of the *Bundesverfassungsgericht* within traditional contexts (cf. Chapters III and IV), it will become apparent that this negative impression is not borne out in practice. Quite the opposite: the principle has had considerable practical impact on the jurisprudence of the *Bundesverfassungsgericht* and decisively shapes the relationship of the *Bundestag* and the *Bundesregierung* also in the European context. The cases surveyed demonstrate that the use the *Bundesverfassungsgericht* makes of the principle of the separation of powers provides answers a number of crucial, practically important questions which in turn have wider impact, for example on the realisation of the principle of democracy, the rule of law and human rights protection. In that, the separation of pow-

⁹ Cf. i.a. Fritz Ossenbühl, 'Aktuelle Probleme Der Gewaltenteilung' (1980) 33 Die Öffentliche Verwaltung 545, 545; Walter Leisner, 'Die Quantitative Gewaltenteilung' (1969) 22 Die Öffentliche Verwaltung 405, 405; NW Barber, 'Prelude to the Separation of Powers' (2001) 60 The Cambridge Law Journal 59, 59; Eric Barendt, 'Separation of Powers and Constitutional Government' [1995] Public Law 599, 600.

ers proves its value as an institutional theory and provides a further argument for an investigation into its potential uses in the European context.

The particular emphasis on the jurisprudence of the *Bundesverfassungsgericht* is due for once to the fact already pointed out above that the Court's contributions to the debate on European integration have so far been very fruitful. It is therefore worth exploring what contribution decisions of the *Bundesverfassungsgericht* may make to other aspects of the debate. Furthermore, an analysis of the jurisprudence of the *Bundesverfassungsgericht* is pivotal within the confines of a legal analysis of the German constitutional system. As in all constitutional systems with a constitutional Court, the text of the *Grundgesetz* by itself is only of limited use – one needs to analyse the jurisprudence to get an accurate impression of what the legal framework for the interaction of the institutions actually is and how it shapes the behaviour of those institutions and the political actors involved. In Germany, the impact of the decisions of the *Bundesverfassungsgericht* on the German constitutional system and the political process are particularly strong. This is usually attributed to the powerful position the Court has in the constitutional system and to the broad range of remedies that give access to the Court.

Roughly speaking, the remedies allowing access to the *Bundesverfassungsgericht* fall into two categories: those that are similar to judicial review in that they review the 'products' of the activities of the constitutional institutions and those where the *Bundesverfassungsgericht* is asked to act as a neutral arbiter to resolve disputes among the constitutional institutions. The remedies in the first category allow the *Bundesverfassungsgericht* to review the constitutionality of statutes, individual administrative decisions as well as Court decisions on the application of the executive of both the federal and Land¹⁰ level, members of the *Bundestag*, courts and individuals in varying degrees.¹¹

¹⁰ The German regions/ states are referred to as *Länder* (plural) or one *Land* in the singular.

¹¹ Abstract and concrete review of statutes, constitutional complaints, inter-institution-disputes, Article 93 and 100 (1) *Grundgesetz*.

As an arbiter, the *Bundesverfassungsgericht* mediates disputes between the federal level and individual Länder and between federal constitutional institutions.¹² From the perspective of the opposition in the *Bundestag*, this represents a veritable plethora of options with which to have the actions of the executive and the *Bundestag* majority reviewed, in particular if it can rely on the support of a Land executive due to party allegiances. Actions may be brought against statutes adopted against the strong views of the opposition,¹³ specific actions of the members of the other institutions, e.g. the Bundeskanzler,¹⁴ *Bundesregierung*¹⁵ or Bundespräsident,¹⁶ or even against the *Bundestag* itself by one of its members.¹⁷ And it is not only the members of the opposition who make use of these remedies. Most of the ESM cases have been brought by individual members of the *Bundestag* from across the benches and concerned citizens.

Due to the availability of so many remedies to so many potential applicants every single major, and most of the minor, political decision in the history of post-war Germany has been reviewed by the *Bundesverfassungsgericht* – and sometimes the results have been very controversial and not necessarily to the liking of the applicant, the respondent, the public or neither party.¹⁸ However, the result was a thorough constitutionalisation of the German legal system, down to the darkest recesses of the administrative sphere, even if compliance was only offered out of fear of being publicly humiliated by the *Bundesverfassungsgericht*.

Unfortunately, a very regrettable downside of this process has been the 'juridification' of a considerable range of political processes that in other countries would be firmly in the hands of the political institutions. Moreover, it is by now a well-established pattern

¹² Especially the so-called Federation-Land dispute (Bund-Länderstreit) and the inter-institutional dispute (Organstreit), Article 93 *Grundgesetz*.

¹³ Cf. e.g. the Bavarian application against the Civil Partnership Act pushed through by the Social-Democrat/ Green party government in: BVerfG, 'Lebenspartnerschaftsgesetz' [2002] BVerfGE 105, 313.

¹⁴ Federal Chancellor, the head of the Federal Government.

¹⁵ BVerfG, 'Duty to Inform the *Bundestag* (ESM)' [2012] BVerfGE 131, 152.

¹⁶ Federal President

¹⁷ Cf. e.g. the inter-institution dispute brought by a single MP against the *Bundestag*'s decision to remove him from his committee BVerfG, 'Wüppesahl' [1989] BVerfGE 80, 188.

¹⁸ Hans Vorländer, 'Regiert Karlsruhe Mit? Das *Bundesverfassungsgericht* Zwischen Recht Und Politik' (2011) 61 *Aus Politik und Zeitgeschehen* 15.

of behaviour of political actors to use the remedies extensively – the proverbial '*Gang nach Karlsruhe*'/ '*trip to Karlsruhe*' (the town in which the seat of the *Bundesverfassungsgericht* is located) has become the method of choice of German politicians for the settlement of political disagreements and politicians rather wait for the *Bundesverfassungsgericht*'s decision than to dare propose a non-judicial resolution. Indeed, in quite a few cases a politically 'hot' question was shifted to the Court which was then in the unenviable position to have to take the blame for the inability of the politicians to make a decision themselves.

The repercussions for the constitutional system are even more profound. With every decision, the political room to manoeuvre becomes smaller and smaller as the *Bundesverfassungsgericht* – unlike the US Supreme Court – does not subscribe to a 'political question' doctrine. Instead, the Court uses the doctrine of separation of powers in order to define the line between acceptable exercise of its review powers under the *Grundgesetz* and unacceptable encroachment onto the legislative's or the executive's sphere of decision-making. As with all good intentions, however, this does not always work out in practice and the Court has been heavily criticised for being inappropriately activist or for not being activist enough – sometimes even in the same case.¹⁹ The drawback for the political institutions is that, whichever side of the line they consider the decision to have ended up on, it binds them and defines the parameters for their future actions.

For the present context however, these considerable disadvantages add value to the analysis conducted here as it enables an evaluation of the Court's own contribution to the situation at hand. Indeed, the Court may turn out to be a far more determined obstacle to the *Bundestag* getting more involved than the *Bundesregierung*.

¹⁹ Cf. e.g. the decisions on abortion, the crucifix in classrooms, the civil partnership act, the headscarf decision, to name but a few -BVerfG, 'Schwangerschaftsabbruch I' [1975] BVerfGE 39, 1; BVerfG, 'Schwangerschaftsabbruch II' [1992] BVerfGE 88, 203; BVerfG, 'Kruzifix' [1995] BVerfGE 93, 1; BVerfG, 'Lebenspartnerschaftsgesetz' (n 13); BVerfG, 'Kopftuch Ludin' [2003] BVerfGE 108, 282.

3. The wider contribution

The thesis also connects to the wider debate on the role of national parliaments in European level decision-making processes. For a considerable time, academics have expressed concern that the impact of European decision-making has had a particularly negative impact on the level of influence national parliaments have managed to retain.²⁰ Once decisions have been taken at European level, national parliaments have very few options for the preservation of national values.²¹ Hence, the focus has shifted to decision-making at European level. The Lisbon treaty represented the culmination of years of effort aiming to increase the involvement of national parliaments in the EU's own decision-making processes. However, it is equally, if not more, important to involve the national parliaments also at the stage *prior* to that, i.e. in the decision-making processes at national level. However, research conducted in particular by political scientists revealed that the effectiveness of such *ex ante* rights depends on an intensive cooperation between the national parliament and government as the latter tends to be in a 'gatekeeper' position, partly because it still largely controls the flow of information to the parliament,²² partly because it largely controls the parliament's agenda: for example in March 2015, the UK House of Commons European Scrutiny Committee published a report that heavily criticised the British government for i.a. refusing to schedule debates on controversial European issues:

*"... It was particularly ironic [...] that at the same time as treating the House's EU scrutiny process in such a cavalier way UK Ministers were speaking across the EU extolling the importance of national parliaments in providing democratic legitimacy for the EU. ..."*²³

²⁰ Tanja A Börzel and Carina Sprungk, 'Undermining Democratic Governance in the Member States? The Europeanization of National Decision-Making' in Ronald Holzhaacker and Erik Albæk (eds), *Democratic governance and European integration: linking societal and state processes of democracy* (Edward Elgar Publishing 2007) 113–114.

²¹ Albi (n 8) 793; Albi (n 7) 320 and 322.

²² Börzel and Sprungk (n 20) 119.

²³ UK Parliament, 'Report Strongly Critical of Government and BBC' (*European Scrutiny Committee*) <<http://www.parliament.uk/business/committees/committees-a-z/commons-select/european-scrutiny-committee/news/scrutiny-reform-follow-up-and-legacy-report/>> accessed 31 March 2016.

In light of the efforts made with the Lisbon treaty to involve national parliaments more in the process of European decision-making, these findings are particularly disappointing. While a lot of effort has been made to raise the 'democratic credentials' of the European Union, the governments of the Member States have neglected to maintain their previously high standards at domestic level. As the HC Committee pointed out, this endangers the legitimacy of decision making not only in the national context, but also at European level. This is made even more disappointing by the fact that this is an issue where the blame cannot be laid at the door of the European Union: the Member States are entirely in control of their national decision-making processes and of how they shape the relationship between the government and the parliament.

It is at this stage where the particular combination of a *legal* analysis conducted within the framework of the separation of powers and with a particular view to the practical implementation and application by national constitutional courts as conducted in this thesis will make a valuable contribution to the already existing debate and provide practical solutions that neither violate the obligations of the Member States under EU law - nor fundamental precepts of their national constitutional systems that are very much worth preserving.²⁴

B. Methodology

The thesis will adopt a positivist approach to the analysis of the jurisprudence of the *Bundesverfassungsgericht* and the relating academic literature, strongly influenced by the methodological approach prevalent in the German civil law tradition of so-called 'juristic hermeneutics' (*Juristische Methodenlehre*) in order to enable an evaluation from 'within the system'.²⁵ The analysis will explore the research question raised above inductively by first establishing the theoretical background and the particular context of German constitutional law for the interaction of the *Bundestag* and the *Bundesregierung* (Chapters I-IV) before proceeding to the evaluation of how the ESM cases fit

²⁴ Albi (n 7) 318.

²⁵ Robert Cryer, *Research Methodologies in EU and International Law* (Hart Publishing 2011) 38.

into the existing conceptual framework as created by the *Bundesverfassungsgericht's* jurisprudence (Chapters V-VII).

C. Chapter outline

The thesis is divided into three parts:

Part I will look at the historical and theoretical roots of the German constitutional tradition with regard to the separation of powers. The idea to divide state power is as old as organised civilisation. Already Aristotle pondered the question on how to organise the activities of government. His approach was largely descriptive in nature, reflecting the practical examples he saw around him. To him, it was more a question of a sensible and efficient allocation of functions that had to be fulfilled in every state – with the division being based on reasons like geography, expertise, or indeed religion or political division.²⁶ His allocation of various tasks to specific decision-making bodies did not follow a consistent and systematic theory. However, once he integrated this concept with the theory on mixed constitutions, it gained momentum for the purposes of distributing power among classes. The intended objective was to create a stable system of government as well as allocate functions and tasks to those best suited for them. The integration of classes, i.e. social power, resulted in a practically effective system of mutual checks and balances in very literal sense.²⁷

Over the course of subsequent centuries, Aquinas, Grotius, Bodin, Hobbes and Pufendorf among others commented on how to organise state power, in particular with respect to dividing it.²⁸ What changed was the cultural and historical context as well as the nature of the 'sphere' within which the theory was intended to operate: the separation of church and state, the detachment of secular power from its supposedly divine origin, the emergence of the concept of the 'state', the notion of popular sovereignty and the differentiation between the constituent power of the people and the consti-

²⁶ Themistokles D Tsatsos, *Zur Geschichte Und Kritik Der Lehre von Der Gewaltenteilung* (Carl Winter Universitätsverlag 1968) 11 and 14.

²⁷ *ibid* 20.

²⁸ Tsatsos (n 26); Udo Di Fabio, '§ 27: Gewaltenteilung' in Josef Isensee and Paul Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, vol II: Verfassungsstaat (3rd edn, Müller 2004).

tuted power of the monarch are only a few of the fundamental upheavals theorists had to cope with over time.²⁹

Chapter I will Locke's *Second Treatise of Government*, Montesquieu's *De l'esprit des lois* and the *Federalist Papers* by Hamilton, Madison and Jay.³⁰ These writings represent the transition from mediaeval systems of government towards modern ones based on constitutions. To this day the writings of Locke, Montesquieu and the Federalists are credited with being *the* theoretical foundation for any modern theory on the separation of powers and its practical interpretation and application within present-day constitutional systems.³¹ As Chapters III and IV will demonstrate, this is also true for the current German system.

With the French and American revolutions, concepts like the system of mixed constitutions, the notion of a social contract, etc. that had constituted a common theoretical foundation for the constitution of the relationship between state and society were swept away.³² Written constitutions introduced values like democracy and rule of law and became the textual foundation for the institutional framework. As of that point, in particular the separation of powers was interpreted and conceptualised in the light of the respective constitutional system the scholar worked with.

Chapter II will therefore explore the reception of the separation of powers in the German constitutional tradition from the 19th century through to present-day conceptualisations. German scholars of the 19th century were rather critical vis-a-vis the separation of powers, largely because the pursuit of national unity impeded the reception of the separation of powers as it seemed to threaten the unity of the state they were hoping to create.³³ Instead, they favoured concepts like absolute (monarchical) and

²⁹ Tsatsos (n 26) 22 and 28.

³⁰ John Locke, *Second Treatise of Government* (1690); Charles de Secondat Baron de Montesquieu, *De l'Esprit Des Lois* (Firmin Didot frères, fils et cie 1748); Alexander Hamilton, John Jay and James Madison, *The Federalist* (George Wescott Carey and James McClellan eds, Liberty Fund 2001).

³¹ Instead of many, please cf. Vile (n 1) 346. Rather neglected in this context are for example i.a. Immanuel Kant, Abbe Sièyes and Jean Jean-Jacques Rousseau.

³² Tsatsos (n 26) 11 and 14.

³³ Kay Waechter, *Geminderte Demokratische Legitimation Staatlicher Institutionen Im Parlamentarischen Regierungssystem: Zur Wirkung von Verfassungsprinzipien Und Grundrechten Auf Institutionelle Und Kompetenzuelle Ausgestaltungen* (Duncker & Humblot 1994) 52–53.

then people's sovereignty and either rejected the separation of powers or tried to re-conceptualise it to integrate it into their notions of nature and purpose of a state and its constitution.³⁴ In combination with a methodological shift towards positivism, this resulted in a theoretical and conceptual crisis of German constitutional law thinking during the Weimar Republic. The fundamental reorientation of the discipline as a whole had major repercussions for constitutional law as it is theorised and practised under the *Grundgesetz*.³⁵

In order to provide the background for the analysis of the implementation and enforcement of the separation of powers within the current constitutional system by the *Bundesverfassungsgericht* (Chapter III and IV), Chapter I will establish the common themes in the works of Locke, Montesquieu and the Federalists in order to explore in Chapter II how they were carried forward, amended or changed after the reception of the separation of powers by the German constitutional tradition of the 19th century through to present-day conceptualisations.

Part II will investigate how the theory as explored in Part I has been implemented into, and applied in, the *Grundgesetz's* system of constitutional government. As could be seen in Chapter II Section C, present-day German authors commonly perceive the theory to be of little practical use. The aim of this Part is to investigate whether that is true and thus to evaluate the theory's practical impact on the German constitutional system firstly with regard to the general domestic context (Chapter III) and then with regard to the area of Foreign Affairs (Chapter IV).

The thesis will continue to pursue the questions set out for the investigation in Part I in order to evaluate the practical implications of the theoretical differences. The analysis will review the jurisprudence of the *Bundesverfassungsgericht* in order to establish whether the shifting values that drive the theory are mirrored in the Court's approach

³⁴ *ibid* 50.

³⁵ Pauly in: Gerhard Anschütz, Richard Thoma and Walter Pauly (eds), *Handbuch des Deutschen Staatsrechts*, vol 1 (Mohr Siebeck 1932, reprinted 1998); Arthur J Jacobson and Bernhard Schlink (eds), *Weimar : A Jurisprudence of Crisis* (University of California Press 2000).

and the solutions it finds for the conflicts arising among the powers. As could be seen in Part I, the theoretical conceptualisation of the separation of powers informs the particular solutions it offers. It will therefore be crucial to establish what theoretical approach the *Bundesverfassungsgericht* pursues: whether it has adopted one suggested by the literature, whether it has designed its own by merging several approaches or whether it has developed its own ideas, e.g. due to the much more practical context it finds itself in. In that context, the questions of how the Court defines 'power' and what it considers to be the primary objective of the separation of powers within a constitutional system are of paramount importance. For example, with regard to that latter point, the literature oscillates between liberty and efficiency and, with that, comes to different conclusions as to how one should resolve particular conflicts among powers. Moreover, it will be interesting to see whether potential dangers foreseen in the literature materialised in practice, for example, the fear that the legislative would become too powerful and usurp the other two powers.

The particular focus of this part of the investigation will be the jurisprudence of the *Bundesverfassungsgericht* with regard to the general domestic context as well as Foreign Affairs in order to establish the parameters for the 'typical' interaction between the *Bundesregierung* and *Bundestag*. Those will serve as comparators for the evaluation of the Court's jurisprudence with regard to European matters and the implications it has for the relationship between the two institutions in Part III.

Part III will explore how the framework as established in Part I and II was applied in the European context. After the ratification of the Treaty of Rome up to the treaty of Maastricht, it is well-known that the focus of the *Bundesverfassungsgericht* was on the promotion of the human rights protection provided by the European communities. Its famous *Solange I*, *Solange II* and *Bananas* decisions³⁶ are still highly influential for the question of implementation of European law into the national legal system and its

³⁶ BVerfG, 'Solange I' [1974] BVerfGE 37, 271; BVerfG, 'Solange II' [1986] BVerfGE 73, 339; BVerfG, 'Bananenmarkt' [2000] BVerfGE 102, 147.

compatibility with national systems of human rights protection.³⁷ Following on from there, the period between the ratification of the treaty of Maastricht and the treaty of Lisbon was dominated by several enlargements which raised the question of how the European integration process should proceed at a fundamental level. Again, decisions of the *Bundesverfassungsgericht*, this time Maastricht and Lisbon³⁸, developed into landmark decisions, partly despite and partly precisely because they provided a different view on the future of the integration process compared to that favoured by the government in the European Member States.

However, over the course of all of those decades very little attention has been given by the Court to the impact the European integration process has on the relationship between the *Bundestag* and the *Bundesregierung*, specifically in the phase prior to decision-making at European level, i.e. at that point in time when national parliaments have the greatest chance to influence the position of their own government and thus law-making at European level.

In the final part of the thesis, the analysis will therefore focus on seven decisions of the *Bundesverfassungsgericht* in the EU context and analyse them not from the perspective of the principle of democracy or with an eye to maximising human rights protection. Instead, the analysis will focus on drawing out the implications for the separation of powers as conceptualised by the *Bundesverfassungsgericht* and for the relationship between *Bundestag* and *Bundesregierung*. In order to track the changes in the Court's approach across time, the investigation will proceed chronologically, starting in Chapter V with the earliest cases after the ratification of the Treaty of Rome up to the ratification of the treaty of Lisbon in 2009. Following on from there, Chapter VI will provide an outline of the so-called ESM cases and Chapter VII will evaluate the potential impact of those cases on the conceptual approach of the *Bundesverfassungsgericht* with regard to the relationship of the *Bundestag* and *Bundesregierung* in the EU context.

³⁷ Albi (n 7) 293.

³⁸ BVerfG, 'Maastricht' [1993] BVerfGE 89, 155; BVerfG, 'Lissabon' [2009] BVerfGE 123, 267.

The thesis will focus on three major strands for the investigation: firstly, how the German constitutional tradition conceptualises the separation of powers, secondly how this theoretical conceptualisation is carried into the practical application by way of the jurisprudence of the *Bundesverfassungsgericht*, and thirdly how the approach developed by the *Bundesverfassungsgericht* for the domestic and Foreign Affairs context is transferred to the European context.

Part I: Theoretical and historical influences

The idea to divide state power is as old as organised civilisation. Already Aristotle pondered the question on how to organise the activities of government. His approach was largely descriptive in nature, reflecting the practical examples he saw around him. To him, it was more a question of a sensible and efficient allocation of functions that had to be fulfilled in every state – with the division being based on reasons like geography, expertise, or indeed religion or political division.³⁹ His allocation of various tasks to specific decision-making bodies did not follow a consistent or systematic theory. However, once he integrated this concept with the theory on mixed constitutions, it gained momentum for the purposes of distributing power among classes. The intended objective was to create a stable system of government as well as allocate functions and tasks to those best suited for them. The integration of classes, i.e. social power, resulted in a practically effective system of mutual checks and balances in very literal sense.⁴⁰

Over the course of subsequent centuries, Aquinas, Grotius, Bodin, Hobbes and Pufendorf among others commented on how to organise state power, in particular with respect to dividing it.⁴¹ What changed was the cultural and historical context as well as the nature of the 'sphere' within which the theory was intended to operate: the separation of church and state, the detachment of secular power from its supposedly divine origin, the emergence of the concept of the 'state', the notion of popular sovereignty and the differentiation between the constituent power of the people and the constituted power of the monarch are only a few of the fundamental upheavals theorists had to cope with over time.⁴²

³⁹ Tsatsos (n 26) 11 and 14.

⁴⁰ *ibid* 20.

⁴¹ Tsatsos (n 26); Di Fabio (n 28).

⁴² Tsatsos (n 26) 22, 28.

Locke's *Second Treatise of Government*, Montesquieu's *De l'esprit des lois* and the *Federalist Papers* by Hamilton, Madison and Jay⁴³ represent the transition from mediaeval systems of government towards modern ones based on constitutions. To this day, these writings are credited with being *the* theoretical foundation for any modern theory on the separation of powers and its practical interpretation and application within present-day constitutional systems.⁴⁴ As Chapters III and IV will demonstrate, this is also true for the *Bundesverfassungsgericht*.

With the French and American revolutions, concepts like the system of mixed constitutions, the notion of a social contract, etc. that had constituted a common theoretical foundation for the constitution of the relationship between state and society were swept away.⁴⁵ Written constitutions introduced values like democracy and the rule of law and became the textual foundation for the institutional framework. As of that point, in particular the separation of powers was interpreted and conceptualised in the light of the respective constitutional system the scholar worked with.

The reception of the separation of powers in the German constitutional tradition from the 19th century through to present-day conceptualisations was rather critical vis-à-vis the separation of powers, largely because the pursuit of national unity impeded the reception of the separation of powers as it seemed to threaten the unity of the state they were hoping to create.⁴⁶ Instead, they favoured concepts like absolute (monarchical) and then people's sovereignty and either rejected the separation of powers or tried to reconceptualise it to integrate it into their notions of nature and purpose of a state and its constitution.⁴⁷ In combination with a methodological shift towards positivism, this resulted in a theoretical and conceptual crisis of German constitutional law

⁴³ Locke (n 30); Montesquieu (n 30) Livre XI; Hamilton, Jay and Madison (n 30).

⁴⁴ Instead of many, please cf. Vile (n 1) 346. Rather neglected in this context are for example i.a. Immanuel Kant, Abbe Sièyes and Jean-Jacques Rousseau.

⁴⁵ Tsatsos (n 26).

⁴⁶ Waechter (n 33) 52–53.

⁴⁷ *ibid* 50.

thinking during the Weimar Republic.⁴⁸ The fundamental reorientation of the discipline as a whole had major repercussions for constitutional law as it is theorised and practised under the *Grundgesetz*.

In order to provide the background for the analysis of the implementation and enforcement of the separation of powers within the current constitutional system by the *Bundesverfassungsgericht* (Chapter III and IV), Chapter I will establish the common themes in the works of Locke, Montesquieu and the Federalists in order to explore in Chapter II how they were carried forward, amended or changed after the reception of the separation of powers by the German constitutional tradition of the 19th century through to present-day conceptualisations.

⁴⁸ Walter Pauly, 'Die neue Sachlichkeit der Staatsrechtslehre in der Demokratie' in Gerhard Anschütz, Richard Thoma and Walter Pauly (eds), *Handbuch des Deutschen Staatsrechts*, vol 1 (Mohr Siebeck 1932, reprinted 1998); Jacobson and Schlink (n 35).

CHAPTER I: Locke, Montesquieu and the Federalists - the separation of powers as a political concept

In contrast to the more contractarian literature of the time,⁴⁹ Locke, Montesquieu and the Federalists went beyond the idea of the legitimacy of state power simply being derived from the social contract and focused on how the *exercise* of that power could be controlled or restricted. Moreover, they aimed to base the existing (Locke, Montesquieu) or to be created (the Federalists) constitutional structures on a coherent theoretical basis that would provide a consistent justification for structural and institutional choices made by a given constitutional system. In short, they aimed for normative content and thus transformed the separation of powers into a formative concept for modern constitutions and a tool for the resolution of practical conflicts among the three powers. Even though Montesquieu has been heavily criticised since, especially by historians, his formulation of the theory of the separation of powers has been highly influential, in particular with regard to the role of the judiciary.⁵⁰

This Chapter will explore how Locke, Montesquieu and the Federalists have conceptualised the separation of powers, how they integrated it into their overarching framework of a social contract (Locke), a system of mixed constitution (Montesquieu) and a written constitution (Federalists). In light of the overarching theme of the thesis, particular attention will be given to the construction of the relationship between the executive and the legislative as 'powers' and the government and the parliament as 'institutions' respectively.

A. John Locke's bi-polar model

In his *Second Treatise of Government*, Locke created a theoretical foundation for a system of lawful government by using the social contract as a framework and the notion of liberty as an anchor.⁵¹ He argued that humans formed communities to escape the state of 'nature' – a state in which every man had complete freedom but was also lia-

⁴⁹ Like e.g. Thomas Hobbes, *Leviathan* (1651); Jean-Jacques Rousseau, *Du Contrat Social Ou Principes Du Droit Politique* (Garnier 1762).

⁵⁰ Brian Tamanaha, *On the Rule of Law History, Politics, Theory* (Cambridge University Press 2004) 53.

⁵¹ Tsatsos (n 26) 31.

ble to be attacked by other free men at any given moment.⁵² Therefore, men consented to give up their freedom to create a more secure way of living together peacefully, in Locke's words to protect their '*... lives, liberties and [...] property...*'.⁵³ To Locke, this was the most important purpose of the social contract made between the people and the ruler and the consent of the governed was both the foundation and the limit of the ruler's powers.⁵⁴ As a consequence, Locke's ruler never was absolute, but from the very beginning limited and directed in the use of the power transferred to him by the people: all the measures furthering this stated aim were legitimate; those that did not had to be considered as an abuse of the trust of the people.⁵⁵ Due to weaknesses of human nature, he considered such an abuse not unlikely⁵⁶ which led him to the conclusion that a state's power needed to be divided so that legislative and executive powers were not held by the same body.⁵⁷

This construction was in stark contrast to Hobbes's absolutist approach where all exercise of state power was deemed legitimate per se.⁵⁸ To Locke, separation of the various state powers served as a means to a clear end: if all state power were concentrated in one hand or in one institution, then no one would have the power to control its use or prevent abuse, i.e. make sure that the state's institutions acted to realise the social contract, fulfil the very reason they were created for.⁵⁹

Locke differentiated four powers: the legislative, the executive, the federative and the prerogative power.⁶⁰ The judiciary was not separated out, but an element of the executive power to enforce the laws of the land.⁶¹ Following the differentiation developed

⁵² Locke (n 30) 123.

⁵³ *ibid.*

⁵⁴ *ibid* 131 and 134.

⁵⁵ Henning Ottmann, *Geschichte des politischen Denkens: Die Neuzeit*, vol 3/1: Von Machiavelli bis zu den großen Revolutionen (Metzler Verlag 2006) 360; Tamanaha (n 50).

⁵⁶ Locke (n 30) 143; Ottmann (n 55) 361.

⁵⁷ Locke (n 30) 143–144.

⁵⁸ Ulrich Thiele, *Die politischen Ideen: von der Antike bis zur Gegenwart* (Marix Verlag 2008) 33.

⁵⁹ Locke (n 30).

⁶⁰ *ibid* 11–14.

⁶¹ Suri Ratnapala, 'John Locke's Doctrine of the The separation of powers: A Re-Evaluation' (1993) 38 *American Journal of Jurisprudence* 189; Vile (n 6).

by John Bodin⁶², Locke distinguished between holding power and exercising it: to him, original sovereignty lay with the people and was considered to be indivisible and inalienable. The people then transferred its *exercise* to another entity which became the legislative, ranking supreme among all government powers.⁶³ This constituted **legislative** could not transfer its power on to another body and neither was any other power allowed to usurp it.⁶⁴ The recipient of this supreme power could be an individual, a group of people or everyone – the people were free to choose whichever entity they preferred. As such, Locke was open to all possible combinations within the framework of the traditional system of mixed constitution, except that he rejected any form of absolutist government – be it by an individual or the people – as it would not necessarily be conducive to safeguarding the aims of the social contract as it allowed for limited control options.⁶⁵ In his opinion, a constitutional monarchy would be the best option. In a system where legislative power was jointly held by the representatives of the people and an individual (the monarch), both parties would have the power to veto the actions of the other and thus have a means for control.⁶⁶

Through the act of appointing the legislative, the people had exercised their freedom and had provided their consent to be subjected to the rules decided on by this body. In turn, the institution being appointed and thus receiving their power had a duty to work for the public good and to ensure that the members of the society did not end up in a worse state than they would have been in a state of nature.⁶⁷ At the same time, there were no systemic limitations on the legislative's power as it was derived directly from the members of the society.⁶⁸ Therefore Locke strongly recommended to make it a non-permanent body and considered it to have the obligation to dissolve itself once it had enacted the statutes required by the executive.⁶⁹ If allowed to be in session on a permanent basis, the members could potentially develop into a separate 'society'

⁶² Thiele (n 58) 103.

⁶³ Locke (n 30) 132 and 134.

⁶⁴ *ibid* 134.

⁶⁵ *ibid* 132.

⁶⁶ Ratnapala (n 61); NW Barber, 'Self-Defence for Institutions' [2013] Cambridge Law Journal 558.

⁶⁷ Locke (n 30) 137.

⁶⁸ *ibid* 134.

⁶⁹ *ibid* 153.

whose interests were no longer aligned with the rest of it and who would thus be liable to act for *its* good rather than that of the society they originated from.⁷⁰

In contrast, the **executive** was meant to be in session permanently as statutes needed executing on a permanent basis. To Locke, this was the main reason that the executive and the legislative needed to be separated as only then a permanent government could be set in place.⁷¹

In keeping with his belief in the weakness of human nature, Locke introduced various mechanisms for interaction between the legislative and the executive power in order to prevent abuses of power. In the first instance, he saw the executive subjected to a systemic limitation in the sense that it needed statutes to execute. This created the need for cooperation with the legislative and thus an element of mutual control. Complementary to the duty of the legislative to dissolve itself, he suggested that the executive should be provided with the right to assemble and dissolve the legislative. This was meant to ensure that it was only convened if and when needed. However, he hastened to add that this right of the executive was not meant to be discretionary but had to be exercised for the public good so as to avoid a subordination of the legislative to the executive.⁷² In turn, the legislative was called upon to control the executive and its implementation of the statutes. In case it found the performance of the executive to be lacking, the legislative could go as far as to dismiss the executive entirely and thus punish it for 'mal-administration'.⁷³

In addition to the above, Locke separated out what he labelled the **federative** power which were the powers relating to Foreign Affairs and allocated to the monarch, i.e. the executive in his preferred model of a constitutional monarchy. Interestingly, Locke assumed that in this area, the legislative should have far less influence and far fewer control options due to the different nature of Foreign Affairs.⁷⁴

⁷⁰ ibid 143.

⁷¹ ibid 144.

⁷² ibid 153–156; Thiele (n 58) 106.

⁷³ Locke (n 30) 153.

⁷⁴ ibid 147.

The **prerogative** power was the fourth power identified by Locke and another one which he allocated to the executive. It referred to the right of the monarch to act without statutory basis for the public good.⁷⁵ This could be necessary in cases where the legislative would be too slow to assemble or where the application of the law needed moderation to ensure justice was served. This power provided the monarch with a great deal of discretion and moreover, was 'never questioned'.⁷⁶ In case of abuse, the only available remedy was an 'appeal to Heaven' as there could be no judge on earth to rule on such a case.⁷⁷ At the same time, the legislative could create laws that would regulate the use of the prerogative in specific cases.⁷⁸

B. Montesquieu: focus on executive and legislative

Montesquieu is generally credited⁷⁹ with providing the classic account of the separation of powers that divides the state's sovereign powers horizontally into executive, legislative and judiciary. Like Locke, he considered the crucial purpose of this separation to be the protection of the political liberty of the people which he defined as the power to behave as one may want within the framework of the law, i.e. to be protected from being subjugated to someone else's will.⁸⁰ To him, this liberty did not simply exist in the absence of any abuse of power. Therefore, a constitutional system should be designed in such a fashion that it would actively promote liberty, not just prevent abuse. As he agreed with Locke that human beings had an innate tendency to abuse power given to them, he required the constitutional framework to ensure that the various powers were able to keep each other in check: '*...que le pouvoir arête the pouvoir...*'⁸¹. Only by dividing up the state's power and organizing it in a way that required cooperation among the created institutions as well as allowed for mutual control,

⁷⁵ ibid 159–160.

⁷⁶ ibid 161.

⁷⁷ ibid 168.

⁷⁸ ibid 162.

⁷⁹ Cf. i.a. Karl-Peter Sommermann, 'Artikel 20' in Hermann von Mangoldt and others (eds), *Kommentar zum Grundgesetz*, vol 2: Article 20 bis 82 (6th edn, Vahlen Verlag 2010) para 201; Vile (n 1); Theodore Georgopoulos, 'The "Checks and Balances" Doctrine in Member States as a Rule of EC Law: The Cases of France and Germany' (2003) 9 *European Law Journal* 530, 532.

⁸⁰ Montesquieu (n 30) III and IV.

⁸¹ ibid IV.

Montesquieu concluded, could the political liberty of the people be protected. While e.g. Locke or Rousseau posited a hierarchical relationship among the powers with the legislative at the top⁸², Montesquieu constructed them to be at the same level: each power held only some of the sovereign rights within the state, so all powers had to co-operate with each other in order to create one coherent whole.⁸³

In contrast to Locke, Montesquieu based his theory less on philosophical considerations but rather on the empirical and sociological context of the law, in particular the class system. He acknowledged the very real power of these social forces (the people, the nobility and the monarch) and the fact that without due consideration of their respective interests, no constitutional framework would be able to function successfully.⁸⁴ Hence, he integrated these social forces into his model in such a way that they would end up controlling each other through the political process but were at the same time dependent on each other for the realisation and protection of their interests.⁸⁵ He considered the interests of each individual class as 'naturally' unaligned or even in opposition to those of the other two. By incorporating that social tension into the constitutional framework, he aimed to ensure that the various institutions did not only have the social standing to stand up to each other but also the political will to do so.⁸⁶ Montesquieu stressed that a key element of an effective system of separated powers was that the membership of the institutions they represented was also kept strictly separate in order to maintain the tension between the classes. In contrast, the *functions*, e.g. legislating, were deliberately allocated to more than one institution, and thus more than one social class, to enable mutual control. Only if the interests of more than one class could be reconciled, would the act of legislating be successful.⁸⁷

⁸² Thiele (n 58) 105.

⁸³ Montesquieu (n 30) VI-56.

⁸⁴ *ibid* VI-33.

⁸⁵ Laurence Claus, 'Montesquieu's Mistakes and the True Meaning of Separation' (2005) 25 Oxford Journal of Legal Studies 419, 420.

⁸⁶ Norbert Gehrig, *Parlament - Regierung - Opposition : Dualismus Als Voraussetzung Für Eine Parlamentarische Kontrolle Der Regierung* (CH Beck Verlag 1969).

⁸⁷ Montesquieu (n 30) VI-12, 37.

According to Montesquieu, those powers were the legislative as the prince's power to make laws, the executive as 'it related to the rights of nations' which included i.a the Prince's power to make peace or war, and the executive 'as it related to civil law' which was a Prince's power to punish crimes and adjudicate conflicts. That latter, Montesquieu decided to refer to as the judiciary.⁸⁸ These powers were the ones that needed to be kept separate in order to achieve political liberty. He posited that if even only two of those powers were to combine in one hand – and any two would do - liberty would be under threat. For example, a combination of the legislative power with the executive or judicial power would result in the executive or the judges being able to pass and enforce any and all statutes they desired to have. Combining the executive and the judiciary would lead to the judges becoming persecutors or the monarch persecuting his opponents by wilfully applying the statutes given to him by the legislative without the latter being able to control the application. Combining all three in one hand or one institution would lead to utter despotism with the individuals at the mercy of the ruler.⁸⁹

He allocated the **legislative** power to the people – or its representatives – so that it would be able to govern itself. Thus, it should be the one vested with the power to make laws applicable to everyone and to supervise their implementation by the executive.⁹⁰ It consisted of two chambers, one for the representatives of the commoners and one for those of the nobility, thus importing the tension between the two classes into the constitutional context where either chamber could exercise a restraining influence on the other during the legislative process.⁹¹

Like Locke, Montesquieu considered the legislative to be the greater threat to the people's liberty due to its unlimited power. Therefore the parliament was not to be convened on a permanent basis but rather if and as necessary. A non-permanent assembly would also relieve the executive from the pressure of having to defend itself

⁸⁸ *ibid* VI-1-2.

⁸⁹ *ibid* VI-4-7.

⁹⁰ *ibid* VI-29.

⁹¹ *ibid* VI-30.

against attempts of the legislative to interfere with its rights.⁹² In addition to this, the legislative had no right to convene itself as that would allow it to undermine its non-permanent character. Montesquieu left this at the discretion of the executive who would know best if and when the legislative needed to convene.⁹³

As for the **executive** power, it should rest with one person, rather than a group of people or the people as a whole. This was based on the more practical reason that one person would be more efficient at executing statutes, but also the result of Montesquieu's insistence that the members of the institutions be kept completely separated along class lines: he argued that drawing on the people itself or the members of the legislative to create the executive would put legislative and executive powers into the same hands and thus lead to tyranny.⁹⁴ The executive was charged with the execution of statutes independently from the legislative. The latter was allowed to control the execution after the fact but not to interfere with the daily running of affairs. To ensure that this remained the case, the executive had several options to defend itself against usurpation by the legislative. In addition to the power to assemble and dissolve parliament (cf. above), the executive, unlike the legislative, was to be in office permanently in order to effectively implement the statutes. But since its power was 'naturally' limited due to its dependence on those statutes, the legislative still had a measure of influence over its activities. Thus, Montesquieu reasoned, it did not leave the executive out of control. Moreover, the executive was allocated a negative veto in the legislating process meant to enable it to stop statutes that aimed to interfere with its rights. Overall, these mechanisms were to create a system of mutual control between the legislative and the executive: the latter needed statutes as a basis for its actions and the former was controlled by the executive as it could not pass statutes against the latter's veto.⁹⁵

⁹² *ibid* VI-39.

⁹³ *ibid* VI-39-41.

⁹⁴ *ibid* VI-36-37.

⁹⁵ *ibid* VI-42, 52-53.

In contrast to Locke, Montesquieu explicitly separated out the **judiciary** from the executive and stressed the need to regulate it, given its profound impact on people's lives.⁹⁶ He aimed at deliberately minimizing its impact – to paraphrase a famous quote: he *made* it 'null' so that it could not become a tool for oppression.⁹⁷ The judges for the ordinary courts were to be drawn from the people and they should not be in session on a permanent basis, but only for as long as was necessary for the case. That way, the judiciary would be rendered more or less 'invisible' so that the people did not end up fearing the person of individual judge, but rather the punishment as such.⁹⁸ Moreover, Montesquieu allocated jurisdiction over specific issues to the nobility's chamber in parliament, i.e. away from the ordinary courts: for trials against nobles, cases where the application of the statutes needed to be moderated to ensure it was not too rigid and cases concerning crimes against the people's rights committed by public officials.⁹⁹ As a result, the membership of the judiciary reached across classes and was at the same time class-focused in terms of its function: the ordinary courts would try the common people, the nobility would try its peers and the monarch remained sacrosanct.¹⁰⁰

The resulting constitutional framework, Montesquieu concluded, should be one where the separated powers are forced to coordinate their activities and to cooperate in order to accomplish affairs of state and thus create a constitutional framework suited to realising and protecting the citizens' political liberty.¹⁰¹

C. The Federalist papers: the rise of the judiciary

In the *Federalist Papers*, Alexander Hamilton, James Madison and John Jay provided a detailed commentary on the draft for the then new US Federal constitution. The authors not only countered the arguments offered against the draft especially by the so

⁹⁶ *ibid* VI-14.

⁹⁷ *ibid*.

⁹⁸ *ibid* VI-13-14.

⁹⁹ *ibid* VI-48-50.

¹⁰⁰ *ibid* VI-13-15.

¹⁰¹ *ibid* VI-56.

called anti-Federalists,¹⁰² but also explained in great detail the theoretical concepts underlying the draft and arguments in favour of the solutions adopted. One of the greatest challenges for the Federalists in this respect was that the revolution had seemingly swept away a large number of the foundations of the very concepts they intended to rely on, in particular the replacement of the class-based system of mixed constitutions by a seemingly monolithic group of 'one' people and the rising emphasis on ideas like democracy and the rule of law in the wake of written constitutions.¹⁰³ As a consequence, the social and the political sphere had become separated and needed to be reconnected.¹⁰⁴ Thus, the Federalists faced considerable theoretical difficulties as they aimed to adapt existing concepts to their hitherto unheard of circumstances. Their insightful discussions resulted in the Federalist Papers becoming one of the most ground-breaking works of American political theory and are considered essential for the interpretation of the US American Constitution to this day.¹⁰⁵

Letters 47-51, written by James Madison, focus on the separation of powers as a theory. Read in conjunction with the letters on the individual powers¹⁰⁶ and those on factions,¹⁰⁷ they illustrate that the Federalists considered the entire constitutional framework as being constructed around that concept – a theory they saw as an '*essential precaution in favor of liberty*'.¹⁰⁸ Despite the fundamental changes that had occurred in society and related to the very tenets of the separation of powers doctrine, Madison still considered it a crucial element of a constitutional system and any constitutional framework that did not adhere to this maxim could only be called tyrannical.¹⁰⁹ To him,

¹⁰² David Wootton, *The Essential Federalist and Anti-Federalist Papers* (Hackett Publishing Company 2003) xxxvi–xxxvii.

¹⁰³ Dieter Grimm, '§ 1: Ursprung und Wandel der Verfassung' in Josef Isensee and Paul Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, vol I: Historische Grundlagen (3rd edn, CF Müller Verlag 2003) para 33.

¹⁰⁴ Gerd Roellecke, '§ 2: Beobachtung der Verfassungstheorie' in Otto Depenheuer and Christoph Grabenwarter (eds), *Verfassungstheorie* (Mohr Siebeck Verlag 2010) 60.

¹⁰⁵ Cf. i.a. Henning Ottmann, *Geschichte des politischen Denkens: Die Neuzeit*, vol 3/2: Das Zeitalter der Revolutionen (Metzler Verlag 2008) 44; Tamanaha (n 50) 54.

¹⁰⁶ Letters no. 52-66 cover both houses of the legislative, letters no. 67-77 deal with the executive and letters no. 78-83 address questions relating to the judiciary.

¹⁰⁷ Letters no. 9 and 10.

¹⁰⁸ Hamilton, Jay and Madison (n 30) 47 [297].

¹⁰⁹ *ibid.*

the critics had misunderstood Montesquieu if they assumed that he had intended a complete and total separation of the state's powers. He had used the British Constitution as the template, and since it clearly did not adhere to such a strict separation, his model could not possibly require it either. However, while a partial overlap could be acceptable, a total overlap between two or three of the powers would not be. Madison then clarified how this would be implemented into the US Constitution: it would allow for cooperation among the three powers as long as each power involved was prevented from usurping one or both of the other powers in their entirety. The separate powers would each be able to veto essential activities of the other powers and thus create a system of checks and balances where no one single power would be able to gain a dominant influence in one particular area, as realised for example in the presidential veto against legislative bills or the requirement for senate approval for judicial appointments by the president.¹¹⁰

Overall, he considered the crucial question to be how one could '*maintain [] in practice the separation delineated on paper*'.¹¹¹ In particular the legislative was deemed in need of being controlled as it had a tendency to expand its reach into the remit of the other powers¹¹² and based on practical experience drawn from the states of the Union so far, one needed more than a paper outlining the limits of each power to ensure that no usurpation would happen in practice.¹¹³ Like Montesquieu, he came to the conclusion that the very structure of the constitutional framework itself had to provide the necessary means for mutual control so that the powers divided on paper did actually stay separate in practice.¹¹⁴ Here, however, Madison was faced with an obstacle: Montesquieu had achieved such control by relying on the very class system the revolutionaries had just abolished. Instead of the people, the nobility and the monarch who would balance each other due to their 'naturally opposing interests', there was now only one group – the 'people' – to supply the personnel for all three powers. However, there

¹¹⁰ *ibid* 48 [305].

¹¹¹ *ibid* 47 [304].

¹¹² *ibid* 48 [306].

¹¹³ *ibid* 48 [310].

¹¹⁴ *ibid* 51 [320].

was still some common ground: like Locke and Montesquieu, the Federalists were convinced of the inherent fallibility of human nature:

*'... But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and **personal motives** to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. **Ambition must be made to counter-act ambition.** The interest of the man must be connected with the constitutional rights of the place. ...'*¹¹⁵

By deliberately promoting rivalling interests and tension among the members of the various 'departments', Madison aimed to ensure that each would control the other at least for their own gain, if they did not do so for the public good. There would always be rivalling factions in society since the abolition of the class system would never lead to a removal of any and all differences among the people.¹¹⁶ In the context of the constitution, this factionalism could be very useful as it provided the necessary tension among the powers. Indeed, the greater the diversity of the various political factions in the population, the better for the political process and thus for the protection of the freedom of people, especially the minority.¹¹⁷

After settling this matter of principle, the authors reviewed the overall set-up and the relationship of the powers as created by the proposed constitution in detail. The **legislative** was to consist of a two-house Parliament comprising representatives of the people (House of Representative) and of each state (Senate). This division would lead to each house relating its mandate back to a different 'constituency' and a different election process, providing them with an independent power base and thus independent political standing within the constitutional framework. Also, by having the states form part of the federal legislative, the set-up mirrored Montesquieu's split legislative by pitting groups with potentially opposing interests against each other *within* one

¹¹⁵ ibid 51 [321], emphasis added.

¹¹⁶ ibid 10.

¹¹⁷ ibid 51 [323].

function. Hamilton assumed that the natural dissention existing among the members even within each house would be an advantage as it prevented them from colluding with each other to reach agreements serving their own interests.¹¹⁸ Where the proposed constitution followed Montesquieu's model very closely was the strict separation of personnel: members of the legislative were precluded from being members of the executive and vice versa. And like Locke and Montesquieu, the Federalists considered the legislative the power most in need of being controlled. As will be shown below, both the executive and the judiciary were provided with the means to provide that control, sometimes in a very confrontational fashion.

The **executive** was allocated to one person, an elected president with a limited term of office to prevent abuse of power. He was allowed 'assistants or deputies' for the administration of government, but they were wholly dependent on him.¹¹⁹ This prima facie rather monarchical set-up was considered justified as one person was not only far more efficient but also far easier to control as responsibilities were clear.¹²⁰ Among his various powers was to be a veto against bills passed by the legislative. As Hamilton hastened to clarify, this was not an absolute veto, but a qualified one – the president could only send bills back for reconsideration, he could not stop them permanently.¹²¹ However, considering that such a veto had to be overcome with a two-thirds majority in both houses, it could in practice have the same effect as an absolute veto. Hamilton considered it necessary for the president to have this right so that he would be able to defend the executive against attempts at usurpation by the legislative by way of changes in legislation and to stop statutes that would violate the constitution.¹²² In turn, the executive was dependent on the cooperation of part of the legislative, specifically the Senate, in two areas: the appointment of i.a. Supreme Court judges was subject to its consent and the ratification of international treaties required a two-thirds

¹¹⁸ *ibid* 71 [444].

¹¹⁹ *ibid* 72 [447].

¹²⁰ *ibid* 70 [434-437].

¹²¹ *ibid* 69 [426].

¹²² *ibid* 73 [454].

majority.¹²³ That way, crucial activities of the executive that could potentially have a major impact on the people were made subject to the control of another power.

A distinct difference to both Locke and Montesquieu is the construction of the **judiciary**: it is established very much as an equal to the other two powers, just as strong as the legislative or the executive. This rise of the judiciary was seen a natural consequence of a system of government using a written constitution as its foundation. As that constitution set out the rules as agreed by the people, it bound in particular the legislative and executive.¹²⁴ While Locke and Montesquieu had relied on those two powers to keep each other in check, the Federalists gave this task also to the judiciary – and thus introduced for the first time the notion that the solution to a conflict should not be a political compromise but a solution based on an objective standard in the guise of the constitution. Hamilton countered the severe criticisms by arguing that firstly to allocate the power to review statutes to the legislative would make them judges in their own cause and that secondly it was after all the ‘natural province’ of judges to interpret laws. Therefore, they should have jurisdiction to interpret also the constitution and to be able to check ordinary statutes for their compliance.¹²⁵ This was not seen as setting up the judiciary to be superior to the other two powers but rather to ensure that the other two respected the will of the people as expressed in the constitution. Like Locke and Montesquieu, the Federalists clearly distinguished between the original power of the people and the power of the institutions created based on their will: the people had created the constitution, the institutions created by it only possessed ‘delegated’ authority. Hence, any act issued by them that was contrary to the constitution was automatically void.¹²⁶ Thus, in order to preserve and protect the will of the people as embodied in the constitution, the judges of the Supreme Court had not only the last word on the interpretation of the constitution, they also had the

¹²³ *ibid* 69 [429-430].

¹²⁴ *ibid* 78.

¹²⁵ *ibid* 78 [484].

¹²⁶ *ibid* 78[483].

right to repeal any and all legislative or executive action violating the constitution, which could concern the institutional set-up as well as unjust laws.¹²⁷

D. From social contract to constitution: a successful transition

As indicated in the introduction, the purpose of this Chapter is to draw out the threads that connect the 'classic' rendition of the separation of powers by Locke, Montesquieu and the Federalists with the 19th and 20th century German tradition (Chapter II).

If one looks for **common base lines** or rules to draw from those writings that will allow one to pin down the specific content of the theory, one will find surprisingly few. They can be summed up with the need for 1) separation of, and 2) cooperation among the powers.¹²⁸ This means that the separated powers needed to be independent (enough) from each other so that they may be strong (enough) to defend their position against attempts at usurpation by the other two powers. At the same time, all three sets of writings emphasize that separating out the powers is not going to achieve effective control all by itself. Therefore, the second requirement - the need for cooperation – refers to the need to ensure that each power can contribute to controlling the other two, either by providing a crucial element to activities of the other powers or by being provided with options to prevent certain actions of the other powers.

However, practical problems start if one tries to implement these 'simple' criteria into a constitutional system due to the fact that there is great terminological confusion as to what 'power' actually refers to. As Vile has pointed out, that term has been used to refer to i.a.

*"... the possession of the **ability** through force or persuasion to attain certain ends, the legal **authority** to do certain acts, the "**function**" of legislating, executing, or judging, the **agencies** or branches of government, or the **persons** who compose these agencies. ..."*¹²⁹

¹²⁷ ibid 78 [484-486].

¹²⁸ Similarly Christoph Möllers, *Die Drei Gewalten: Legitimation Der Gewaltengliederung in Verfassungsstaat, Europäischer Integration Und Internationalisierung* (Velbrück Wissenschaftsverlag 2008) 47, he further distinguishes between cooperation and control.

¹²⁹ Vile (n 1) 13 emphasis added.2

For modern constitutionalist states, one could add to that list the responsibility for certain policy areas or tasks that do not fit into the neat tripartite division of legislating, executing or judging, strictly speaking – for example Foreign Affairs, as will be explored later.

If one considers the three sets of writings outlined above, what they insist on separating appears to be the 'legal authority' to do certain acts: in Locke's model, the people create the social contract expressing their authority to determine their life, that authority is then transferred to the legislative as an institution; Montesquieu expressly defines the legislative power as the power of the *"Prince or the magistrate [to make] laws for a time of always and correct or abrogate those that have been made"*¹³⁰; and to Madison, similarly to Locke, the creation of the *"three great departments of power"*¹³¹ is based on the constitution as an expression of the supreme will of the people. However, all three authors then proceed to connect the authority to act in a specific way to specific 'agencies' – or institutions – and their personnel: the legislative is connected to the parliament, the executive is connected to the monarch/ president and his advisers (a.k.a. the 'government') and the judiciary is connected to the courts and judges. Those institutions in turn are connected to a specific way of acting: the legislative acts by way of statute, the executive by way of individual decisions and the judiciary by way of Court decisions.

This is where the actual separation comes to the fore: what all three writers very much insist on keeping separate are the institutions and their members. Montesquieu in particular is very insistent on the fact that membership of either house of parliament and of the executive may not overlap. In that sense, one could argue that for Montesquieu, 'power' equates to social power, i.e. the classes.¹³² Even though Locke and the Federalists focus more on the separation of the institutions, they also conclude that membership may not overlap. The reasons for this are twofold: for Montesquieu, this would

¹³⁰ Quoted after the English translation in Charles de Secondat Montesquieu, *The Spirit of the Laws*, (ed and trans by Anne M Cohler, Basia Carolyn Miller and Harold Samuel Stone, Cambridge University Press 1989) 156.

¹³¹ Hamilton, Jay and Madison (n 30) 47 [298].

¹³² Gehrig (n 86).

undermine his class-based mechanism for mutual control among the powers as it would lead to the representation of class interests becoming fragmented. The other reason is that all three writings allocate a different basis for legitimacy to each institution. For the Federalists, for example, the Congress and the president are the result of two separate acts of election, i.e. derived from a different constituency. For both Locke and Montesquieu, each class has a different method of choosing its representatives – elections for the members of the Commons, hereditary succession for the nobility and the monarch, temporary nomination for the judges.¹³³

In contrast, none of them seem to equate 'power' with 'function'. Quite the opposite in fact: all of them deliberately require that the function of 'legislating' is shared between the legislative and the executive, either by way of joint decision-making (Locke, Montesquieu) or by providing one power with a veto to block the activities of the other (Federalists).¹³⁴ The result of those shared activities is still a statute, something only the 'legislative' is able to create. One may tentatively conclude that 'functions' seem to be allocated as a core activity to one specific institution and its personnel who has the authority to act in a specific way, while the activities comprising that 'function' may be shared. In other words: the 'function' legislating is the core activity of the institution 'parliament' who has the legal authority to act by way of statute – hence, it is referred to as the 'legislative'. It is submitted in conclusion that the term 'power' is taken to have been understood by Locke, Montesquieu and the Federalists as referring to the 'legal authority' to do certain acts. This will be important to take forward into Chapter II to compare it to the 19th and 20th century German tradition.

An area where all three writings agree is the **justification** for introducing the separation of powers into a constitutional system. Even though the phrasing varies slightly, overall, they aim for the same: to protect the rights and political liberty of the individual members of society from potential abuse by the powerful ruler or instituted powers respectively of their state. Interestingly, this threat is considered to come primarily

¹³³ Waechter (n 33) 50.

¹³⁴ Wilhelm Calker, 'Die Verfassungsentwicklung in den deutschen Einzelstaaten' in Gerhard Anschütz, Richard Thoma and Walter Pauly (eds), *Handbuch des Deutschen Staatsrechts*, vol 1 (Mohr Siebeck 1932, reprinted 1998) 53–54.

not from the monarch or the executive – after all, it had been ‘tamed’ by the introduction of the separation of powers in the first place. Instead, the power that is now feared is the legislative. After providing it with (supreme) authority from the people, all authors hastened to point out that due to the unspecified remit of the legislative’s competences, it was the likeliest candidate for expanding its powers beyond what was acceptable and thus had to be under strict control by either the executive or the judiciary.

With regard to the **relationship between the legislative and the executive**, the different nature of the control mechanisms stands out. The legislative controls the executive mainly through her ‘product’, i.e. the need of the executive to act based on statutes. The executive on the other hand controls the legislative mainly through procedural mechanisms: its right to convene and dissolve the legislative and especially its veto. With the Federalists, this changes considerably: they highlight that the only tool left to the executive is the veto. Congress decides itself on the timing, duration, etc. of its sessions. Overall, this means that the legislative is mostly relegated to an ex post control with no right to interfere in the daily business of the executive. At the same time, all models allow for the removal of an executive that does not fulfil its duties, in the case of the Federalists through the very obvious method of regular elections. And even though Montesquieu’s monarch is sacrosanct, his ministers are not, and they can be tried before the nobility’s chamber.¹³⁵

Incidentally, both Montesquieu and the Federalists favour a model where the tension used for effective control plays out *within* the legislative¹³⁶, not merely *between* the legislative and the executive, by deliberately choosing to have different classes (Montesquieu) or nation-wide and regional representation (Federalists) confront each other.¹³⁷ While one may argue that this creates the risk of a deadlock if the interests of those two groupings on one particular issue are truly in opposition, it is in fact true to the spirit of the separation of powers: if the two houses do not agree and thus the bill

¹³⁵ Montesquieu (n 30) VI-50.

¹³⁶ Montesquieu (n 30); Hamilton, Jay and Madison (n 30).

¹³⁷ Ottmann (n 55).

never becomes law, the state will be without a statute to execute and thus unable to restrict the people's liberty on this particular issue.

One particular area all authors consider of paramount importance in this context is the **budget**.¹³⁸ Levying taxes without the consent of the parliament or granting too far-sweeping an authorisation to the executive is seen as tantamount to losing control of the 'purse strings' and all practical control over the executive and thus to losing all liberty.¹³⁹ In short, budgetary control was the legislative's most important right. This very powerful position is counteracted in Locke's and Montesquieu's model by the right of the executive to convene and dissolve the legislative. To Montesquieu, this was an example for how the need for cooperation could be practically enforced: even though he posited that the executive enjoyed discretion as to when and how often the legislative was to convene, he considered it the executive's duty to convene the legislative on a regular basis, at least once a year, to decide on the budget.¹⁴⁰

Lastly, the changes regarding the status and nature of **Foreign Affairs** should be highlighted. Interestingly, both Locke and Montesquieu singled it out not merely as a task or a policy area allocated to one of the powers, but as a separate 'power' allocated specifically to the executive – Locke calls it the '*federative*' power, Montesquieu the executive power '*regarding the rights of nations*'. Locke expressly posited that much less supervision by, and overall participation of, the legislative was expected or even possible in this context.¹⁴¹ He saw this as a natural consequence of the social contract: its strictures could only apply to its members, i.e. on the 'inside'. The 'outside' was not subject to the rules agreed by the members of a particular society and thus not bound by them. In order to deal with these outsiders, the executive needed more room to manoeuvre in order to protect the interests of those people who had concluded the social contract in order to protect their liberty.¹⁴² Therefore, it was given the power to declare war or peace and to command the armed forces. Beyond that, both Locke and

¹³⁸ Montesquieu (n 30) VI-59-60; Locke (n 30) 140.

¹³⁹ Montesquieu (n 30) VI 59-60.

¹⁴⁰ *ibid* VI-59-60.

¹⁴¹ Locke (n 30) 147.

¹⁴² Locke (n 30).

Montesquieu were silent on the matter as if the separation of powers were only an issue for the regulation for the interaction of the institutions on the 'inside'. In particular, the references to the legislative's supervision rights only referred to 'statutes' and not to 'treaties'.

In contrast, the Federalists labelled as 'powers' only those within the domestic system. They conceptualised the competence to handle Foreign Affairs as a 'task' which had to be carried out by one or more of the 'powers'.¹⁴³ They found it surprisingly difficult to allocate Foreign Affairs to any one power and ended up allocating it to the executive and part of the legislative: as mentioned above, the draft constitution provided that the executive needed the approval of two thirds of the Senate for the ratification of treaties. In defending this solution, the Federalists referred to the hybrid nature of Foreign Affairs: the executive would be best suited to handle the negotiations, but the legislative needed to be involved due to the potential impact on the lives of the people.¹⁴⁴

E. Conclusion

The outlines provided above illustrate the development the theory of the separation of powers has undergone from Locke to the Federalist Papers. While Locke still argued on the basis of a social contract as the key reference point for the will of the people, the Federalists saw it embodied in a written constitution. **Locke's** concept of the separation of powers introduced a crucial element into the debate – separating the state's powers and providing each power with individual competences and influence so that all needed each other's cooperation to be able to function properly.¹⁴⁵ He aimed to create a balanced system of government by dividing power and creating interdependencies and control mechanisms between the powers in addition to the limits stemming from the social contract. **Montesquieu** is often both heralded for having developed the classic account of the horizontal the separation of powers and criticised for basing his

¹⁴³ Hamilton, Jay and Madison (n 30) Letter 75.

¹⁴⁴ *ibid* 75 [463-464].

¹⁴⁵ Ratnapala (n 61).

model on a rather skewed version of the English constitutional system of the time.¹⁴⁶ Either way, compared to Locke's model, his conceptualisation represented a qualitative step forward towards a system of democratic governance and proved inspirational not only to the drafters of the U.S. American Constitution.

The **Federalists** represent another step toward the tripartite model favoured by present-day constitutions. They provided the judiciary with an equal footing vis-à-vis the legislative and the executive. They also adapted the theory to a major shift in the factual, social, political and legal framework within which it operated: the move away from a monarchical state conceptualised through a social contract and determined by a class system towards a society nominally without classes and founded by a constitution. To them, the crucial point was that despite those changes the very heart of the theory had not changed: it was still an '*essential precaution in favor of liberty*'¹⁴⁷ and in order for it to fulfil that purpose, the Federalists had the constitution stand as the embodiment of the people's will which – similar to Locke's social contract – provided very tangible limits to the actions of the institutions. Together with the powers of judicial review, this approach paved the way towards present-day constitutional systems of government where the 'people' are 'citizens', where the 'governed' have become active participants in the political process.¹⁴⁸ By putting forward persuasive arguments as to why citizens should have the power to challenge decisions made by their own government, the Federalists provided an alternative means to control the political process and the institutions in it and thus allowed the system of checks and balances to reach beyond the constitutional and political sphere into society.¹⁴⁹

¹⁴⁶ Tamanaha (n 50) 53.

¹⁴⁷ Hamilton, Jay and Madison (n 30) 47 [297].

¹⁴⁸ Sommermann (n 79) 202–203.

¹⁴⁹ Hamilton, Jay and Madison (n 30) 84.

What should be taken forward from this Chapter for the exploration of the 19th and 20th century German tradition are firstly the two fundamental criteria for a system of the separation of powers: separation and cooperation of 'powers'; secondly, the variety of connotations that the term 'power' may encompass; thirdly, whether the authors continue to see liberty as the foundation and justification for the implementation of a system of the separation of powers; and lastly, how the authors conceptualised the relationship between the legislative and the executive, in particular with regard to the budget and Foreign Affairs, should they offer such clarification.

CHAPTER II: The German tradition: the separation of powers as 'Ordnungsidee'

As could be seen in the previous Chapter, the transition from Locke and Montesquieu to the Federalists was in many ways less radical than one may have expected considering the substantial change to the political and social framework within which the separation of powers operated. In contrast, the reception of the theory by German scholars in the 19th century and the early 20th century could be described as conflicted. It was informed by four circumstances already existing, or developing in parallel to, the reception of the separation of powers, namely the traditional distinction between 'state law' and 'constitutional law'; the achievement of German national unity; the rise of the rule of law and a fundamental shift in methodology towards positivism.

In the German public law tradition, one distinguishes between Staatsrecht/ 'state law' and Verfassungsrecht/ constitutional law. This is largely due to the fact that, in the German context, the 'state' as a separate entity from society was recognised before the advent of constitutions in the legal system. Therefore, scholars focused on that rather than the nature and role of constitutions, sovereignty or 'the people':

*"... the **state** produced the articles of the Constitution and **statutory law** but the former were logically no 'higher' or better protected than the latter. [...] State power was pre-constitutional that was only limited, and not constituted, by law. (emphasis added) [...] This explains why Imperial Staatsrecht had [...] no theory of the primacy of the constitution..."¹⁵⁰*

In other words, the 'subject' of research was not a constitution and its effect on the legal system but rather the conceptualisation of the 'state'. This provided a different perspective for the reception of the separation of powers in the sense that the constitution was merely seen as a limitation to the state's pre-existing powers instead of the constitutive foundation of the state's powers in the first place.¹⁵¹ The perception that

¹⁵⁰ Jo Eric Khushal Murkens, *From Empire to Union: Conceptions of German Constitutional Law since 1871* (Oxford University Press 2013) 16.

¹⁵¹ Murkens, *From Empire to Union* (n 150); Rainer Wahl, '§ 2: Die Entwicklung des deutschen Verfassungsstaates bis 1866' in Josef Isensee and Paul Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, vol I: Historische Grundlagen (3rd edn, CF Müller Verlag 2003) paras 17–18; Arthur J Jacobson and Bernhard Schlink, 'Constitutional Crisis: The German and American Experience'

the existence of the state was the foundation of the monarch's rights persisted until 1949. Only with adoption of the *Grundgesetz*, it was the constitution that was seen as – quite literally – constituting the legal foundation of the state.¹⁵²

This fixation on the concept of the 'state' may have been due in part to the fact that a state called 'Germany' did not exist for most of the 19th century. After the collapse of the Holy Roman Empire in 1806, there were merely numerous principalities, cities and countries – until national unity was finally achieved in 1871 with the foundation of the German Empire. However, there was a strong popular movement for national unity, so any theory that would endanger the realisation of that goal or threatened to reverse the process once that unity was achieved could hardly be looked on favourably.

The pursuit of national unity favoured a focus on concepts like absolute (monarchical) and the people's sovereignty. Moreover, German state law scholars had embraced Bodin's theory of unified absolute sovereignty. According to the previously dominant mediaeval tradition, a state's 'power' was in actual fact a bundle of sovereign rights.¹⁵³ To consider dividing those rights up among several bearers would not have been problematic from a conceptual perspective. However, once the idea of a unified, single 'sovereignty' had been accepted, it seemed counterintuitive to attempt to divide it up again. Critics put forward that an actual distribution of the state's power to several independent bearers was bound to lead to the state tearing itself apart due to power struggles among those bearers. Hence, they put forward the assumption that there was only one 'power' which was exercised in three different ways ('functions') and those were allocated to institutions which were suitable to exercise them.¹⁵⁴

After the failed revolution of 1848, a timely implementation of a democratic system of government in a united German state seemed unlikely. As a reaction, German state/constitutional lawyers turned to the idea of a state bound by the rule of law, the

in Arthur J Jacobson and Bernhard Schlink (eds), *Weimar : a jurisprudence of crisis* (University of California Press 2000) 2.

¹⁵² Wahl (n 151) 64.

¹⁵³ Ratnapala (n 61).

¹⁵⁴ Ernst Rudolf Huber, '§ 4: Das Kaiserreich als Epoche verfassungsstaatlicher Entwicklung' in Josef Isensee and Paul Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, vol Band I: Historische Grundlagen (3rd edn, CF Müller Verlag 2003) para 3, 7 and 26; Tsatsos (n 26) 74–75.

Rechtsstaat and the role of the courts in this context. The term 'rule of law' is used here not in reference to a specific legal concept, but rather in a more literal sense as the basic idea that state power is meant to be subject to rules that are intended to bind everyone equally, including the government.¹⁵⁵ Over the course of the 19th century, German scholars develop this notion into a fully-fledged justification for a comprehensive system of judicial review where all state action that interfered with rights of the citizens – as far as they were recognised – was deemed to need a statutory basis and where the interpretation and application of those statutes was subject to a full review by the courts. Thus, the notion of the *Rechtsstaat* developed into a powerful tool for the regulation of the activities of the state's institutions.¹⁵⁶ At the same time, it was still a formalistic view – any activity of the executive not regulated by statute was not subject to judicial review and thus favoured the traditional allocation of responsibilities to the executive.¹⁵⁷

The methodological shift towards positivism occurred slowly over the course of the 19th century. Up to the end of the 18th century, research and teaching relating to the 'state' was by no means limited to the legal appreciation of its nature, its institutions, functions or structure. It also encompassed the exploration of its philosophical, political and historical roots and the analysis of the reality of state and society.¹⁵⁸ Over the course of the 19th century, however, this multidisciplinary approach was rejected and all non-legal considerations excluded. This move towards legal positivism established 'state law' as an autonomous academic, purely legal discipline¹⁵⁹ and reached its culmination with Kelsen's pure theory of law.¹⁶⁰

¹⁵⁵ John Alder, *Constitutional and Administrative Law* (9th edn, Palgrave Macmillan 2013) 117.

¹⁵⁶ Möllers (n 128) 37.

¹⁵⁷ Bernhard Diestelkamp, 'Die Historischen Wurzeln Der Deutschen Rechtsstaatskonzeption' (2012) 51 *Der Staat* 591, 593.

¹⁵⁸ Jo Eric Khushal Murkens, 'Neither Parochial Nor Cosmopolitan: Appraising the Migration of Constitutional Ideas (Book Review)' (2008) 71 *Modern Law Review* 303, 10–12.

¹⁵⁹ Murkens, *From Empire to Union* (n 150) 11.

¹⁶⁰ Waechter (n 33); Murkens, *From Empire to Union* (n 150); Frieder Günther, *Denken Vom Staat Her: Die Bundesdeutsche Staatsrechtslehre Zwischen Dezision Und Integration 1949 - 1970* (Oldenbourg 2004) 30.

At the beginning of the 20th century, however, this newly designed legal discipline was considered to be in crisis: *"... The political neutralisation of constitutional law, that was after all the outcome of political will and determination, could only lead to its fossilisation ..."*¹⁶¹ Critics put forward that state law conceived in a purely legal way could not account for the phenomenon of the 'state' in its complex reality and that the very elements that had been stripped from it, namely i.a. political sciences, sociology, history and comparative law, were necessary for a meaningful analysis.¹⁶² Moreover, the developments up to the First World War put serious pressure on the mainstream opinion as the practical importance of the national parliament and the changing role of political parties within the constitutional system outgrew the role they had been assigned by those theories.¹⁶³ The tension between the theory and the political reality led to the development of new theories and the reconsideration of the complete separation of legal sciences in general and state/ constitutional law in particular from social and political sciences. This led straight into the so-called 'controversy over methodology and objectives' that was the defining feature of state/ constitutional theory in the Weimar Republic (cf. below Section B).¹⁶⁴

The combined effect of the four characteristics sketched out above on the reception of the separation of powers resulted in the theory being transformed into what among German lawyers is referred to as a so-called '**Ordnungsidee**':

*"... a [legal] concept [...] which should, time and again in a larger context, contribute towards ensuring a continuous course of development and adequacy of systematization among different legal institutions. ..."*¹⁶⁵

In other words, the separation of powers came to be perceived very much as an organisational principle, threaded through, and underlying, a constitutional system – a prin-

¹⁶¹ Murkens, *From Empire to Union* (n 150) 17.

¹⁶² *ibid* 18.

¹⁶³ Günther (n 160) 32; Huber (n 154).

¹⁶⁴ Günther (n 160) 33.

¹⁶⁵ Eberhard Schmidt-Assmann, *Das Allgemeine Verwaltungsrecht Als Ordnungsidee : Grundlagen Und Aufgaben Der Verwaltungsrechtlichen Systembildung* (Springer 1998) 1; English translation cited after Mahendra Pal Singh, *German Administrative Law in Common Law Perspective* (2nd edn, Springer Verlag 2001) 5.

ciple meant to ensure efficiency of the institutional organisation of the state and of the exercise of its power.¹⁶⁶ With that transformation, it lost the purpose that Locke, Montesquieu and the Federalists had ascribed to it – to be an indispensable means to ensure the liberty of the individual citizen.

Bearing in mind the above historical context, this Chapter will now explore how the separation of powers was received and conceptualised by German scholars in the 19th and 20th century. Particular reference will be given to carrying forward the findings from the previous Chapter, i.e. to bringing out how the models designed by the scholars realise the two fundamental criteria of 'separation' and 'cooperation'; what definition the scholars use for the term 'power' and how they conceptualise the relationship between the legislative and the executive. One of the questions has already been answered: the 19th and 20th century German tradition did no longer focus on liberty as the foundation of the separation of powers. Instead, they saw efficiency at the heart of the theory's value for a constitutional system. This Chapter will therefore explore the repercussions of such a shift for the conceptualisation of the separation of powers and its potential effects within a constitutional system. The investigation in this Chapter will proceed in a chronological order, starting with the earliest receptions at the beginning of the 19th century through to the days of the Weimar Republic and present day writings.

A. Reception in the 19th century: The separation of powers as a threat to unified sovereignty?

In order to illustrate how state theorists and constitutional lawyers approached the theory of the separation of powers, this Section will look at two scholars that strongly influenced later work and whose effect can still be traced in the jurisprudence of the *Bundesverfassungsgericht* today.

¹⁶⁶ Günther (n 160) 30.

1. Johann Christoph von Aretin: representation of interests

In his 1824 monograph called '*Staatsrecht der konstitutionellen Monarchie*' (State law in constitutional monarchies), Johann Christoph von Aretin provided a commentary on the theory of the separation of powers. He used the model of a social contract in order to explain the problems he foresaw if one were to truly separate the sovereign rights existing within a state. He posited that with the social contract the people had transferred all state power to the monarch. Hence, in order for that power to *be able to be* separated, some of it had to have remained with the people since 'power' in this context should be deemed as a combination of will and the 'might' to enforce one's will - which required independent social powers as illustrated by Montesquieu.¹⁶⁷ As a consequence, neither the legislative nor the judiciary (lacking might), nor the executive (without independent will) could be considered "powers" for the purposes of Montesquieu's theory. In conclusion, Aretin rejected the separation of powers as conceptualised by Locke, Montesquieu or the Federalists as not capable of limiting a monarch's power effectively.¹⁶⁸

Returning to the notion of the social contract, he proceeded to outline his approach. His starting point was that, with such a contract, people transferred all state power to the monarch. The monarch in turn was meant to use that power in order to fulfil the purpose the state was created for (*Staatszweck*): maintaining the government of laws and securing safety and liberty. To Aretin, the social contract provided both the foundation as well as an outline of the inherent limits the monarch was subject to. In order to implement the element of cooperation effectively, Aretin identified 'interests' of the monarchy, the nobility and the people, stressing that he did not mean to have them simply identified with social powers a.k.a. the classes they took their labels from. Instead, he defined them as follows: the monarchy was meant to stand for a strong state power and thus for the state as a whole, the nobility for continuity of the policies and thus for the continued development of the state and the people stood the democratic

¹⁶⁷ Johann Christoph von Aretin, *Staatsrecht Der Konstitutionellen Monarchie* (Literatur Comptoir 1827) 85.

¹⁶⁸ Waechter (n 33) 54.

interest in terms of the civil and political liberties and thus for the dynamic political element.¹⁶⁹ This list was not exhaustive and should new interests worthy of being represented be identified, they would be allocated to the group best suited to represent them. In this, Aretin rejected Montesquieu's argument that each class could only ever represent its own interests which had grown over time. Instead, he created a direct link between the characteristics of a particular group of representatives and the interests they were allocated to represent.¹⁷⁰ In other words, the question was no longer how well the allocation of a particular task or function would enable that power to promote liberty, but rather how 'efficient' that power could promote the interests (whatever they may be). That provided the separation of powers with a much stronger organisational directive than before.

At first glance, this seems merely to create a system of the separation of powers under a different heading – instead of separating sovereign rights, Aretin divided up the *exercise* of that power in his unique way. Different to Locke, Montesquieu and the Federalists is his understanding that while the possible number of groups of representatives may be set at three, the interests each group can represent vary and depend on the individual suitability to represent them.¹⁷¹

2. Immanuel Kant: separation of powers as a question of justice

Kant built on Aristotle's division of 'usual' state activities¹⁷² and postulated that there were three functions that a state had to exercise itself in order to be called a 'state' – i.e. if any one of them would be transferred to private individuals, the state would cease to be a 'state'. These three functions were the power to rule ('*Herrschergewalt*'/sovereignty) by way of adopting general rules - the legislative; the power to govern ('*vollziehende Gewalt*') in obedience to statute - the executive; and the power to judge ('*rechtsprechende Gewalt*') as adjudication to each individual what they were due ac-

¹⁶⁹ von Aretin (n 167) 153–155.

¹⁷⁰ Waechter (n 33) 56.

¹⁷¹ *ibid.*

¹⁷² Tsatsos (n 26) 11.

according to statute - the judiciary.¹⁷³ Stressing the indivisible nature of sovereignty, Kant argued that each of these three *functions* represented a facet of the general will of the political entity that was the state.

Kant constructed the relationship among those three functions along the lines of a classic philosophical syllogism: abstract/generic rules represented the major premise and corresponded to the legislative's activity; relating everyday situations to those generic rules was the minor premise and corresponded to the executive; the definitive allocation of what was due in a given situation, i.e. the conclusion, corresponded to the judiciary.¹⁷⁴ That way, Kant arrived at deducing three distinct 'powers' that represented specific necessary functions that every state needed to fulfil.

Those functions he then allocated to specific institutions within the state. Like Locke, Kant saw a social contract as the foundation of the state which had been agreed by the individuals in order to preserve their freedom. The continued existence of this freedom in undiminished form could only be maintained if the people themselves held supreme power within the state and with it legislative authority: true freedom meant that no individual could be allowed to coerce another - therefore the people itself needed to make the decision of what was to be 'law' - only then would there be no coercion as each individual shared in the decision over her/his own situation.¹⁷⁵ This would also lead to all statutes being 'just' as, philosophically speaking, injustice can only be done to someone by someone else, not by oneself to oneself.¹⁷⁶ In that, Kant created a legislator that 'can do no wrong'.¹⁷⁷

Following on from the assumption that freedom could only be maintained if the people decided together and without coercion, the people could not be the ones who enforced those rules on each other or adjudicated in case of disputes as either type of action required the power to coerce or carried the danger of making mistakes, i.e. being

¹⁷³ Thiele (n 58) 125.

¹⁷⁴ *ibid* 126.

¹⁷⁵ *ibid* 127.

¹⁷⁶ *ibid* 126.

¹⁷⁷ Waechter (n 33) 57.

'unjust'.¹⁷⁸ The executive and judiciary in turn were being given the duty to implement those choices and thus needed to be able to coerce - which precluded them to act via statute and in turn precluded the legislative from acting by way of individual decisions as those constituted 'coercion'. In short, each power was 'unsuitable' to use the type of action that any of the other part two powers did.¹⁷⁹

On the one hand, he saw these three powers as separate and independent from each other as they each fulfilled a specific function. On the other hand, they were dependent and subordinate to each other in that they each could only fulfil their own function properly if the other two fulfilled theirs properly. This, according to Kant, meant that each power was prohibited from usurping the other as that would prevent either power from functioning properly. This combination of separation and subordination was the construction that guaranteed the citizens' rights.¹⁸⁰

Using the terminology identified in Chapter I, Kant posited a model where not only the institutions and the personnel, but also very specifically the type of action each 'power' could take as well as the function were to be kept truly separate. In other words, he complied with the criterion 'separation', but created only extremely limited options for 'cooperation'. Indeed, the latter seems to consist of each power respecting the sphere of the other and allowing it to exercise its function to the fullest extent. Given the examples provided by Madison in the Federalist Papers¹⁸¹, such a model does not seem to work very well in practice. The strong connection Kant created between an institution, its function and the type of action it may take, to the exclusion of the other two 'powers' due to their lack of 'suitability', brings the notion of organisational efficiency to the fore. Locke, Montesquieu and the Federalists had already stressed that efficient decision-making was a desired outcome, but Kant took this a step further by relying on a theoretical syllogism instead of historically grown characteristics for the allocation of 'power'. The disadvantage was that it was no longer possible to use opposing class in-

¹⁷⁸ Thiele (n 58) 126, 129.

¹⁷⁹ Waechter (n 33) 58.

¹⁸⁰ Thiele (n 58) 127–128.

¹⁸¹ Cf. Hamilton, Jay and Madison (n 30), Letter 47.

terests to create a system of interwoven decision making and veto powers (as done by Montesquieu) where effective control was exercised from within the system.

This enabled the shift of the role of the separation of powers within a constitutional system from a political concept that protected liberty to a legal concept that focused on organisational efficiency. As will be seen in Section C below, this particular approach can be traced to present day German scholars who see the separation of powers merely as a 'convenient' organisational tool even though they emphasise the fundamental importance for a constitutional framework.

3. Conclusion

The two models outlined above illustrate how difficult it was to redesign the classic version of the separation of powers in order to reflect the transition towards sovereignty as an indivisible power and the shift towards efficiency while trying to maintain the unique contribution the separation of powers could make to a constitutional system. It is questionable whether these attempts were truly successful. As will become apparent in the approaches designed by present day German authors, one particular weakness in the construction is the deliberate dissociation of social power (be it expressed as class or factions) from the institutions. Precisely the element that made the separation of powers such an effective tool in the eyes of Locke, Montesquieu and the Federalists was taken out of the equation and since then a continuous criticism has been that it was this that considerably diminished the practical impact of the separation of powers within a constitutional system (cf. below Section C).¹⁸²

¹⁸² Waechter (n 33) 63.

B. The Weimar days: the state in crisis

The early 20th century tradition built on the theories developed in the 19th century and adapted them to new realities: after the First World War, the Constitution of the Weimar Republic was the first democratic German constitution to enter into force. This caused a considerable methodological and existential crisis for state/ constitutional law scholars who felt that the very foundations of their discipline had been shaken - the major research 'subject' of the 19th century, the 'state', its conceptualisation, its relationship to society and the nature and role of written constitutions were all called in-to question. This led them to re-evaluate the entire discipline at a fundamental level in the so-called '*Methoden- und Richtungsstreit*'/ '*controversy over methodology and objectives*'.¹⁸³ One side argued that positivism, the methodology of choice of the whole discipline (law), should continue to apply also in the area of state/ constitutional law. Their opponents criticised that this would result in the methodology defining the research 'subject' (a.k.a. the state, the constitution, etc.) which was not acceptable. Instead, they suggested that the approach usually adopted in the humanities should be followed here as well, i.e. the research 'subject' should determine the methodology. Since it had changed so fundamentally, the choice of methodology needed to be re-considered as well.¹⁸⁴

This controversy strongly influenced the conceptualisation of the separation of powers as well. Interestingly, it was not the changeover from monarchical to popular sovereignty that led to differences of opinion. The underlying premise developed in the 19th century was considered to have remained the same: sovereignty was indivisible. Hence, it was again only the exercise of its various facets that needed to be considered. What did cause a fundamental re-evaluation, however, was how scholars thought about the role of the constitution as this informed how they saw the role of constitutional principles, i.a. the separation of powers. The two authors explored in this Section illustrate the two sides of the divide: Richard Thoma (subsection 1) adopt-

¹⁸³ Christoph Gusy, 'Die Weimarer Verfassung Als „negative Ordnungsidee“?' (2011) 5 *Journal der Juristischen Zeitgeschichte* 47, 48.

¹⁸⁴ Pauly (n 48) 3*-4*.

ed a positivist approach and considered the constitution as a regulatory framework for the interaction of the state's institutions. As a consequence, he considered the separation of powers as an organisational tool promoting efficient decision-making. In contrast, Rudolf Smend (subsection 2) saw the constitution as the means to achieve the continuously ongoing integration between state and society which led to the development of a rather unique approach to the separation of powers.

1. Richard Thoma: a positivist understanding

In the *Handbook on State law* ('*Handbuch des Staatsrechts*'), one of the most eminent contemporaneous commentaries on the Weimar constitutional system, Richard Thoma comments on the role of the separation of powers within the newly created constitutional framework.¹⁸⁵ Quite tellingly, the Section is not headed 'the separation of powers' but rather 'theory on the functions of the state' (*Staatsfunktionenlehre*). This very expressly drew attention to the conceptual shift the theory had undergone during the 19th century and what expectations it was expected to meet.

Even though Thoma stressed the importance of the separation of powers for modern constitution building, he considered its contribution to be purely theoretical and not intended to lead to any constitutional claims.¹⁸⁶ To him, Montesquieu's tripartite setup seemed more of a sensible suggestion rather than a normative demand. Despite that, he still took it as the starting point for his analysis of the institutional framework underlying the Weimar Constitution. The constitution followed the by then traditional division into legislative, executive and judiciary and identified one institution as the primary bearer of each function. However, it also included what Thoma considered traditional derogations to that principle by allocating responsibility for the determination of the budget, warfare and peace agreements as well as enquiry committees to the legislative.¹⁸⁷ Interestingly, he did not connect the allocation of responsibility for Foreign

¹⁸⁵ Richard Thoma, 'Die Funktion der Staatsgewalt - Grundbegriffe und Grundsätze' in Gerhard Anschütz, Richard Thoma and Walter Pauly (eds), *Handbuch des Deutschen Staatsrechts*, vol 2 (Mohr Siebeck 1932, reprinted 1998) 108–137.

¹⁸⁶ *ibid* 111.

¹⁸⁷ *ibid* 116–117.

Affairs and warfare to the executive as following that traditional pattern. Rather he thought this to be the result of an application of the separation of powers: all exercise of state power that could not be categorised as 'legislative' or 'judicial' activity depending on the defining nature of each power had to be seen as allocated to the comprehensive 'function' of administering, i.e. the executive.¹⁸⁸ Since Foreign Affairs and warfare could not be considered to be either of the former two, it was logical to task the executive with that responsibility.

As regards the interaction between legislative and executive in particular, Thoma was rather critical as the Weimar Constitution, unlike the 1871 Constitution, was built on a parliamentary system. He pointed out that due to the complexities of the legal and economic system of the time, it could be argued that all important decisions were actually not taken by the executive, but rather by the legislative due to the fact that the executive needed statutes in order to govern.¹⁸⁹ He expressed concern that such a dependence could lead to what he called a 'power monism' of the legislative. The constitution did not contain any express limitation on its competences, but in turn did contain options for the legislative to gain control of the executive indirectly through its control of the legislative process and directly by way of no-confidence votes against individual members of the government or the government as a whole.¹⁹⁰

2. Rudolf Smend: the separation of powers as a means to integration

Rudolf Smend developed his so-called integration theory as a deliberate counter model to the 1920s positivist mainstream in general and Kelsen's pure theory of law in particular. He proposed to reintegrate political, sociological and historical considerations into the legal assessment of the constitution.¹⁹¹ He posited that the role of the constitution was to mediate between society and the state, in other words the *integration* of society's interests and the state's objectives.¹⁹² Thus, its purpose was to provide the

¹⁸⁸ *ibid* 109.

¹⁸⁹ *ibid* 135–137.

¹⁹⁰ *ibid* 116–117.

¹⁹¹ Stefan Koriath, 'Rudolf Smend - Introduction' in Arthur J Jacobson and Bernhard Schlink (eds), *Weimar: a jurisprudence of crisis* (University of California Press 2000) 210.

¹⁹² Günther (n 160) 41.

normative framework for the integration process which was meant to be harmonious, uniting and non-confrontational.¹⁹³ This meant that a constitution was not set in stone but part of the continuous process of integration that had to happen again and again in view of the developments in society. As a consequence of this constant renewal, the constitutional institutions could deviate, if necessary, from the pathways set out in the written constitution as long as this did not violate its spirit. That way, the institutions were able to adapt to the changes brought about by the ongoing process of 'integration'.¹⁹⁴

He distinguished among three 'factors' of integration: *personal* – especially the head of the state (president or monarch) should have an 'integrative effect'; *functional* – all the procedures that mediate between state and society, i.a. elections, law-making, decisions of courts; and *substantive* – the goals, values and symbols of a state that help the people identify with it and provide identifiable markers for the integration process, among them were e.g. the flag, a state's territory or its history, but in particular the constitution as the embodiment of fundamental value decisions made by the people in question – in this respect the provisions on fundamental rights were of central importance.¹⁹⁵

In this setup, the separation of powers unfolded as an element of the *functional* factor of integration. Smend did distinguish among legislative, executive and judicial procedures, but derived their legitimacy not from a particular mode of nomination or particular suitability to fulfil the function at hand, but rather from a power's 'effectiveness as tools of integration'.¹⁹⁶ This meant that the legislative was responsible for creating statutes because its specific decision-making processes were the most suitable to achieve a result that would further the integration process, e.g. by providing a plat-

¹⁹³ Koriath (n 191) 211.

¹⁹⁴ Rudolf Smend, 'Constitution and Constitutional Law' in Arthur J Jacobson and Bernhard Schlink (eds), *Weimar : a jurisprudence of crisis* (University of California Press 2000) 217.

¹⁹⁵ *ibid* 222.

¹⁹⁶ Murkens, *From Empire to Union* (n 150) 59.

form for the discussion of all the interests at stake in a given situation and by subsequently providing the agreed-upon solution in form of a statute.¹⁹⁷

3. Conclusion

The approaches of Thoma and Smend emphasize how the conceptualisation of the context within which the separation of powers is designated to work may in turn influence the conceptualisation of the separation of powers itself. Locke, Montesquieu as well as the Federalists had considered the whole purpose of the social contract, and the constitution respectively, to be the promotion and preservation of the liberty of the people involved and they deemed the separation of powers to have that same inherent purpose. Over the course of the 19th century, however, the separation of powers was dissociated from its political and social roots and turned into a legal principle that was considered to serve the purpose of the state or the constitution, whatever it may be. Thoma and Smend demonstrated how making the separation of powers dependent on external values shifts the evaluation of its usefulness to the question of how successful it realises those values. In short, organisational efficiency became the key objective.¹⁹⁸

Of further interest for the investigation is in particular Thoma's approach to both budgetary responsibility and Foreign Affairs. His reasoning that the allocation of the former to the legislative is due to traditional reasons, while the allocation of the latter to the executive is due solely to a consistent application of the separation of powers appears historically inaccurate and logically flawed, if one considers the developments of the preceding decades of German history as well as the arguments put forward by the Federalists as well as Kant. Foreign Affairs engendered the need for legislation as well as the judicial resolution of conflicts in the same way as domestic matters – to blindly allocate this whole area of policy making to the executive based on the argument that Foreign Affairs do not contain legislative or judicial elements is unconvincing.

¹⁹⁷ Günther (n 160) 42.

¹⁹⁸ Waechter (n 33).

C. Present-day approaches: the separation of powers in crisis?

With the entry into force of the *Grundgesetz* in 1949, the political, social and legal turmoil of the preceding three decades seemed overcome. The new constitution not only introduced a different system of government, but also changed things at a conceptual level. The *Grundgesetz* turned the relationship between state and constitution on its head: instead of considering the constitution as an after-the-fact introduced limitation on the state's powers, the *Grundgesetz* was meant to be the document that – quite literally – constituted their foundation.¹⁹⁹

With that, also the crisis of state/ constitutional law as a discipline was resolved. The main focus was now on realising the intentions of the *Grundgesetz*, in particular with respect to the human rights guarantees. As a consequence, rather little attention was given to the separation of powers. Those German scholars that did engage with it expressed their frustration, like their English speaking colleagues, at the contrast between the theory's eminence in the theoretical debate and its apparently (very) limited practical impact.²⁰⁰ It was hailed variably as 'central concept in modern constitutionalism'²⁰¹, fundamental constitutional principle²⁰² and the unshakeable foundation of liberal constitutionalist states.²⁰³ With the same breath, authors deplored that in light of the plethora of different constitutional systems existing in practice it seemed nearly impossible to pin down the theory's normative content.²⁰⁴ This was mostly attributed to the juridification of the theory: now that it was subject to legal interpretation based on a constitution which was intent on creating a democratic system of government, it seemed that it had lost most of its effect and appeal as a 'tamer' of state power.²⁰⁵ This led some authors to question the usefulness of the separation of pow-

¹⁹⁹ Wahl (n 151).

²⁰⁰ Cf. i.a. Leisner (n 9) 405; Ossenbühl (n 9) 545; Matthias Cornils, '§ 20: Gewaltenteilung' in Otto Depenheuer and Christoph Grabenwarter (eds), *Verfassungstheorie* (Mohr Siebeck 2010) 660.

²⁰¹ Barendt (n 9) 599; for similar statements cf. e.g. Ossenbühl (n 9); Leisner (n 9); Thomas von Danwitz, 'Der Grundsatz Der Funktionsgerechten Organstruktur' (1996) 35 *Der Staat* 329, 329; Eoin Carolan, *The New Separation of Powers: A Theory for the Modern State* (Oxford University Press 2009).

²⁰² Di Fabio (n 28).

²⁰³ Ossenbühl (n 9); Sommermann (n 79) 204–205.

²⁰⁴ Barber (n 9).

²⁰⁵ Werner Kägi, 'Von Der Klassischen Dreiteilung Zur Umfassenden Gewaltenteilung' in Heinz Volker Rausch (ed), *Zur heutigen Problematik der Gewaltentrennung* (Wissenschaftliche Buchgesellschaft

ers as a matter of principle.²⁰⁶ Overall, it seemed that it was now the separation of powers itself that was in crisis and had to prove whether it was indeed a constitutional corner stone or merely a decorative remnant of days long past.

This Section will explore in chronological order contributions by three authors that are to this day considered seminal contributions to the German language debate on the separation of powers. The authors all agree that the theory's real objective was to create an efficient institutional set-up capable of fulfilling its allocated duties,²⁰⁷ but approached the above conundrum from three different angles. Leisner (Subsection 1) attempted to draw the focus of the German language discussion away from the question of how to best protect the individual sphere of responsibility of legislative and executive respectively and towards the question of how to balance the influence of either power on a particular decision. Ossenbühl (Subsection 2) explored how the separation of powers could be used to delineate precisely the spheres of responsibility of the legislative and the executive in a practical context. His solution focused strongly on the specific characteristics of the decision-making processes of each power and the legitimacy they provided the decision with the result. Finally, Danwitz (Subsection 3) considered whether a reformulation that focused very much on the efficiency of decision-making could provide the separation of powers with the desired normative force.

In keeping with the course of the investigation so far, the analysis will focus on how the authors realise the two fundamental criteria of 'separation' and 'cooperation', how they define 'power', how they conceptualise the relationship between the legislative and the executive and what the repercussions are of using efficiency as key objective as opposed to liberty.²⁰⁸

1969) 299; Hans D Jarass, 'Artikel 20' in Hans D Jarass and Bodo Pieroth (eds), *Grundgesetz für die Bundesrepublik Deutschland - Kommentar* (12th edn, CH Beck Verlag 2012).

²⁰⁶ Carolan (n 201).

²⁰⁷ Leisner (n 9) 406; Ossenbühl (n 9) 549; von Danwitz (n 201) 330.

²⁰⁸ as outlined in the introduction, cf. above p. 4

1. Walter Leisner (1969): The emphasis on balance

In his article '*Die quantitative Gewaltenteilung*',²⁰⁹ Leisner posited that the two key objectives of the classic approach - ensuring that each power maintained its independence and to create balance among powers - were actually not compatible with each other in the same context, i.e. one could not achieve both at the same time: consistently applied, any notion of independence of a power had to rely on there being certain areas, competences or functions that could not be interfered with by the other powers. However, if one took the notion of balance seriously, there could not be anything untouchable because there would be situations where deep interference would be necessary in order to create the desired balance.²¹⁰ As a consequence, he considered it impossible to do both notions justice at the same time. Moreover, the practical reality had to be taken into account and with reference to parliamentary democracies like Germany, these notions were based more on fictitious aspirations than realistic options for implementing the theory of the separation of powers. Indeed, the legislative and the executive were so interwoven that any separation had practically ceased to exist beyond the nominal level.²¹¹ From an individual's perspective, it was not necessarily transparent what act was attributable to which power. So the best protection of the interests of individuals during the decision-making process was to introduce collective responsibility of the legislative and executive for actions which in reality they took together anyway.

He therefore suggested to prioritise the second objective – balance – and to look at it not in the way it had been done so far where a *qualitative* understanding had prevailed – in the sense that each power has a unique contribution to make. Instead, he proposed a *quantitative* approach where the differing weight of each power's influence would be factored in for each step of the decision-making process. Since this required one to abandon traditional notions of separate competences and responsibilities, it

²⁰⁹ Leisner (n 9).

²¹⁰ *ibid* 407.

²¹¹ *ibid* 408.

changed the existing overlap between the legislative and the executive from being a problem into part of the solution.²¹²

At first glance, Leisner's approach may appear to follow in the tradition of the Federalists with the notion of checks and balances. However, it is submitted that the Federalists' notion of 'balance' was rather the opposite of the one proposed by Leisner. The Federalists considered balance in the context of one power cancelling out the influence of the other due to the fact that the function in question could not be fulfilled by one power alone. In contrast, Leisner suggested to consider the activities of the legislative and the executive as one process. This removes any possibility to delineate which power should decide what, in how much detail and when.

He was rightfully criticised for this lack of a clear or even identifiable pattern for the resolution of arising conflicts, as it was precisely what the separation of powers had been designed to prevent.²¹³ A definitive allocation of responsibilities and thus clarity and transparency of who took ultimate responsibility for the resulting act was necessary as otherwise citizens would be unable to identify clearly the institution that had issued the act violating their rights and decide on the appropriate judicial remedies to use.²¹⁴

2. *Fritz Ossenbühl (1980): Legitimacy of decision-making as the key objective*

Ossenbühl's contribution revolves around the question of how the separation of powers could provide guidance for the determination of what decisions the legislative should take itself and which ones could be left to the administration as well as what level of scrutiny the administrative courts should apply.

He preceded his analysis by pointing out that the circumstances that had informed the formulation of the separation of powers by Locke, Montesquieu and the Federalists had changed considerably since then which had repercussions for the application of

²¹² ibid 409.

²¹³ Hartmut Maurer, *Staatsrecht I: Grundlagen, Verfassungsorgane, Staatsfunktionen* (6th edn, CH Beck Verlag 2010); Ossenbühl (n 9); von Danwitz (n 201); Sommermann (n 79).

²¹⁴ von Danwitz (n 201).

the separation of powers to present day situations. To him, these repercussions affected in particular the question of the preparedness and suitability of a particular institution for the responsibilities it had been tasked with.²¹⁵ Like Kant, he placed a strong emphasis on the nature and format of the decision-making process associated with a particular institution and the consequences those had for the legitimacy of the decision taken by the institution. He posited that one needed to evaluate what kind of legitimacy a particular question required in order to allocate it to either the legislative or the executive. For example if the decision required an extensive and in-depth debate of the various options available, required access for the public and transparency, required that the proponents publicly defended their choices, etc. then the legislative would be the right forum to take that decision. In contrast, if none of the above was important, but rather that the decision be taken fairly quickly and with due consideration for individual circumstances, then the executive was the appropriate choice.²¹⁶ The requirements in each situation were determined by the interests of the individuals involved. Here, Ossenbühl created a very strong link to the overarching purpose of the separation of powers – to protect the liberty of the people. His particular contribution is that he connects that purpose to the question of efficiency and legitimacy of the decision-making process.

The second problem he addressed was the question not of whether the legislative had to get involved, but rather how far it could get involved in policy areas that were heavily 'saturated' with technology. As example he drew on the regulation of the peaceful use of nuclear power. The respective statute used the device of introducing a generic duty on the owners of a nuclear power station to keep reactor security and other technological necessities "... updated to the latest standards...". Ossenbühl argued that this was an example for the legislative deliberately leaving the statutory basis fairly vague so as to enable the executive to implement that duty effectively without having to request repeated updates of the statute whenever technological advancements were made. Critics suggested that the legislative had violated its responsibilities to

²¹⁵ Ossenbühl (n 9) 549.

²¹⁶ *ibid.*

regulate the necessary detail itself. However, Ossenbühl pointed out that in this situation the legislative was simply too slow to keep up with the advancements in the field and a deliberate move to leave matters to the executive was the far more appropriate choice as that would ensure timely and adequate decisions.²¹⁷ He concluded that the separation of powers could provide valuable arguments for both of the problematic areas pointed out above if one focused on its capabilities to support the allocation of responsibilities to those institutions that were functionally the most capable of handling them. To him that would lead to the best possible decision and thus promote the protection of liberty of the individual.²¹⁸

Ossenbühl's approach reached beyond the simple question of whether a particular decision appears to be 'legislative' or 'executive' in nature. He connected an institution's designated decision-making process to the question of allocation of the authority to take that decision and illustrates how this may contribute to, or indeed diminish, the decision taken in a particular situation. In short, he asked not merely who 'should' take a particular decision, but also whether that power actually 'could' take that decision. His emphasis is very much on the latter and he derived the legitimacy to allocate particular responsibilities largely on account of already existing decision-making structures. What he did not ask was whether a particular institution who 'could not' take a decision, but 'should', had a duty to adapt its decision-making processes to make itself capable of taking the decision in question. Neither did he ask whether a Court had the authority to review such matters. Those and other follow-up questions were posed and answered by Danwitz about 15 years later.

3. *Thomas von Danwitz (1996): The Grundsatz der funktionsgerechten Organstruktur*

Danzitz fleshed out Ossenbühl's approach and took over his phrase '*Grundsatz der funktionsgerechten Organstruktur*' – fairly literally translated it means '*principle of the function-appropriate institutional structure*'. This phrase was meant to capture the

²¹⁷ ibid 550.

²¹⁸ ibid 553.

idea that functions and responsibilities should be exercised by those institutions that were – based on their internal structure, composition, working methods and decision-making processes – best equipped to handle them.²¹⁹ And since each power held a distinct and unique weight and legitimacy within the state organisation, the question of who had what competence carried great meaning for the achievement of '*Entscheidungsgerechtigkeit*' (roughly translates as 'decisional justice/ fairness').²²⁰

The supporters of the *Grundsatz der funktionsgerechten Organstruktur* argued that in order to resolve practical questions such as how to determine what issues should be dealt with by the administration and which ones to reserve to the legislative, a balance-focused approach like Leisner's would review only whether the institution who decided did upset the balance among the powers, not necessarily whether that institution should have the competence to decide in the first place. The *Grundsatz der funktionsgerechten Organstruktur*, on the other hand, aimed to ensure that each decision was taken by the 'right' institution – one that had the appropriate means to do justice to all concerns involved.²²¹ Therefore, one would first consider the internal structure and decision-making processes of each of the potentially appropriate institutions and consider the resulting weight and legitimacy of the decision were the respective institution to take it. Where the *Grundsatz der funktionsgerechten Organstruktur* reaches beyond the classic rendition of the theory of the separation of powers is its ability to pursue these questions not just between two powers but also inside of just one power, i.e. it carried the notion of the separation of powers into the heart of e.g. an administrative body and then reviewed that body with regard to two issues: the allocation of functions and the institutional structure. The outcome of such a review could be that the institution was indeed the one who 'should' have the responsibility in question, but that the institutional structures left something to be desired and so needed to be

²¹⁹ *ibid* 549.

²²⁰ von Danwitz (n 201) 336.

²²¹ *ibid*.

amended in order to ensure the appropriate level of legitimacy for the taking of that decision.²²²

Unlike Leisner's approach, the *Grundsatz der funktionsgerechten Organstruktur* leads to clear allocations of competences and functions and thus transparency. However, as with the former, taken by itself it cannot justify whether a particular issue needs to be factored in or how individual interests should be taken into account in a given situation in order to determine which institution would achieve a 'just' decision. The answers to those questions are far more dependent on how the constitutional system in question conceptualised the role and influence of other values, in particular democracy, the rule of law, human rights protection, etc. In other words, the question of which power should fulfil a given function was strongly influenced by how the constitutional system aimed to protect the interests of the individuals involved in, and affected by, it. In conclusion, it is submitted that the *Grundsatz der funktionsgerechten Organstruktur* does have an advantage over Leisner's approach in that it makes the resulting allocation of functions less unpredictable, but, like Leisner's, it does not provide the theory of the separation of powers with normative content all by itself. For the present context it is also worth noting that in the case of administrative bodies, Danwitz had no compunction to demand the adaptation of the decision-making processes should they be deficient to the responsibility the respective body was to receive. However, he refused to draw similar consequences for the constitutional context. As a consequence, constitutional institutions are 'frozen' within the structures and decision-making processes the constitution provides them with. Therefore, the only question asked under the *Grundsatz der funktionsgerechten Organstruktur* is whether a power 'as is' may be suitable for a particular responsibility, not whether it should carry or participate in that responsibility with the result that its structures and decision-making processes may need to be adapted.

²²² *ibid* 340.

D. Conclusion

This Chapter explored how the theory of the separation of powers was received in Germany over the course of the 19th and 20th century, what developments it underwent in the process and what the repercussions of those developments are for the formulation of the theory compared to its classic modern rendition provided by Locke, Montesquieu and the Federalists (cf. Chapter I).

The reception of the theory into the German constitutional tradition highlighted how general constitutional developments, the values embodied in constitutions, but also the legal tradition as such influence the role and status of the separation of powers. It was explored how the meaning of 'power' shifted from 'having the authority to do' more towards 'function' due to the fact that German state law tradition adopted the concept of indivisibility of sovereignty as posited by Bodin. With that and due to the rise of the notion of *Rechtsstaat* and the successful implementation of a democratic system of government, the purpose of the separation of powers as a protector of liberty lost much of its significance and was replaced by the focus on efficient decision-making. However, this shifted the focus of the analysis, and depending on one's definition of 'efficiency', almost entirely in favour of the executive. For example, when it comes to fast and decisive action, any legislative will likely have to be considered 'inefficient' and thus be dismissed as unsuitable. In contrast, if one were to ask in the same context what institution may be best suited to protect the people's liberties, the decision would not be as straightforward. It is therefore submitted that any attempt to redefine the separation of powers as being based on efficiency would have to provide a definition of 'efficiency' that did not disadvantage either of the three powers due to their inherent organisational structures – in particular since they apparently cannot be adapted if one follows Danwitz's line of argument that the decision-making structures of constitutional institutions cannot be *made* suitable for purpose.

Part I: Conclusion

Part I investigated the role and status of the theory of the separation of powers in constitutional systems with particular reference to German legal scholarship.

Chapter I concluded that for Locke, Montesquieu and the Federalists the separation of powers constituted an indispensable element of a constitutional system in order to avoid the establishment of a tyrannical regime. The separation of powers enabled the three powers to influence and control each other from *within* the political process, thus preventing any one power from becoming too dominant. These authors used the social power embodied in the classes (Locke, Montesquieu) or in the diverse factions existing in the population (the Federalists) in order to provide the institutions those groupings constituted with the necessary standing and ambition to exercise the desired control. Additionally, this made the people, or rather their representatives, part of the constitutional process and thus provided them with a direct conduit to the exercise of state power and with the means to controlling it. **Chapter II** explored how general constitutional developments, the values embodied in constitutions, but also the German legal tradition as such and philosophical traditions on the nature and role of the state and the constitution itself influence the conceptualisation of the role and status of the separation of powers within the German constitutional system. As a consequence, present-day approaches of German legal scholars accord the separation of powers a high status for theoretical discussions but see its value as negligible for the resolution of practical conflicts.

Part II will now turn to the current German constitutional system in order to investigate whether the perception of the legal scholars regarding the relative uselessness of the separation of powers for the resolution of practical conflicts holds true. To that end, the jurisprudence of the *Bundesverfassungsgericht* will be examined in detail in order to establish the impact of the separation of powers in the context of domestic decision making as well in the area of Foreign Affairs. The jurisprudence will be evaluated with particular regard to the relationship it creates between the *Bundestag* and the *Bundesregierung*.

Part II: The separation of powers and the *Grundgesetz*

This Part will investigate how the theory as explored in **Part I** has been implemented into, and applied in, the *Grundgesetz*'s system of constitutional government. As could be seen in Chapter II Section C, present-day German legal scholars commonly perceive the theory to be of little practical use. The aim of this Part is to investigate whether that is true and thus to evaluate the theory's practical impact on the German constitutional system firstly with regard to the general domestic context (Chapter III) and then with regard to the area of Foreign Affairs (Chapter IV).

The thesis will continue to pursue the questions set out for the investigation in Part I in order to evaluate the practical implications of the theoretical differences. The analysis will review the jurisprudence of the *Bundesverfassungsgericht* in order to establish whether the shifting values that drive the theory are mirrored in the Court's approach and in the solutions it finds for the conflicts arising among the powers. As could be seen in Part I, the theoretical conceptualisation of the separation of powers informs the particular solutions it offers. It will therefore be crucial to establish what theoretical approach the *Bundesverfassungsgericht* pursues: whether it has adopted one suggested by the literature, whether it has designed its own by merging several approaches or whether it has developed its own ideas, e.g. due to the much more practical context it finds itself in. In that context, the questions of how the Court defines 'power' and what it considers to be the primary objective of the separation of powers within a constitutional system are of paramount importance. For example, with regard to that latter point, the literature oscillates between liberty and efficiency and, with that, comes to different conclusions as to how one should resolve particular conflicts among powers. Moreover, it will be interesting to see whether potential dangers foreseen in the literature materialised in practice, for example, the fear that the legislative would become too powerful and usurp the other two powers.

The particular focus of this part of the investigation will be the jurisprudence of the *Bundesverfassungsgericht* with regard to the general domestic context as well as Foreign Affairs in order to establish the parameters for the 'typical' interaction between the *Bundesregierung* and *Bundestag*. Those will serve as comparators for the evaluation of the Court's jurisprudence with regard to European matters and the implications it has for the relationship between the two institutions in Part III.

CHAPTER III: from theory to practice: implementation of the separation of powers into the Grundgesetz

Since its creation, the *Bundesverfassungsgericht* and its jurisprudence have had a profound impact on the German legal system as a whole, and on constitutional law in particular. Any investigation into how the separation of powers works in practice will have to consider how the Court's decisions frame the choices open to the political institutions and other actors within the constitutional system. The focus of this Chapter is to connect the theory of the separation of powers as laid out in Part I to that practice and to evaluate its impact on the resolution of practical conflicts arising before the Court.

This Chapter will first explore what the Court considers the theory's role and status within the constitutional system to be, before analysing how the Court realised its demands within the context of conflict resolution. The analysis will use the two criteria identified in the literature – separation and cooperation – in order to establish a common terminology as the basis for the comparison between the literature and the Court's approach. Section B will focus on the efforts of the Court to ensure that the powers remain separate, followed by Section C for the mechanisms for cooperation provided by the *Grundgesetz* will be reviewed.

A. The separation of powers as an organisational principle

1. The separation of powers as a fundamental principle

Starting with the earliest cases in the 1950s, the Court has repeatedly had the opportunity to comment on what it saw as the role and status of the separation of powers within the German constitutional system. In one of its earliest decisions, the *Bundesverfassungsgericht* considered the separation of powers to be “... ein tragendes Organisationsprinzip des Grundgesetzes...”/ “... a fundamental organisational principle of the Grundgesetz...”²²³.

²²³ BVerfG, ‘Gleichberechtigung’ [1953] BVerfGE 3, 225, 247, as translated by author.

According to German constitutional doctrine, the five principles referred to in especially Article 20 (2) and (3) *Grundgesetz*²²⁴ are the so-called structural constitutional principles of the *Grundgesetz*, namely federalism, democracy, the 'Rechtsstaat', republicanism and social justice. Following Smend's approach to see the constitution as an embodied objective value system, these principles are taken to express the fundamental value decisions that form the basis for legitimate exercise of state authority in Germany. Therefore, they are considered to provide the theoretical framework for the German constitutional system and e.g. to provide primary normative guidelines for the interpretation and application of individual constitutional provisions.²²⁵ As some of the decisions discussed in this thesis will illustrate, their role goes beyond that and they are used by the Court to reinforce a claimant's individual rights, for the current context the Court's decisions on the Maastricht and Lisbon treaties are the most famous examples.²²⁶ The principles form part of the constitutional core that is protected by the so-called 'eternity clause' in Article 79 (3) *Grundgesetz* from being altered or abolished even by way of constitutional amendment.

For this investigation, the principles of democracy and *Rechtsstaat* are of particular relevance as they provide the theoretical framework for the interaction of the *Bundesregierung* and the *Bundestag*. Broadly speaking, their respective areas of application may be distinguished as follows: with the principle of democracy, the emphasis is on the realisation of the *exercise* of sovereign power by the people and how to establish democratic legitimacy for the actions of the state's institutions while the *Rechtsstaat* principle comprises various concepts and mechanisms that *control and limit* the exercise of state power by the institutions in any given situation. Together, they provide the means to allow the institutions to aspire to what the *Bundesverfassungsgericht* refers to as the '*demokratische Rechtsstaat*' – a system of government

²²⁴ Please cf. the full text of the provision in the Annex in the original German and in English translation.

²²⁵ Uhle, 'Artikel 64' in Bruno Schmidt-Bleibtreu, Hans Hofmann and Axel Hopfau (eds), *Kommentar zum Grundgesetz* (12th edn, Carl Heymanns Verlag 2011) para 2; Murkens, *From Empire to Union* (n 150) 60; Koriath (n 191) 212.

²²⁶ BVerfG, 'Maastricht' (n 38); BVerfG, 'Lissabon' (n 38).

founded on strong democratic ideals where the exercise of all state power is comprehensively bound by law and justice and informed by a deep respect for human dignity.²²⁷

The principle of **democracy** serves to delineate the powers and remit of the individual constitutional institutions within the *Grundgesetz*'s system of parliamentary democracy: since the almost only instance²²⁸ of exercise of sovereign power directly by the people at federal level is the general parliamentary election, this act is seen as carrying very great meaning. As a consequence, the *Bundestag*'s position as the 'only directly elected federal institution' is seen as pivotal for the provision of democratic legitimacy to the other constitutional institutions. The *Bundesverfassungsgericht* developed the concept of the so-called 'chain of democratic legitimacy' where every single decision taken by a public body – be it legislative, executive or judicial in nature – has to be part of a continuous 'chain' that in an unbroken line leads directly back to the *Bundestag* – and thus to the people. For example, a decision taken by cabinet minister is linked to the Bundespräsident who was the one who appointed the minister. The Bundespräsident in turn was elected by Federal Assembly and the Federal Assembly comprises all of the members of the *Bundestag*. That way all the civil servants working in that ministry are linked up to the *Bundestag* as well. As will be explored further in Chapter V, this concept is one of the underlying threads in the Maastricht decision. There, the Court's concern was whether by transferring too many competences to the European Communities, this chain may be broken as decisions could no longer be traced back to the *Bundestag* as the elected representative of the German people.²²⁹

The **Rechtsstaat principle** is commonly seen as embodied especially in Article 1 (1) and Article 20 (3) *Grundgesetz*.²³⁰ The concept is fairly often simply translated as 'rule of law' but according to German constitutional doctrine a state needs much more than what the rule of law e.g. in English constitutional law connotes in order to be a

²²⁷ For one of the earliest references cf. e.g. BVerfG, 'Volksbefragung' [1958] BVerfGE 8, 104.

²²⁸ Changes to the geographic borders of the individual Länder require confirmation by way of referendum in the Länder affected by the change (Article 29 *Grundgesetz*).

²²⁹ BVerfG, 'Maastricht' (n 38).

²³⁰ Please cf. the full text of the provision in the Annex in the original German and in English translation.

Rechtsstaat – a ‘state under the rule of law’ – which has led some English scholars to posit that ‘...the UK is hardly a *Rechtsstaat* ...’.²³¹ The *Rechtsstaat* principle provides the conceptual framework for a number of procedural as well as substantive concepts which taken together aim to provide comprehensive control of the exercise of state power in various contexts. The notion of constitutional sovereignty, the *Grundgesetz*’s system of human rights protection, the right to access to effective judicial remedies, non-retroactivity, the principle of proportionality and the general statutory reserve, to name only a few, all form part of the *Rechtsstaat* principle. The separation of powers is considered to be part of it as well.²³² Indeed, it is often described as the indispensable core of the modern *Rechtsstaat* which in turn is inextricably linked to the modern constitutionalist state with its strong system of human rights protection.²³³

This ‘classification’ of the separation of powers as part of the *Rechtsstaat* principle places a strong emphasis on its role in *controlling* the exercise of state power, very much in keeping with Locke and the Federalists. At first glance, therefore, notions of efficiency, legitimacy of decision-making or even integration as were developed in the 19th and 20th century literature seem to be much less important in practice. The next Section will now turn to the more specific definition of the separation of powers as developed by the *Bundesverfassungsgericht*.

2. Separating and ‘interlacing’ powers: Gewaltenteilung in the Grundgesetz

Article 20 (2) explicitly differentiates out that state power is exercised by “... *besondere Organe der Gesetzgebung, der vollziehenden Gewalt und der Rechtsprechung* ...” / “... *through specific legislative, executive and judicial bodies* ...”²³⁴ Even though the *Grundgesetz* uses here the classic tripartite construction, the provisions dealing with

²³¹ Alder (n 155) 117.

²³² cf. i.a. Jarass, ‘Artikel 20’ (n 205) 23; Maurer (n 213) 208.

²³³ Axel Hopfauf, ‘Einleitung’ in Bruno Schmidt-Bleibtreu, Hans Hofmann and Axel Hopfauf (eds), *Kommentar zum Grundgesetz* (12th edn, Carl Heymanns Verlag 2011) para 131; Sommermann (n 79) 205–207.

²³⁴ ‘Grundgesetz Für Die Bundesrepublik Deutschland’ (translated by Prof. Christian Tomuschat, David P. Currie and Donald P. Kommers) <http://www.gesetze-im-internet.de/englisch_gg/index.html> accessed 15 April 2016.

the various institutions in detail do not allocate any institution explicitly to one of those 'powers' or detail their specific function and responsibilities in the constitutional system with respect to the 'power' they may belong to. The *Bundesverfassungsgericht*, however, was a bit more forthcoming. After establishing the separation of powers as a fundamental principle, the Court proceeded to clarify its role and purpose:

"... dass die Organe der Legislative, Exekutive und Justiz sich gegenseitig kontrollieren und begrenzen, damit die Staatsmacht gemäßigt und die Freiheit des Einzelnen geschützt wird. ..."

"... that the organs of the legislative, executive and judiciary control and limit each other, so that state power may be moderated and the freedom of the individual be protected..."²³⁵

By 1972, the following paragraph had become a well-established formula:

*"... Das Grundgesetz will die politische **Machtverteilung**, das **Ineinandergreifen** der drei Gewalten und die daraus sich ergebende **Mäßigung** der Staatsherrschaft. Das Prinzip der Gewaltenteilung ist für den Bereich des Bundes jedoch nicht rein verwirklicht. Es bestehen zahlreiche Gewaltenschränkungen und –balancierungen. Nicht absolute Trennung, sondern **gegenseitige Kontrolle, Hemmung und Mäßigung** der Gewalten ist dem Verfassungsaufbau des Grundgesetzes zu entnehmen..."*

*"... The Grundgesetz aims for the **distribution** of political power, the **interlacing** of the three powers and the resulting **moderation** of state authority. However, for the domain of the Federation the principle of the separation of powers has not been realised in a 'pure' fashion. There exist numerous instances where the powers are interlaced and balanced in a specific way. Not absolute separation, but **mutual control, limitation and moderation** of the powers can be identified from the structure of the Grundgesetz..."²³⁶*

After clarifying its purpose and its understanding of the criteria 'separation' and 'cooperation', the Court established its own list of criteria that would allow it to resolve conflicts among the powers:

²³⁵ BVerfG, 'Bremer Personalvertretung' [1959] BVerfGE 9, 268, 279, as translated by author.

²³⁶ BVerfG, 'Hessisches Richtergesetz' [1972] BVerfGE 34, 52, 59 [emphasis added], as translated by author.

“... so muß doch andererseits die in der Verfassung vorgenommene **Verteilung der Gewichte** zwischen den drei Gewalten bestehen bleiben. Keine Gewalt darf ein von der Verfassung nicht vorgesehenes **Übergewicht** über eine andere Gewalt erhalten. Keine Gewalt darf der für die Erfüllung ihrer verfassungsmäßigen Aufgaben erforderlichen **Zuständigkeiten beraubt** werden. Der **Kernbereich** der verschiedenen Gewalten ist unveränderbar. Damit ist ausgeschlossen, daß eine der Gewalten die ihr von der Verfassung zugeschriebenen typischen Aufgaben **preisgibt...**”

“... The **balance of power** among the three powers as created by the constitution has to be preserved. No power may acquire a **predominant position** over another power that was not intended by the constitution. No power may **be deprived** of the competences necessary for the carrying out **of its responsibilities** as allocated by the constitution. That way it is precluded that one of the powers **relinquishes** the typical responsibilities ascribed to it by the constitution...”²³⁷

A later addition was an explicit reference to the *Grundsatz der funktionsgerechten Organstruktur* as developed by Ossenbühl and Danwitz that all decisions should be taken by the institution or the power most capable and best equipped to do so.²³⁸ However, while prominent in the area of Foreign Affairs (as will be discussed in Chapter IV), that particular approach did not feature highly in the jurisprudence of the Court with regard to the domestic context.

Based on the above statements, it becomes clear that the Court emphasises the need for separation much more than the need for cooperation. Most of the formulations quoted above phrase things in a way that allow the power to defend itself against attempts at usurpation by one of the other powers. What is also striking are the references to the ‘intentions’ of the constitution, for example ‘the balance as intended by the constitution’, ‘a predominance not intended by the constitution’ or ‘the responsibilities allocated by the constitution’. The implication seems to be that the constitution as the definitive guide for establishing what the relationship among the powers in a

²³⁷ ibid [emphasis added], as translated by author; please cf. also BVerfG, ‘Bremer Personalvertretung’ (n 235); and BVerfG, ‘Südumfahrung Stendal’ [1996] BVerfGE 95, 1, 15; most recently with a slightly different phrasing, cf. e.g. BVerfG, ‘Untersuchungsausschuss Geheimgefängnisse’ [2009] BVerfGE 124, 78, 120.

²³⁸ BVerfG, ‘Rechtschreibreform’ [1998] BVerfGE 98, 218, para 137.

given situation should be like. Formulated differently: not the theory as developed by legal scholars, but the constitution as the embodiment of the will of the people determines how the institutions should interact, regardless of the imbalance this may create among the powers or potentially even regardless of whether the allocation of a specific task or function would be considered 'appropriate' for the power in question. And indeed the Court has expressly pointed out that the people have the power to create exceptions to the general rules on the relationship among the powers – it is part of its prerogative to make decisions about how to balance e.g. legal certainty and material justice in a given situation.²³⁹

B. Maintaining 'separateness'

The drafters of the *Grundgesetz* opted for a parliamentary democracy as a constitutional model which from the perspective of the separation of powers may be characterized as a constitutional system where the separation of the legislative and the executive is not maintained with regard to the personnel of the institutions – usually the members of the government are also members of the parliament. In this model, the government is on the one hand dependent on the confidence of the parliament for its continuance in office, but on the other capable of controlling the parliament by way of its control over the majority of the House. If one looks at the text of the *Grundgesetz*, one does find the matching institutional set-up:

The *Bundestag*, the elected lower house of the Federal Parliament forms the **federal legislative** together with the Bundesrat, the upper house of the Federal Parliament. It is elected based on a mixed-member electoral system for four years and, in a deliberate reaction to Weimar, the *Bundestag* may not be dissolved prematurely unless in very few situations and under strict conditions. In particular, the *Grundgesetz* does not provide the *Bundestag* with the right to dissolve itself, nor does it allow the executive to initiate a dissolution on its own accord.²⁴⁰ The Bundesrat is the institution that represents the interests of the Länder at federal level. Unlike the US American Senate, the

²³⁹ BVerfG, 'Gleichberechtigung' (n 223) 247.

²⁴⁰ Cf. Article 63 and 68 *Grundgesetz*.

members of the Bundesrat are not elected, but appointed by the respective Land government, i.e. technically speaking, they represent only the parliamentary majority in the respective Land and not the people of the respective Land as such.²⁴¹ Moreover, it is a permanent institution, i.e. it does not dissolve on a regular basis but rather its composition changes constantly in consequence of elections in the Länder. Among other things, this has led to the Bundesrat becoming a platform of party politics, since the political parties in power in the Länder are often not the same ones as those that support the *Bundesregierung*. This has implications for the practical control powers available to the *Bundestag* which will be discussed below in Section C 2.

The **federal executive** consists of the *Bundesregierung* and the Bundespräsident with the actual political decision-making power of the executive vested in the Bundeskanzler as head of the *Bundesregierung*.²⁴² The *Bundestag* elects the Bundeskanzler, and may overthrow the whole *Bundesregierung* by electing a new Bundeskanzler by way of a constructive vote of no confidence.²⁴³ Neither the Bundeskanzler nor the members of the cabinet have to be members of the *Bundestag*.²⁴⁴ Interestingly however, ever since 1949, the Bundeskanzler as well as all the members of the *Bundesregierung* have always also been members of the *Bundestag*.²⁴⁵ In other words: the standard constitutional practice 'interlaces' the personnel of the key part of the executive with that part of the legislative that is directly elected by the people. This means that the *Bundesregierung* theoretically has the power to use its controlling majority in the *Bundestag* to undermine that institution's independent decision-making power and thus to subvert its options to control the activities of the *Bundesregierung*. Whether this theoretical danger is realised in practice, will be explored in Section C below.

²⁴¹ Article 51 (1) *Grundgesetz*.

²⁴² Article 65 *Grundgesetz*.

²⁴³ Article 67 *Grundgesetz*

²⁴⁴ for the Bundeskanzler cf. Uhle, 'Artikel 63' in Bruno Schmidt-Bleibtreu, Hans Hofmann and Axel Hopf auf (eds), *Kommentar zum Grundgesetz* (12th edn, Carl Heymanns Verlag 2011) para 8; for the Bundesminister cf. Uhle (n 225) 15.

²⁴⁵ Bernhard Brockmeyer, 'Artikel 66' in Bruno Schmidt-Bleibtreu, Hans Hofmann and Axel Hopf auf (eds), *Kommentar zum Grundgesetz* (12th edn, Carl Heymanns Verlag 2011) para 25.

Going forward, it is tentatively concluded that the *Grundgesetz*'s institutional setup point towards an understanding of 'power' in terms of 'legal authority to act' with a strong emphasis on formally separating functions, although as will be demonstrated in Section C 1 below, the executive is considerably involved in the process of legislation.

1. The nature of the function

The guidance from the Court looks at first glance as a statement of the obvious: the legislative creates statutes by way of legislating, the judiciary adjudicates conflicts and the executive is defined negatively as everything that is not part of the other two.²⁴⁶ This is supplemented via the typical 'product' of the power's activities – a statute, an individual decision or a judgment – by attaching specific and distinct value to the respective decision-making process. As Ossenbühl outlined, the purpose of the legislative process may be seen in providing a public forum for the discussion of questions of fundamental importance whereas the advantage of executive decisions lies in their speed and adaptability. Hence, the different processes carry a different kind of democratic legitimacy which impacts on the resulting 'product'.²⁴⁷ The Court maintains that both the legislative and the executive carry their own democratic legitimacy and that the mere fact that the *Bundestag* was directly elected and the *Bundesregierung* was not, does not affect the latter's democratic 'credentials' and does not create a generic presumption to act in favour of the former.²⁴⁸ Indeed, the *Bundesverfassungsgericht* expressly rejected the notion of using the principle of democracy to enable the legislative to override the allocation of functions and tasks to the executive as set out by the *Grundgesetz* in favour of a general presumption of competences in favour of the parliament.²⁴⁹ However, when it comes to one power controlling the activities of the other, the legislative's more direct democratic credentials do carry more weight: be it enquiry committees, questions about the budget or activities affecting the independence

²⁴⁶ BVerfG, 'Südumfahrung Stendal' (n 237) 15–16; BVerfG, 'Hessisches Richtergesetz' (n 236) 59–60.

²⁴⁷ Ossenbühl (n 9) 549.

²⁴⁸ BVerfG, 'Kalkar I' [1978] BVerfGE 49, 89, 124–125.

²⁴⁹ BVerfG, 'Kalkar I' (n 248).

of the members of *Bundestag*,²⁵⁰ to name only a few, the *Bundesverfassungsgericht* regularly stresses that in this context the *Bundestag* represents the people and has a duty to make sure that the executive acts within the bounds provided by the *Grundgesetz*.²⁵¹

Clearly inspired by the *Grundsatz der funktionsgerechten Organstruktur*, the Court's general approach is to focus on what kind of 'resolution' a particular political issue requires, i.e. whether it should be decided via statute or may be decided via individual decisions.²⁵² For example, the question whether Germany should make peaceful use of nuclear energy was deemed to have such a profound impact on the lives of the citizens that it could not be left to the executive to decide if and under what conditions this would happen.²⁵³ Thus, the Court aims to provide a clear answer to the competence issue arising without having to delineate a precise range of competences for each power. This flexibility comes at the price of predictability in the sense that the institutions involved in the daily political activities may find it difficult to predict the Court's stance on a particular issue.

In a case where the *Bundesverfassungsgericht* had to review proceedings created to establish the constitutionality of election results, the legal issue was how such decisions should be made. The parliament of Hessen had decided to give this task to a parliamentary committee and to provide its decisions with 'the force of law'.²⁵⁴ The *Bundesverfassungsgericht* reasoned that as such the parliament of Hessen had been free to decide on the nature of the remedy as it was well-established parliamentary tradition to leave such decisions to a parliamentary committee and not to refer them to the judiciary. However, the Court took exception to attaching consequences to the deci-

²⁵⁰ BVerfG, 'Untersuchungsgegenstand' [1978] BVerfGE 49, 70; BVerfG, 'Flick-Untersuchungsausschuß' [1984] BVerfGE 67, 100; BVerfG, 'Minderheitsrechte Im Untersuchungsausschuß' [2002] BVerfGE 105, 197; BVerfG, 'Untersuchungsausschuss Geheimgefängnisse' (n 237); BVerfG, 'Überwachung von *Bundestagsabgeordneten*' [2009] BVerfGE 124, 161.

²⁵¹ BVerfG, 'Abgeordnetenbeobachtung' [2013] BVerfGE 134, 141, paras 100–101.

²⁵² BVerfG, 'Kalkar I' (n 248) 127.

²⁵³ *ibid.*

²⁵⁴ BVerfG, 'Wahlprüfung Hessen' [2001] BVerfGE 103, 111.

sions of this parliamentary body which were inherently judicial in nature.²⁵⁵ The Court rejected the argument that the process could not be considered 'judicial' since it was executed by a legislative body. It considered the intentions of the legislative as to what kind of procedure it had aimed to adopt to be secondary. If the mechanism had to be considered judicial from an objective perspective, it was not something a legislative body could do.²⁵⁶ In short, the legislative had to make a choice which power it wanted to task with the review of election results and was then restricted to the means available to that power for the design of the decision-making process as well as the status of the resulting decisions.

In cases where the Court does not consider the nature of the activity under review to be clearly attributable to one power, it can be surprisingly generous regarding the activities of the legislative and the executive. For example, when the *Bundesregierung* decided to have the *Bundestag* and Bundesrat adopt a planning decision directly via statute instead of using the existing planning laws, the Court argued that since 'planning' was neither clearly an executive nor clearly a legislative activity, the parliament was free to decide the issue itself and not to leave it to the executive.²⁵⁷ Considering that the actual decision to have parliament pass a statute was taken by the government – i.e. the executive – and not the parliament and that this course of action was adopted deliberately to circumvent the options for judicial review embedded in the planning laws, the decision seems to run contrary to the courts usual efforts to maintain a high standard of fundamental rights protection. It also illustrates the potential dangers that lie in the institutional overlap between the *Bundesregierung* and the *Bundestag*. Those will be explored further in Section C.

2. Protecting the core: the ultimate limit to usurpation

With regard to the Court's original definition of the boundaries within which non-separateness between powers may be tolerated, the criteria have been drawn togeth-

²⁵⁵ *ibid* 139.

²⁵⁶ BVerfG, 'Verwaltungsstrafverfahren' [1967] BVerfGE 22, 49, 78; BVerfG, 'Wahlprüfung Hessen' (n 254) 137.

²⁵⁷ BVerfG, 'Südumfahrung Stendal' (n 237) 16.

er into the notion that a power's 'core' must be protected. This idea was developed in the area of fundamental rights protection and tries to convey the image that while limitations (there: to a right's sphere of protection) were as such possible, they must not reach into the very heart, i.e. the 'core', of what the right was all about as that would turn the idea of fundamental rights protection into a hollow promise.²⁵⁸

In the present context, the use of this notion allowed the *Bundesverfassungsgericht* to determine whether a particular action constituted a 'still acceptable' overlap between powers or indeed an unacceptable usurpation. An approach followed by the US courts is to start with the theory and to attempt to characterize the activity or task in question as being legislative, executive or judicial in nature so that one may establish who 'should' be fulfilling it – which can then be checked against who is doing it in a specific case.²⁵⁹ In contrast, the *Bundesverfassungsgericht* favoured what one could label a more textual approach. Specifically, the Court looks to the text of the constitution first to establish whether it contains an express or implied allocation of the function or task in question. If so, that power has the right to fulfil that function, irrespective of the potential imbalance this may cause. The limits to this constitutional sovereignty may be found in overriding considerations based on the *Rechtsstaat* principle and the citizens' fundamental rights.

The wiretapping decision of 1970 provides an illustration of how the *Bundesverfassungsgericht* handles this in practice.²⁶⁰ The case concerned a challenge against an amendment to Article 10 *Grundgesetz* (right to privacy of correspondence, post and telecommunications) that was meant to enable the secret services to monitor, intercept, wire-tap, etc. such forms of private communication. Contentious was that the system for reviewing the actions of the secret services was set up by way of a parliamentary committee instead of the usual judicial review. The *Bundesverfassungsgericht's* very pragmatic response was that the *Grundgesetz* expressly allowed the legislative the option to create such a replacement mechanism. So making use of

²⁵⁸ Cf. the notion of 'Wesensgehalt' in Article 19 (2) *Grundgesetz*, Leisner (n 9).

²⁵⁹ For further details please cf. i.a. M Elizabeth Magill, 'The Real Separation in The separation of powers Law' (2000) 86 *Virginia Law Review* 1127.

²⁶⁰ BVerfG, 'Abhörurteil' [1970] BVerfGE 30, 1.

that option could not be considered per se a violation of the separation of powers. However, since the provision in question clearly stated that the parliamentary procedure was to 'replace' the judicial one, the system created had to be the latter's equivalent in terms of the procedural and substantive characteristics, its effectiveness as well as the level of control exercised over the secret services.²⁶¹ The Court argued that such a replacement was justified in this particular case by national security considerations, so derogations from the *Grundgesetz's* usual requirements with regard to judicial review standards were acceptable. Overall, this derogation did not touch the judicial power in its core since the ratio underlying the separation of powers – mutual limitation and control of the powers – was still achieved as the activities of the executive were reviewed by another power, the legislative.²⁶² The interesting result of the Court's reasoning is that now the legislative exercises a function that the Court itself would consider judicial in nature. The clear impetus behind this reasoning was of course the Court's concerns for the fundamental rights of the individuals involved. In that sense, its solution is a rather creative reversal of the intentions of the amendment: the *Bundesverfassungsgericht* allowed the legislative and the executive to circumvent the normal judicial review processes in the first instance, only to recreate the effect as much as possible in the second step by forcing the respective parliamentary committee to act as much as a judicial tribunal as possible.

One of its earliest cases concerned the protection of the executive against organisational restructuring efforts of the legislative. The case concerned a statute enacted by the Bremen parliament that aimed to transfer final decision-making power for personnel decisions relating to civil servants away from the Bremen government to a newly created body chaired by the president of the Bremen parliament. The *Bundesverfassungsgericht* considered this to be unconstitutional as it violated the executive's power in its core. While there was as such flexibility as to how to arrange the administrative setup, the organisational structures had to ensure that the executive was still able to fulfil its tasks independently and in a manner that allowed them to carry the political

²⁶¹ *ibid* 23.

²⁶² BVerfG, 'Abhörurteil' (n 260).

responsibility for its decisions. This newly created body would take final decision-making power over personnel decisions away from the executive which would lead to the unacceptable situation that the executive had to take responsibility for the actions of employees they had not appointed to the position in the first place. This case illustrates how the Court sees the duty to fulfil a certain function as corresponding to the power to do so, i.e. it creates a direct link to the criterion mentioned by the Court that '*No power may be deprived of the competences necessary for the fulfilment of its responsibilities*'.²⁶³ It also illustrates the great variety in which one power may attempt to usurp another.

With regard to the latter, a recent series of decisions of the *Bundesverfassungsgericht* proved cases in point: The cases concerned the observation of elected members of the *Bundestag* or a Land legislature by the federal secret services. The *Bundesregierung* had used the secret services to spy in a fairly general fashion on several parliamentarians of the LINKE party (the successor of the GDR's socialist party). The *Bundesverfassungsgericht* dealt with this fairly harshly. It held that such activities constituted an interference with the parliamentarians' rights i.a. to political freedom of expression and to pursue their office without hindrance. In a very real sense, it impeded the work of the *Bundestag* as a whole as it could lead to an atmosphere of intimidation.²⁶⁴ All in all, it created the false image of the members of the legislative being accountable to the executive while only the reverse was true.²⁶⁵ Thus, the Court reasoned, such observations could only be constitutional for 'imperative reasons of national security' and had to be based on concrete allegations of wrongdoing. It could not ordered merely for the sake of membership in a particular party that may, or may not, have political convictions the current *Bundesregierung* did not like.

The cases outlined above illustrate that the protection of the core is not done merely for the sake of preserving a power's independence or for the sake of it being able to

²⁶³ BVerfG, 'Hessisches Richtergesetz' (n 236) 59.

²⁶⁴ BVerfG, 'Überwachung von *Bundestagsabgeordneten*' (n 250) 195.

²⁶⁵ BVerfG, 'Abgeordnetenbeobachtung' (n 251) 100–101.

control other powers in turn. Instead, the Court's arguments emphasise that the core of each power is immutable because each power has been given specific tasks and functions by the constitution. In this, the separation of powers is supplemented by the *Rechtsstaat* principle in that the latter requires that the institutions fulfilling these tasks and functions have to be accountable to the democratically elected parliament. However, this is only possible if the actions taken by those institutions are their own in the first place – i.e. if they cannot decide independently, then one cannot in all honesty claim that those decisions were their 'own' and accountability is impossible.²⁶⁶ It is concluded that the *Bundesverfassungsgericht* may be considered as generous in situations where the legislative and the executive re-allocate functions and tasks not specifically provided for in the *Grundgesetz* – provided they stay away from the core.²⁶⁷

C. The need for cooperation

'Cooperation' is the second criterion identified in the literature as required for a functioning system of the separation of powers. Its realisation is less straightforward than that of the notion of separateness as the exact nature of the control and cooperation mechanisms will largely depend on the nature of the constitutional system in question.

For example in a presidential system like the United States, where especially institutions and personnel are kept strictly separate, cooperation and control mechanisms will have to provide access to the activities of one power from the outside, as it were, as the other powers are deliberately not part of its decision-making process. For example in the field of legislation, Congress is more or less solely in control, apart from the veto of the president. That veto does not make the president part of the deliberations on the bill, it just allows the executive to control the activities of the legislative from the 'outside'. Overall, cooperation and control mechanisms in presidential systems will likely be fairly confrontational, pitting power against power.

In contrast, in a parliamentary democracy the mechanisms for cooperation and control between the legislative and the executive are largely political and procedural in nature

²⁶⁶ BVerfG, 'Bremer Personalvertretung' (n 235) 281.

²⁶⁷ *ibid* 282.

as the powers' overlap with regard to personnel allows in particular the executive to participate in the activities of the legislative by right of membership. As a result, those mechanisms are built around options to influence the process of decision-making itself within the institution rather than controlling the actual decision at the end of the process.

With regard to maintaining the separateness of the powers involved, this leads to a situation where one power – the executive in form of the government – becomes so much part of another power – the legislative – so that it can influence or even dominate its decision-making. As a result, the powers are no longer required to cooperate with each other and thus one cannot rely on the tension between them for mutual control. Montesquieu considered this to be one of the dangers of 'unified' government and thus a violation of the very notion of the separation of powers.²⁶⁸ Thoma, faced with a similar institutional setup in the Weimar Constitution, was less severe, but was still rather concerned about the potential 'power monism' where the executive was in danger of becoming nothing more than an executive committee of the legislative. In contrast, others considered precisely the political means of control to be an effective compensation.²⁶⁹

This section will explore precisely how that institutional overlap impacts on the ability of each power to exercise effective control over the other. The first 'mechanism' to be reviewed will be the legislative process (Sub-section 1). In that context, the impact of constitutional practice with regard to party political influences on the process and on the institutions' behaviour will be of particular importance (Sub-section 2). The last two mechanisms reviewed here are the budgetary responsibility of the *Bundestag* and the right of the *Bundestag* to instate enquiry committees (Sub-section 3).

1. Cooperation through joint allocation of responsibilities

German constitutional law scholars describe the responsibilities of the *Bundestag* and the *Bundesregierung* in the domestic context as '*Staatsleitung zur gesamten Hand*'/

²⁶⁸ Cf. above Chapter I B.

²⁶⁹ Möllers (n 128); Thoma (n 185) 132.

'joint state leadership'.²⁷⁰ This means that, in theory, the *Bundestag* and the *Bundesregierung* share the rights and responsibilities that are part of governing a state as equal partners which each have a unique contribution to make. Traditionally, the *Bundesregierung* is seen to be in charge of setting the political agenda whereas the *Bundestag* is seen as the forum for debate on the adoption of the legislation the government needs to implement its agenda – an allocation of roles which is seen as corresponding to their nature as executive and legislative respectively.

As far as the legislative process as designed by the *Grundgesetz* goes, the *Bundesregierung*'s influence is very noticeable throughout: it has the right to introduce legislative bills into the *Bundestag*²⁷¹ and votes on ordinary bills only require a simple majority²⁷² for the adoption. As members of the *Bundestag*, the members of the *Bundesregierung* together with the members of the government coalition have a controlling influence on the work in the committees and can thus support a bill at every stage of the way. This procedural influence is combined with the *Bundesregierung*'s advantage in terms of information and expertise which results in the fact that in practice the *Bundesregierung* provides ca. 60% of all bills deliberated in the *Bundestag*. On the surface, this provides the *Bundesregierung* with a comprehensive set of mechanisms to exert control over the *Bundestag*. This raises the question as to how much independent decision-making power the *Bundestag* has truly left, considering that the executive may reach into its very heart.

However, the *Bundesverfassungsgericht* has developed two reserves that provide the *Bundestag* as a whole, but also the opposition parties, with options for recourse to prevent the *Bundesregierung* from abusing its practical dominance – and thus prevent the usurpation of the legislative by the executive. Derived from the *Rechtsstaat* principle, the general statutory reserve (*Gesetzesvorbehalt*) requires the executive to have a statutory basis for any action that impacts on the fundamental rights of an individual. This would indicate that, as such, the executive is very much dependent on the legisla-

²⁷⁰ Sommermann (n 79); Di Fabio (n 28).

²⁷¹ Article 77 *Grundgesetz*.

²⁷² Article 42 *Grundgesetz*.

tive for every single action relating to the implementation of its political agenda. However, the *Bundesregierung* could easily circumvent these strictures by way of using its majority in the *Bundestag* to pass any statute it wished or even to pass legislation that empowered it to adopt far-reaching delegated legislation, thus making the *Bundestag* redundant. However, as the *Bundesverfassungsgericht* made clear, such a move would be a violation of the allocation of tasks and functions as created by the *Grundgesetz*, i.e. of the separation of powers as well the *Rechtsstaat* principle.²⁷³ According to the so-called '*Wesentlichkeitstheorie*', the *Grundgesetz* contains a so-called parliamentary reserve (*Parlamentsvorbehalt*) that all 'fundamental' decisions have to be taken by the legislative itself. In other words, the *Bundestag* is prevented from delegating away its power to make decisions for the people who elected it. In the jurisprudence of the Court, this theory has been of particular relevance in the area of human rights. For example, the *Bundesverfassungsgericht* held that the question whether a teacher in a public school may or may not wear a headscarf could not be left to administrative discretion but had to be settled directly by statute.²⁷⁴ Considered through the lens of the separation of powers, this reserve shows a strong connection to Kant's idea of the people having the right to decide themselves what limitations they wished to be subject to. From a practical point of view, this reserve prevents the *Bundesregierung* from using its control over the political parties supporting it to abuse their dominance over the *Bundestag* in order to delegate legislative power to the *Bundesregierung*. In essence, this reserve protects the core of the *Bundestag*'s legislative function against it being undermined 'from the inside'.

Beyond these two reserves, the division of labour between the executive and the legislative is left to a large extent to the institutions involved. For example while the political decision as such about the peaceful use of nuclear energy had to be taken by the parliament,²⁷⁵ it was perfectly acceptable for it to regulate the matter through the use of vague legal terms that by their very nature transferred a lot of actual decision-

²⁷³ BVerfG, 'Hessisches Richtergesetz' (n 236) 59–60.

²⁷⁴ BVerfG, 'Kopftuch Ludin' (n 19).

²⁷⁵ cf. above the comments on BVerfG, 'Kalkar I' (n 248).

making power to the executive during the implementation. Without expressly referring to it, the *Bundesverfassungsgericht* relied on notions developed later by Ossenbühl with his *Grundsatz der funktionsgerechten Organstruktur*²⁷⁶ when it argued that in an area of law so dependent on staying on top of fast-moving technological progress, any legislator would be hard-pressed to keep a statute properly updated – and concluded that it was no violation of the *Wesentlichkeitstheorie* if the executive was provided with a considerable amount of discretion if that discretion was guided by a statute providing the necessary basic framework.²⁷⁷

2. Cooperation as part of the political process

The overview in the previous Section may have created the impression of an almost overpowering influence of the executive over the legislative. While this matches the constitutional reality to some extent, there are two factors in particular that temper the overall independence of the Bundeskanzler and the *Bundesregierung* and thus prevent the executive from simply usurping the *Bundestag*. One such factor is the influence of party politics that limit in particular the Bundeskanzler's political room to manoeuvre, the other is the rather unexpected emergence of the Bundesrat as a platform for party political power play.

As could be seen in the previous Section, at first glance the existence of political parties has led to a situation where the competences and rights that the *Grundgesetz* officially allocates to the *Bundestag* are in reality controlled by the *Bundesregierung*. Since 1949, all but one government have enjoyed the very stable support of the political parties supporting the government coalition. This could lead one to conclude that the *Grundgesetz*'s version of a parliamentary democracy lends itself very well to a domination by the executive: the nominal need for the confidence of the *Bundestag* into the *Bundesregierung* is in practice reduced to the government having to make sure of the support of the coalition parties who in turn have a vested interest to provide stable support to the government. In short, the 'natural' tension Montesquieu envisaged be-

²⁷⁶ Ossenbühl (n 9).

²⁷⁷ BVerfG, 'Kalkar I' (n 248) 135.

tween two opposing powers has been replaced by a seemingly total alignment of the interests involved. If one then considers that the *Grundgesetz* provides the Bundeskanzler with i.a. total control over the composition of the *Bundesregierung* and the political agenda (Article 65), it seems that the *Grundgesetz*'s very structures allow the convergence of all political decision-making power onto one office and person: that of the Bundeskanzler.

The political reality, however, is different. The Bundeskanzler's competences on paper are severely limited in practice by precisely the same forces that seem to empower her/ him beyond what the drafters of the *Grundgesetz* may have intended. The mixed-member-based electoral system allows a larger number of parties to enter the *Bundestag*. One of the consequences is that it is very difficult for one party to achieve an absolute majority. Since 1949, the *Bundesregierung* always consisted of a coalition of at least two parties, even in 1957, when the conservatives did gain an absolute majority. This led to the development of a political culture dominated by the search for compromise and where pre-election electoral manifestos have very little influence on the voters since they know that the parties will have to compromise on their political objectives in the post-election negotiations leading to the so-called coalition agreement.

The coalition agreement is a contract between the parties of the intended coalition that sets out the general conditions and goals of their proposed cooperation for the coming parliamentary term. It seriously limits the Bundeskanzler's power to 'determine' the political agenda independently as it would likely lead to the break-up of the coalition if the Bundeskanzler went against it.²⁷⁸ Another important part of the coalition negotiations is the agreement on the composition of the *Bundesregierung* – down to what party will be allowed to fill how many and which posts and who from each party will fill which post. Without an agreement on this, no party will sign the coalition agreement. Thus, a practice like the 'reshuffle' so common in English constitutional politics is an entirely foreign notion in the German system as it is politically almost impossible for the Bundeskanzler to reassign the members of the cabinet to different

²⁷⁸ Article 65 *Grundgesetz*.

posts or actually to get rid of one. Even if one were to resign, the decision about who will succeed in office is again taken in agreement among the coalition parties, even though the *Grundgesetz* officially allocates this power to the Bundeskanzler alone.²⁷⁹ As a consequence, it is very important for the *Bundesregierung* to secure the continuous support of the members of the government coalition. As Sprungk²⁸⁰ has investigated, one way of doing so are weekly meetings where a considerable amount of information flows from the government to the members of the coalition parties. This does provide the majority of the *Bundestag* with influence on the *Bundesregierung*, however it undermines the position of the whole house since the opposition parties are left out. The effect this has in the area of Foreign Affairs will be explored in the next Chapter.

Another factor that has proven to exert a strong counter influence to the *Bundesregierung's* dominance of the *Bundestag* is the **Bundesrat** (Federal Council). The drafters of the *Grundgesetz* intended it to be the institutional representation of the interests of the Länder at federal level, but over time the Bundesrat has turned out to be far more often a platform for party political manoeuvring and an effective veto player.²⁸¹

As the Federalists explained, a federal state structure leads to decision-making power being divided not only in a horizontal dimension among legislative, executive and judiciary, but also in a vertical dimension between the federal level and the Land level. An institution like the US Senate or the Bundesrat provides the connection between the levels and allows the states/ Länder a direct route into the decision-making process at federal level in order to make sure that their rights are not infringed. How much this underlying rationale determines the position and role of the Bundesrat in Germany's federal constitutional system is evident in the specific rights and responsibilities the Bundesrat is provided with. It has the right to request the presence of (members of) the *Bundesregierung* at its sessions and its members have the right to access all ses-

²⁷⁹ Article 64 *Grundgesetz*.

²⁸⁰ Carina Sprungk, 'National Parliamentary Scrutiny in the European Union: The German *Bundestag* and the French Assemblée Nationale, Key Players or Side-Shows?' (2003) <<http://aei.pitt.edu/7278/>> accessed 15 April 2016.

²⁸¹ Barber (n 66).

sions of the *Bundestag*.²⁸² Most importantly, as the upper house of the federal parliament, the Bundesrat is involved in the legislative process: Generally, it has the right to object to a bill passed by the *Bundestag*; in instances expressly specified by the *Grundgesetz*, bills require the express consent of the Bundesrat.²⁸³ Those instances usually concern situations where sensitive interests of the Länder are at stake,²⁸⁴ so in and by itself a seemingly reasonable compromise between the interests of the federal level and those of the Länder. Unfortunately for the *Bundesregierung*, these instances turned out to be the rule and not the exception and thus the main reason why the Bundesrat gained so much power: by the mid-2000's more than 60% of all federal bills were subject to the consent of the Bundesrat which provided its members with a lot of political leverage to 'reopen' negotiations with the *Bundesregierung* and the majority in the *Bundestag* about the content of the statute.

This situation is exacerbated by the specific institutional structures of the Bundesrat and the resulting influence of party politics. The members of the Bundesrat are not elected by the people of the Land in question but appointed by its executive.²⁸⁵ In practice, the appointees are usually members of the Land's government, including its head of government. Unlike the *Bundestag*, the Bundesrat does not have a fixed term. Instead its composition is subject to continuous change depending on the date and outcome of the elections in the Länder. Unfortunately for the *Bundesregierung*, the parliamentary terms in the Länder do not coincide with the term of the *Bundestag*²⁸⁶ and with up to sixteen elections at Land level over the course of one four-year term of the Federal Parliament, the membership and thus the majority situation based on party membership is in constant flux. Moreover, a noticeable trend over the last sixty years has been that even if a new *Bundesregierung* started out with the majority in the Bundesrat on its side, this had usually shifted to the opposition by the end of its term,

²⁸² Article 53 and 43 (2) *Grundgesetz* respectively.

²⁸³ Article 77 *Grundgesetz*.

²⁸⁴ e.g. their autonomy to determine their own administrative structures for the implementation of federal statutes (Article 83-85 *Grundgesetz*)

²⁸⁵ Article 53 *Grundgesetz*.

²⁸⁶ Most Länder parliaments have a 5 year term, only the senates of Bremen and Hamburg have a term of 4 years.

sometimes quite dramatically. For example, Angela Merkel's 2009-2013 Conservative/Free Democrat²⁸⁷ coalition government started out with a Bundesrat majority in its favour of 38 out of 69 votes. By 2013, the parties in opposition in the *Bundestag* held the majority in the Bundesrat with 36 out of 69 votes while the parties of the *Bundesregierung* had only 15 votes safely on their side. Such developments allow the opposition in the *Bundestag* to play on party allegiances and in case it is outvoted in the *Bundestag*, to use its leverage in the Bundesrat to push for compromises that the *Bundesregierung* rejected during the debate in the *Bundestag*. For the *Bundesregierung* this means in turn that the mere fact that it controls the majority in the *Bundestag* is not necessarily the decisive factor when it comes to the implementation of its political agenda.

While this 're-dedication' of the Bundesrat may be deplored from the perspective of its role as representative of the Länder, it is a welcome development within the context of the separation of powers. It turns the Bundesrat into an effective counter-force to the *Bundesregierung* and provides the *Bundestag*'s opposition parties with an additional option to control the activities of the *Bundesregierung*. However, as has been seen in the past, if used to excess, this effect may become seriously disruptive to the political process, even to the point of gridlock,²⁸⁸ something that is as such is not a natural occurrence within the German constitutional system.

3. Cooperation through confrontation: budgetary responsibility and enquiry committees

Unlike the process of legislation and the practical cooperation due to party political constraints, the options for interaction reviewed in this Section are more confrontational in the sense that they allow the *Bundestag* to interfere considerably with the independent workings of the *Bundesregierung*. Especially in the hands of the opposition, they can develop into powerful tools for political control.

²⁸⁷ The German equivalent to the UK's Liberal Democrats

²⁸⁸ As it happened to the last Schröder government (2002-2005) who was faced with a 2/3 majority against him in the Bundesrat and hostile opposition parties.

The responsibility for the budget is one of the most fiercely protected rights of any parliament, the German literature tends to refer to it as the '*Königsrecht*' – literally the 'royal' right of a parliament.²⁸⁹ Historically speaking, the power to control the budget was one of the earliest parliamentary rights to develop - already Magna Carta listed it among the concessions made by King John²⁹⁰ and with the Bill of Rights 1689, it finally became political reality that the monarch could not raise taxes without parliamentary approval.²⁹¹ It was fought over for good reason - control over the budget enabled the parliament to control the monarch's activities in a very direct way: without the power to raise the money necessary to raise an army and to pay for weapons, it was impossible for the monarch to wage war. The ultimate control over war and peace was thus – in a practical and very real sense – in the hands of the parliament. As Montesquieu pointed out:

"... Si la puissance exécutive statue sur la levée des deniers publics autrement que par son consentement, il n'y aura plus de liberté,..."

*"... If the executive could control the raising of funds all by itself, there would be no liberty any more..."*²⁹²

The *Grundgesetz* follows in that tradition and allocates ultimate decision-making power over public spending (the annual budget as well as control of expenses made) to the national parliament, specifically the *Bundestag*.²⁹³ Despite the fact that the *Bundesregierung* holds the majority in the house and can usually be sure of winning the vote, this allows the *Bundestag* considerable influence over the government's policy decisions for two reasons: for one, the political impact of the debate is considerable. The debate on the budget is considered one of the most important events in the annual political calendar that is used by the members of the *Bundestag*, especially by the op-

²⁸⁹ Hopfauf (n 233) 68.

²⁹⁰ "...No 'scutage' or 'aid' may be levied in our kingdom without its general consent...", Section 12 of the 'Magna Carta 1215' (English translation provided by the British Library) <<http://www.bl.uk/magna-carta/articles/magna-carta-english-translation>> accessed 15 April 2016.

²⁹¹ "... That levying Money for or to the Use of the Crowne by pretence of Prerogative without Grant of Parlyament for longer time or in other manner then the same is or shall be granted is Illegall...", 'Bill of Rights 1688' (1688) <<http://www.legislation.gov.uk/aep/WillandMarSess2/1/2/introduction>> accessed 15 April 2016; Alder (n 155).

²⁹² English translation quoted after: Montesquieu (n 130).

²⁹³ Article 110 *Grundgesetz*.

position, as a general review of the government's policies.²⁹⁴ It usually attracts considerable media attention which allows the Parliament to fulfil one of its most important functions: to provide a platform for the exchange of a broad spectrum of opinions and to create transparency and accountability of the government vis-à-vis the electorate.²⁹⁵ In its jurisprudence, the *Bundesverfassungsgericht* has used this allocation of responsibilities as an argument to strengthen the *Bundestag*'s position on financial matters vis-à-vis the *Bundesregierung*. Seen from the perspective of the separation of powers, the repercussions for the relationship between the executive and the legislative are considerable: the government's right to protect the independence of its internal decision-making processes is much more limited when it comes to providing access to information about budgetary affairs.²⁹⁶

Secondly, as the right is officially allocated to the *Bundestag* as a whole, it can turn into a powerful tool in the hands of the opposition when used as the basis for an investigation within the framework of an enquiry committee. As the jurisprudence of the *Bundesverfassungsgericht* outlined below illustrates, there are not many instances where the executive can legitimately refuse to hand over the requested information.²⁹⁷

Using the doctrine of separation of powers, the *Bundesverfassungsgericht* strengthened the rights of the opposition in this context, for example to prevent the parliamentary majority from amending the mandate of the enquiry committee in order to subvert the enquiry as a whole and/or to turn it away from the actions of the government the opposition wished to scrutinize.²⁹⁸ The *Bundesverfassungsgericht* held that in a parliamentary system the tension necessary for an effective control among the powers did no longer exist between the government and the parliament as such, but rather between the governmental majority in the parliament and the opposition/ the parliamentary minority.²⁹⁹ In light of that fact, the enquiry rights would allow for an effective

²⁹⁴ BVerfG, 'Greek Bailout/ EFSF' [2011] BVerfGE 129, 124.

²⁹⁵ Hans Hofmann, 'Artikel 20' in Bruno Schmidt-Bleibtreu, Hans Hofmann and Axel Hopfauf (eds), *Kommentar zum Grundgesetz* (12th edn, Carl Heymanns Verlag 2011).

²⁹⁶ BVerfG, 'Informationspflichten Der Regierung' [2004] BVerfGE 110, 199.

²⁹⁷ BVerfG, 'Minderheitsrechte Im Untersuchungsausschuß' (n 250).

²⁹⁸ BVerfG, 'Untersuchungsgegenstand' (n 250) 85.

²⁹⁹ *ibid.*

control of the government and the majority it controlled only if they could be used effectively by the opposition.³⁰⁰ Hence, it was particularly important that that function and those rights could not be undermined by the government by using its majority in the *Bundestag* to change or amend the mandate of the enquiry committee in order to frustrate the investigation as such or to slow it down to such a degree that its purpose could no longer be fulfilled. Therefore, the only amendments that were acceptable against the wishes of the minority could be those that clarified the mandate or added issues that were necessary for an objective review of the issues under investigation.³⁰¹ However, the Court stressed that the majority had the burden of proof on this point as it had to be obvious that the amendments met those criteria. If it was not, they were automatically inadmissible.³⁰²

Furthermore, once the enquiry was under way, the committee had the right to gather all the evidence it needed to conclude the investigation and the executive had a duty to cooperate by providing the files requested or by giving its civil servants permission to appear as witnesses.³⁰³ The executive had no discretion³⁰⁴ to refuse access to files or witnesses on the grounds for example that a disclosure would be against the best interests of the nation or that confidentiality issues were at stake. The *Bundesverfassungsgericht* stressed that the protection of the interests of the nation was the joint duty of both government *and* parliament and thus as a general rule, the government could not rely on this argument against the parliament in order to refuse access to files unless confidentiality could not be ensured.³⁰⁵ Overall, to refuse access was to be the rare exception, not the rule, and acceptable reasons were mainly linked to the protection of the government's internal decision-making processes which the *Bundesverfassungsgericht* considered to be part of the executive's core.³⁰⁶

³⁰⁰ *ibid* 86.

³⁰¹ *ibid*.

³⁰² *ibid* 88.

³⁰³ BVerfG, 'Flick-Untersuchungsausschuß' (n 250) 129.

³⁰⁴ BVerfG, 'Untersuchungsausschuss Geheimgefängnisse' (n 237) 118.

³⁰⁵ BVerfG, 'Flick-Untersuchungsausschuß' (n 250) 134.

³⁰⁶ *ibid* 139.

D. Conclusion

As the survey of the *Bundesverfassungsgericht's* jurisprudence illustrates, the Court's approach is based in theory to a certain extent, but is overall very pragmatic and driven by the desire to resolve the practical conflict at hand.

The Court's overall approach to the separation of powers may be described as very pragmatic and flexible – instead of attempting to define and delineate each power precisely, it uses the separation of powers in combination with in particular the principle of democracy and fundamental rights protection in order to determine the scope and limits of each power's sphere of influence and their relationship in the context at hand. In addition, its overall focus is much more on the element of cooperation rather than that of separation, probably due to the fact that it considered the latter to be secured by the *Grundgesetz* itself through its provisions on the institutions. Moreover, the conflicts emerging from the system of parliamentary democracy which the Court had to resolve revolved far more around the need to regulate mechanisms for mutual control rather than to protect the legislative or the executive from being usurped by the other. The limits to that flexibility can be found in particular in the *Rechtsstaat* principle and the requirement to protect each power's core.

The link to the literature in terms of explicit references is tenuous which could be seen as confirmation that the theory is of little use 'in the field': certainly questions of power delineations or discussions of the underlying purpose of the theory – issues that are widely discussed in the academic literature – are rare to non-existent. The Court does provide very little in terms of positive definitions or explanations - what exactly may be necessary to achieve '*mutual control, limitation and moderation*'³⁰⁷ is not explained.

The mechanisms for the mutual control existing between legislative and executive provide each power with opportunities to exercise considerable influence, depending on

³⁰⁷ BVerfG, 'Hessisches Richtergesetz' (n 236) 59 as translated by author.

the situation. They are largely procedural and political in nature, so do not lend themselves easily to be enforced before the *Bundesverfassungsgericht*. The overall image that emerges is that the separation of powers is one element in the toolbox of the Court that helps it to shape the relationship between the *Bundestag* and the *Bundesregierung*. The principle of democracy, the *Rechtsstaat* principle and in particular fundamental rights protection are recurring themes that influence the balance of power between institutions, sometimes just as much as the separation of powers.

CHAPTER IV: Foreign affairs – the separation of powers ‘misfit’?

The previous Chapter focused on the interaction of the *Bundestag* and the *Bundesregierung* in the domestic context and how the jurisprudence of the *Bundesverfassungsgericht* has shaped their relationship in practice as well as the underlying conceptualisation of the separation of powers in the *Grundgesetz*. As could be seen, the *Bundesverfassungsgericht* rather favours case by case solutions over enforcing a specific line of reasoning as a matter of principle. As will be seen in this Chapter, this is turned on its head when it comes to Foreign Affairs. The Chapter will provide an overview over the *Bundesverfassungsgericht*'s approach to Foreign Affairs in general and its repercussions for the relationship between the *Bundestag* and the *Bundesregierung*.

A. Establishing the executive's foreign policy prerogative

1. The text of the Grundgesetz

In keeping with Germany's federal nature, the *Grundgesetz* contains an explicit allocation of the responsibility in Foreign Affairs as regards the level – the federation or the Länder. Article 32 (1) specifies that '*Die Pflege der Beziehungen zu auswärtigen Staaten ist Sache des Bundes.* / '*Relations with foreign states shall be conducted by the federation.*' However, who exactly at the federal level is meant to 'conduct' those relations is not specified – like many constitutions, the *Grundgesetz* does not make explicit provision as to what institutions or power(s) should be responsible for dealing with Foreign Affairs. Other provisions only regulate individual aspects, but do not explicitly allocate the responsibility for Foreign Affairs as a matter of principle to one or more power(s). On the other hand, what is regulated is the involvement of the *Bundestag* in two very specific situations:

Artikel 24

(1) Der Bund kann durch Gesetz Hoheitsrechte auf zwischenstaatliche Einrichtungen übertragen.

Artikel 59

(2) Verträge, welche die politischen Beziehungen des Bundes regeln oder sich auf Gegenstände der Bundesge-

Article 24

(1) The Federation may by a law transfer sovereign powers to international organizations

Article 59

(2) Treaties that regulate the political relations of the Federation or relate to subjects of federal legislation

setzung beziehen, bedürfen der Zustimmung oder der Mitwirkung der jeweils für die Bundesgesetzgebung zuständigen Körperschaften in der Form eines Bundesgesetzes. Für Verwaltungsabkommen gelten die Vorschriften über die Bundesverwaltung entsprechend.

shall require the consent or participation, in the form of a federal law, of the bodies responsible in such a case for the enactment of federal law. In the case of executive agreements the provisions concerning the federal administration shall apply mutatis mutandis.

Article 24 (1) reflects the realisation of the drafters of the *Grundgesetz* that the role of international organisations would become much larger in post-World War II international relations. Hence, it regulates to whom, how and why Germany may transfer 'sovereign powers'. In the past 60 years it was applied for example to the ratification of the NATO treaty, the UN Charter and of course the European treaties.

In contrast to the very specific scenario regulated in Article 24, Article 59 (2) refers to the 'everyday' workings of international relations with respect to obligations created through treaties. Like many constitutions, the *Grundgesetz* demands the involvement of the parliament at the stage of ratification. As can be seen above, Article 59 (2) requires the involvement of the parliament for two specific types of treaties: those that "... regulate the political relations of the Federation or relate to subjects of federal legislation...". According to established jurisprudence, treaties regulating the political relations of the Federation are those that affect the existence of the state, its territorial integrity, its independence or its status in the international community and thus affect matters of such fundamental concern for the state and the people that parliamentary consent is necessary. Treaties 'relating to subjects of federal legislation' are in turn those that create international obligations for Germany that need to be implemented by way of federal statute, i.e. where the implementation at domestic level requires the enactment of statutes and thus the *Bundestag's* cooperation.³⁰⁸ In the past, for example the European Convention of Human Rights has been ratified based on Article 59 (2). Inversely, this means that as long as a treaty does not affect fundamental question

³⁰⁸ BVerfG, 'Petersberger Abkommen' [1952] BVerfGE 1, 351, 380; Wilhelm Grewe, '§ 77 Auswärtige Gewalt' in Josef Isensee and Paul Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, vol Band III: Das Handeln des Staates (2nd edn, CF Müller Verlag 1996) para 58.

of Germany's very existence or falls within existing powers of the *Bundesregierung* (original or delegated), it does not require parliamentary consent for its ratification.

Article 24 and Article 59 do not explicitly determine the relationship between the *Bundestag* and the *Bundesregierung* in the area of Foreign Affairs in general.³⁰⁹ Thus, since the 1950s, there has been a controversial discussion among academics regarding the allocation of the responsibility for Foreign Affairs and over the exact extent of the *Bundestag's* and the *Bundesregierung's* respective responsibilities and competences and in particular about the options of control the *Bundestag* may have over the actions of the *Bundesregierung* and the resulting balance of power between the institutions.

The discussion among academics has revolved around mainly two different interpretations: the more traditional position perceives Foreign Affairs to be 'naturally' a matter for the executive.³¹⁰ Such an approach would be very much in keeping with the one taken by Locke and Montesquieu. Montesquieu described what he later on referred to as the executive power as the 'power referring to the rights of nations', i.e. to him, the typical activities of the executive included the relations to foreign states. Locke even separated it out as the 'federative' power – distinct from the ordinary executive power and the prerogative power.³¹¹ The consequence of such a classification would be that the *Bundesregierung* would be considered as exclusively in charge and the *Bundestag* would be relegated to a minor role consisting of after-the-fact oversight and political control powers.

Critics have been very vocal about this remnant of 'monarchical' perceptions of the relationship between the legislative and the executive in the area of international relations.³¹² Instead of the solution that gives one power a very dominant role and leaves the other in a fairly weak position, supporters of an alternative approach suggest to consider Foreign Affairs as a joined responsibility of legislative and executive. Such an

³⁰⁹ Grewe (n 308) 41.

³¹⁰ i.a. Christian Calliess, '§ 83: Auswärtige Gewalt' in Josef Isensee and Paul Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, vol IV: Aufgaben des Staates (3rd edn, Müller 2006) para 22.

³¹¹ Locke (n 30) 137; Montesquieu (n 30) VI-1-2.

³¹² Möllers (n 128) 167.

approach would provide the *Bundestag* with a level of influence similar to that enjoyed in the domestic context.³¹³ This view could be supported by reference to one of the Court's own decisions on the separation of powers. Regarding the reorganisation of the Bremen personnel division, the Court had decided that a power that was given responsibilities by the *Grundgesetz* may not be deprived of the competences to fulfil those obligations since otherwise that power would be made accountable for decisions it had no control over (cf. Chapter III B 2).³¹⁴ If one considers the *Bundestag's* general democratic responsibility vis-à-vis the people, in particular for the actions of the *Bundesregierung*, one may argue that the traditional approach leaves the *Bundestag* in a situation where it has to ratify treaties without having had any input into the negotiation - in short: with the ratification, it is made responsible for actions of the *Bundesregierung* it had no control over. Such a situation would be avoided if Foreign Affairs were to be considered the joint responsibility of the *Bundestag* and *Bundesregierung*.

2. The Court's initial approach

Unfortunately, the *Bundesverfassungsgericht* decided already very early on to follow the more traditional approach. In two seminal decisions in 1952, the Court opted to allocate the competence to one power only, namely the executive, and relegated the legislative to control powers only which were largely political in nature.

The first case concerned the so-called Petersberg Agreement which was meant to enable the then occupied Western Germany to participate in the activities aimed at creating the first European communities. The second case concerned an agreement between France and Western Germany on trade and financial transactions.³¹⁵ In both cases, the *Bundesregierung* had concluded the negotiations with the Western Allies,

³¹³ Eberhard Menzel, 'Die Auswärtige Gewalt Der Bundesrepublik' in Wilhelm Grewe and Eberhard Menzel (eds), *Die auswärtige Gewalt der Bundesrepublik* (Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer, Band 12, De Gruyter Verlag 1954) 192; Ernst Friesenhahn, 'Parlament Und Regierung Im Modernen Staat' in Ernst Friesenhahn and Karl Josef Partsch (eds), *Parlament und Regierung im modernen Staat/ Die Organisationsgewalt* (Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer, Band 16, De Gruyter Verlag 1959) 37.

³¹⁴ BVerfG, 'Bremer Personalvertretung' (n 235).

³¹⁵ BVerfG, 'Petersberger Abkommen' (n 308); BVerfG, 'Deutsch-Französisches Wirtschaftsabkommen' [1952] BVerfGE 1, 372.

and the French government respectively, and then had the agreements published in the Federal Gazette without submitting them to a vote in the *Bundestag*. The *Bundestag*'s opposition challenged this as a violation of the *Bundestag*'s rights under Article 59 (2). Both cases concerned matters arising under the statute regulating the powers of the Western Allied Forces for the purposes of the occupation (the so-called *Besatzungsstatut*) and thus dealt with very specific and rather untypical situations. Nevertheless, the Court used this opportunity to set out its interpretation of Article 59 (2) in a detailed fashion, creating rules that govern the relationship of the *Bundestag* and the *Bundesregierung* in the area of Foreign Affairs to this day.

The Court dismissed both claims since neither treaty fell under the two alternatives laid out for consent requirements in Article 59 II – the Petersberg Agreement did not because it was a treaty with the occupying powers and thus not subject to the regular provisions of the *Grundgesetz*; and the Franco-German treaty did not because it was not a treaty that '*regulate[d] the political relations of the Federation or relate[d] to subjects of federal legislation*' for the purposes of Article 59 (2). With respect to the relationship between the *Bundestag* and the *Bundesregierung*, the Court's reasoning contains several statements that developed into recurring themes in the subsequent decades, so it is worth quoting them in full:

"... Article 59 Abs. 2 GG durchbricht das Gewaltenteilungssystem insofern, als hier die Legislative in den Bereich der Exekutive **übergreift**. [...] daß auch insoweit die Politik des Bundeskanzlers der parlamentarischen Kontrolle unterliegt, die in einem Mißtrauensvotum nach Article 67 GG gipfeln kann. ..."

"... Article 59 (2) of the Basic Law deviates from the system of the separation of powers, in that the legislative branch **encroaches** in the area of the executive branch. [...] policy making by the Federal Chancellor is subject to parliamentary control, which can culminate in a vote of no-confidence under Article 67 of the Basic Law..."³¹⁶

"... In der parlamentarischen De-

"... In a parliamentary democracy,

³¹⁶ BVerfG, 'Petersberger Abkommen' (n 308) 369–370, emphasis added. Quoted after the translation available at <<https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=1364>> accessed 15 April 2016.

mokratie ist grundsätzlich dem Parlament die Rechtsetzung vorbehalten und der Exekutive die Regierung und Verwaltung übertragen. Hierzu gehört auch die Führung der Außen- und Handelspolitik.[...] Der Bundestag **kann** diese Funktion der Regierung **nicht übernehmen**, soweit ihm nicht ausdrücklich Regierungsaufgaben zugewiesen sind. [...] Nur weil im Article 59 Abs. 2 GG für die beiden Sonderfälle [...] die Form des Gesetzes vorbehalten ist, kann die Legislative durch Mitwirkung in dieser Form in die Tätigkeit der Exekutive eingreifen. Darüber hinaus hat Article 59 Abs. 2 GG dem Bundestag kein Recht gegeben, in den Zuständigkeitsbereich der Regierung einzugreifen. Der Bundestag **bleibt auf die allgemeinen verfassungsmäßigen Kontrollmöglichkeiten beschränkt**. Er regiert und verwaltet nicht selbst, sondern er kontrolliert die Regierung. Mißbilligt er deren Politik, so kann er dem Bundeskanzler das Mißtrauen aussprechen (Article 67 GG) und dadurch die Regierung stürzen. Er kann aber nicht selbst die Politik führen. ...“

legislation is basically reserved for parliament, with government and administration being assigned to the executive branch. To the latter belongs also the conducting of foreign policy and trade policy. [...] The Bundestag **is not able to** assume this function of government unless it is expressly provided with such functions. [...] Only because Article 59 (2) requires a law in the two special cases [...] is the legislature able to intervene in executive activity by way of participation in the form of law making. Above and beyond this, Article 59 II has not given the Bundestag a right to intervene in the Government's zone of responsibility. **It remains limited to the general constitutional powers of supervision**; rather than itself governing and administering, it controls the Government. Should it disapprove of the latter's policies, it is empowered to express its lack of confidence in the Federal Chancellor (Article 67 of the Basic Law) and bring down the Government. But it is not able to conduct policy making of its own accord. ...”³¹⁷

These statements contain in a very compacted fashion the base line of the Court's past – and present – attitude in the area of Foreign Affairs: that according to the *Grundgesetz's* system of the separation of powers, Foreign Affairs had to be considered the exclusive domain of the executive and any activity of the legislative in this context could only be seen as ‘encroaching’ on that domain. As a consequence, provisions allowing

³¹⁷ BVerfG, ‘Deutsch-Französisches Wirtschaftsabkommen’ (n 315) 394–395. Quoted after the translation available at <<https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=603>> accessed 15 April 2016.

such encroachment – like Articles 24 and 59 (2) – have to be considered as exceptions to that rule and thus have to be interpreted very strictly so as to protect the rights of the executive.³¹⁸ Instead of legal rights, the Court consistently refers the *Bundestag* to its political control rights such as plenary debates, question times, etc. and of course the ultimate weapon: the vote of no confidence.

Considering the rather sweeping nature of the statements above, it is very interesting to see that the Court does not provide any explanation as to why foreign policy should be the exclusive domain of the executive, why a broader interpretation of Article 59 II would create such an intolerable disturbance of the balance of power between executive and legislative or why the shift of power in favour of the executive created by the broad discretion in turn does not present reason for concern with regard to the balance between the two powers. Had such a question been asked in the domestic context, the cases reviewed in the previous Chapter illustrate that the Court would have reached a different conclusion.

Overall, this approach has to be considered rather executive-friendly as it leaves a lot of political decision-making power to the executive and relegates the legislative to exercising an after-the-fact legal control and otherwise to having to rely on political means to carry out some measure of oversight over the activities of the executive. Thus, even though the Court provided a measure of procedural support to the opposition, it created an atmosphere where the chances for a successful challenge against the executive's actions appeared slim indeed. This stance has attracted considerable criticisms from the academic community and the opposition in the federal parliament has tried in numerous cases to change the Court's mind. However, apart from very specific exceptions that will be discussed in Section B below, the *Bundesverfassungsgericht* has kept to this line of reasoning to this day.

³¹⁸ *ibid* 394.

3. *Developments since the 1950s*

Cases decided over the next few decades confirmed those early decisions without adding anything substantially new to the line of argument outlined above.³¹⁹ This changed in 1984, although not in favour of the parliament: the Green party (then in opposition in the *Bundestag*) brought a challenge against the *Bundesregierung's* agreement in the NATO council to allow the US to station Pershing 2 and Cruise missile nuclear weapons in Germany.³²⁰ Again, the Court dismissed the action, but this time it added considerably to its reasoning established in the earlier cases. The Green party tried to rely in particular on the *Bundesverfassungsgericht's* earlier decision regarding the peaceful use of nuclear energy where the Court had declared that that question was of such fundamental importance for the rights and lives of the citizens that only the legislative had the democratic legitimacy to decide about it.³²¹ The Green party now argued that the military use of nuclear energy (in form of nuclear weapons) could only be treated likewise. Moreover, the decision of the NATO council constituted a qualitative shift in NATO policy that was not covered by the original ratification decision of the *Bundestag* in 1955.³²²

The *Bundesregierung* countered that the decision of the NATO council was a normal part of NATO's activities and was thus covered by the *Bundestag's* 1955 decision to ratify the NATO treaty. Hence, it did not require a new vote in the *Bundestag*. Moreover, it argued that the earlier decision of the *Bundesverfassungsgericht* referred to by the Green party had actually explicitly stated that Foreign Affairs were the exclusive domain of the executive.³²³

Essentially, the *Bundesverfassungsgericht* followed the *Bundesregierung's* arguments. It still used the reasoning outlined above as a base line but now added arguments relating to the doctrine of the separation of powers to re-enforce its position. It high-

³¹⁹ Cf. i.a. the decisions in BVerfG, 'Grundlagenvertrag' [1973] BVerfGE 36, 1; BVerfG, 'Ostverträge' [1975] BVerfGE 40, 141; BVerfG, 'Eurocontrol I' [1981] BVerfGE 58, 1.

³²⁰ BVerfG, 'Atomwaffenstationierung' [1984] BVerfGE 68, 1.

³²¹ BVerfG, 'Kalkar I' (n 248).

³²² Submissions of the applicant, BVerfG, 'Atomwaffenstationierung' (n 320) 6–13.

³²³ Submissions of the respondent, *ibid* 13–26.

lighted that Article 59 II had to be interpreted in light of the doctrine of the separation of powers and thus established clear delineations of the respective competences of the *Bundesregierung* and the *Bundestag* in the area of Foreign Affairs. Even though the *Bundestag* had certain rights due to the consent requirements, those rights were still an exception to the rule created by the *Grundgesetz* that Foreign Affairs were the exclusive domain of the executive – for seemingly good reason:

*“... Die organisatorische und funktionelle Unterscheidung und Trennung der Gewalten [...] zielt darauf ab, daß staatliche Entscheidungen möglichst richtig, das heißt **von den Organen getroffen werden, die dafür nach ihrer Organisation, Zusammensetzung, Funktion und Verfahrensweise über die besten Voraussetzungen verfügen**, und sie will auf eine Mäßigung der Staatsgewalt insgesamt hinwirken. Die Konzentration politischer Macht, die darin läge, dem Bundestag in auswärtigen Angelegenheiten - über die ihm im Grundgesetz zugeordneten Befugnisse hinaus - zentrale Entscheidungsbefugnisse exekutivischer Natur zuzuordnen, liefe dem derzeit vom Grundgesetz normierten Gefüge der Verteilung von Macht, Verantwortung und Kontrolle zuwider. [...] Die konkrete Ordnung der Verteilung und des Ausgleichs staatlicher Macht, die das Grundgesetz gewahrt wissen will, **darf nicht durch einen aus dem Demokratieprinzip fälschlich abgeleiteten Gewaltenmonismus in Form eines allumfassenden Parlamentsvorbehalts unterlaufen werden.** [...]”*

[...] beruht auf der Annahme, daß institutionell und auf Dauer typischerweise allein die Regierung in hinreichendem Maße über die personellen,

*“...The organizational and functional distinction and the separation of powers [...] aims at securing the taking of public decisions as rightly as possible, that is, **by those agencies in the best position to do so according to their organization, composition, function and mode of procedure**, and acts towards moderation of State power as a whole. The concentration of political power which would lie in assigning the Bundestag central decision-making powers of an executive nature in Foreign Affairs beyond those assigned to it in the Basic Law would run counter to the structure of apportionment of power, responsibility and control laid down at present by the Basic Law [...] The specific order of the apportionment and balancing of State power which the Basic Law wishes to see guaranteed **must not be undermined by a monism of powers falsely derived from the democracy principle in the form of an all-embracing reservation on behalf of Parliament.***

[...] institutionally and in the long term it would be typically only the government that will adequately dispose of the personal, material and organizational capacities to respond

sachlichen und organisatorischen Möglichkeiten verfügt, auf wechselnde äußere Lagen zügig und sachgerecht zu reagieren und so die staatliche Aufgabe, die auswärtigen Angelegenheiten verantwortlich wahrzunehmen, bestmöglich zu erfüllen. ...“

speedily and properly to changing external positions and thus carry out in the best possible way the national task of responsibly handling Foreign Affairs.....”³²⁴

Here, the Court introduces ideas and lines of reasoning developed in the domestic context as the so-called ‘*Grundsatz der funktionsgerechten Organstruktur*’³²⁵ / the ‘*principle of the function-appropriate institutional structure*’ in order to justify why the executive would be best suited to handle Foreign Affairs. It adds an almost emphatic rejection of the principle of democracy as a justification for a different result and again referred the *Bundestag* to the existing political options as adequate ‘compensation’. Overall, this decision strengthened the executive’s position considerably and confirmed its line of reasoning developed for the relationship of legislative and executive in the domestic context.

It is interesting to see, that this is one of the very few instances where the Court explicitly refers to an approach to the separation of powers developed in the literature in order to justify its interpretation of the *Grundgesetz* in a specific situation. Unfortunately, the Court uses it in order to lock the *Bundestag* into its role as merely providing after-the-fact control by arguing that it is institutionally ‘unsuitable’ to be involved in activities in the area of Foreign Affairs in a more meaningful way. Even if that were true, it is surprising that the Court does not even consider whether the *Bundestag*’s institutional structures could be adapted in order to make it more ‘suitable’ and thus capable of carrying more responsibility to exercise effective control over the executive.

Of particular interest is the strongly worded dissenting opinion of Judge Mahrenholz who challenged the majority’s position as being far too favourable to the executive.³²⁶

³²⁴ ibid 86–87, emphasis added. Quoted after the translation available at <https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=575> accessed 15 April 2016.

³²⁵ As first coined by Ossenbühl (n 9); then further developed by von Danwitz (n 201).

³²⁶ BVerfG, ‘Atomwaffenstationierung’ (n 320) 111–132.

He criticised in particular the use of the doctrine of the separation of powers and the almost cavalier attitude of the majority in allowing the executive to agree on its own to a step that within the domestic context would certainly require parliamentary approval. Considering that such a transfer of sovereign rights to an international institution had a considerable impact on the competence structures established by the *Grundgesetz* and thus amounted in practice to a constitutional amendment, the requirements for parliamentary consent required strict observation, not limitation. Moreover, he challenged the reasoning of the majority that the *Bundestag* had already given its consent to the recent events as it had provided its consent to the ratification in 1955. Since the NATO treaty itself did not contain even an outline of a potential directionality of an integration programme, the original consent could not be seen as covering the new developments. He concluded that the majority's opinion allowed the executive to exercise competences that were inherently legislative – something that the *Grundgesetz* most definitely did not intend.³²⁷

He also criticised that the majority allocated the responsibility for Foreign Affairs to the executive as a matter of principle and thus considered Article 59 (2) as an exception to the doctrine of the separation of powers as expressed by the *Grundgesetz*. To him, it was precisely the other way around: the *Grundgesetz* did not rely on some pre-constitutional, ideal model of the separation of powers, but rather its individual provisions had to be seen as an expression of the model the *Grundgesetz* tried to establish. Thus, Article 59 (2) had to be seen as part of the positive expression – and not a negative exception – of the *Grundgesetz*'s the separation of powers model. This meant that the interpretation of Article 59 (2) had to be based on the purpose of the provision, in this case, the protection of the *Bundestag*'s right to be involved in fundamental policy decisions.

Finally, he dismissed as insufficient and beside the point the repeated reference of the *Bundesverfassungsgericht* to the political options of the *Bundestag* as 'compensation' for a lack of further legal rights. He pointed out that for example the vote of no confi-

³²⁷ *ibid* 124.

dence may punish the government by removing it from office but that it neither removed the validity of the executive's action at international level nor remedied the lack of the *Bundestag*'s participation earlier in the decision-making process. In addition, this measure was meant for the extraordinary circumstances of a fundamental disagreement between the government and its supporting majority, not for the everyday interaction of the *Bundestag* with an executive secure in its power.

Overall, Mahrenholz's dissent shines an uncomfortably bright light onto the inconsistencies and weaknesses of the majority's opinion and shows that it seems to be motivated by a very traditional approach to Foreign Affairs that rebuffs the efforts of the *Bundestag* to effect more control over the actions of the *Bundesregierung* at every turn. Unfortunately, while the academic debate welcomed Mahrenholz's dissent very warmly,³²⁸ the *Bundesverfassungsgericht* stuck to its line of reasoning in subsequent decisions and formally, it remains unchanged to this day.³²⁹

B. A selective exception based on domestic competences

The NATO/ Pershing decision shaped the relationship of the legislative and the executive for a further 10 years, before the *Bundesverfassungsgericht* moved finally away from its very executive-friendly stance and created a limit to the government's almost boundless discretion. The case concerned the changes to NATO's mission directive as agreed by the NATO members in 1993 and the German participation in the subsequent peacekeeping missions enforcing the embargo and the no-fly zone against Serbia and UNOSOM II.³³⁰ The deciding senate of the *Bundesverfassungsgericht* was split 4:4 as to whether the changes to NATO's mission directive should have been subjected to a parliamentary vote according to Article 59 (2). This meant a dismissal on this point, as in cases without a majority of judges supporting the unconstitutionality of the action un-

³²⁸ Cf. i.a. Grewe (n 308); Kay Hailbronner, 'Kontrolle Der Auswärtigen Gewalt' in Kay Hailbronner and Rüdiger Wolfrum (eds), *Kontrolle der auswärtigen Gewalt* (Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer, Band 56, De Gruyter Verlag 1997) 11; Martin Baumbach, *Vertragswandel Und Demokratische Legitimation: Auswirkungen Moderner Völkerrechtlicher Handlungsformen Auf Das Innerstaatliche Recht* (Duncker & Humblot 2008) 24.

³²⁹ confirmed e.g. in BVerfG, 'Lagerung Chemischer Waffen' [1987] BVerfGE 77, 170.

³³⁰ BVerfG, 'Out-of-Area-Einsätze' [1994] BVerfGE 90, 286.

der review, it is deemed constitutional.³³¹ While frustrating for the applicant, such decisions still send a clear signal to the respondent (in this case the government) to act more circumspectly in future.

The novel part of the decision concerned the German participation in armed peace keeping mission and who was responsible for such a decision. All judges agreed that the deployment of armed forces required express approval by the *Bundestag* prior to the mission in question.³³² In terms of the dogmatic construction, however, the judges took a rather interesting route: they did not limit the executive's foreign policy prerogative within itself but used the general provisions of the *Grundgesetz* dealing with the armed forces to establish the notion of the 'parliamentary army': in their view, the provisions on the creation, maintenance and the deployment of the armed forces contained a common thread of strong parliamentary involvement, involvement that was not limited to controlling the executive's actions but included real political decision-making power. This led them to conclude that the *Grundgesetz* – like its predecessor, the Weimar Constitution – had intended to transfer the ultimate decision over war and peace to the parliament, i.e. deliberately away from the executive. In the present context, this resulted in a parliamentary reserve for the deployment of armed forces irrespective of the reason or the area they were deployed to – e.g. due to Germany being attacked or due to Germany's commitments as a member of a system of collective security, inside or outside of Germany or NATO's Member States.³³³ Only in cases of emergency did the executive have the right to make the preliminary decision itself, but had to ensure that parliamentary approval was provided as soon as possible afterwards.³³⁴

The Court strengthened the *Bundestag's* position in a decision in 2008: whether a specific situation fell under the parliamentary reserve was not left to the discretionary appreciation of the executive, but depended on factual and legal criteria the fulfilment of

³³¹ § 15 IV 3 BVerfGG (Federal Constitutional Court Act)

³³² BVerfG, 'Out-of-Area-Einsätze' (n 330) 381.

³³³ *ibid* 383.

³³⁴ *ibid* 388.

which was subject to full review by the Court.³³⁵ The case concerned the NATO mission of surveillance of Turkish airspace by AWACS aircrafts in 2003. Despite repeated requests by the *Bundestag*, that the *Bundesregierung* schedule a vote for approval of the mission, it refused to do so. It argued that those flights were strictly routine, purely defensive and thus not linked to, or likely to lead to, armed military action. Hence, the consent of the *Bundestag* was not required. The *Bundesverfassungsgericht* disagreed. The *Bundestag's* right to approve the deployment of armed forces could not be seen as a 'mere' control mechanism, but constituted a genuine right and responsibility to take the fundamentally important, political decision whether Germany wished to participate in armed military action. This right could not be interpreted strictly, e.g. by arguing that the executive needed the wide margin of discretion its foreign policy prerogative usually provided in order to act effectively.³³⁶ On the contrary: the responsibility of the *Bundestag* in this area was an *intended* part of the *Grundgesetz's* system of the separation of powers, not a derogation like Article 59 (2).³³⁷ This led to a reversal of the usual dynamic: it was not the *Bundestag* who had to justify why it wished to approve a particular mission. Instead, it was the executive who had to justify why it considered a particular situation not to be subject to the *Bundestag's* reserve – and since this reserve did not form part of the area of Foreign Affairs, the discretion the *Bundesregierung* enjoyed in this area did not apply, i.e. its decision was subject to the full review of the *Bundesverfassungsgericht*.³³⁸

This line of cases does provide a practical limit to the executive's discretion in the area of Foreign Affairs and the 2008 decision strengthened the *Bundestag's* position considerably. However, it concerns only a very specific scenario – the remainder of the decisions on military strategy, e.g. the deployment of unarmed forces, of forces providing humanitarian assistance only or even the decision not to deploy German forces are all still left to the government's discretion. Also, as could be seen in the 2008 decision, the discussion becomes focused on what may or may not constitute 'armed missions' or

³³⁵ BVerfG, 'Luftraumüberwachung Türkei' [2008] BVerfGE 121, 135.

³³⁶ *ibid* 161–162.

³³⁷ *ibid* 163.

³³⁸ *ibid* 168–169.

whether a mission that started out as 'unarmed' has become 'armed' over the course of its duration and thus subject to the approval of the *Bundestag*. The decision highlighted as well how the *Bundesregierung* seems to consider greater parliamentary involvement as a nuisance and an hindrance rather than a measure of transparency and democratic legitimacy, an attitude fostered i.a. by the *Bundesverfassungsgericht*'s own line of reasoning in the cases related above.

C. Conclusion

As could be seen, the *Bundesverfassungsgericht*'s approach in the area of Foreign Affairs differs considerably from the approach adopted for the domestic context: the Court conceptualises Foreign Affairs as one discrete competence area where the *Grundgesetz* is deemed to contain clear rules on the nature of the relationship between the *Bundesregierung* and the *Bundestag*. This approach has been consistent since the 1950s, despite considerable criticisms from the academic literature.

For the purposes of this thesis, the following common threads can be drawn from the cases related above: like in the domestic context, the *Bundesverfassungsgericht* relies heavily on its notion of what the balance of power between the executive and the legislative as 'intended by the *Grundgesetz*' should be. Unlike in the domestic context, however, it considers the area of Foreign Affairs as one 'block' area instead of considering the individual activities at hand and of creating an individual balance of power between the executive and the legislative depending on the activity in question. The Court justifies this by arguing that the executive's organisational structure and support, its decision-making processes, etc. are uniquely suitable to meet the demands of modern-day international relations – a capacity the *Bundestag* is considered to lack.³³⁹ Curiously, this does not seem to matter when it comes to deciding the deployment of armed forces. Here, the practical demands of international relations and the potentially urgent need for a decision are suddenly secondary to the need to include the oppo-

³³⁹ BVerfG, 'Atomwaffenstationierung' (n 320).

sition in a 'free parliamentary debate' which allows also the public to evaluate the true scope of the intended action³⁴⁰ - the classic role of a parliament as a platform for debate, transparency and democratic legitimacy thus outweighs the practical disadvantages of a decision-making process that is seen as cumbersome and potentially time-consuming. This contradictory reasoning raises two rather challenging questions: why can the *Bundestag's* general 'unsuitability' to participate in Foreign Affairs be overlooked in this context but not in others, e.g. when it comes to reviewing changes made to existing treaty regimes like NATO? And more fundamentally: why did the Court simply accept the *Bundestag's* general 'unsuitability' to deal with Foreign Affairs instead of demanding that the *Bundestag's* decision-making processes be adapted so that they matched the needs for e.g. secrecy, timely decision-making, etc. that international relations apparently required?

It is interesting that the one exception to the exclusive competence of the executive is based on provisions that form part of the domestic context of power relationships – only those seem to be powerful enough to break through the rather rigid dividing line the Court has drawn between domestic and Foreign Affairs. Even more worrying are the practical consequences of the Court's very strict and very consistent jurisprudence for the overall structure of the *Grundgesetz's* system of government and the general relationship between the executive and the legislative. The Court continues to reject any suggestion to change its restrictive interpretation of Article 59 and 24 and thus to increase the number of situations that fall within their scope of application and thus the requirements for parliamentary consent. This leaves the *Bundestag* with very few 'hard' legal options to exercise a truly effective control of the executive's activities – something that is at the very heart of the doctrine of the separation of powers and is – ironically – regularly confirmed by the *Bundesverfassungsgericht* as far as the domestic context is concerned.

³⁴⁰ BVerfG, 'Luftraumüberwachung Türkei' (n 335) 162.

The weaknesses and inconsistencies of the Court's approach have been heavily criticised by dissenting judges as well as academics. A particular point of criticism is that the Court seems to premise its approach on the possibility of a clear distinction between foreign and domestic affairs. However, this appears entirely out of touch with the reality of international relations in the modern-day world and their impact on the domestic systems of the states. Academics argue that the line between domestic and Foreign Affairs has been blurred to such an extent that clear, non-arbitrary definitions of what constitutes 'foreign' affairs as opposed to (purely) 'domestic' affairs are almost impossible to establish.³⁴¹

³⁴¹ Baumbach (n 328); Ulrich Fastenrath, *Kompetenzverteilung Im Bereich Der Auswärtigen Gewalt* (CH Beck Verlag 1986).

Part II: Conclusion

Following on from the investigation of the theory of the separation of powers in Part I, **Part II** explored the implementation of the separation of powers into the German constitutional system with regard to the domestic context as well as Foreign Affairs. It is submitted that the perception in the literature – that the theory is fairly useless in practice – does not hold true. The cases surveyed here provide critical dividing lines for the behaviour of the legislative and the executive, both in the domestic context as well as in the area of Foreign Affairs.

The contrast between the Court's approach in the domestic context compared to that in the area of Foreign Affairs is quite striking. In the domestic context, the Court differentiates between various types of activities and creates 'area specific' balances of power between the legislative and the executive. For example, as far as matters of the budget are concerned, the executive is in a fairly weak position. However, in general the executive is fairly free to use its procedural and political predominance over the *Bundestag* in order to implement its political agenda. The cases also illustrate how the Court sees the separation of powers as one principle among several that determine the outcome of the case. Fairly often considerations of democratic legitimacy, fundamental rights protection and the freedom of the individual inform the Court's solution more than arguments specifically relating to the separation of powers.

In striking contrast, none of this seems to matter in the area of Foreign Affairs. Here, the *Bundesverfassungsgericht* merely considers the 'suitability' of the legislative and the executive respectively to handle Foreign Affairs as a matter of principle. The Court does not differentiate among for example treaty negotiations, everyday work in international organisations like NATO or the UN, or indeed sensitive diplomatic manoeuvres, in order to achieve a tiered pattern of involvement that would allow the *Bundestag* much greater influence and thus create a greater degree of accountability for the actions of the *Bundesregierung*. In addition, the set of values and principles employed

in the domestic context like the principle of democracy, the *Rechtsstaat* principle and human rights protection, are not used here to modify the solution found based on what essentially amounts to organisational efficiency considerations.

The investigation will now turn to the examination of the seminal decisions of the *Bundesverfassungsgericht* in the area of European matters in order to establish how the Court's two very distinct approaches for delineating the relationship between the *Bundestag* and the *Bundesregierung* are applied in that context. Particular reference will be made to the most recent decisions of the *Bundesverfassungsgericht* regarding the European Stability Mechanism and Fiscal treaties.

Part III: The separation of powers in the European context

From the ratification of the Treaty of Rome up to the Treaty of Maastricht, the focus of the *Bundesverfassungsgericht* was on the promotion of the human rights protection provided by the European communities. Its famous *Solange I*, *Solange II* and *Bananas* decisions³⁴² are still landmarks for the question of implementation of European law into national legal systems and its compatibility with national systems of human rights protection.³⁴³ Following on from there, the period between the Treaty of Maastricht and the Treaty of Lisbon was dominated by several enlargements which raised the question of how the European integration process should proceed at a fundamental level. Again, decisions of the *Bundesverfassungsgericht*, this time *Maastricht* and *Lisbon*³⁴⁴, developed into landmark decisions, partly despite and partly precisely because they provided a different view on the future of the integration process compared to that favoured by the governments in the European Member States.

However, over the course of all of those decades very little attention has been given by the Court to the impact the European integration process has had on the relationship between the *Bundestag* and the *Bundesregierung*, specifically in the phase prior to decision-making at European level, i.e. at that point in time when national parliaments have the greatest chance to influence the position of their own government and thus law-making at European level. In the final part of the thesis, the analysis will therefore focus on seven decisions of the *Bundesverfassungsgericht* in the EU context and analyse them not from the perspective of the principle of democracy or with an eye to maximising human rights protection. Instead, the analysis will focus on drawing out the implications for the separation of powers as conceptualised by the *Bundesverfassungsgericht* and for the relationship between *Bundestag* and *Bundesregierung*. In or-

³⁴² BVerfG, 'Solange I' (n 36); BVerfG, 'Solange II' (n 36); BVerfG, 'Bananenmarkt' (n 36).

³⁴³ Albi (n 7) 293.

³⁴⁴ BVerfG, 'Maastricht' (n 38); BVerfG, 'Lissabon' (n 38).

der to track the changes in the Court's approach across time, the investigation will proceed chronologically, starting in Chapter V with the earliest cases after the ratification of the Treaty of Rome up to the ratification of the Treaty of Lisbon in 2009. Following on from there, Chapter VI will provide an outline of the so-called ESM cases and Chapter VII will evaluate the potential impact of those cases on the conceptual approach of the *Bundesverfassungsgericht* with regard to the relationship of the *Bundestag* and *Bundesregierung* in the EU context.

CHAPTER V: European matters – a ‘special kind’ of Foreign Affairs?

As outlined in the previous Chapter, since its inception the *Grundgesetz* had contained various provisions managing the interaction between the German constitutional system and the international sphere. The ratification of the Treaties of Paris and Rome, therefore, did not represent anything out of the ordinary at the time: the treaties demanded the transfer of powers from their signatories to the newly created organisations and, according to Article 24 (1) of the *Grundgesetz*, “... *The Federation may by a law transfer sovereign powers to international organisations ...*”. This required parliamentary approval in the form of a statute which was provided in due course by the *Bundestag* and *Bundesrat*. According to the precepts of the *Grundgesetz*, Germany was now ready for the European institutions to take up their work and for the integration process to begin.

However, the ensuing European integration process went far beyond what the drafters of the *Grundgesetz* may have imagined in terms of international cooperation. This begged the question just how open to international integration the *Bundesverfassungsgericht* considered the *Grundgesetz* to be or in other words: how their interpretation of Article 24 would affect the ability of the German constitutional system to ‘weather’ the European integration process. Up to the Treaty of Maastricht, the cases brought to the Court provided it with the opportunity to delineate the relationship Article 24 created between the European and the German legal order, its impact on the latter and the responsibilities of the German institutions, especially after the powers transferred had been used. The Court favoured the principle of democracy and the *Grundgesetz*’s system of human rights protection as a framework for its analysis of the impact of the European integration process on the German constitutional system. Looking back at those cases now, it becomes apparent that the Court gave very little attention to the potential impact on the role of the executive and the legislative or on their relationship with each other. For conclusions on those two points, one is left to indirect inferences from the cases when analysed through the lens of separation of powers instead of democracy as the *Bundesverfassungsgericht* prefers to do.

A. From Rome to Maastricht: not really the parliament's business?

The decades between the ratification of the Treaty of Rome and the Treaty of Maastricht were dominated by two major strands in the jurisprudence of the *Bundesverfassungsgericht*: how to fit the European Communities – that clearly developed into something strange and new – into the existing constitutional framework and how to deal with the repercussions of the implemented European law. As regards the latter, the Court's decisions regarding the need to maintain appropriate levels of fundamental rights protection are well known and deliberately not included here as they are not the focus of this investigation. Instead, this Section will focus on the first strand referred to above: how the *Bundesverfassungsgericht* dealt with the emerging supranationality of the EC with a particular eye on the separation of powers. As this Section will demonstrate, the Court did not see the need to adapt its existing approach very much which had a devastating effect for the position of the *Bundestag* within the context of European decision-making as well as for its relationship with the *Bundesregierung*.

1. Conceptualising Supranationality: Article 24 and the EC

As was highlighted in the previous Chapter, Article 24 (1) covers situations where a treaty goes beyond creating traditional obligations for Germany as a signatory state. It applies to forms of international cooperation that require its members to surrender a measure of control to institutions outside of the national legal sphere by transferring sovereign rights to those institutions. The consequences are two-fold: at international level, the treaty effects the transfer of sovereign rights to the newly created international institutions; in the national sphere, the statute under Article 24 (1) not only provides the international institutions with the authority to create acts which take direct legal effect within the German legal system, it also places an obligation on the German constitutional institutions and public authorities to ensure that those acts could take their full effect.³⁴⁵

An early opportunity for the *Bundesverfassungsgericht* to comment on the relationship between Germany and the recently created European Communities presented itself in

³⁴⁵ BVerfG, 'Solange I' (n 36); BVerfG, 'Eurocontrol I' (n 319).

1967. The case concerned a constitutional complaint directed directly against an EEC regulation.³⁴⁶ The complainants argued that the Regulation had to be treated as if issued by the German authorities themselves since the European institutions had received their powers from the German state. This meant that the German authorities had to be considered directly accountable for the actions of the institutions they had thus empowered. From the complainants' perspective, the relationship seemed to be that of agent and principal - with the principal being fully accountable for the actions of the agent. Consequently, the complainants considered a constitutional complaint to the *Bundesverfassungsgericht* the appropriate remedy against the violation of their fundamental rights by the Regulation in question.

The *Bundesverfassungsgericht* held the complaint to be inadmissible, insisting that the procedure only allowed acts of *German* public authorities to be challenged and that - in contrast to the views of the complainants - the EEC institutions did not qualify as such.³⁴⁷ The judges argued that the treaties had created their own legal order which was quite separate and independent from the German one.³⁴⁸ Rejecting the idea of a principal-agent relationship, the judges declared that the mere fact that the supranational bodies of that separate legal order had received their powers from Germany did not make them 'German' institutions for the purposes of the Court's rules of procedure. And even though the acts of the EEC institutions could only take effect within Germany due to the consent provided by the German parliament under Article 24, they did not become 'German' acts simply because they applied in Germany. To assume otherwise would not only hopelessly blur boundaries necessary to determine the scope of the *Bundesverfassungsgericht's* jurisdiction³⁴⁹, it would also circumvent the treaties' own system of remedies which was intended to cover precisely the situation at hand. As a result, direct challenges against European legislation were inadmissible. At the same time, the judges hastened to add that this decision should not be taken as precluding a review of EEC law with regard to the fundamental rights guarantees of the

³⁴⁶ BVerfG, 'EWG Verordnung' [1967] BVerfGE 22, 293.

³⁴⁷ *ibid* 295.

³⁴⁸ *ibid* 296.

³⁴⁹ *ibid* 298.

Grundgesetz in the context of a case that was otherwise admissible.³⁵⁰ This conceptualisation of how the European and German legal sphere interact has become the standard formula of the *Bundesverfassungsgericht* used in cases from *Solange I* in 1974 to *Mangold/ Honeywell* in 2010.³⁵¹ It also laid the foundation of the notion of the Member States being '*masters of the treaties*' coined later on in the decision on the Maastricht treaty.³⁵²

In a case in 1971, the Court clarified further what the transfer of rights under Article 24 entailed for the German legal system. A company had brought a constitutional complaint against a judgment of the Federal Tax Court that had used a decision of the ECJ interpreting Article 95 and 97 of the EEC treaty to override certain provisions of the German tax statutes applying to the company's activities. The complainants argued that such behaviour violated the doctrine of separation of powers as laid down in the *Grundgesetz* - such adjustments constituted amendments of a statute which could only be done by the legislative and not by the judiciary. The *Bundesverfassungsgericht* rejected the complaint by arguing that the Federal Tax Court had 'merely drawn the consequences' of the ECJ's decision and that such adjustment were well within the powers of the judiciary.³⁵³ Indeed, the Federal Tax Court had only done what was its duty under Article 24:

"... Article 24 Abs. 1 GG besagt bei sachgerechter Auslegung nicht nur, daß die Übertragung von Hoheitsrechten auf zwischenstaatliche Einrichtungen überhaupt zulässig ist, sondern auch, daß die Hoheitsakte ihrer Organe, wie hier das Urteil des Europäischen Gerichtshofs, vom ursprünglich ausschließlichen Hoheitsträger anzuerkennen sind. Von dieser Rechtslage ausgehend müssen seit

*"... Article 24 (1) Basic Law, on a proper interpretation, says not only that the transfer of sovereign rights to inter-governmental institutions is permissible as such but also that the sovereign acts of the organs, such as the judgment of the European Court of Justice here, **are to be recognized by the originally exclusive bearer of sovereignty.** On the basis of this le-*

³⁵⁰ ibid 299.

³⁵¹ BVerfG, 'Solange I' (n 36); BVerfG, 'Mangold/ Honeywell' [2010] BVerfGE 126, 286.

³⁵² BVerfG, 'Maastricht' (n 38).

³⁵³ BVerfG, 'Milchpulver (Lütticke)' [1971] BVerfGE 31, 145, 173.

dem Inkrafttreten des Gemeinsamen Markts die deutschen Gerichte auch solche Rechtsvorschriften anwenden, die zwar einer eigenständigen außerstaatlichen Hoheitsgewalt zuzurechnen sind, aber dennoch aufgrund ihrer Auslegung durch den Europäischen Gerichtshof im innerstaatlichen Raum unmittelbare Wirkung entfalten und entgegenstehendes nationales Recht überlagern und verdrängen; denn nur so können die den Bürgern des Gemeinsamen Markts eingeräumten subjektiven Rechte verwirklicht werden. ..."

*gal position, since the entry into force of the Common Market the German courts must also apply legal provisions which, though **attributable to an autonomous sovereign power outside the State**, do nevertheless on the basis of their interpretation by the European Court of Justice **develop direct effect within the State** and override and displace contrary national law; for it is only in this way that the subjective rights allowed citizens of the Common Market can be realized. ..."*³⁵⁴

As can be seen, the *Bundesverfassungsgericht* placed great emphasis on the duties of the German courts to give effect to the acts of the European institutions in the German legal system. However, the national courts, which were at the heart of this process, came to have grave concerns about the compatibility of those acts with fundamental principles of the *Grundgesetz* and began making references to the *Bundesverfassungsgericht* in order to have pieces of European law reviewed. The reference procedure in Article 100 (1) *Grundgesetz* serves a similar function to that laid down in Article 267 TFEU: since ordinary German courts do not have jurisdiction to set aside legislation they consider unconstitutional, they have to make a reference to the *Bundesverfassungsgericht*. The *Bundesverfassungsgericht* will then conduct a review of the statute or the provision in question and should the statute be found to violate the *Grundgesetz*, the Court has the power to declare it void. Such decisions bind all state bodies, i.e. the ordinary courts as well as parliaments and governments at federal and Land level.³⁵⁵ In 1967, a regional tax Court made such a reference to have the *Bundesverfassungsgericht* review Regulation 19/62/EEC.³⁵⁶ The arguments of the referring Court dif-

³⁵⁴ *ibid* 174, emphasis added. Quoted after the translation available at <https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=590> accessed 15 April 2016.

³⁵⁵ § 31 BVerfGG (Federal Constitutional Court Act)

³⁵⁶ BVerfG, 'EWG Recht' [1967] BVerfGE 22, 134.

fer from the human rights related arguments that have dominated the discussion since *Solange I* in that their main focus is the institutional structure of the EEC. From the referring Court's point of view, the secondary legislation enacted by the Council under then Article 189 EEC had to be classified as genuine legislative acts. However, since the whole Council was composed of representatives of the Member States' executives, its involvement in genuine legislative activity constituted a violation of the principle of separation of powers. This violated the limits to integration set out in Article 79 (3) *Grundgesetz* which in turn led to the unconstitutionality of the German statute ratifying the EEC Treaty.³⁵⁷ With that statute void, the EEC had no valid authority for its activities - the 'permission' under Article 24 to use the sovereign rights with effect for Germany having been lost, as it were.

The *Bundesverfassungsgericht* rejected the reference on a technicality and did not engage with the arguments of the referring Court regarding the institutional structure. Indeed, even though similar arguments were put forward by referring courts and applicants in several cases over the years, the Court did not engage with them at all until much later in its *Maastricht* decision and even then only in passing.³⁵⁸ Instead, the Court stressed that the ratification had been the moment in time at which the institutional structures and decision-making processes could - and should - have been influenced to make sure they complied with the requirements of the *Grundgesetz*.³⁵⁹ Once that moment had passed, the only option left was for the German courts to try to protect the individuals in Germany from having to suffer under the consequences of those structural deficits the political institutions had not taken the necessary precautions to prevent.³⁶⁰ In other words: the *Bundesverfassungsgericht* had more or less 'banished' European law to its own legal 'sphere', where it enjoyed a certain amount of autonomy. The Court followed through on this line with its claims to have retained review powers regarding fundamental rights protection, ultra vires actions and violations of

³⁵⁷ *ibid* 143.

³⁵⁸ Not until BVerfG, 'Maastricht' (n 38) 187.

³⁵⁹ BVerfG, 'Eurocontrol I' (n 319) 28.

³⁶⁰ BVerfG, 'Solange I' (n 36); as was commented at the time by Hans D Jarass, 'Artikel 24' in Hans D Jarass and Bodo Pieroth (eds), *Grundgesetz für die Bundesrepublik Deutschland: Kommentar* (1st edn, CH Beck Verlag 1989) para 10.

the *Grundgesetz's* identity.³⁶¹ True to form (cf. Chapter III), the Court chose what it considered the fastest and most effective way to deal with the problem, invariably favouring the legal over the political option. Instead of waiting until such time as the *Bundesregierung* had managed to use its influence at European level to effect the desired changes to the institutional structures³⁶², the Court proceeded to provide itself the protection it considered necessary. In doing so, it also established itself as a powerful veto player in opposition to the European – and German – political institutions, the same position it had shaped for itself in the purely national context.

Overall, in the Court's interpretation of the *Grundgesetz*, the ratification of the NATO treaty was not in any way different to the ratification of the European treaties: both had created non-German institutions which had been authorised to create legally binding acts that reached directly into the national legal sphere without any further acts of implementation or transformation by the German institutions being necessary. In its decisions, the *Bundesverfassungsgericht* did not separate out the EEC from the overall context of Article 24. For example, it built on its decision in *Solange I* (1974) to decide a complaint regarding *Eurocontrol* (1981) which in turn fed forward into a decision on NATO (1984) and later into *Solange II* (1986)³⁶³, even though the integration process for those three organisations had been vastly different. For the Court, however, they seemed to be merely three examples of the many forms international cooperation could take and where the Court had to deal with the implementation.

2. Delineating spheres of responsibility

Looking at the decisions of the *Bundesverfassungsgericht* on European matters, the absence of comments on the institutional structures and decision-making processes of the organisation Germany had transferred a considerable amount of sovereign rights to is remarkable. Equally, potential changes to the balance of power between the *Bundesregierung* and *Bundestag* resulting from the European integration process did not

³⁶¹ BVerfG, 'Solange I' (n 36); BVerfG, 'Solange II' (n 36); BVerfG, 'Kloppenburg' [1987] BVerfGE 75, 223.

³⁶² BVerfG, 'Solange I' (n 36).

³⁶³ *ibid*; BVerfG, 'Eurocontrol I' (n 319); BVerfG, 'Atomwaffenstationierung' (n 320); BVerfG, 'Maastricht' (n 38).

seem to have been a concern. Unlike in the area of Foreign Affairs where the opposition began to challenge the actions of the government before the *Bundesverfassungsgericht*, the cases concerning the EEC were all either references from ordinary courts or constitutional complaints from individuals. While these procedural constellations do shape the framework of the decisions around fundamental rights, there would have been opportunity for the Court to explore the questions indicated above.³⁶⁴ In order to evaluate the impact of the European integration process on the relationship between the government and the parliament, one therefore has to look at the decisions of the Court on Foreign Affairs since, from the perspective of the *Grundgesetz*, European matters were still considered to be such.

As was discussed in the previous Chapter on Foreign Affairs, the *Bundesverfassungsgericht* considered Articles 59 and 24 *Grundgesetz* to establish a clear system of allocation of powers between the executive and the legislative: the executive was the power to which responsibility for Foreign Affairs was allocated as a matter of principle.³⁶⁵ The legislative was meant to provide oversight only. Hence, provisions providing the *Bundestag* with options to participate in Foreign Affairs had to be interpreted narrowly - as the exception to the rule. Over the years, the *Bundesverfassungsgericht* has given particular attention to the question what exactly was covered by the ratification decision under Articles 59 and 24 and how the rights of the *Bundestag* in this context had to be understood in relation to the position of the government.

The Court argued that the right of the *Bundestag* to approve the ratification of treaties in general and the transfer of sovereign rights in particular was rooted in the general right of the legislative to control the activities of the executive as well as in the idea that decisions of such importance should be approved by the directly elected representatives of the people. In its *Eurocontrol* decision in 1981, the Court elaborated on the latter: transferring sovereign rights to institutions outside the constitutional structures of the *Grundgesetz* interfered with, and changed, the competence structures as originally designed by the constitution, i.e. such a transfer had all the actual effects of a

³⁶⁴ as illustrated by BVerfG, 'EWG Recht' (n 356).

³⁶⁵ BVerfG, 'Atomwaffenstationierung' (n 320).

constitutional amendment without having gone through the procedure normally required for it (Article 79). To leave the decision whether Germany should participate in such endeavours in the hands of the executive in exercise of its foreign policy prerogative was therefore not possible and justified the requirement for parliamentary approval as a necessary precaution to preclude constitutional amendments through a 'back door'.³⁶⁶ This did not mean, however, that every single decision in such a context required parliamentary approval. In the *NATO* decision, the Court developed the notion of the so-called 'programme of integration', i.e. that the original ratification decision covered not only the text of the treaty 'as was' but also reasonably foreseeable developments of the treaty system. As was further developed in the *Maastricht* and *Lisbon* decisions, the Court considered the integration programme to be part of the original treaty and as long as future developments and the activities of the international and the German institutions did not go beyond it, the approval requirement would not be triggered anew.³⁶⁷ The Court's reasoning was based on the idea that when the *Bundestag* had decided on the ratification of the original treaty, it had 'of course' considered, assessed and evaluated potential future developments of the integration process and deemed them constitutional - insofar as they could be deemed as 'foreseeable'. Consequently, the government did not need to trouble the parliament again when those potential developments became a reality later on.

As such, the notion that the parliamentary approval could cover not just the original treaty but allow it to develop according to an 'integration programme' does make sense within the context of Article 24 which, after all, aims to promote Germany's international integration and not to make it practically impossible by requiring parliamentary approval at the slightest deviation from the original text of the treaty. However, the use the *Bundesverfassungsgericht* made of this notion arguably stretched the notion of 'foreseeability' to the breaking point: for example its decision that the original NATO treaty (ratified in 1954) actually contained the 'seeds' for the new defence

³⁶⁶ BVerfG, 'Eurocontrol I' (n 319) 36.

³⁶⁷ First mentioned in BVerfG, 'Eurocontrol I' (n 319); then later in particular in BVerfG, 'Atomwaffenstationierung' (n 320); BVerfG, 'Maastricht' (n 38); BVerfG, 'Lissabon' (n 38).

concept developed after the end of the cold war, seems rather questionable.³⁶⁸ The assumption that the parliament could foresee at least the outline of the subsequent development of the European integration process merely by looking at the original treaties of Rome and Paris, seems equally precarious.

In practical terms, this meant that conducting the 'day-to-day business' of international relations including activities in international organisations was the business of the executive. Only once the government had concluded the negotiations on a treaty, had decided whether Germany should become a party and which and how many sovereign rights to transfer – in short: had made all the political choices – was the *Bundestag* allowed to get involved and to vote on whether it wanted to give its approval for the ratification.

These practical consequences of the Court's decisions are in stark contrast to notions expressed in earlier decisions where one could perceive the *Bundestag* not only as the key decision maker but as being actually in charge of the whole process of negotiating the power transfer:

"... Article 24 Abs. 1 GG räumt dem Gesetzgeber ein weites Ermessen ein, ob und inwieweit einer zwischenstaatlichen Einrichtung Hoheitsrechte eingeräumt werden und in welcher Weise diese Einrichtung rechtlich und organisatorisch ausgestaltet werden soll. ..."

*"... Article 24 (1) grants the **legislator** broad discretion as to whether and to what extent an international institution may be granted sovereign powers and in what way this institution is to be given legal and organizational shape. ..."*³⁶⁹

The express reference to the **legislator** (and not the executive) could lead one to believe that the *Bundestag* was not merely called to approve (or not) of the treaty as a whole and only once it was negotiated. Quite the opposite in fact: the *Bundestag*'s involvement seemed to include deciding on nature and scope of the powers to be trans-

³⁶⁸ BVerfG, 'NATO-Konzept' [2001] BVerfGE 104, 151.

³⁶⁹ BVerfG, 'Eurocontrol I' (n 319) 28 emphasis added. Quoted after the translation available at <https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=582> accessed 15 April 2016.

ferred as well as influencing the institutional framework and the decision-making processes of the organisation receiving those powers. Unfortunately, any hopes of such an interpretation were destroyed only three years later by the Court's *NATO* decision where it clarified that the powers of the *Bundestag* in the area of Foreign Affairs should most certainly not be understood as enabling it to make actual political choices or even to shape foreign policy.³⁷⁰ Indeed, to interpret the *Bundestag*'s approval rights in this fashion would lead to far too much political power pooling in the hands of the legislative, power to boot that the Court considered to be executive and not legislative in nature. In short, to allow the *Bundestag* to do more than sign off (or not) on the treaty in question would enable it to usurp the government's power which would violate the very idea of separation of powers as established by the *Grundgesetz*.³⁷¹ In order to prevent the legislative from exerting 'undue political pressure' on the executive, the Court went as far as giving the latter the monopoly on the initiation of the debate in parliament.³⁷² As a result, the *Bundestag*'s only tools for overseeing the activities of the executive that were under its control were the same political tools that it had to control the executive's activities in general, i.a. question times and enquiry committees.³⁷³

Overall, the interpretation of Articles 59 and 24 by the *Bundesverfassungsgericht* provided the government with an astonishing amount of power in the area of Foreign Affairs and left the parliament with very few options to control those activities. It seems highly ironic that this is the result of decisions motivated by grave concerns about an all-powerful legislative setting out to usurp the powers of a helpless executive.³⁷⁴

While the Court's reasoning had a profound effect on the relationship of the executive and the legislative in the area of classic Foreign Affairs, the impact in the European context was almost overwhelming: it exacerbated the shift of political decision-making power from the legislative to the executive caused by the institutional structures of the

³⁷⁰ BVerfG, 'Atomwaffenstationierung' (n 320).

³⁷¹ *ibid.*

³⁷² BVerfG, 'Luftraumüberwachung Türkei' (n 335).

³⁷³ BVerfG, 'Atomwaffenstationierung' (n 320).

³⁷⁴ *ibid.*

EEC, since - protected by the foreign policy prerogative - the government alone had the right to conduct the 'everyday business' in Brussels.³⁷⁵

The *Bundestag's* contributions prior to the implementation stage were limited to the original ratification and the political oversight conducted as part of their general duty to control the actions of the executive. The resulting disempowerment of the parliament was regretted by many but considered to be the unavoidable consequence of a membership in the EC.

³⁷⁵ Cf. i.a. Börzel and Sprungk (n 20); Katrin Auel, 'Adapting to Europe: Strategic Europeanization of National Parliaments' in Ronald Holzhaacker and Erik Albæk (eds), *Democratic governance and European integration: linking societal and state processes of democracy* (Edward Elgar Publishing 2007).

B. From Maastricht to Lisbon: the Bundestag as political 'by-stander'?

The period between the Treaty of Maastricht and the Treaty of Lisbon was a rather eventful period in European integration history, shaped by profound changes to the treaty system, major strides with regard to the development of the common market and of course the introduction of the EURO. All these changes had decided repercussions for the national legal systems of the Member States. This Section will explore whether the *Bundesverfassungsgericht*, in light of those changes, re-considered its position on the role of the *Bundestag*, the manner and shape of its involvement and its relationship to the government.

A prominent feature during these years were the *Bundesverfassungsgericht's* continuing efforts to develop further its particular brand of judicial cooperation. However, the Court also started to give attention to the duties of the parliament. The amendment of the *Grundgesetz* in the wake of the ratification of the treaty of Maastricht is of particular interest here: the newly minted Article 23 was intended to provide a explicit constitutional basis for Germany's relationship with the EU as well as to compensate the *Bundestag* and the *Länder* for the loss of power they had suffered due to European integration. However, initial hopes were soon disappointed. Only in one area did the *Bundesverfassungsgericht* leave the *Bundestag* in a slightly better position than before: the ratification of the Treaty of Lisbon saw the *Bundestag* provided with a share in the 'integration responsibility' incumbent on the German institutions to shape the integration process in a way that was compatible with the *Grundgesetz*.

Overall, however, the *Bundesverfassungsgericht* did not make any move to halt or even reverse the continuing disempowerment of the *Bundestag* - it left the parliament in its role as political bystander.

1. Democracy and Sovereignty: the framework for legitimate integration

The ratification of the Treaty of Maastricht represented a qualitative shift in the nature of the European integration process. In that light, Article 24 was considered to be far too 'meagre' to be able to continue to support the developments that had already taken place and those still to come.³⁷⁶ The consensus among the political institutions was that a new constitutional foundation was needed that was capable of taking Germany safely into the future.³⁷⁷ Compared to the 'meagre' Article 24 (1) which merely states that '*The Federation may by a law transfer sovereign powers to international organisations*', the clause in Article 23 (1) that deals with the future integration process is far more specific:

Zur Verwirklichung eines vereinten Europas wirkt die Bundesrepublik Deutschland bei der Entwicklung der Europäischen Union mit, die demokratischen, rechtsstaatlichen, sozialen und föderativen Grundsätzen und dem Grundsatz der Subsidiarität verpflichtet ist und einen diesem Grundgesetz im wesentlichen vergleichbaren Grundrechtsschutz gewährleistet. Der Bund kann hierzu durch Gesetz mit Zustimmung des Bundesrates Hoheitsrechte übertragen. Für die Begründung der Europäischen Union sowie für Änderungen ihrer vertraglichen Grundlagen und vergleichbare Regelungen, durch die dieses Grundgesetz seinem Inhalt nach geändert oder ergänzt wird oder solche Änderungen oder Ergänzungen ermöglicht werden, gilt Artikel 79 Abs. 2 und 3.

*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.*³⁷⁸

³⁷⁶ Hans D Jarass, 'Artikel 23' in Hans D Jarass and Bodo Pieroth (eds), *Grundgesetz für die Bundesrepublik Deutschland - Kommentar* (12th edn, CH Beck Verlag 2012) para 1.

³⁷⁷ Christian Hillgruber, 'Artikel 23' in Bruno Schmidt-Bleibtreu, Hans Hofmann and Axel Hopfau (eds), *Kommentar zum Grundgesetz* (12th edn, Carl Heymanns Verlag 2011) para 2.

³⁷⁸ 'Grundgesetz Für Die Bundesrepublik Deutschland' (n 234).

Especially the first sentence represents the attempt to transform into legislation the conditions and limits for European integration developed by the *Bundesverfassungsgericht* over the previous thirty years. It aims to provide a detailed picture of Germany's vision for the integration process and expects the political institutions to work actively towards it, e.g. through the transfer of sovereign rights which as before is subject to parliamentary approval.

Subsequently, Members of the *Bundestag* used it to challenge the ratification of the treaty of Maastricht and, 16 years later, the ratification of the treaty of Lisbon. Those cases provided the *Bundesverfassungsgericht* with an opportunity to review a European treaty prior to its ratification, i.e. to comment on more than an already enacted piece of European legislation based on a competence already transferred. It enabled the Court to comment on the integration process as a whole, its past and its potential future. The procedural framework in both cases was a constitutional complaint which required the Court to frame its analysis around individual rights of the complainants - in this case the right to vote under Article 38.³⁷⁹ This enabled the Court to frame the analysis around the two themes of sovereignty and democracy: it depicted the right to vote as the ultimate expression of a people to elect the representatives who would then wield its sovereign power in order to implement the people's will. Since it was not the representatives' power in the first place and because they needed to remain capable of doing what they were elected to do, those representatives were limited in how they could dispose of that power.³⁸⁰ Most importantly, they could not transfer it away to other institutions or organisations to such an extent that they would lose the ability to be the decisive shaper of policy since that would make electing them meaningless - which in turn would make the right to vote meaningless. In the domestic context, for example, this resulted in limits as to scope and extent of regulatory power the parliament could delegate to the government. In the present context, the *Bundesverfassungsgericht* used it as the backdrop for the evaluation of the Maastricht and the Lisbon treaties. It steered the analysis very much towards an examination of Germany's

³⁷⁹ Article 38 *Grundgesetz*.

³⁸⁰ BVerfG, 'Maastricht' (n 38) 165–166.

role in the integration process, i.e. the relationship between the EC/ EU and Germany as a whole. Unfortunately, this drew attention almost entirely away from issues arising with regard to the relationship of government and parliament - which were, interestingly, very much the focus of the complainants' arguments.

a) The Maastricht decision: democracy under review

The main issue in *Maastricht* was whether or not the ratification of the Maastricht Treaty violated the principle of democracy. The complainants argued that with the European Parliament in a mostly consultative role, the EC's main legislator was in fact the Council. So all the competences that were transferred to the EC were essentially transferred to an institution composed of members of the executive. In addition, Article 23 essentially handed sole decision-making power over the exercise of the participation rights of the *Bundestag* to the *Bundesregierung*. In combination, the effect on the position of the *Bundestag* would be that it would be turned into a Parliament in name only, as all essential powers would be transferred to the EU/EC. As the German people had elected the *Bundestag* (and not the EC) to exercise that power, their sovereign right to determine who governed them was threatened. The complainants considered this to be not only a violation of the doctrine of separation of powers, but also a violation of the principle of democracy in its very core and thus unconstitutional.³⁸¹

The judges unanimously concluded that it was not. At the same time they established a number of limits for the transfer of powers to the EC that had to be respected by the German as well as the European institutions. In this, they agreed with the complainants: the democratic principle was part of the inviolable core of the *Grundgesetz*, one of those values that were reserved to the disposition by the sovereign alone - highlighted by the *Grundgesetz* by protecting them from constitutional amendment even by the Parliament.³⁸² As the *Bundestag* did not have any powers in this respect, these values constituted the limit up to which it could commit Germany to European Integra-

³⁸¹ *ibid* 168–169.

³⁸² Article 79 (3) GG, the so-called 'eternity clause'.

tion.³⁸³ Therefore it had the political responsibility to make sure that any transfer left it with functions and powers of 'substantial importance'.³⁸⁴

The *Bundesverfassungsgericht* also worried about the exercise of those powers after the transfer, specifically the exact delimitation of the powers transferred to the EC. In its opinion, the principles of conferral, subsidiarity and proportionality were the main safeguards to prevent the EC from assuming powers which it was not supposed to have. Therefore, the German representative in the Council had to ensure strict compliance with those principles.³⁸⁵

After establishing these important duties for the German institutions, the Court confirmed its view on Supremacy established in *Solange II*³⁸⁶: since this principle derived its legitimacy from the approval of the Member States embodied in the act of accession, any action that was not based on a competence actually transferred to the EC lacked such approval and would not be binding on the Member States. To control the actions of the EC institutions in this respect was the responsibility of the Member States. For Germany, this responsibility fell to the *Bundesverfassungsgericht* who therefore had the competence to review secondary EC law and where it was found to transgress Community competences, to declare it inapplicable within Germany.³⁸⁷ Commentators saw this pronouncement as a clear indication that the *Bundesverfassungsgericht* had not relinquished its negative attitude towards the EC or the ECJ but had indeed created an additional obstacle to successful European Integration.

Unfortunately, this did not change anything for the *Bundestag*. The fact that from the *Bundesverfassungsgericht's* perspective democratic legitimacy was now shared between the European Community/ Union and Germany did not lead to a re-evaluation of its classification of European matters as Foreign Affairs. As a consequence, the foreign policy prerogative was still in full effect and still determined largely the relationship between *Bundestag* and *Bundesregierung*.

³⁸³ BVerfG, 'Lissabon' (n 38) 218.

³⁸⁴ BVerfG, 'Maastricht' (n 38).

³⁸⁵ *ibid* 181–182, 186 and 211.

³⁸⁶ BVerfG, 'Solange II' (n 36) 375.

³⁸⁷ BVerfG, 'Maastricht' (n 38) 188.

b) The Lisbon decision: sovereignty under review

In June 2009, the *Bundesverfassungsgericht* delivered a judgment on the constitutionality of the ratification of the Lisbon Treaty and the two accompanying Acts: the Act changing the *Grundgesetz* and the Act *Extending and Strengthening the Rights of the Bundestag and the Bundesrat in EU Matters*, (the so-called Extending Act), following Constitutional Complaints by several Members of the *Bundestag* and an application for an Inter-Institution Dispute (*Organstreit*) by the Linke-Party.³⁸⁸

The arguments of the complainants and applicants pertaining to this analysis were as follows: the changes would cause a violation of unalterable core values (especially the principles of democracy, the *Rechtsstaat* principle, human rights protection and separation of powers), in particular an intolerable increase of the already existing lack of democratic legitimacy. Also, the transfer of powers would go beyond the limits established in *Maastricht* and – considering its extent – would equip the EU with all the characteristics of a state with substantive competences in all fundamental areas (e.g. foreign policy, internal security and the use of the military) that so far had remained more under the control of the Member States. This would effectively lead to the end of Germany's existence as an independent state. As this new European state did not comply with the very strict standards established by the *Grundgesetz*, the resulting German participation would violate the democratic principle and thus the limits established in *Maastricht*.³⁸⁹ Unanimously, the judges dismissed the challenge against the Lisbon Treaty and the Act changing the *Grundgesetz* but held the Extending Act to be unconstitutional and ordered a stay in the German ratification process until the Extending Act had been revised to their satisfaction.

The main focus of the reasoning was on the changes to the overall treaty system and their compatibility with the democratic principle of the *Grundgesetz*. The *Bundesverfassungsgericht* first of all stressed that the *Grundgesetz* encouraged German participation in various forms of peaceful international cooperation and integration. Such

³⁸⁸ BVerfG, 'Lissabon' (n 38).

³⁸⁹ *ibid* 103, 112–118.

participation was not '*tantamount to submission to alien powers*',³⁹⁰ but was in fact a realisation of the *Grundgesetz*'s notion of sovereignty.³⁹¹ For the EU, the *Grundgesetz* is seen to go even further:

"... der Verfassungsauftrag zur Verwirklichung eines vereinten Europas bedeutet insbesondere für die deutschen Verfassungsorgane, dass es nicht in ihrem politischen Belieben steht, sich an der europäischen Integration zu beteiligen oder nicht. Das Grundgesetz will eine europäische Integration ... Es gilt deshalb der Grundsatz der Europarechtsfreundlichkeit. ..."

*"... the constitutional mandate to realise a united Europe ... means in particular for the German constitutional bodies that it is **not left to their political discretion** whether or not they participate in European integration. The [Grundgesetz] wants European integration ... Therefore ... the principle of openness towards European law (Europarechtsfreundlichkeit) applies. ..."*³⁹²

For the Court, this 'Openness towards European law' implied that the strict constitutional standards applying to the *Grundgesetz* in terms of democratic governance did not apply to the EU; a certain amount of democratic deficit could be tolerated since the EU, after all, was not a nation-state.³⁹³

However, the Court confirmed that limits established in *Maastricht* still applied: the core of unalterable values was 'not amenable to integration',³⁹⁴ – in particular the principle of democracy was 'inviolable',³⁹⁵ Supremacy was still rooted in the 'constitutional empowerment',³⁹⁶ of the Member States and applied only 'by virtue of, and in the context of, the constitutional empowerment that continues in effect',³⁹⁷ and a blanket empowerment that would allow the EU to draw competences independently from the

³⁹⁰ *ibid* 220 of the official English translation.

³⁹¹ *ibid* 219–226.

³⁹² *ibid* 225 of the official English version, emphasis added. Quoted after the official English translation available at http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2009/06/es20090630_2bve000208en.html accessed 15 April 2016

³⁹³ *ibid* 227.

³⁹⁴ *ibid* 235 of the official English translation.

³⁹⁵ *ibid* 216 of the official English translation.

³⁹⁶ *ibid* 240 of the official English translation.

³⁹⁷ *ibid*.

Member States' transfer decision, i.e. to give the EU *Kompetenz-Kompetenz*, would be unconstitutional. The principle of conferral in particular acted as a safeguard of the Member States' prerogative in this respect.

For the Court, this did not mean, however, that a treaty had to outline every detail in order for the competence transfer to be constitutional. Following its reasoning in the NATO and Maastricht decisions, the judges affirmed that it was enough if the Lisbon Treaty specified the 'integration programme'. It was the *Bundestag's* responsibility to assess whether this integration programme and the potentially resulting integration process were overall compatible with the limits set out in the *Grundgesetz*. Its decision to ratify was then deemed to cover the ensuing integration process as a whole, even if the process developed an inner dynamic and led to unexpected results like e.g. the principle of Supremacy. However, any such development bound Germany only because of the original decision of the *Bundestag*. Consequently, any action of EU institutions that was not covered by that decision could take no effect in the Member States, thus justifying the *Bundesverfassungsgericht's* competence to declare actions ultra vires and to review 'whether the inviolable core content of the constitutional identity ... is respected' in order to protect the ultimate prerogative of the German people as the sovereign.³⁹⁸

At this point, the Court clarified that the duty to respect the limits outlined above rested not only on the EU institutions, as expressed in Article 4 (2) EU (Lisbon), but also on the national constitutional institutions. The *Bundesregierung* and the *Bundestag* carried the primary 'integration responsibility'. They had to cooperate closely and to use all the options available to them – e.g. as Council representative or before the ECJ – including those introduced by the Lisbon Treaty (e.g. the early warning system for the national parliaments) to ensure compliance, so that their 'integration responsibility' could be realised in the everyday work of the EU institutions (e.g. while legislating) as well as during a revision of the treaty system.³⁹⁹ As one of Germany's constitutional institutions, the *Bundesverfassungsgericht* also carried that responsibility. Therefore it

³⁹⁸ BVerfG, 'Lissabon' (n 38) 240.

³⁹⁹ *ibid* 242–245.

had to offer remedies against actions ultra vires of EU institutions and, from now on, also against actions that violated the *Grundgesetz's* constitutional identity. Should the review confirm a violation with regard to either, the Court would declare the respective piece of EU law to be inapplicable in Germany. However, any applicant had to exhaust the remedies available to them on EU level first and the review followed the principle of Openness towards European Law.⁴⁰⁰

After thoroughly examining the changes introduced by the Lisbon Treaty, the judges concluded that the ratification did not violate the limits outlined above: neither did the power transfer give the EU *Kompetenz-Kompetenz*, nor did the introduction of the bridging clauses enable the EU to change primary law independently from the Member States.⁴⁰¹ However, in order to protect the political responsibility of the German Parliament, as the directly elected representative of the German people, and to preserve the democratic principle, the German representative in the Council was not allowed to act without prior approval by the German Parliament when it came to changes in primary law, e.g. by using the newly introduced simplified or regular amendment procedures, the use of any of the bridging clauses, but also the use of the competence in Article 352 TFEU (formerly Article 308 EC). The vote for this approval had to be taken as a formal statute requiring the consent of the Bundesrat and in some cases (e.g. the use of Article 352 TFEU) even a two-thirds majority in both Houses, as required by Article 23 GG.⁴⁰²

2. The integration responsibilities of the Bundestag

a) Participation rights for the European context

The new Article 23 did include not only a 'successor' clause to Article 24 in terms of the transfer of sovereign rights, but also provisions on how the *Bundestag* and the Bundesrat (as representative of the Länder) were meant to participate with regard to the decision making at EU level as well as the formation of the *Bundesregierung's* position

⁴⁰⁰ ibid 240–241.

⁴⁰¹ ibid 298, 306 and 322.

⁴⁰² ibid 319, 320, 327, 328 and 365.

prior to that stage. The official claim was that those clauses were meant to compensate both the *Bundestag* and the *Länder* for the loss of political decision-making power they had suffered since the 1950s.⁴⁰³ The wider participation rights for the *Bundestag* and the *Bundesrat* served a dual purpose: to compensate them for the loss of power and to enable closer scrutiny of the actions of the *Bundesregierung*. The result was meant to be a stronger democratic foundation of the actions of the *Bundesregierung* in the European institutions and thus to strengthen the principles of democracy and federalism.

Given the acute loss of power the *Bundestag* had suffered over the course of the thirty years between the ratification of the Treaties of Rome and Maastricht, one could have expected its members to have been particularly keen to see their options to participate in the formation of Germany's position in the European institutions removed from the general rules of cooperation applying in Foreign Affairs and strengthened by having them expressly included in the constitution. Surprisingly, however, it was the *Länder* and not the *Bundestag* that were the major force behind having participation rights put down in writing. They, too, had been greatly affected by the transfer of legislative competences to the European institutions, partly because it was their own competences that were transferred and partly because the loss of federal competences impacted on their influence on the federal legislative process via the *Bundesrat*. Unlike the *Bundestag*⁴⁰⁴, however, they were very conscious of that fact and as a consequence very insistent on seeing the constitutional amendment providing them with adequate compensation.⁴⁰⁵ Since the ratification of the Maastricht treaty required the *Grundgesetz* to be amended in more areas than just the new Article 23 and such amendments required a two-thirds majority in both *Bundestag* and *Bundesrat*, they had the necessary leverage to see their claims realised. In striking contrast, the *Bundestag*'s utter lack of awareness of its diminished position is illustrated by the fact that

⁴⁰³ Cf. i.a. Hillgruber (n 377) 4–6.

⁴⁰⁴ Please cf. for further references Rudolf Streinz, 'Der Verfassungsstaat Als Glied Einer Europäischen Gemeinschaft' (1990) 105 *Deutsches Verwaltungsblatt* 949, 961.

⁴⁰⁵ Rudolf Streinz, 'Artikel 23' in Michael Sachs (ed), *Grundgesetz: Kommentar* (3rd edn, CH Beck Verlag 2003) para 4.

the original draft of the new Article 23 provided for its participation only with respect to the transfer of sovereign rights, i.e. where the drafters had adapted the existing rule in Article 24. Provisions for the *Bundestag*'s participation in 'every-day-business' were added only after the bill had already been introduced to the parliament for deliberation.⁴⁰⁶ For the present context, the crucial provisions are the second and third paragraph of Article 23:

(2) In Angelegenheiten der Europäischen Union wirken der Bundestag und durch den Bundesrat die Länder mit. Die Bundesregierung hat den Bundestag und den Bundesrat umfassend und zum frühestmöglichen Zeitpunkt zu unterrichten.

(3) Die Bundesregierung gibt dem Bundestag Gelegenheit zur Stellungnahme vor ihrer Mitwirkung an Rechtsetzungsakten der Europäischen Union. Die Bundesregierung berücksichtigt die Stellungnahmen des Bundestages bei den Verhandlungen. Das Nähere regelt ein Gesetz.

(2) The Bundestag and, through the Bundesrat, the Länder shall participate in matters concerning the European Union. The Federal Government shall keep the Bundestag and the Bundesrat informed, comprehensively and at the earliest possible time.

(3) Before participating in legislative acts of the European Union, the Federal Government shall provide the Bundestag with an opportunity to state its position. The Federal Government shall take the position of the Bundestag into account during the negotiations. Details shall be regulated by a law.

At first glance, they seem fairly straightforward: the *Bundesregierung* still had the leading role and the *Bundestag* was allowed to 'participate' in those activities e.g. by providing opinions. The *Bundesregierung* in turn had a duty to keep the *Bundestag* informed. Given the very visible connection between the *Bundesverfassungsgericht*'s decisions on Article 24 and the text of the new Article 23, commentators agreed that the cases decided under the 'old' rule could still be used as a reference point for the interpretation of the new one.⁴⁰⁷ However, when it came to the actual interpretation of those provisions, the situation seemed less clear. The question arose whether Article 23 was simply meant to perpetuate the status quo or was intended to provide any di-

⁴⁰⁶ *ibid* 5.

⁴⁰⁷ *ibid* 12.

rection beyond the old rule, given e.g. the specific references to strengthening the principles of democracy and federalism. In other words, whether these provisions did indeed provide (some) compensation for the very real loss of influence and decision making power the *Bundestag* had suffered in the preceding decades and/ or what effect those rights would have on the relationship between the *Bundesregierung* and the *Bundestag*.

The debate among academics was divided between those who considered Article 23 as a mere distillation of what had been constitutional practice anyway and those who argued that it did indeed provide something more than that.⁴⁰⁸ As analysed in the previous Chapter, the constitutional practice until then had led to a particularly powerful government that could keep the *Bundestag*'s involvement to the bare minimum by relying on its foreign policy prerogative: since it was the executive's right to conduct Foreign Affairs, the parliament had to justify its 'interference', usually by relying on the principle of democracy.⁴⁰⁹ This gave the latter the mandate to monitor the government's activities, but could only justify oversight up to a point. If one were to apply this logic to Article 23 (2) and (3) in order to determine how far exactly the *Bundestag* was allowed to influence and control the *Bundesregierung*'s activities, one would have to opt for a fairly narrow interpretation of 'participate' (Article 23 (2)) and 'opportunity to state its position' (Article 23 (3)) in order to keep the *Bundestag* from being able to undermine the *Bundesregierung*'s responsibilities. Cynically put, the *Bundestag*'s rights under Article 23 (3) would be comparable to those of the European Parliament under the consultation procedure.

In contrast, other authors claimed that the new Article 23 had been intended to reconceptualise the relationship between the EU and the German legal system by integrating the former into *domestic* policy making and thus to set the relationship between the executive and the legislative onto an entirely different footing.⁴¹⁰ Such an interpretation would turn the existing dynamics on its head and completely alter the balance

⁴⁰⁸ Jarass, 'Artikel 23' (n 376).

⁴⁰⁹ *ibid* 46.

⁴¹⁰ Streinz (n 405) 91.

of power between the two institutions: as explored in Chapter III, in the *domestic* context, the *Bundestag* (and the *Bundesrat*) are seen as being involved in political decision-making processes as a matter 'of course' and of right and it is the government that has to justify any limitation on their influence.⁴¹¹ Considering the considerable practical repercussions, it is astonishing that until the ratification of the ESM Treaty in 2012, there were no cases brought to the *Bundesverfassungsgericht* to decide this fundamental question. Not a single member of the *Bundestag* felt it necessary to challenge the activities of the government as being in violation of their right to 'participate' in European matters. It was left to academic commentary to debate the issue and the majority favoured the narrow interpretation, i.e. to assume that no changes to the pre-existing constitutional practice had been intended.

b) Reserves from the domestic context

In the *Lisbon* decision, the *Bundesverfassungsgericht* commented on various areas of policy making where integration efforts had to tread rather carefully. Two of them stand out because they provide the parliament with actual decision-making power beyond the confines of Article 23 (2) and (3): the deployment of armed forces and the budget.

Chapter IV above provided an evaluation of how the *Bundesverfassungsgericht* had conceptualised the decision-making on military action outside of Germany. The *Bundestag's* right to approve such an action prior to the mission was not meant as a limitation of the government's foreign policy prerogative, but rather as a genuine right of the parliament. This construction has already proven to be very effective in protecting the rights of the *Bundestag*, but here we can see that it also applies to the European context – a consistent continuation of the reasoning that European matters are still Foreign Affairs. The Court declares that any Europeanisation would not be permissible, i.e. the specific responsibility to decide on the deployment of armed German forces was in the hands of the *Bundestag* and had to remain there. This did not mean that the European Union could not develop defensive capabilities, but it did mean that the Eu-

⁴¹¹ Hillgruber (n 377).

European treaties could not be amended in a way that would enable the authorisation of specific military action without the express approval of the *Bundestag*. In the words of the Court, this reserve outranked Article 23 and was therefore 'integration resistant'.⁴¹² The Court then clarified that the budget required similar consideration because it protected the material means of a Member State to realise its goals:

"... Die Hoheit über den Haushalt ist der Ort konzeptioneller politischer Entscheidungen über den Zusammenhang von wirtschaftlichen Belastungen und staatlich gewährten Vergünstigungen. [...] Entscheidend ist aber, dass die Gesamtverantwortung mit ausreichenden politischen Freiräumen für Einnahmen und Ausgaben noch im Deutschen Bundestag getroffen werden kann. ..."

*"... Budget sovereignty is where political decisions are planned to combine economic burdens with benefits granted by the state. [...] What is decisive, however, is that the overall responsibility, with sufficient political discretion regarding revenue and expenditure, can still rest with the German Bundestag. ..."*⁴¹³

c) The Mandate to integrate

Given the Court's persisting image as hostile towards European integration, the characterization of the *Grundgesetz*'s stance as a 'mandate to integrate' constitutes perhaps the most surprising part of the *Lisbon* judgment. It would have been easier to simply recall *Maastricht* and then to allow the Lisbon Treaty to pass, subject to the previously established provisos. Instead, the *Bundesverfassungsgericht* unequivocally asserted the *Grundgesetz*'s commitment to European integration, a commitment that binds all of Germany's constitutional institutions, including the *Bundesverfassungsgericht* itself. The characterization of this commitment as a 'constitutional mandate' and as part of a constitutional principle emphasizes the importance that the *Bundesverfassungsgericht* attached to the process of European integration and Germany's participation in it.⁴¹⁴ As outlined in Chapter III A, such principles represent fundamental value decisions of the *Grundgesetz* that play a vital role in the interpretation

⁴¹² BVerfG, 'Lissabon' (n 38) 255.

⁴¹³ *ibid* 256.

⁴¹⁴ Daniel Thym, 'In the Name of Sovereign Statehood: A Critical Introduction to the Lisbon Judgment of the German Constitutional Court' (2009) 46 *Common Market Law Review* 1795, 1807.

of individual constitutional provisions and in the assessment of the constitutionality of actions under review,⁴¹⁵ as can be seen in the *Maastricht* decision where the Court used the principle of democracy to great effect. Although, unlike the latter, this new principle of openness is not seen as part of the unalterable core, its status as a constitutional principle means that the *Bundesregierung* and *Bundestag*, the German courts, but also the *Bundesverfassungsgericht* itself, will have to consider it whenever European law is involved.

In this context, one noticeable difference between the *Maastricht* and the *Lisbon* decision is the Court's approach to the institutions and their activities. While *Maastricht* had strongly emphasized the duties of the European institutions with regard to respecting the Member States' rights, the focus in *Lisbon* is far more on the duties 'incumbent upon German constitutional bodies'.⁴¹⁶ The *Bundestag* and the *Bundesregierung* are identified as carrying the primary responsibility which has to be realised in the everyday work of the European institutions (e.g. while legislating) as well as during a revision of the treaty system.⁴¹⁷ In order to maintain the political responsibility of the *Bundestag*, the Court decided that the bridging clauses and the simplified and ordinary amendment procedure as well as the use of Article 352 TFEU could only be used with prior approval of the German Parliament. Moreover, the vote on this instruction had to be taken as a formal statute requiring the consent of the Bundesrat and in some cases even a two-thirds majority in both Houses.⁴¹⁸

These requirements do constitute a qualitative shift: while so far the activities of the *Bundesregierung* have of course been subject to parliamentary oversight as of right, the democratic principle now turns this right into a duty. This forces the members of the *Bundestag* to take their role more seriously and not simply to rely on the *Bundesverfassungsgericht* to enforce their rights vis-à-vis the *Bundesregierung*.⁴¹⁹

⁴¹⁵ Hopfauf (n 233) 88.

⁴¹⁶ BVerfG, 'Lissabon' (n 38) 245 of the official English translation.

⁴¹⁷ *ibid* 242–245.

⁴¹⁸ *ibid* 319, 320, 327, 328 and 365.

⁴¹⁹ Christoph Schönberger, 'Lisbon in Karlsruhe: Maastricht's Epigones At Sea' (2009) 10 German Law Journal 1201, 1217.

In terms of the practical consequences, however, these changes strengthen the *Bundestag*'s position only to a limited degree. The subjection of the bridging clauses and the simplified amendment procedure to the *Bundestag*'s approval merely confirms the existing approval rights under Article 23 (1). The only new element is that now also the use of Article 352 TFEU is included here which could potentially lead to a greater involvement of the *Bundestag*. Overall, however, the integration responsibility of the *Bundestag* seems to constitute merely of a small degree of tighter internal control to ensure that the Executive does not use its position in the European institutions to circumvent the parliament's right officially to control the integration process. This complements the principles developed in the decisions on the *European Arrest Warrant Act* and *Greenhouse Gas Emissions Trading System* cases regarding accountability especially of the activities of the Federal Parliament.⁴²⁰

Therefore, before one hails this as a strengthening of the *Bundestag*'s rights, one should consider that these approval requirements only come into play once the government has decided that it wants to vote *for* the use of the clause in question. If the *Bundesregierung* has decided to use its veto anyway, they do not need to seek the approval of the *Bundestag*. So the actual political decision as to *whether* the clause is used is still very much with the government. Considering also that in parliamentary democracies like Germany, the government will generally be able to rely on its own majority in parliament to get the required approval, it remains to be seen how effective this control mechanism will be in practice.⁴²¹ It will be very much up to the Members of the *Bundestag* themselves whether the only consequences of the *Lisbon* requirements will be increased transparency and public scrutiny⁴²² or whether they will manage to achieve a measure of actual control. The identity review introduced by *Lisbon* may be used here as an internal enforcement mechanism, allowing the *Bundestag*

⁴²⁰ BVerfG, 'Europäischer Haftbefehl' [2005] BVerfGE 113, 273; BVerfG, 'Treibhausgasemissionsberechtigungen (ETS)' [2007] BVerfGE 118, 79.

⁴²¹ Daniel Halberstam and Christoph Möllers, 'The German Constitutional Court says "Ja Zu Deutschland!"' (2009) 10 German Law Journal 1241, 1252; Philipp Kiiver, 'German Participation in EU Decision-Making after the Lisbon Case: A Comparative View on Domestic Parliamentary Clearance Procedures' (2009) 10 German Law Journal 1287, 1293.

⁴²² Kiiver (n 421) 1295.

(especially the opposition), to challenge any action taken without prior approval. But the *Bundesregierung* could also make use of it: using it in combination with the mandate to integrate, it could challenge the constitutionality of a particular vote before the *Bundesverfassungsgericht* in order to have it annulled, in case the *Bundestag* refused to authorise steps for further integration although they would not threaten Germany's constitutional identity. Used creatively by both *Bundesregierung* and *Bundestag*, the procedural mechanisms can be both a threat and an opportunity. Ideally, this should induce the government to involve the Parliament more and earlier in the process, in particular to keep the *Bundestag* informed well ahead of the vote at European level to give it enough time to schedule the necessary debate and vote.

It has been argued that the requirements outlined above were established to safeguard Germany's sovereignty.⁴²³ However, they would not be very effective in this respect, but then again they were not meant to serve as such. The *Bundesverfassungsgericht* is not concerned that e.g. the bridging clauses will be used at all but that, when the decision about their use is taken, it is done by the institution that the German people elected for that very purpose. Incidentally, those requirements mirror demands for more participation of national Parliaments at European level that featured highly during the process of drafting the Constitutional Treaty as well as the Lisbon Treaty, so to interpret them simply as expressions of euro-hostility would be an oversimplification.⁴²⁴

3. Conclusion

Even though the European integration process developed in quite a different way to e.g. NATO, the *Bundesverfassungsgericht* saw no need to adapt the stance adopted for Foreign Affairs in general: under Article 24, the *Bundestag* had political decision-making power as to the treaty as a whole and the duty to make sure that the power

⁴²³ Claimed e.g. by Doukas Dimitrios Doukas, 'The Verdict of the German Federal Constitutional Court on the Lisbon Treaty: Not Guilty, but Don't Do It Again!' (2009) 34 *European Law Review* 866, 876.

⁴²⁴ Cf. the conclusions drawn by Jo Eric Khushf Murkens, '*Bundesverfassungsgericht* (2 BvE 2/08): "We Want Our Identity Back" - the Revival of National Sovereignty in the German Federal Constitutional Court's Decision on the Lisbon Treaty' [2010] *Public Law* 530, 550.

transfer did not transgress the limits established by the *Grundgesetz*. Once the original ratification was completed, the usefulness of the *Bundestag* seemed to be 'exhausted'. Its only options for control and supervision of the activities of the *Bundesregierung* in the European institutions were political tools such as question times and enquiry committees.⁴²⁵ In other words, the foreign policy prerogative of the executive applied unaltered even though over time the decisions taken in Brussels began to impact far more on domestic policy making than any decisions in more traditional international affairs ever had.⁴²⁶

The requests for reform focused all on the EEC and revolved around fundamental rights protection, i.e. the *Bundesverfassungsgericht's* efforts focused on subjecting the actions of the 'new' shared bearer of Germany's sovereign rights to restrictions regarding the content in the same way as it did with the German institutions. As the relationship between institutions is shaped by processes and competences, the doctrine of separation of powers did not feature prominently in the Court's decisions. A further reason for the Court's neglect could be that it saw the institutional structures of the EEC as being fixed in the moment of ratification with no further option for change. Also, the cases brought to the *Bundesverfassungsgericht* were mostly constitutional complaints which forced the Court to use a fundamental rights framework for its decision which did not lend itself easily to the consideration of separation of powers issues. However, the fact that no cases were brought by the *Bundestag*, especially the *Bundestag's* opposition, speaks volumes in itself and is an interesting parallel to the evolution of the European integration process during those decades.⁴²⁷ In conclusion, up to the treaty of Maastricht, European matters were treated like Foreign Affairs under the *Grundgesetz* and the rather unique development of the European integration process since then up to the treaty of Lisbon did not lead to a reconsideration of that assessment.

⁴²⁵ BVerfG, 'Atomwaffenstationierung' (n 320).

⁴²⁶ As commented at the time by Christian Hillgruber, 'Artikel 32' in Bruno Schmidt-Bleibtreu, Franz Klein and Hans Bernhard Brockmeyer (eds), *Kommentar zum Grundgesetz* (7th edn, Luchterland Verlag 1990) para 18.

⁴²⁷ Sprungk (n 280).

C. Conclusion

The overall picture that forms of the decades between Maastricht and Lisbon is that of a parliament the main activities of which are still reduced to the implementation stage, despite various statutory changes at European and at national level. Hopes⁴²⁸ that those changes would integrate European decision making into the *national* process of policy formation were disappointed. The declared aim of Article 23 to strengthen the democratic legitimacy of the executive's actions by countering the legislative's loss of power was not achieved. Thus, the only moment in time when the *Bundestag* holds real decision-making power is still the original ratification and subsequent amendment treaties.

This is due to a combination of factors: in the domestic context, the parliament is in a rather strong position and well capable of controlling the government, mainly due to its role in the legislative process.⁴²⁹ However, this strength turns into a weakness in the European context where a lot of legislative competences have been transferred to the EU which translated into fewer opportunities for the *Bundestag* to scrutinize the *Bundesregierung's* policies. The compensation intended by Article 23 was to involve the parliament more actively at an earlier stage, especially before matters are decided at European level. However, even though Article 23 (2) specified that the *Bundestag* had the right to be 'kept informed' and to 'participate', it was still kept at arm's length. The switch to an ex ante system of scrutiny made it dependent on the government for access to information and for the implementation of its concerns. Interestingly, it is actually not predominantly the attitude or behaviour of the government or the nature of the integration process that contributes to the disempowerment of the *Bundestag*. Instead, the *Bundesverfassungsgericht* turns out to be the main 'gate keeper'⁴³⁰ – with its insistence on classifying European matters as 'Foreign Affairs'⁴³¹ and on maintaining the foreign policy prerogative of the government even in the face of the substantial

⁴²⁸ Streinz (n 405).

⁴²⁹ Börzel and Sprungk (n 20) 124.

⁴³⁰ *ibid* 119; Kiiver (n 421).

⁴³¹ Claus Dieter Classen, 'Artikel 23' in Hermann von Mangoldt and others (eds), *Kommentar zum Grundgesetz*, vol 2: Article 20 bis 82 (6th edn, Vahlen Verlag 2010) para 64.

loss of legislative power of the *Bundestag*, it prevented the participation rights in Article 23 (2) from gaining momentum and thus the parliament from regaining at least some of the power it lost. As a result, the *Bundestag* is still left with the role of political 'bystander' – a position the *Bundesverfassungsgericht* would never tolerate in the domestic context and which is also very much at odds with the Court's own jurisprudence on how the powers should provide '*mutual restraint and control*' to each other.

As the cases examined in the next Chapter will show, the *Bundesverfassungsgericht* has largely maintained that position. Even though it has moved to establish yet another reserve that limits the power of the *Bundesregierung*, its overall approach remains dishearteningly consistent and in favour of a strong executive.

CHAPTER VI: The decisions on the ESM and Fiscal Treaties

The EURO crisis and the creation of the European Financial Stability Facility (EFSF) and the European Stability Mechanism (ESM) as well as the adoption of the Fiscal Treaty gave rise to a series of so far more than eleven decisions that, for the first time, revolved very much around the role of the *Bundestag* in the European context. This Chapter will focus on seven⁴³² of those decisions that deal with the substantive content of the challenges brought partly against the ratification of the treaties in questions (in the tradition of the decisions on the Maastricht and Lisbon Treaties) and partly against decisions of the *Bundestag* under the EFSF and the ESM; against the statute detailing the procedure as to how the *Bundestag* would be involved in decision making in this context as well as against the activities of the *Bundesregierung* in the run-up to the ratification of the ESM and the Fiscal Treaties. The detail provided here will form the background of the analysis in the following Chapter.

A. The ESM cases: facts, arguments and outcomes

The seven decisions issued between September 2011 and March 2014 that are the focus of this thesis stem from four different proceedings brought before the *Bundesverfassungsgericht*. In chronological order, the decisions were issued as follows:

1. The decision issued in September 2011 concerned the decision to grant Greece funding for a bailout and the creation of the EFSF;
2. The decision made in February 2012 dealt with a challenge against the statute adopted by the *Bundestag* to regulate the procedure for parliamentary decision-making within the EFSF;
3. The decision of June 2012 asked for a review of the behaviour of the *Bundesregierung* prior to the ratification of the ESM and the Fiscal Treaties;

The next four decisions are all part of the same set of proceedings where complainants challenged the constitutionality of the ESM and Fiscal treaties. After the *Bundes-*

⁴³² The other decisions issued in this context are i.a. applications for injunctions and costs related to the main action. For further details please cf. Sebastian Graf von Kielmansegg, 'Parlamentarische Informationsrechte in Der Euro-Rettung: Anmerkung Zum Ersten ESM-Urteil Des BVerfG Vom 19.06.2012' (2012) 47 *Europarecht* 654.

tag and Bundesrat ratified the treaties in June 2012, citizens as well as members of the *Bundestag* brought actions to have the constitutionality of the treaties reviewed:

4. In September 2012, complainants brought an injunction against the Federal President to prevent him from submitting the ratification documents before the decision in the main action;
5. After the ESM had taken up its work, some of the complainants brought an injunction in April 2013 in order to prevent the *Bundestag* from voting on the application of Cyprus under the ESM framework;
6. Among the acts challenged in the main action was the decision of the European Central Bank concerning Outright Monetary Transactions (OMT). In January 2014 the *Bundesverfassungsgericht* made the unprecedented move to make a preliminary reference to the CJEU because the judges considered the decision to be Ultra Vires;⁴³³
7. In March 2014, the Court issued the decision in the main action on the remaining challenges.

1. BVerfGE 129, 124: Greek Bailout/ EFSF (7 September 2011)⁴³⁴

Several members of the *Bundestag* as well as members of the general public brought constitutional complaints against the German statutes implementing the decision of the European Council about the financial aid for Greece, the creation of the EFSF and the decision of the Members of the EURO-zone to enhance the stability of the EURO ('EURO stabilization package'). As they did in the Maastricht and Lisbon case, the complainants used the right to vote under Article 38 *Grundgesetz* and the principle of democracy to challenge the above which would allow them to have the content of the decisions and statutes reviewed by the *Bundesverfassungsgericht* (cf. above Chapter V

⁴³³ Registered as Case C-62/14 *Peter Gauweiler et al. v Deutscher Bundestag*. The Advocate General's opinion is available at Pedro Cruz Villalón, 'OMT Reference - Opinion of the Advocate General' (14 January 2015) <<http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1429408819509&uri=CELEX:62014CC0062>> accessed 15 April 2016; the decision of the CJEU is available at CJEU, 'OMT Reference' (16 June 2015) <<http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1434974260296&uri=CELEX:62014CJ0062>> accessed 15 April 2016.

⁴³⁴ BVerfG, 'Greek Bailout/ EFSF' (n 294).

B 1). The Court considered admissible only the challenges against the German statutes and only on the grounds of a violation of the right to vote under Article 38. The challenges directly against the acts of the European institutions for being ultra vires were considered inadmissible since the complainants were not directly affected by these acts and thus could not challenge them via constitutional complaint. The Court also dismissed the challenges against the acts of participation of the German representative in those institutions, holding that the alleged violation of the integration responsibility of the *Bundestag* was insufficiently substantiated.⁴³⁵

The Court reaffirmed that the right to vote in Article 38, in conjunction with the democratic principle, allowed challenges against actions of the *Bundestag* that eroded its role as an effective representative of the citizens. Picking up a thread from the Lisbon decision⁴³⁶, the judges now extended that to include decisions that could render a present or future parliament not just legally – through transfer of competences – but practically – e.g. by binding its finances – incapable of fulfilling that role: budgetary autonomy and manoeuvrability was a fundamental element of democratic self-determination and one of the crucial tools available to a parliament for a comprehensive control of the government. Thus the responsibility for the budget formed part of the core of a parliament's power and of the protected democratic identity of the *Grundgesetz*⁴³⁷ - it had to remain with the *Bundestag* even within a system of inter-governmental governance.⁴³⁸

As it was the *Bundestag's* responsibility to ensure that Germany retained its financial autonomy, it would violate the democratic core if the *Bundesregierung* could enter into substantial commitments without the prior consent of the *Bundestag*.⁴³⁹ It was up to the *Bundestag* to evaluate Germany's budgetary capacities and economic strength and to balance these against the likelihood that the guarantees be realised. As long as fundamental fiscal decisions were taken by, or with the consent of, the *Bundestag*,

⁴³⁵ *ibid* 113–118.

⁴³⁶ BVerfG, 'Lissabon' (n 38) 256.

⁴³⁷ BVerfG, 'Greek Bailout/ EFSF' (n 294) 101–102.

⁴³⁸ *ibid* 124.

⁴³⁹ *ibid* 105.

they would not violate the constitutional core even if they reached substantial proportions.⁴⁴⁰ In order to exercise its budgetary responsibility, the *Bundestag* had to ensure it retained a decisive influence on the decisions taken in these organisations, in particular situations even on a case-by-case basis.⁴⁴¹

Applying these principles, the *Bundesverfassungsgericht* concluded that the statutes and decisions under consideration did not erode the *Bundestag*'s budgetary autonomy to the point that it violated the core of the democratic principle. In particular did they not create an automated liability where decisions of other Member States could cause the creation of liabilities for Germany without its say-so. With regard to the Greek bailout under review, the Court emphasized that it had to respect the political prerogative of the parliament in this context, which prevented it from substituting its own assessment of the risks for that of the elected body and limited its review to evident violations of the limitations outlined above. 'Evident' in this context were decisions that were unjustifiable in light of the amount involved and the potential consequences for budgetary autonomy.⁴⁴² The Court concluded that the *Bundestag*'s assessment about the potential impact on the budget was constitutionally acceptable.⁴⁴³

Conversely, the Court did find parliamentary control insufficient with regard to the statute implementing the EFSF as it required the *Bundesregierung* merely to try to obtain the approval of the *Bundestag*'s budget committee in advance of the decision in the EFSF council. Instead of annulling the statute, however, the judges merely required it to be interpreted in conformity with the constitution, i.e. it had to be read as requir-
ing the Committee's prior consent, unless it was an emergency.⁴⁴⁴

⁴⁴⁰ *ibid* 124.

⁴⁴¹ *ibid* 127–128.

⁴⁴² *ibid* 130.

⁴⁴³ *ibid* 133–135.

⁴⁴⁴ *ibid* 141.

2. BVerfGE 130, 318: Participation of the Bundestag (EFSF) (28 February 2012)⁴⁴⁵

The next decision was a challenge against the statute that aimed to implement the requirements resulting from the *Bundesverfassungsgericht's* decision in September 2011. The statute had been amended following a proposal from the *Bundestag's* Budget Committee and defined in detail what situations were subject to the approval of the *Bundestag* as a whole, which ones were to be decided by the Budget Committee and which ones were to be referred to a so-called Special Committee formed by a small number of members of the Budget Committee.⁴⁴⁶

The applicants, members of the *Bundestag*, brought an inter-institutional dispute against the *Bundestag*, arguing that with the enactment of that statute, the latter had violated their rights to equal participation under Article 38 *Grundgesetz*. In an inter-institutional dispute, the applicant claims that the respondent institution violated its rights under the *Grundgesetz* and the Court's decision is intended to settle the difference of opinion between the two parties. The potential consequences are rather limited: if the Court finds the actions under review to be unconstitutional, all it can do is declare them to be thus, unlike in case of a constitutional complaint where it can repeal the actions in question - one of the main reasons that the actions against European treaties tend to be brought as constitutional complaints. Despite its limitations, the procedure is a very useful tool especially for the opposition of the *Bundestag* as it allows challenges against actions of the majority of the *Bundestag* or the government and results in a definitive delineation of the rights in questions. Since the Court's interpretation is binding on all institutions, such cases have decided repercussions for their future behaviour and thus the potential to reshape the relationship of the institutions involved in a fundamental fashion - as could be seen in Chapter IV (Foreign Affairs), where the Court's jurisprudence on the parliamentary reserve on the deployment of armed forces originated in an inter-institutional dispute.

⁴⁴⁵ BVerfG, 'Participation of the *Bundestag* (EFSF)' [2012] BVerfGE 130, 318.

⁴⁴⁶ *ibid* 32–58.

Here, the applicants argued that according to established jurisprudence⁴⁴⁷ of the *Bundesverfassungsgericht*, all members of the House have the right to equal participation in the duties and responsibilities of the *Bundestag*.⁴⁴⁸ Therefore the default delegation of decisions in EFSF matters to the Budget Committee (with a size of 41 out of the then total number of 620 members of the *Bundestag*) would exclude a majority of the House from participating in decisions that the *Bundesverfassungsgericht* had, after all, deemed to be a crucial part of the parliament's duties. This would apply even more in the case of matters intended to be referred to the Special Committee - which had an intended size of only 9 members (out of 620).⁴⁴⁹ The respondent *Bundestag* - supported by the *Bundesregierung* - argued that the case be dismissed since the *Bundestag* as an institution had the right to organise its own affairs autonomously and that included decisions as to which matters to refer to committees and which ones to reserve to the plenum.

Given the track record of the *Bundesverfassungsgericht* for dismissing challenges in the EU context, it must have come as a rather unwelcome surprise to the *Bundesregierung* when the Court found in favour of the applicants. It concurred with them in that in principle it was the *Bundestag* as a whole that was the directly elected representative of the people. As a consequence, all members had in principle the same right to share effectively in the activities of the House.⁴⁵⁰ This applied in particular to the budgetary responsibility. The budget represented the economic dimension of fundamental policy decision-making for which the *Bundestag* was responsible vis-à-vis the people. Through the debates, parliament became the platform for public discussion of the competing interests and thus allowed the citizens to participate in the control of the powers governing them. As a result, the responsibilities of the *Bundestag* with regard to the budget were not merely a means to control the government, but rather a fundamental element of democratic self-determination.⁴⁵¹ Therefore it was also the *Bun-*

⁴⁴⁷ One of the key cases in this context is BVerfG, 'Wüppesahl' (n 17).

⁴⁴⁸ BVerfG, 'Participation of the *Bundestag* (EFSF)' (n 445) 65.

⁴⁴⁹ *ibid* 72.

⁴⁵⁰ *ibid* 101–104.

⁴⁵¹ *ibid* 105–107.

destag as a whole that had the responsibility for the budget - not just the parties holding the majority (and supporting the government), particular parliamentary party groups or even individual members.

Recalling their decision of September 2011, the judges highlighted that the obligation on the *Bundesregierung* to obtain prior approval of the *Bundestag* before a vote in the governing body of the EFSF was meant to prevent the government from entering into financial obligations that would circumvent the *Bundestag*'s responsibilities.⁴⁵² The '*Bundestag*' in this context was as such the plenum, i.e. every member of the *Bundestag* had the right to review and vote on EFSF proposals. The Court distinguished between two different types of committee activities had to be distinguished:⁴⁵³ to refer to committees work *preparing* for a vote in the plenum was a well-established parliamentary tradition and sensible for the sake of efficiency. However, the referral of actual decision-making power away from the plenum was subject to strict proportionality considerations⁴⁵⁴. Here, the statute under review employed the assumption that almost all decisions were 'urgent' and/ or required confidentiality and thus were within the remit of the Budget Committee, if not the Special committee. This turned the committee referral, which was supposed to be the exception, into the rule and thus removed most decisions on the EFSF from the remit of the plenum of the *Bundestag*, i.e. most of its members.⁴⁵⁵ With regard to the Special Committee, the judges criticised that its composition defeated its purpose: if the committee was supposed to enable fast decision-making in urgent situations, then it made no sense not to have deputies assigned to each member so that quorum could be ensured.⁴⁵⁶ The only instance where the Court considered the referral to the Special Committee justifiable were for highly sensitive decisions where even a hint of a rumour about mere discussions taking place would endanger the very purpose of the measure under consideration.⁴⁵⁷

⁴⁵² *ibid* 110.

⁴⁵³ *ibid* 119–122.

⁴⁵⁴ *ibid* 125, 144.

⁴⁵⁵ *ibid* 145, 153.

⁴⁵⁶ *ibid* 146.

⁴⁵⁷ *ibid* 149–150.

3. BVerfGE 131, 152: Duty to Inform the Bundestag (ESM) (19 June 2012)⁴⁵⁸

Like the previous decision, the decision of June 2012 was rendered in an inter-institutional dispute - this time between the Green party parliamentary group (part of the opposition) and the *Bundesregierung*. The applicants challenged the behaviour of the *Bundesregierung* in the run-up to the ratification of the ESM and the Fiscal Treaties as being in violation of their rights under Article 23 (2) *Grundgesetz*. Since its introduction into the *Grundgesetz* in 1993, this was the first case ever to be brought with regard to Article 23 (2) and politicians as well as academics eagerly awaited the outcome. And again, against all expectations, the applicants won.

The case revolved around the events that had taken place from ca. November 2010 up to the finalisation of both treaties in November 2011. The *Bundesregierung* had a very active role in the negotiations about the ESM and the Fiscal treaty had actually been its own idea. Despite this, the *Bundesregierung* kept the *Bundestag* very much at arm's length during the entire time - based on the argument that the events in question were not 'European matters' for the purposes of Article 23 and that therefore the traditional rules on interaction in the area of Foreign Affairs applied. In other words: the *Bundesregierung* considered these negotiations to be within the remit of its foreign policy prerogative and the *Bundestag* had no right to interfere. In keeping with this view, any information it provided to the *Bundestag* was given under the express proviso that this could not be construed as an acknowledgment of a legal duty to do so. Over the course of the months, cabinet ministers informed individual committees and answered requests from individual members of the *Bundestag* in a more or less detailed fashion, but there was no coherence. The first draft of the ESM treaty that was available at European level at the beginning of April 2011 was not forwarded to the *Bundestag* by the *Bundesregierung* – the members of the *Bundestag* only got access to it because they managed to get a copy from the Austrian parliament.⁴⁵⁹

⁴⁵⁸ BVerfG, 'Duty to Inform the *Bundestag* (ESM)' (n 15).

⁴⁵⁹ *ibid* 25.

The applicants argued that this behaviour had violated their right under Article 23 (2) to be kept informed about European matters '*comprehensively and at the earliest possible time*'. The behaviour of the *Bundesregierung* made it impossible for the *Bundestag* to have any real and effective input into the decision-making process and on the content and shape of the ESM or the Fiscal treaties.⁴⁶⁰

Providing a definitive interpretation of the rights in article 23 (2) for the first time almost twenty years after its enactment, the *Bundesverfassungsgericht* largely agreed with the applicants, but also outlined limitations to those rights that aimed to preserve the core of the government's prerogative. The judges started by outlining the *Grundgesetz*'s traditional approach to Foreign Affairs, stressing that the *Grundgesetz* had allocated the competence for Foreign Affairs to the executive and that it enjoyed broad discretion as to how to fulfil that responsibility.⁴⁶¹ They recalled their established jurisprudence that the *Grundgesetz* was to be seen as having deliberately limited the *Bundestag*'s in the area of Foreign Affairs due to the *Bundestag*'s institutional structures being 'unsuitable' for handling the daily demands of Foreign Affairs. The judges also recalled their evaluation that to give the *Bundestag* a greater role would lead to a circumvention of the balanced system of power distribution set up by the *Grundgesetz*. Therefore the parliament's input was limited to after-the-fact legal control of the government's actions.⁴⁶²

The judges then asserted that the traditional approach did not apply to Article 23 which they saw as having intended to set the relationship between *Bundesregierung* and *Bundestag* in European matters on a different footing: while the executive was still meant to be the power in control, the participation rights provided to the *Bundestag* were intended as a compensation for the loss of power it had suffered as a consequence of the European integration process. In order for those participation rights to be most effective, one had to give Article 23 a broad remit, i.e. adopt a broad definition of 'European matters'. Therefore the ESM and the Fiscal treaty had to be consid-

⁴⁶⁰ *ibid* 47 and 54.

⁴⁶¹ As established in: BVerfG, 'Atomwaffenstationierung' (n 320), cf. Chapter IV for the details.

⁴⁶² BVerfG, 'Duty to Inform the *Bundestag* (ESM)' (n 15) 91–93.

ered as such even though they were created deliberately outside the EU's treaty structure.⁴⁶³

An equally broad interpretation had to be applied to the duty of the government under Article 23 (2) to keep the *Bundestag* informed. Reiterating a point already made in their judgement in February 2012,⁴⁶⁴ the judges highlighted that without comprehensive information the *Bundestag* could not exercise its participation rights effectively and since the *Bundesregierung* - due to its dominant role in the decision-making processes at European level - was in possession of the necessary information, it had a duty to provide the *Bundestag* with all the materials and information it needed to make an informed decision. And this information had to be provided early enough so that the *Bundestag* had a real chance to influence the position of the *Bundesregierung* before definite decisions were made in Brussels. In other words: Article 23 (2) did precisely not intend for the *Bundestag* to conduct only after-the-fact legal control. The judges also pointed out that the duty to provide comprehensive information in time had been even more important in the present context since it concerned the budgetary responsibility of the *Bundestag* - one of its core duties.⁴⁶⁵

While the judges considered those rights of the *Bundestag* to be rooted in the principle of democracy and in need of a broad interpretation so that the *Bundestag* could use them effectively, they did not leave the government entirely 'defenceless'. Similar to their approach in the domestic context (cf. Chapter III), they used the doctrine of separation of powers in order to establish the limits of the *Bundestag's* rights to get actively involved in European matters. They argued that the doctrine served to protect the *Grundgesetz's* system of power distribution between the institutions, in this case it acted to preserve the independence of the executive's internal decision-making processes - as a matter of principle, the phase of '*initiative, deliberation and action*' was not subject to review or control by the *Bundestag* while it was still on-going.⁴⁶⁶ However, this did not mean that the government could withhold all information until it had

⁴⁶³ *ibid* 96.

⁴⁶⁴ BVerfG, 'Participation of the *Bundestag* (EFSF)' (n 445) 158–160.

⁴⁶⁵ BVerfG, 'Duty to Inform the *Bundestag* (ESM)' (n 15) 145.

⁴⁶⁶ *ibid* 115.

taken the final decision. Interim or partial results that were capable of being released to the public or to third parties for consultation were no longer part of the internal decision-making process and the government had a duty to inform the *Bundestag* about those results.⁴⁶⁷

4. *BVerfGE 132, 195: Injunction against the ESM and Fiscal Treaties (12 September 2012)*⁴⁶⁸

Directly after the decision of the *Bundesverfassungsgericht* of June 2012, the *Bundestag* voted for the ratification of the ESM and Fiscal treaties. Immediately afterwards, a considerable number of concerned citizens and some members of the *Bundestag* brought constitutional complaints and the members of the opposition party Die LINKE brought an inter-institutional dispute, all contesting the constitutionality of those treaties and of some of the implementing legislation. In September 2012, the Court decided on an injunction brought by those complainants and applicants. The aim of the injunction was to suspend the ratification until after the Court had decided on the main action, i.e. to avoid that matters became irrevocable before the constitutionality of the issues under review had been settled.

The Court's general approach to injunctions is to assess only the potential consequences of granting or refusing the injunction without assessing the likely outcome of the case, so as to avoid pre-empting the decision in the main action. However, in the present case the potential repercussions either way reached far beyond Germany or its constitutional system: if the Court rejected the injunction, the ratification would go ahead and Germany would become bound by those treaties under international law. Should they ultimately prove to be unconstitutional, it would be very difficult for Germany to disentangle itself from those legal and financial obligations - the latter ones potentially of considerable proportion. On the other hand, if the Court granted the in-

⁴⁶⁷ *ibid* 124.

⁴⁶⁸ BVerfG, 'ESM/ Fiscal Treaty (Injunction)' [2012] BVerfGE 132, 195 Please be advised that the paragraph numbering in the English translation available on the BVerfG's website differs considerably from the one in the German original. E.g. in the German original the Court's assessment of the facts (Part B) begins at para. 85, in the English translation it begins at para. 189. For simplicity's sake, only the paragraph numbers of the German original will be referred to.

junction, the ratification would be suspended and, without Germany, the treaties could not enter into force. The economic repercussions of that scenario would affect not just Germany but the whole EURO zone. Should the treaties then prove to be constitutional, the resulting economic and political damage would likely be impossible to remedy.⁴⁶⁹ In cases such as this one, the *Bundesverfassungsgericht* tends to derogate from its usual practice and to conduct a summary examination of the main action in order to establish whether there was a 'high degree of probability',⁴⁷⁰ for a success or dismissal and then granted or refused the injunction accordingly.

Its summary examination led the Court to conclude that the actions appeared mostly admissible but not likely to be well founded on the merits. It therefore rejected the injunction with the proviso that the Federal president submitted the following two reservations when submitting the German ratification instruments:

1. ... dass keine Vorschrift dieses Vertrages so ausgelegt werden kann, dass für die Bundesrepublik Deutschland ohne Zustimmung des deutschen Vertreters höhere Zahlungsverpflichtungen begründet werden;

2. die Regelungen der Artikel 32 Absatz 5, Artikel 34 und Artikel 35 Absatz 1 des Vertrages zur Einrichtung des Europäischen Stabilitätsmechanismus nicht der umfassenden Unterrichtung des Bundestages und des Bundesrates entgegenstehen.

1. ... that no provision of this Treaty may be interpreted in a way that establishes higher payment obligations for the Federal Republic of Germany without the agreement of the German representative;

2. the provisions under Article 32 paragraph 5, Article 34 and Article 35 paragraph 1 of the Treaty establishing the European Stability Mechanism do not stand in the way of the comprehensive information of the Bundestag and of the Bundesrat.⁴⁷¹

The Court considered the applications admissible only insofar as the complainants had argued that the ratification of the treaties would violate their rights under Article 38 by transferring too much decision-making power to the supranational level which would make it impossible for the *Bundestag* to realise its budgetary responsibilities. The judges agreed that this created at least the possibility of a violation of the core of the

⁴⁶⁹ ibid 88.

⁴⁷⁰ ibid 192 of the English translation.

⁴⁷¹ BVerfG, 'ESM/ Fiscal Treaty (Injunction)' (n 468) the operative part of the judgement.

principle of democracy which in turn constituted a violation of the *Grundgesetz*'s identity as highlighted in the decision on the Lisbon treaty.⁴⁷²

The Court largely recalled its comments made in the decisions issued in September 2011 and February 2012 with regard to the nature of the *Bundestag*'s budgetary responsibilities. It confirmed that they - as well as the right to be kept informed by the *Bundesregierung* - were an essential element in the *Grundgesetz*'s efforts to ensure the realisation of a strong democracy and thus part of the *Grundgesetz*'s identity protected by Article 79 (3).⁴⁷³ However, the judges rejected the applicants' arguments that the changes made to Article 136 TFEU were unconstitutional simply because they constituted an alteration of the existing structure of the currency union and as such went beyond what the *Bundestag* had agreed to with the original act of ratification and what the *Bundesverfassungsgericht* itself had declared to be constitutional in its review of the Maastricht treaty. They pointed out that the regime originally established by the treaty was by no means the only viable design option and that it was well within the remit of the Member States as the 'masters of the treaties' to review and change the existing regime should it prove unsuitable to the task.⁴⁷⁴

With regard to the Fiscal Treaty, the Court agreed that it would oblige its parties to pursue a specific budgetary and fiscal policy. But this did not constitute a per-se violation of the principle of democracy. The judges pointed out that in 2009, the *Bundestag* and Bundesrat themselves had amended the *Grundgesetz* to include a provision that put considerable restrictions on the federal and Länder parliaments with regard to borrowing. The reasoning behind these limits was to prevent current parliaments from incurring debts that would severely limit the financial manoeuvrability of future parliaments and thus their democratic power to shape the lives of their citizens. Hence, the Court had no objection to such restrictions being created not merely by national constitutional law but also by international or European law since those obligations were freely entered into. The primary political responsibility for assessing if and how far

⁴⁷² *ibid* 91–92.

⁴⁷³ *ibid* 111.

⁴⁷⁴ *ibid* 118.

Germany should bind itself in this fashion rested with the legislator and it enjoyed a considerable amount of discretion in this respect.⁴⁷⁵

Applying those considerations to the actions under review, the Court concluded that they were not unconstitutional. However, it found the ESM treaty to be slightly ambiguous with regard to the overall amount each Member State could be made liable for and with regard to the secrecy required by the members of the governing bodies. Therefore it required the Federal President to clarify those points at the moment of ratification by submitting the two reserves formulated in the operative part of the judgement (cf. above).

5. *Injunction against the approval of ESM grants to Cyprus (17 April 2013)*⁴⁷⁶

After the injunction failed in the September 2012, the ratification went ahead and the ESM was established as planned. Since June 2012, Cyprus had been in negotiations with the European Commission, the European Central Bank and the IMF about financial support within the EFSF framework. A Memorandum of Understanding was agreed in March 2013. In April 2013, Cyprus made an application to the ESM for further funds. On the 13th April, the Federal Minister of Finance submitted a proposal to the *Bundestag* for a vote approving the adaptation of the existing Memorandum of Understanding and for approval of the release of ESM funds. The vote on this proposal in a plenary session of the *Bundestag* was scheduled for the 18th April - in time for the vote in the ESM's Governing Council on the 24th April.

Some of the concerned citizens who had brought the - at that time still pending - constitutional complaint against the ESM and Fiscal treaty filed for an injunction in order to prevent the *Bundestag* from voting on the proposal and to require the *Bundesregierung* to provide further and more detailed information to clarify a number of issues that had remained unclear in the documentation provided by the European Commis-

⁴⁷⁵ *ibid* 120–124.

⁴⁷⁶ BVerfG, 'Cyprus (Injunction)' (2 BvQ 17/13 [unreported], 17 April 2013) <http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2013/04/qk20130417a_2bvq001713.html> accessed 15 April 2016.

sion, the European Central Bank and the IMF. They argued that the extremely short period of time between the submission of the proposal and the vote did not leave the members of the *Bundestag* enough time to properly review the details of the proposed regime and assess its ramifications. To them, this constituted a violation of their rights under Article 38 as the *Bundestag* could not effectively exercise its budgetary responsibility as established by the Court in previous ESM decisions.

This case was the first one dealing with an attempt to have the government's practices with respect to the *Bundestag*'s rights within the EFSF/ ESM framework reviewed and to test how much control power this new budgetary reserve could provide. Unfortunately, the *Bundesverfassungsgericht* disposed fairly swiftly of the application: for an injunction to be granted, the associated main action had to be at least admissible and in the complainants' case there was none available.⁴⁷⁷ Their already pending case against the ESM treaty could not serve in this function since the objectives of the two actions were different. And a potentially new, separate, constitutional complaint would be inadmissible since the complainants would have no standing: it was accepted practice in the European context to use Article 38 to challenge in principle decisions of the *Bundestag* transferring powers and/ or setting up a regime for their use. However, it did not provide complainants with the option to challenge every single individual decision made by democratically elected institutions - i.e. it did not give citizens the power to have the Court review any majority decision simply because they did not approve of it.⁴⁷⁸ The judges further pointed out that the only way for a case against the actions in question to be admissible was to file an inter-institutional dispute and claim a violation of the *Bundestag*'s participation rights under Article 23 (2). This, however, was not an option open to the complainants since they were 'merely' citizens and not members of the *Bundestag*.⁴⁷⁹

⁴⁷⁷ *ibid* 21.

⁴⁷⁸ *ibid* 26.

⁴⁷⁹ *ibid* 27.

6. BVerfGE 134, 366: OMT/ Order for a preliminary reference to the CJEU (14 January 2014)⁴⁸⁰

A move that divided the academic community⁴⁸¹ was the decision of the *Bundesverfassungsgericht* to separate out the challenges against the decision of the European Central Bank of September 2012 concerning Outright Monetary Transactions (OMT) and to refer it for review to the CJEU as it considered that decision to be Ultra Vires. According to the requirements of the test the Court had developed in its own Mangold/ Honeywell decision,⁴⁸² it was obliged to make a reference to the CJEU before it could declare the act to be ultra vires, so as to give the European Court the opportunity to clarify the interpretation of the act in question. The decision was taken with six judges forming the majority and Justices Lübbe-Wolff and Gerhardt issuing two very critical dissenting opinions. Incidentally, Justice Landau, who had issued the critical dissenting opinion in the Mangold/ Honeywell case, formed part of the majority this time.

The test devised by the Court required that a measure had to be 'manifestly' ultra vires, i.e. violate the principle of conferral and thus the existing competence structures in a 'sufficiently serious'⁴⁸³ manner. Such a sufficiently serious violation was contingent on the impugned act being manifestly in breach of competences and leading to a structurally significant shift to the detriment of the Member States in the structure of competences.⁴⁸⁴ The *Bundesverfassungsgericht* considered those criteria to be met by the OMT decision as it went beyond the mandate of the ECB conferred by the European treaties merely to support the general economic policies of the European Union, but not to implement its own independent policy. Moreover, considering its scope and intended method of implementation, the OMT programme would amount to a systemic financial redistribution, an option that was precisely precluded by the treaties which

⁴⁸⁰ BVerfG, 'OMT/ Order for Preliminary Reference' (2014) BVerfGE 134, 366.

⁴⁸¹ As an illustration in particular with regard to the economic angle of the case, please cf. i.a. the range of opinions in the articles of the special issue of the German Law Journal 2014 (Volume 15, issue 2, p. 107-382), available at <<http://www.germanlawjournal.com/volume-15-no-02>> accessed 15 April 2016

⁴⁸² BVerfG, 'Mangold/ Honeywell' (n 351).

⁴⁸³ *ibid* 61. The official English translation uses at this point the phrase 'sufficiently qualified', but the context makes it clear that it should read 'sufficiently serious'.

⁴⁸⁴ *ibid*.

aimed to protect the budgetary independence of members of the monetary union. Thus, both cumulative criteria were met and the act had to be considered ultra vires.⁴⁸⁵ Such a classification led to specific duties for the German institutions in light of their so-called integration responsibility: not only were they prohibited from implementing or applying such acts, but they also had a duty to challenge such transgressions.⁴⁸⁶ This is why the majority considered the constitutional complaints challenging the OMT decision to be admissible as citizens had a right to challenge the actions of German public authorities if they violated the limits for European integration as set out in Article 23 and as protected by Article 38.⁴⁸⁷

The Grand Chamber of the CJEU issued its decision in June 2015 after Advocate General Cruz Villalón submitted his opinion in January 2015. Cruz Villalón discussed in great detail the reasons put forward by the *Bundesverfassungsgericht* in favour of the ultra vires nature of the OMT decision, but concluded that it should be considered lawful (though an unconventional move) provided certain conditions were met during implementation to ensure proportionality and strict compliance with the TFEU. The CJEU agreed with Cruz Villalón in principle that the OMT decision was indeed lawful and not ultra vires, but decided against imposing the conditions for the implementation suggested by Cruz Villalón.⁴⁸⁸ With that, the case returned to the *Bundesverfassungsgericht* and awaits decision after the oral hearing on 16 February 2016.⁴⁸⁹

For the present context not the proposed ultra vires review, but the two rather strongly worded dissenting opinions are of interest. Justices Lübbe-Wolff and Gerhardt heavily criticised the majority for what they described as setting a dangerous precedent for the introduction of an *actio popularis*/ popular action.⁴⁹⁰ The challenges the majority

⁴⁸⁵ BVerfG, 'OMT/ Order for Preliminary Reference' (n 480) 39–41.

⁴⁸⁶ *ibid* 47–48.

⁴⁸⁷ *ibid* 53.

⁴⁸⁸ Cruz Villalón (n 433); CJEU (n 433).

⁴⁸⁹ *Bundesverfassungsgericht*, 'Mündliche Verhandlung in Sachen „OMT-Programm Der Europäischen Zentralbank“' (*Pressemitteilung Nr. 3/2016*, 15 January 2016) <<http://www.bverfg.de/SharedDocs/Pressemitteilungen/DE/2016/bvg16-003.html>> accessed 15 April 2016.

⁴⁹⁰ i.e. the possibility of bringing a constitutional complaint without having to prove standing, Dissenting Opinion of Justice Lübbe-Wolff, BVerfG, 'OMT/ Order for Preliminary Reference' (n 480) 3 and 18; Dissenting Opinion of Justice Gerhardt, *ibid* 7 and 19.

held to be admissible were not only brought directly against an act of a European institution, but also against what the applicants considered to be objectionable omissions on the part of the German authorities, specifically that the *Bundesregierung* had not brought an action for annulment under Article 263 TFEU against the OMT decision and that the *Bundestag* had not conducted a thorough review of the proposed activities of the ECB.

Justice Lübbe-Wolff criticised that by declaring admissible challenges against omissions instead of specific actions, the majority had gone far beyond what a Court could legitimately decide without violating the principles of democracy and separation of powers in the process. In other words, the Court had crossed the line between what was 'justiciable' and what was not.⁴⁹¹ Lübbe-Wolff readily acknowledged that that line was fluid and formulated and interpreted differently by different legal traditions. For example, US courts used the so-called *political question doctrine* to draw that line while the *Bundesverfassungsgericht* traditionally used admissibility criteria and self-imposed limits to its own review powers for the same purpose. Despite that fluidity, she considered there to be certain guidelines that one could derive from the principle of democracy, the *Rechtsstaat* principle and the doctrine of separation of powers which all pointed to the inadmissibility of the challenges in the present case.⁴⁹² Moreover, the majority's approach derogated from principles only recently confirmed i.a. in the Court's own decisions of September 2011 and June 2012 where challenges against omissions had been considered admissible only as far as a very specific action could be identified as having been required and a very specific follow-up action could be identified. In the present case Lübbe-Wolff saw neither as being possible: how precisely the *Bundesregierung* and the *Bundestag* had been supposed to react to an EU act that was potentially ultra vires and how they would have to react if the *Bundesverfassungsgericht* were to declare the act to be so, was not something a Court should dictate or the public should be able to dictate with the assistance of a Court. The choice

⁴⁹¹ Lübbe-Wolff, BVerfG, 'OMT/ Order for Preliminary Reference' (n 480) 3.

⁴⁹² Lübbe-Wolff, *ibid* 4–11.

between legal or political action was that of the *Bundesregierung* and the *Bundestag* alone.⁴⁹³

Similarly, Justice Gerhardt argued that the *Bundesverfassungsgericht* had in essence allowed the complainants to challenge activities of the political institutions without Article 38 providing a sufficient basis for the challenge since “... *the individual citizen cannot claim a right under Article 38 (1) to particular acts of the Federal Government and of the Bundestag.* ...”⁴⁹⁴ Put differently: what the complainants (and the majority) had classified as a lack of democratic action, Gerhardt saw as precisely the opposite: not to criticise the ECB was a political choice the *Bundestag* was entitled to make and this ‘in-action’ represented the decision of a democratically elected majority for a specific policy. It was up to the parliamentary groups in the *Bundestag* to criticise that decision and thus push for a public debate on that issue. It was not up to the citizen to control the flow of the debate by way of judicial action. And it was not for a Court to enable such control.⁴⁹⁵

7. BVerfGE 135, 317: Decision in the main action on the ESM and Fiscal Treaties (18 March 2014)⁴⁹⁶

So far the final decision in the ESM series, issued in March 2014, was the decision in the main action against the ratification of the ESM treaty and the Fiscal Treaty - minus the OMT challenges. After the Court’s decision on the injunction in September 2012, the overall outcome was not surprising: in as far as the Court considered the challenges to be admissible, it dismissed them as not well founded on the merits. It reiterated that the right to vote in Article 38 enabled the complainants to challenge activities that threatened the democratic process - and in this context in particular the budgetary responsibility of the *Bundestag*. The legislator had to make sure that it could effectively exercise its integration responsibility and in particular did not endanger its budgetary responsibility.⁴⁹⁷ The Court recalled its statements from the previous decisions on the

⁴⁹³ Lübbe-Wolff, *ibid* 18–20.

⁴⁹⁴ Gerhardt, *ibid* 19.

⁴⁹⁵ Gerhardt, *ibid* 23.

⁴⁹⁶ BVerfG, ‘ESM/ Fiscal Treaty (Main Action)’ [2014] BVerfGE 135, 317.

⁴⁹⁷ *ibid* 159.

importance of the budget for the democratic self-determination of a people and that the *Bundestag* had to ensure that it could discharge its responsibilities in this respect even within a system of 'intergovernmental governance'.⁴⁹⁸ This included i.a. a duty to ensure that Germany would never be in a position that its voting rights in the governing bodies of the ESM were suspended.⁴⁹⁹ With regard to the Fiscal treaty, the Court confirmed its previous statements that obligations to pursue a particular fiscal policy did not in principle violate the budgetary autonomy as it was

*"... Dabei ist es in erster Linie Sache des **Gesetzgebers**, abzuwägen, ob und in welchem Umfang zur Erhaltung demokratischer Gestaltungs- und Entscheidungsspielräume auch für die Zukunft Bindungen in Bezug auf das Ausgabeverhalten geboten und deshalb - spiegelbildlich - eine Verringerung des Gestaltungs- und Entscheidungsspielraums in der Gegenwart hinzunehmen ist"*

*"... primarily for the **legislature** to weigh whether and to what extent, in order to preserve some discretion for democratic management and decision-making, one should enter into commitments regarding future spending behaviour and therefore – correspondingly – accept a restriction of one's discretion for democratic management and decision-making in the present. ..."*⁵⁰⁰

Overall, neither the ESM treaty, the Fiscal Treaty nor the implementing legislation violated the core of the principle of democracy. All actions taken at the European and the national level were still effectively linked to the *Bundestag*. The Court stressed that not the format but the practical effectiveness of the *Bundestag's* influence was the crucial issue.⁵⁰¹

At the same time, it confirmed its position that foreign - and European - affairs were as such the responsibility of the executive and the discretion necessary to act effectively in this area was at odds with strict parliamentary oversight. However, the Court conceded that for the present, limited, context the need to preserve the *Bundestag's*

⁴⁹⁸ ibid 162.

⁴⁹⁹ ibid 200.

⁵⁰⁰ ibid 173, emphasis added. Quoted after the official English translation available at http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2014/03/rs20140318_2_bvr139012en.html accessed 15 April 2016

⁵⁰¹ ibid 235.

budgetary responsibility made it necessary to subject the representative of the German government in the ESM institutions to strict instructions.⁵⁰²

B. Conclusion

The ESM cases are remarkable in several ways: in some instances the applicants actually won - given the track record of the *Bundesverfassungsgericht* to dismiss challenges after using the case to make statements on matters of principle, this was in itself a surprising occurrence. It contributed to the impression that the cases had a profound impact on the relationship of the *Bundesregierung* and the *Bundestag*. Taken together, the decisions also provide a unique opportunity to track the impact of the Court's approach on the relationship between the *Bundesregierung* and the *Bundestag* along the whole range of their interaction in the European context within the same treaty/ treaties:

- the behaviour of especially the *Bundesregierung* during the negotiations prior to the ratification of a treaty,
- the content of the treaty - its compatibility with the *Grundgesetz* reviewed at the stage of ratification,
- review of the domestic legislation enacted to enable the implementation of the obligations arising from the treaty,
- and, lastly, the practice arising from the use of the powers laid down in that legislation in the 'day-to-day' activities of the international institutions created.

After the first of the decisions under discussion here was issued, the subsequent debate in the *Bundestag* on the revision of the statutes concerning German participation in the EFSF framework, the leader of the CDU party group, Volker Kauder, hailed the decision as a paradigm shift in the relationship between the *Bundesregierung* and the *Bundestag* in matters of parliamentary scrutiny.⁵⁰³ And indeed, these cases appear to recast the relationship between the *Bundesregierung* and the *Bundestag*: the new par-

⁵⁰² ibid 236–238.

⁵⁰³ debate of 29 September 2011; Gregor Gysi (then leader of the opposition party 'Die Linke') on the other hand heavily criticised the level of secrecy still involved under the new regime. *Deutscher Bundestag* (n 6) at 15204 and 15213 respectively.

liamentary 'reserve' on matters of budgetary responsibility created by the *Bundesverfassungsgericht* requires the *Bundestag* to have a rather active role in the decision-making processes, something that the Court had so far considered as contrary to the intentions of the *Grundgesetz* regarding European matters and Foreign Affairs (cf. esp. Chapter IV). However, now, effective ex ante decision-making power in the European context seemed for once to be within its reach. Albeit only on one specific issue: the new reserve does not mean that the regular EU budget will now require prior parliamentary approval – since the mechanisms and procedures for this were cleared by the Court with the approval of the Lisbon treaty.

The next Chapter will evaluate the impact of the cases with regard to the *Bundesverfassungsgericht's* approach to the separation of powers and to the conceptualisation of the relationship between the *Bundestag* and the *Bundesregierung* in the EU context. The analysis will focus on whether a 'paradigm shift' did indeed occur or whether the Court has in actual fact merely created a very specific exception to the general rule that Foreign Affairs as well as European matters are still very much the domain of the executive. If it is the latter, the rather prominent role for the *Bundestag* would be merely due to the fact that all these activities strongly affect state finances and the budget, i.e. an area where - in the domestic context - parliaments are traditionally in a strong position.

However, if it is the former, those cases could be considered as (the first step of) a move towards a different conceptualisation of European matters and the general balance of power between the executive and the legislative in this context.

CHAPTER VII: The myth of the paradigm shift

At first glance, the ESM cases seem to indicate a major shift in the Court's approach to European matters in general and to the relationship between the *Bundestag* and the *Bundesregierung* in particular: the importance of the *Bundestag*'s involvement is emphasized throughout and for the first time the focus is on the phase prior to decision-making at European level – something that Article 23 had provided for since its insertion in 1993 but that had never been fleshed out by the Court. This would then appear to be in stark contrast to the Court's previous attitude to see the *Bundestag*'s role mostly in providing the official stamp of democratic approval to yet another amendment treaty after it was negotiated by the *Bundesregierung* – as was the case for i.a. the Maastricht and Lisbon treaties.

However, as the analysis in this Section will reveal, this impression does not hold up on closer inspection. Even though there are a number of changes as to how the Court approaches the theoretical conceptualisation of the relationship between the executive and legislative, the implementation by the *Bundestag* and enforcement by the *Bundesverfassungsgericht* illustrate the shortcomings of this new reserve.

This Section will analyse the impact of the ESM cases on the *Bundesverfassungsgericht*'s approach to separation of powers in the EU context and with that, on the relationship between the *Bundesregierung* and the *Bundestag* – e.g. with regard to the balance of power between them and the level of scrutiny and control exercised by the *Bundestag* over the actions of the *Bundesregierung*. The aim is to evaluate whether the Court has created 'merely' a very specific parliamentary reserve regarding the budget in the area of European matters or Foreign Affairs - similar to the reserve on troop deployments (cf. above Chapter IV B) or whether the decisions can be seen as the first steps of a reconceptualization of the relationship between the *Bundesregierung*/ executive and the *Bundestag*/ legislative in the European context. To that end, Section A will determine scope and limits of what the *Bundesverfassungsgericht* has labelled the 'budgetary responsibility' of the *Bundestag* and will then consider how this more prominent role of the *Bundestag* relates to, and impacts on, the foreign policy prerogative of the executive/ the government that still largely applies in European matters. Section B will follow this with an evaluation of how issues of implementation

and enforcement may impact on the practical effectiveness of the *Bundestag*'s newly created rights and duties.

A. New parameters of interaction for Bundestag and Bundesregierung in the European context

1. The budgetary responsibility as a core power of the parliament

In the traditional context (as outlined in Chapter III C 3), control over the budget allowed the parliament to control a monarch's activities in a rather literal sense: without the power to raise the money necessary e.g. to raise an army and to pay for weapons, it was impossible for the monarch to wage war. The ultimate control over war and peace was thus – in a practical and very real sense – in the hands of the parliament. Even though things have changed since then – and with them the reasons as to **why** the parliament (and not the government) has ultimate control over the budget, it is still considered to be one of the most crucial powers a parliament may possess: without money, a government would find it impossible to implement the policies it had decided on. Controlling the money gave the parliament the necessary leverage to exercise effective control over the government's activities. This is one of the reasons why – as the *Bundesverfassungsgericht* itself stresses – the annual plenary session on the budget is traditionally used as a general review of the government's policies, especially by the opposition.⁵⁰⁴

Like many other constitutions, the *Grundgesetz* allocates ultimate decision-making power over public spending to the national parliament, specifically the *Bundestag*. As was demonstrated in Chapter III, this allows the parliament considerable influence over the government's policy decisions in the domestic context; even more so in the hands of the opposition and in particular when it becomes the subject matter of an enquiry committee: the *Bundesverfassungsgericht* has repeatedly strengthened the right of the *Bundestag* to have extensive access to government files and with it the

⁵⁰⁴ BVerfG, 'Greek Bailout/ EFSF' (n 294).

level of practical control the *Bundestag* may exercise over the government. Overall, its budgetary responsibilities enable the legislative to provide an effective check on the executive's powers.

The Court defined the budgetary/ fiscal control exercised by the *Bundestag* as a crucial element in a state's democratic process: as the Court highlighted in the Lisbon decision, it was not just a question of sovereignty or a limit to integration for its own sake:

"... Die Hoheit über den Haushalt ist der Ort konzeptioneller politischer Entscheidungen über den Zusammenhang von wirtschaftlichen Belastungen und staatlich gewährten Vergünstigungen. ..."

*"... Budget sovereignty is the place of conceptual political decisions on the connection of economic burdens and privileges granted by the state. ..."*⁵⁰⁵

In other words: budgetary autonomy and manoeuvrability were crucial to democratic self-determination and part of the constitutional core identity - without control over their 'purse strings', the Member States would no longer be able to shape the lives of their citizens in a truly independent fashion.

The ESM cases presented the Court with an opportunity to elaborate on scope and limits of this 'budget sovereignty' as well as the *Bundestag*'s role in protecting it within the European integration process. The judges recalled their by now traditional reasoning developed in the decisions on the Maastricht and the Lisbon treaty that the notions of sovereignty and democracy as embodied in the *Grundgesetz* required that the German people as the sovereign needed to stay in ultimate control of what happened in the German state. This meant that their elected representatives in the *Bundestag* did not have the right to render themselves powerless and thus incapable of fulfilling the very role the people had elected them for – to exercise its sovereign power in its stead.

In this respect, the present cases remained on familiar ground: in the Maastricht and Lisbon decisions, this line of argument had led to a review of the transfer of legislative

⁵⁰⁵ BVerfG, 'Lissabon' (n 38) 256. Quoted after the official English translation available <http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2009/06/es20090630_2bve000208en.html;jsessionid=B37C4C4FC23468852118AC04BA8BBEF6.2_cid393> accessed 15 April 2016.

competences for its impact on the power the *Bundestag* could still effectively wield, i.e. the legal consequences of membership in the EU. The ESM cases saw the same logic applied to factual financial obligations and in light of the potential consequences, the Court considered the undertaking of financial obligations capable of limiting a country's independence just as much as legal obligations when it came to the ability of the German parliament to shape German affairs independently.⁵⁰⁶ The control of the Member States over their budget not only in a formalistic sense, but in terms of actual financial manoeuvrability, was essential to preserve the Member States' independence and a crucial tool for controlling the government. Hence, the parliament needed to retain actual decision-making power throughout – as regards treaty content, ratification and subsequent implementation. The parliament as the directly elected representative of the people had to control public spending – and thus the government. If it could not do so – because the money was spent on someone else's say-so (here the ESM council or another Member State), then democratic self-determination was impossible.

This is in stark contrast to the situation in the area of traditional Foreign Affairs. The fact that a treaty may lead to (considerable) financial obligations for Germany is not a factor that would limit the government's exclusive power to negotiate and conclude the treaty in question. As illustrated in Chapter IV, Germany's membership in the IMF, the World Bank or NATO did not cause concerns in terms of the incurred financial obligations. Taking NATO as an example: the government's agreement in the NATO Council to support a distinctive change in NATO's military policy could have led to Germany having to increase its defence budget considerably. If one were to apply the line of thought developed in the ESM cases to this situation, the result would have been that the *Bundesregierung* should not have agreed to that change without prior approval of the *Bundestag* due to the substantive effects on Germany's financial resources. However, as was outlined in Chapter IV, the Court did not even consider the financial impli-

⁵⁰⁶ BVerfG, 'Greek Bailout/ EFSF' (n 294).

cations of that decision but simply considered it to be part of the 'normal' Foreign Affairs activities conducted by the executive.⁵⁰⁷

The same held true so far for the EC and the EU in general: the fact that Germany has been a net-contributor to the European budget for decades did not seem to worry the *Bundesverfassungsgericht*. In its evaluation of the establishment of the currency union in the Maastricht decision, the Court focused on how many competences, in other words how much legal decision-making power, would be transferred to the European level. To the Court, the crucial point was apparently not how the obligations undertaken by the members of the currency union to maintain a stable budget and limit their national debts would impact on Germany financial manoeuvrability. Rather, the Court focused on whether a progressive transfer of competences could end up disempowering the German parliament to such an extent that it was no longer capable of effectively representing the interests of the German people.⁵⁰⁸

While the arguments in the ESM cases are employed vis-à-vis the European level, i.e. with a view as to how much 'Europeanization' of Germany's budget was constitutional, the language used also hints at the use of the doctrine of separation of powers: the political responsibility for the budget is considered to be part of the 'core' of the legislative's power⁵⁰⁹ – part of its very essence. The *Bundesverfassungsgericht* highlights how it is part of the crucial control powers the legislative has over the executive. These lines of argument strongly remind one of how the Court delineated the relationship between the executive and the legislative in the domestic context (cf. Chapter III): it established for each power certain core areas, competences and activities which were protected against interference from the other powers or in turn used to allow each power to control the other two. For example, in the present context the right of the *Bundestag* to decide on the national budget (Article 110) was seen not just as a simple allocation of competences to certain institutions but as the expression of a constitu-

⁵⁰⁷ BVerfG, 'NATO-Konzept' (n 368).

⁵⁰⁸ BVerfG, 'Maastricht' (n 38).

⁵⁰⁹ Hopfauf (n 233) 68; Bernhard Brockmeyer, 'Artikel 110' in Bruno Schmidt-Bleibtreu, Hans Hofmann and Axel Hopfauf (eds), *Kommentar zum Grundgesetz* (12th edn, Carl Heymanns Verlag 2011) para 8b.

tional principle – the notion that it is in the *Bundestag* where financial decisions are made. This 'locus' of decision-making had to be maintained even within the '*intergovernmental system of governance*'⁵¹⁰ that the EU currently represents. Hence, the Court reasoned, the *Bundestag* had to be given the power to make the actual decision on the release of funds within the ESM/EFSF framework.

Unlike with the competence transfer where the government leads not only on the negotiations about the amendment treaty, but also afterwards when it comes to the formulation and vote on European legislation in the Council, here the Court requires that the parliament is involved in the treaty negotiations prior to ratification as well as retains control over individual decisions afterwards. That latter part is indeed very 'new' and could potentially alter the relationship between the *Bundestag* and the *Bundesregierung* in a fundamental manner (cf. further Subsection 2 below).

As the Court clarifies, the *Grundgesetz* places this responsibility as a matter of principle on the *Bundestag* as a whole.⁵¹¹ It therefore firmly rejected the proposal from the budget committee – tabled by its majority a.k.a. the *Bundesregierung* – to transfer most of the actual decision-making power away from the plenum to the budget committee or an even smaller group of MPs in its decision of February 2012.⁵¹² Interestingly, on the surface, this case dealt with complaints from individual MPs about how the *Bundestag* organises its internal committee structures as expressed in the decisions by the majority of the House. The arguments revolved around the rights of the *Bundestag* as an institution to organise its own work, of individual MPs to participate in that work, etc. And even though the *Bundesregierung* joined the proceedings on the side of the *Bundestag*, its position or influence does not seem to factor into the assessment: the political reality that the majority of the respondent institution – the *Bundestag* – is in fact controlled by the government is not acknowledged by the Court in an express fashion. However, reading between the lines of this case, the Court's arguments send a clear signal to the government that the *Bundestag's* budgetary responsibility cannot be

⁵¹⁰ BVerfG, 'ESM/ Fiscal Treaty (Injunction)' (n 468) 211; BVerfG, 'ESM/ Fiscal Treaty (Main Action)' (n 496) 122, 161.

⁵¹¹ BVerfG, 'Participation of the *Bundestag* (EFSF)' (n 445).

⁵¹² *ibid* 106.

circumvented by making use of the institution's internal organisational structures. For example, the Court rejected the argument made by the government that all of the decisions concerning the ESM related to Foreign Affairs and were highly political in nature and therefore should be decided by a committee and not the plenum. Instead, the Court recalled the reasons that the budget is deliberated and voted on in the plenum and had no compunction to apply the same line of thought to decisions relating not to domestic, but European affairs, specifically the ESM/EFSF framework. The underlying reasoning seems to be that decisions on financial matters affect all citizens and need to be debated in the public forum '*Bundestag*'. Whether it concerns the national defence budget, social benefits or indeed ESM funding, the Parliament *as a whole* has a right to share in the decision.

Related to the political tension outlined above is another issue: like in its previous EU cases, the ESM cases see the Court refer to the 'parliament' as an institution or to the 'Gesetzgeber' / the 'legislator' as a power to be the one that bears the *political* responsibility for the decision on competence transfers (cf. especially the Lisbon decision) or – as in this case – the decision whether Germany should undertake the financial obligations in question. The decisions of September 2011 and March 2014 make it very clear: the Court expressly points to the political prerogative of the Parliament to assess whether the national budget could retain its autonomy in light of the amounts involved. However, as the decision of June 2012 makes abundantly clear, it was precisely not the 'parliament' who negotiated the details of the EFSF, the ESM or the Fiscal Treaty. Not only did the government keep the parliament out of the loop, it withheld vital information from the parliament until all decisions had been finalised at European level. All the Parliament actually got to decide was whether to ratify the treaties put before it. Considering that the *Bundestag* is dominated by a government who currently⁵¹³ holds an 80% majority in that house and that the situation was so politically charged that a NO vote was only a theoretical option, it turned the parliament's power to control the actions of the government as intended by the *Grundgesetz* on its head and the

⁵¹³ *Bundestag* of 2013-2017.

vote into little more than a 'tick-box' exercise. This gives the impression that the Court seems to ignore the political reality that the majority in the *Bundestag* is controlled by the *Bundesregierung*. An argument in favour of Court's approach could be that from its perspective the government is after all deemed in charge of Foreign Affairs, so it should be able to realise its political agenda effectively – using the fact that it controls the majority in the *Bundestag* is therefore a means to ensure that the legislative cannot undermine the executive in one of its core activities. However, the retreat behind a rather formalistic view of checking that the correct 'institution' took the required decision – without expressly acknowledging the political composition of that institution or the implications of the fact that in Germany's parliamentary democracy that institution is controlled by another power – considerably diminishes the nature and amount of democratic legitimacy a vote in the *Bundestag* is able to provide.

The overall result of this reasoning is that it burdens the *Bundestag* with the political responsibility vis-a-vis the people for decisions that it had no factual control over. This is in rather jarring contrast to the Court's stance in one of its earliest cases on the doctrine of separation of powers where it established that the executive could not be deprived of certain powers without this leading to a situation where it was responsible for decisions it had no control over.⁵¹⁴ At that time, the Court considered this to be a violation of the principle of separation of powers as enshrined in the *Grundgesetz*.⁵¹⁵ This begs the question why arguments made in favour of the executive do not seem to apply to the legislative when it finds itself in a similar situation. The pattern identified in Chapter III can again be seen here: the Court uses the principle of democracy to define the *Bundestag*'s role within the institutional setup and then sets the principle of separation of powers against it to protect the executive. The decision of June 2012 is a case in point: the further rights of the *Bundestag* under Article 23 (2) are justified by reference to the principle of democracy and then limited by the government's right to protect the confidentiality of its internal decision-making processes with reference to the principle of separation of powers.

⁵¹⁴ BVerfG, 'Bremer Personalvertretung' (n 235).

⁵¹⁵ Leisner (n 9); Ossenbühl (n 9).

2. The budgetary responsibility in the European context

a) 'Foreign affairs' versus 'European matters'

After establishing the budget responsibility of the *Bundestag* as one of its core powers, the *Bundesverfassungsgericht* had to integrate it into the existing constitutional framework governing the relationship between the *Bundestag* and *Bundesregierung* in the European context. This required a reconciliation between scope and limits of the legislative's core power with regard to the budget and the executive's core power in the area of Foreign Affairs respectively - or, as the Court framed it in its jurisprudence, to balance scope and limits of the principles of democracy and separation of powers respectively.

The end result in many ways reflects the approach adopted by the Court in the domestic context when it had to balance the *Bundestag's* budgetary responsibilities with the *Bundesregierung's* right to protect its internal decision-making processes: a pragmatic balancing act that aims to preserve as much of each power's core as possible. However, even though the Court clearly differentiated between 'European matters' for the purposes of Article 23 on the one hand and 'Foreign Affairs' in general on the other, it did not sever the link between the two completely. When it came to outlining the repercussions for the relationship between the *Bundestag* and the *Bundesregierung* as regards 'European matters', the reasoning followed very much the logic applied in the area of Foreign Affairs: as such, the role of the *Bundestag* in the European context may be intended to provide greater democratic legitimacy for the actions of the government. But this did not alter the principle as such that the government was seen to be in charge of European affairs. In this context, Article 23 (2) provided both the foundation and the limit for the *Bundestag's* participation in European matters.

Even though Article 23 (2) had introduced the term 'European matters' into the *Grundgesetz* in 1993 and was meant to provide the *Bundestag* with a greater role in the European context, the decision of June 2012 was the first one where the *Bundesverfassungsgericht* explicitly differentiated between 'Foreign Affairs' on the one hand and 'European matters' on the other. This was largely due to the fact that the EU-related cases decided since 1993 did not revolve around the rights of the *Bundestag* in the phase prior to the ratification of an amendment treaty. In contrast, in the decision

of June 2012, precisely this point was one of the contentious issues as the *Bundesregierung* (the respondent in the case) had argued that the negotiations about the ESM and the Fiscal treaty were not 'European matters', but rather generic 'Foreign Affairs'. Consequently, the *Bundesregierung* argued, the *Bundestag* could not rely on its rights under Article 23 (2), but was limited to the options for participation and control traditionally available in the area of Foreign Affairs.⁵¹⁶

As was outlined in Chapter IV, this would have left the *Bundestag* with very few legal options indeed as the *Bundesregierung* is more or less exclusively in charge. The means available to the *Bundestag* are largely political in nature, e.g. scheduling debates on contentious issues, questioning members of the government during such a debate in the plenum, requesting information and documents from the government, convening enquiry committees, etc. – and of course the ultimate option to depose the government by way of a constructive vote of no confidence (Article 67). As the *Bundesverfassungsgericht* consistently insists in its jurisprudence that these are by no means useless or ineffective tools.⁵¹⁷ However, none of these tools can effectively stop the *Bundesregierung* from executing its plans. There are only three instances where the *Bundesregierung* cannot proceed without the official approval of the *Bundestag*: the ratification of international treaties (Article 59), the transfer of sovereign rights to international institutions (Article 24) and the deployment of armed forces. As was highlighted in Chapter IV, this does provide the *Bundestag* as an institution with some power. However, considering that the *Bundesregierung* controls the majority of the *Bundestag* and can thus ensure that the necessary vote is likely to go its way, even these three instances have so far not impacted that much on the *Bundesregierung's* freedom to manoeuvre.

As could be seen in Chapter V, up to the ratification of the treaty of Maastricht in 1993, this legal regime officially applied also in the European context. Even though the institutional setup of the then European Communities had led to a distinct shift in actual decision-making power away from the parliament/legislative towards the government/executive, the Court did not see the need to strengthen the *Bundestag's* rights

⁵¹⁶ BVerfG, 'Duty to Inform the *Bundestag* (ESM)' (n 15).

⁵¹⁷ BVerfG, 'Atomwaffenstationierung' (n 320).

at that time. Instead, it focused on the phase of implementation and enforcement of EC law and on its compatibility with human rights guarantees. The legal situation changed in 1993 with the introduction of Article 23, a provision wholly dedicated to Germany's relationship with the European Communities and the European Union. Unlike Article 24 and 59, Article 23 provided the *Bundestag* with specific rights to information and participation beyond the ratification stage. However, as was demonstrated in Chapter V, this new foundation in law hardly made any difference to the relationship between the *Bundesregierung* and the *Bundestag* in practice.

As a consequence, the decision of June 2012, almost 20 years after the insertion of Article 23 into the *Grundgesetz*, provided very welcome guidance on scope and limits of Article 23 (2) and its relationship to Article 24 and 59, in other words on what exactly the difference was between 'European matters' and 'Foreign Affairs' and what the role of the *Bundestag* in each context was meant to be. The precise formulation at issue was "... *In Angelegenheiten der Europäischen Union...*" / "...*in matters concerning the European Union...*".⁵¹⁸ The *Bundesregierung* suggested that 'matters concerning the European Union' had to be interpreted narrowly as Article 23 (2) constituted an exception to the rule that the *Bundesregierung* was in charge of Foreign Affairs. So, it should be understood as referring to matters arising within and from the framework created by the existing European treaties. Since the ESM and Fiscal treaty did not form part of that, but were created deliberately outside of the existing treaty framework, they did not fall within the scope of Article 23 (2) and the *Bundestag* could not rely on the rights to participation information prescribed therein.

The *Bundesverfassungsgericht*, however, rejected those arguments. It started by recalling the traditional approach to Foreign Affairs and the reasons for it being an exclusive competence of the *Bundesregierung*, mainly because the judges considered the *Bundestag* to be organisationally/ institutionally 'unsuitable' to play a greater role than merely supporting the government's activities by way of after-the-fact legitimacy.⁵¹⁹ The judges contrasted this with the regime introduced by Article 23. They argued that

⁵¹⁸ 'Grundgesetz Für Die Bundesrepublik Deutschland' (n 234).

⁵¹⁹ BVerfG, 'Duty to Inform the *Bundestag* (ESM)' (n 15).

the legislative history and the purpose of Article 23 suggested that a broad interpretation had been intended at its inception. It had been intended to capture how far European integration had progressed up to 1993 and to compensate for the changes the integration process had caused in the national constitutional system and was i.a. meant to compensate the *Bundestag* for the loss of influence it had suffered in its wake.⁵²⁰ It was also intended to provide a solid constitutional foundation for the integration yet to come and thus had to be interpreted as covering the evolving integration process in all its dynamic and variety.⁵²¹ As a consequence, 'European matters' could not be understood as referring merely to matters arising specifically within the existing treaty framework, but also those that

"... wenn sie in einem Ergänzungs- oder sonstigen besonderen Näheverhältnis zum Recht der Europäischen Union stehen. [...] oder ein sonstiger qualifizierter inhaltlicher Zusammenhang mit einem in den Verträgen niedergelegten Politikbereich - also mit dem Integrationsprogramm der Europäischen Union - besteht, [...] oder wenn ein völkerrechtlicher Vertrag ausschließlich zwischen Mitgliedstaaten der Europäischen Union geschlossen werden soll. ..."

*"... supplement, or stand in another particular proximity to, the law of the European Union. [...] if there is another qualified substantive connection with an area of policy laid down in the treaties – that is, with the integration programme of the European Union [...] or if an agreement under international law is to be entered into solely between Member States of the European Union. ..."*⁵²²

According to the Court, this meant that the rights of the *Bundestag* laid down in Article 23 (2) did apply to a broader range of situations than merely that of preparing secondary legislation and that it had indeed intended to reshape the relationship between the *Bundesregierung* and the *Bundestag* for the European context.⁵²³

From a pragmatic perspective, this non-technical definition that detaches 'European matters' from specific EU competences or competence areas provides the *Bundestag*

⁵²⁰ *ibid* 96.

⁵²¹ *ibid* 102.

⁵²² *ibid* 100. Quoted after the official English translation available at http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2012/06/es20120619_2_bve000411en.html accessed 15 April 2016

⁵²³ *ibid* 99.

with influence in all matters that concern the EU, irrespective of how the currently existing treaty framework develops in future or of how many complementary frameworks the Member States decide to create. However, this seems to be in stark contrast to the approach adopted in the area of Foreign Affairs where the Court tends to limit the involvement of the parliament as much as possible. Except when it came to the deployment of armed forces, the Court had consistently upheld its approach as to why the executive had to be solely in charge of Foreign Affairs and maintained that the *Bundestag* was 'unsuitable' or institutionally 'incapable' of participating as an equal partner. That line of thought does not seem to matter in the European context, however. Here, the question of whether the *Bundestag* is institutionally 'capable' of participating effectively does not seem to constitute an argument to limit its involvement as a matter of principle. Instead, the Court saw the higher level of involvement of the *Bundestag* justified by the fact that this would enable the *Bundestag* to provide democratic legitimacy to the European decision-making processes.⁵²⁴ As Section B below will show, this leads the Court to require the *Bundestag* to create the necessary decision-making structures so that it can effectively realise its budgetary responsibilities – in other words, the Court has identified the institution who 'should' make the decision and then requires adaptations so that the institution 'becomes capable' of doing so. This is very much in contradiction to the Court's approach in the area of Foreign Affairs where it consistently maintains that the *Bundestag* is institutionally incapable of bearing more responsibility and the notion of adapting its institutional structures to *make* it more capable does not even enter the discussion.⁵²⁵

Essentially, the Court returned to the ideas of sovereignty and democracy, its overarching themes in the European context – the former as the ultimate limit to integration, the latter as its indispensable precondition. For once, however, the Court's line of thought does not focus on the democratic legitimacy of the actions of the European Union, but rather aims to ensure that decision-making also at national level does not

⁵²⁴ *ibid* 98.

⁵²⁵ initially, BVerfG, 'Atomwaffenstationierung' (n 320); then consistently confirmed in e.g. ; BVerfG, 'NATO-Konzept' (n 368); BVerfG, 'Luftraumüberwachung Türkei' (n 335).

fall below constitutionally acceptable standards. This does provide a different starting point in theory compared to the area of Foreign Affairs: there, the *Bundestag*'s participation is seen as the exception to the rule that the government is in charge. Article 23 (2) as interpreted by the *Bundesverfassungsgericht* changes that logic slightly in the sense that the *Bundestag*'s participation is considered the rule, however, as the analysis below will show, the Court retained the notion that overall responsibility lies still with the government which has decided repercussions for scope and limits of the *Bundestag*'s involvement in practice.

Therefore, despite individual comments that could be taken to the contrary, the ESM cases do not represent a shift in the Court's general approach to considering European matters as being rooted in Foreign Affairs and to the resulting allocation of the competences and responsibilities of the *Bundestag* and the *Bundesregierung* and the balance of power between the institutions in this context.

b) The budgetary responsibility and the foreign policy prerogative

In the ESM cases, the *Bundesverfassungsgericht* constructed the relationship between the budgetary responsibility of the *Bundestag* and the foreign policy/European policy prerogative of the government similar to the way the judges constructed the troop deployment reserve in the area of general Foreign Affairs: it is not merely an option for control handed to the parliament in an area where the government has as such the exclusive competence. Instead, one is dealing with a genuine right of the parliament which is pitted against a genuine right of the government. As pointed out above in Chapter IV, the crucial difference is that in the first case the judges would interpret such control powers narrowly in order to give the power who has full control every chance to maintain its independence. In the second case, however, that logic does not apply. Here, the Court has to find a balance between two stakeholders whose interests are equally valid and have to be protected as much as possible.

After establishing the budgetary responsibilities as a core power of the legislative as a matter of principle, the Court outlined its impact on the relationship between the *Bundestag* and *Bundesregierung*. Interestingly, the *Bundesverfassungsgericht* did not use the *Bundestag*'s more generic integration responsibility, the so-called mandate to in-

tegrate, or even the Principle of Openness to European Law to frame the analysis. It steps away from these tools for conceptualising the relationship of the German constitutional institutions with the European Union that were so prevalent in the Lisbon decision. Indeed, the Court explicitly rejected these arguments as put forward by the *Bundesregierung* as a limitation to the budgetary responsibilities of the *Bundestag* and as to why the government's foreign policy prerogative should have precedence.⁵²⁶

This has been taken as evidence that the Court has not considered properly the dogmatic repercussions of its new reserve.⁵²⁷ At the same time, the pattern used here is similar to that used in the context of classic Foreign Affairs and the *Bundestag's* reserve for the deployment of armed forces: like the budgetary responsibilities, this reserve stems from the relationship between the powers on the domestic level and is then applied by the Court to the area of Foreign Affairs (as for troop deployment) and European affairs (as for budget responsibility) respectively. This meant that the budgetary responsibilities of the *Bundestag* were not seen as an exception to the rule, as interfering with the foreign policy/European affairs prerogative of the government – in which case they would have been interpreted narrowly in order to retain as much as possible of the government's prerogative. Instead, the Court conceptualised the budgetary responsibilities as a limit to the government's prerogative, i.e. as a reserve proper that could as such not be interfered with and where the government had no discretion as to the form and procedure of the *Bundestag's* involvement.⁵²⁸ That way, the issue is presented as a conflict not between one power in charge of the situation and another which is tasked with controlling the activities of the other. Rather, the Court conceptualises it as a conflict between two powers that both aim to rely on competences and responsibilities that relate to their respective core, i.e. are more or less on an equal footing. However, in trying to find a workable compromise between the foreign policy prerogative of the government on the one hand and the budgetary respon-

⁵²⁶ BVerfG, 'Participation of the *Bundestag* (EFSF)' (n 445) 90 and 109 respectively.

⁵²⁷ Christian Calliess and Tim Beichelt, 'Auf Dem Weg Zum Europäisierten *Bundestag*: Vom Zuschauer Zum Akteur' [2013] Gütersloh: Bertelsmann Stiftung <http://bertelsmann-stiftung.org/bst/de/media/xcms_bst_dms_37451_37452_2.pdf> accessed 15 April 2016.

⁵²⁸ Gehrig (n 86).

sibilities of the *Bundestag* on the other, the Court reverts to its usual pattern of resolving a conflict between the legislative and the executive: it uses the principle of democracy in order to delineate scope and reach of the *Bundestag*'s right and duty to preserve its budgetary responsibilities and then uses the doctrine of separation of powers in order to protect the government's right to lead on the political choices.⁵²⁹ Any impression that the Court had indeed transitioned to a different view of European affairs was subsequently disappointed by the decision of March 2014.⁵³⁰ The judges made it very clear that they considered European matters still to be very much rooted in Foreign Affairs and that the government's exclusive competence in this respect was not just a practical solution but a constitutional requirement.

This meant that the only reason that the *Bundestag* was allowed greater level of involvement of the *Bundestag* in the ESM framework was because of its budgetary responsibility and because Article 23 (2) stipulated as much. But the judges stressed that this was - and had to remain - very much the exception. Indeed, the judges seemed rather uncomfortable with the fact that the *Bundestag* should be able to interfere with the prerogative of the government in a substantial fashion:

"... Mit Blick auf die außen- und integrationspolitische Tätigkeit der Exekutive ist zu berücksichtigen, dass die sachlich-inhaltliche Legitimation nur begrenzt durch parlamentarische Vorgaben ausgestaltet werden kann. Der Verkehr mit anderen Staaten, die Vertretung in internationalen Organisationen, zwischenstaatlichen Einrichtungen und Systemen gegenseitiger kollektiver Sicherheit sowie die Sicherstellung der gesamtstaatlichen Verantwortung bei der Außenvertretung Deutschlands fallen grundsätzlich in

"... With regard to the work of the executive branch in the areas of Foreign Affairs and European integration, it must be taken into account that parliamentary requirements can only to a limited extent ensure substantive legitimation. Dealings with other states, representation in international organisations, international institutions and systems of mutual collective security, and guaranteeing the responsibility of the country in the context of Germany's external representation, are generally the responsibility of the Federal

⁵²⁹ BVerfG, 'Duty to Inform the *Bundestag* (ESM)' (n 15). More on this in Section B below regarding implementation and enforcement.

⁵³⁰ BVerfG, 'ESM/ Fiscal Treaty (Main Action)' (n 496) 236.

den Kompetenzbereich der Bundesregierung. Die zur Wahrnehmung ihrer Aufgaben notwendigen Freiräume stehen einer strikten parlamentarischen Determinierung entgegen ...

*...Soweit die Mitwirkung der deutschen Vertreter in den ESM-Organen **die haushaltspolitische Gesamtverantwortung des Bundestages betrifft**, sind allerdings, um dessen maßgeblichen Einfluss zu wahren, konkrete parlamentarische Weisungen an die Bundesregierung erforderlich. ...“*

Government ... The latitude which the Federal Government needs to perform its functions would conflict with strict parliamentary determination ...

*... **To the extent that** the participation of the German representatives in the ESM bodies **affects the overall budgetary responsibility** of the Bundestag, specific parliamentary instructions to the Federal Government are required to safeguard the Bundestag's decisive influence ...”⁵³¹*

In this, the Court's approach clearly shows that the starting point for its reasoning still owes a great deal to the traditional conceptualisation as applied in the area of Foreign Affairs and the to its conviction that the *Bundestag* is structurally not capable of being involved as an equal partner.⁵³² However, given that the Court clearly considers the *Bundestag* to be, or to be able to become, capable of making decisions regarding the budget whatever the context, its insistence that the *Bundestag* is otherwise incapable by nature to be involved as an equal partner more generally in European matters, if not Foreign Affairs, begins to appear inconclusive. Here the Court clearly returns to its (by now outdated) approach to value the government's ability to represent Germany's interests effectively in the international arena over ensuring democratic accountability and legitimacy of the actions of that institution.

This is consistent with the Court's approach to separation of powers in the domestic context where the doctrine is applied very much with the aim to support effective government rather than with the aim to control the exercise of state power. As could be seen in Chapter III, the *Bundesverfassungsgericht* follows very much the narrow interpretation put forward by the German literature in that separation of powers has a

⁵³¹ ibid 236 and 238, emphasis added. Quoted after the official English translation available at http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2014/03/rs20140318_2bvr139012en.html accessed 15 April 2016

⁵³² von Danwitz (n 201).

very strong procedural and organisational input but does not primarily serve the preservation or protection of individual liberty. Even though this notion features in the standard formula for the separation of powers developed by the Court⁵³³, the application in practice leans much more towards the use of separation of powers as a tool to ensure effective governance (cf. Chapter III C). In this, the German tradition differs quite markedly from the original conceptualisation as put forward by Locke, Montesquieu and the Federalist papers (cf. Chapter I).⁵³⁴ The cases also demonstrate that the *Bundesverfassungsgericht* still favours the protection of the core of each power over creating a balanced system of separated powers (as outlined in Chapter III B). It still considers the allocation of competences as set out by the constitution as the deliberate expression of how the powers are intended to interact, even if this leads to an uneven balance between powers or even a clear dominance of one power in a specific context. Consequently, it sees its own role as having to maintain that relationship, however imbalanced, and to protect the core of each power from being usurped by another.

In conclusion, it is submitted that even though there is a qualitative shift in the Court's approach to the relationship between the *Bundesregierung* and *Bundestag* in the European context, the analysis shows that it is focused on a very specific area. In that, it is very similar to the *Bundesverfassungsgericht*'s jurisprudence on the reserve regarding troop deployment. There, same as here, the Court uses the connection to what it considers core competences of the legislative in order to justify the *Bundestag*'s involvement in Foreign Affairs/ European matters – or as the Court put it itself in its 1952 decision, the *Bundestag*'s 'encroachment' into the exclusive zone of the executive.⁵³⁵

What cannot be answered without the guidance of further decisions is whether this reserve in the Court's view may or should apply to European matters in general. The Lisbon decision provides some guidance as regards the ratification of amendment treaties. The Court explicitly stated that a supranationalisation of the budget would not be

⁵³³ BVerfG, 'Abhörurteil' (n 260); BVerfG, 'Hessisches Richtergesetz' (n 236).

⁵³⁴ Carolan (n 201).

⁵³⁵ BVerfG, 'Petersberger Abkommen' (n 308) 369–370.

compatible with the *Grundgesetz*.⁵³⁶ However, it did not introduce any requirement for the *Bundesregierung* to obtain the consent of the *Bundestag* prior to a e.g. budget summit. Therefore, it has to be assumed that the existing treaty regime regarding the determination of the European Union's budget is compatible with the *Grundgesetz*. This would allow the tentative conclusion that e.g. the ratification of the TTIP treaty, should it reach that stage, would be subject to a similar level of scrutiny by the Court, but likely not trigger specific consent requirements either. In other words, the Court would fall back on its traditional approach to Article 24 and Article 23 in the sense that the vote by the *Bundestag* and *Bundesrat* to ratify the treaty covers all reasonably foreseeable consequences, which in case of the TTIP could be deemed to include e.g. investment dispute settlement decisions going against Germany, even if they reach substantial amounts. The next Section will explore whether the changes in the theoretical set up are likely to have repercussions in practice

B. The practice: issues of implementation and enforcement

As the previous Section demonstrated, the *Bundesverfassungsgericht* focused very much on providing a pragmatic solution to the conflicts at hand rather than a fully developed theoretical reconstruction of the issue. As a result, the ESM cases provide a lot of guidance on how to implement this new budgetary reserve and also serve as examples as to how to enforce it within the context of Article 23 and the systems of remedies available before the *Bundesverfassungsgericht*.

This Section will first consider how the Court appears to envisage the implementation of the budgetary reserve and how this may change the relationship, potentially even the balance of power, between the *Bundestag* and *Bundesregierung* (Sub-section 1). Then the analysis will turn to the Court's approach with regard to enforcement, in particular the admissibility of remedies available in this context and how this may affect the practical effectiveness of the budgetary reserve (Sub-section 2).

⁵³⁶ BVerfG, 'Lissabon' (n 38) 249 and 256.

1. Implementation: forging new pathways of interaction

As the decisions outlined in Chapter VI illustrate, the *Bundestag*'s duty to retain ultimate control over the budget applies to all stages of decision making: from the negotiations about a prospective treaty to the individual decisions to be taken once the treaty has been ratified and implemented. This complements and reinforces the *Bundestag*'s rights to 'participate' and to be 'kept informed by the *Bundesregierung*' under Article 23 (2) which has decided repercussions for the executive:

- during the negotiation phase, the *Bundesregierung* has to provide the *Bundestag* more often, and with more detailed information, than it would normally have done to enable the *Bundestag* to exercise actual influence on the position of the government during the negotiations (decision of June 2012);⁵³⁷
- the treaty must be drafted in such a fashion that it does not preclude the involvement of *Bundestag* to the degree necessary for it to retain ultimate control over the budget, if necessary this needs to be clarified and asserted during ratification (decision of September 2012);
- the implementation of the treaty needs to ensure that the German representative in the institutional framework created by the treaty may not act without prior authorisation from the *Bundestag* (decision of February 2012 and March 2014);
- and last, but not least, the Court expressly clarified that the government may not reclaim an undue control over those participation rights by the way the parliamentary procedures are designed (decision of February 2012).

The underlying thread that runs through all those decisions is the Court's attempt to strike a balance between on the one hand the need to provide democratic legitimacy and accountability by involving the *Bundestag* and on the other hand the clear intention to retain the government's ability to act as an effective representative of Germany's interests at European level. It also tried to resolve practical issues that concern in particular the availability, and the flow, of information between the two institutions.

⁵³⁷ BVerfG, 'Duty to Inform the *Bundestag* (ESM)' (n 15).

The decision of June 2012 illustrates this with regard to the negotiation phase of the ESM and Fiscal Treaties: the Court severely criticised that the government had provided only very sketchy information and only to specific committees of the *Bundestag* instead of providing regular and detailed updates to the *Bundestag* as a whole. While this constituted already a violation of the *Bundesregierung's* duty under Article 23 (2), the Court emphasised that the *Bundesregierung* should have been even more diligent considering the subject matter of the treaties concerned the budgetary responsibility of the *Bundestag* and considering that it was in possession of the information the *Bundestag* needed in order to make an informed decision.⁵³⁸ The result of the government's behaviour was that the *Bundestag* was faced with the situation of having to ratify treaties without having had the opportunity to influence their content or even to discuss its position and thus influence the stance taken by the government during the negotiations. Even worse, by the time the *Bundestag* was informed in a more comprehensive fashion, the draft treaty had already been agreed on by the governments involved which meant that Germany as a Member State had already created legitimate expectations as to the eventual ratification which in turn left the *Bundestag* fairly helpless to prevent the treaty from becoming binding.⁵³⁹ Overall, the government's behaviour had effectively prevented the *Bundestag* from realising its budgetary responsibilities in this context. At the same time, the Court was equally clear on the limits of the *Bundestag's* rights to request information: using the principle of separation of powers, the Court argued that the internal decision-making processes of the government prior to the formulation of a position were not subject to the duties outlined above which meant that the *Bundestag* had to wait until the government had at least developed the preliminary position which was suitable to be communicated to third parties, e.g. the public or the governments of other Member States.⁵⁴⁰

The decision of February 2012 on the parliamentary procedures dealt with similar issues at the stage of implementation. It also illustrates how the *Bundesregierung* may

⁵³⁸ *ibid* 145.

⁵³⁹ *ibid* 171.

⁵⁴⁰ *ibid* 124.

attempt to use the fact that it controls the majority in the *Bundestag* in order to minimise the latter's involvement as much as possible and thus circumvent the requirements laid down by the *Bundesverfassungsgericht* in its decision of September 2011. The Court prevented such a circumvention by holding that as a matter of principle it was the whole house, and not just the committee that carried the budgetary responsibility and thus the default position should be that the house as a whole decided on financial grants within the EFSF and ESM framework.

Both of these decisions illustrate the attitude of the current *Bundesregierung* with regard to the involvement of the *Bundestag*: it appears that they intend to minimise it as much as possible and prefer to adhere to the letter of the Court's decisions rather than their underlying spirit. This attitude may lead to a situation where the shift in the legal situation (as outlined in Section A above) will have very little impact in practice unless members of the opposition are willing to challenge the government's behaviour again and again before the *Bundesverfassungsgericht*. This situation is further exacerbated by practices that have developed outside the framework designed by the Court. Empirical research indicates that the members of the government parties have privileged access to government information by way of their regular party meetings prior to major events. While the meetings originated probably in the need to ensure that the government would have the coalition parties' support, they do provide the members of the coalition parties with opportunities to influence the government's position.⁵⁴¹ This development is not only worrying because it prevents the opposition parties from gaining access to that same information, but also because it undermines the parliament as an institution and as a 'power' in one of its core functions – to provide a platform for debate, to ensure transparency of decision-making and to provide effective control over the government's activities. The two decisions outlined above may counter this development to certain extent, but it will depend to a considerable degree on the attitude of the government how effective the *Bundestag* can be in realising its budgetary responsibilities.

⁵⁴¹ Sprungk (n 280); Auel (n 375).

2. Enforcement: the weak link?

The final point of interest in the analysis concerns the conclusions that may be drawn from the cases as to how the *Bundesverfassungsgericht* intends to enforce the rights it proclaimed so resoundingly. On this point, similarly to the question of implementation discussed above, the Court's actions seem to undermine the theoretical shift it undertook in the cases under review.

For example in the decision of September 2011, the Court allowed the political actors considerable leeway and did not respond to the arguments of the complainants that the political pressure exercised by the *Bundesregierung* prior to the vote had turned parliamentary participation into mere window dressing.⁵⁴² As was already highlighted above, the applicants in the decision of June 2012 raised similar concerns and highlighted the tension between the formalistic adherence to the *Bundestag*'s participation in the form of the vote on the ratification of the treaty and the political reality of what happened: even though it had little to no influence over the content of those treaties, it had to assume the political responsibility vis-à-vis the people. The outcome of the case feels unsatisfactory: even though the Court did consider the actions of the *Bundesregierung* to be unconstitutional, this could not prevent the treaty from being ratified. Even more paradox: as the decisions of September 2012 and March 2014 illustrate, the only option to prevent the ratification of the treaties was to challenge the constitutionality of their content irrespective of any irregularities during the ratification procedure.

The decision on the injunction against the vote on the ESM grants to Cyprus⁵⁴³ further illustrates this point: the statute implementing the ESM treaty provided that the Federal Minister for finance compiled a proposal for the *Bundestag* to vote on 'sufficiently in advance' of the vote in the ESM governing bodies. The complainants criticised that the members of the *Bundestag* had received the proposal on very short notice which left them no time to review it properly and thus to make an informed decision during the vote in the *Bundestag*. The complainants also criticised that the Federal Minister

⁵⁴² BVerfG, 'Greek Bailout/ EFSF' (n 294) 53.

⁵⁴³ BVerfG, 'Cyprus (Injunction)' (n 476).

for finance had not carried out his own investigations, but largely relied on the report from the European Commission for the compilation of the proposal. The *Bundesverfassungsgericht* rejected the injunction as inadmissible largely because the complainants were not members of the *Bundestag* and therefore lacked standing.⁵⁴⁴ However, the scenario demonstrates the difficulty a constitutional Court faces in the context at hand: even though the *Bundesverfassungsgericht* is notorious for its proactive stance and for not shying away from interfering with the political process to a considerable extent, outlining the conditions for preventing or potentially invalidating a vote in parliament reaches into the internal decision-making processes of the legislative to such an extent that the Court may see itself in violation of the separation of powers.

A further thread that runs through a number of the cases under discussion is the use of the right to vote in Article 38 as a means to bring a constitutional complaint against actions of the political institutions. In particular the decision of September 2011, September 2012, the Cyprus injunction of April 2013 and the decision of March 2014 contain repeated comments by the Court that even though the right to vote as embodied in Article 38 does allow citizens to challenge the constitutionality of treaties that may undermine the powers of its representative, a.k.a. the parliament, it does not ...

*“... regelmäßig kein Recht der Bürger, demokratische Mehrheitsentscheidungen auf ihre Rechtmäßigkeit hin durch das Bundesverfassungsgericht kontrollieren zu lassen. Das Wahlrecht dient nicht der **inhaltlichen Kontrolle** demokratischer Prozesse, sondern ist auf deren **Ermöglichung** gerichtet. Als Grundrecht auf Mitwirkung an der demokratischen Selbstherrschaft des Volkes verleiht Article 38 Abs. 1 GG daher grundsätzlich keine Beschwerdebefugnis gegen Parlamentsbeschlüsse, insbesondere Gesetzesbeschlüsse”*

*“... in general give rise to any right of the citizens to have the lawfulness of democratic majority decisions reviewed by the Federal Constitutional Court. The right to vote does not serve to **monitor** the **content** of democratic processes, but is intended to **facilitate** them. Article 38.1 of the Basic Law, as the fundamental right to participate in the democratic self-government of the people, therefore in principle grants no entitlement to file a specific constitutional complaint against decisions of Parliament, in particular enactments. ...”⁵⁴⁵*

⁵⁴⁴ ibid 26.

⁵⁴⁵ BVerfG, ‘Greek Bailout/ EFSF’ (n 294) 99; emphasis added.

Even though the Court proclaimed this to be an established principle of its jurisprudence on European matters, it reversed its stance in a rather dramatic fashion in its OMT decision in January 2014 by declaring admissible the constitutional complaints against the omission of the *Bundesregierung* and the *Bundestag* to use their influence to have the OMT decision of the European Central Bank repealed.⁵⁴⁶ As dissenting Justices Lübbe-Wolff and Gerhardt pointed out, in doing so the Court transgressed its self-established boundaries with regard to Article 38 and provided citizens with an opportunity for 'popular action'⁵⁴⁷ for a review of the constitutionality of the *content* of acts or omissions of the *Bundesregierung* and *Bundestag* as well as the European institutions.⁵⁴⁸ Considering that the same judges returned to their original position in their decision of March 2014, it is submitted that the stance taken in the OMT decision was very much a strategic move in order to enable the *Bundesverfassungsgericht* to refer the OMT decision to the Court of Justice of the European Union which is not likely to be repeated in future.

This leaves the question as to whether the *Bundesverfassungsgericht* would consider to apply this new reserve to everyday activities of the European institutions that could result in considerable financial obligations for Germany as a Member State or have considerable impact on its budget. Such a question has not yet been raised explicitly before the Court. Theoretically there are two options for dealing with such a situation: the more likely possibility is that the Court would argue that the ratification of the European treaties by the *Bundestag* and Bundesrat contained an implicit approval of the actions of the *Bundesregierung* in the given context.

The other possibility is that the Court would see this as a violation of the limits to integration, as set out most recently in the Lisbon decision, and use the ultra vires and identity review to deal with the situation. The use of the ultra vires review is rather improbable. The test developed in the Mangold/ Honeywell decision requires that a measure has to be 'manifestly' ultra vires, i.e. violate the principle of conferral and

⁵⁴⁶ BVerfG, 'OMT/ Order for Preliminary Reference' (n 480).

⁵⁴⁷ i.e. the option to bring a constitutional complaint without having to prove standing

⁵⁴⁸ Dissenting opinion of Justice Lübbe-Wolff BVerfG, 'OMT/ Order for Preliminary Reference' (n 480) 16 and 18; Dissenting opinion of Justice Gerhardt ibid 5–7.

thus the existing competence structures in a 'sufficiently serious' manner.⁵⁴⁹ Such a sufficiently serious violation is contingent on the impugned act being manifestly in breach of competences and leading to a structurally significant shift to the detriment of the Member States in the structure of competences.⁵⁵⁰ As the OMT case illustrates, the Court takes that test seriously which means that the ultra vires review would only be available in those rare cases where the act in question – *in parallel* to causing considerable financial burdens for the Member States – were to satisfy those criteria.

The other alternative is the relatively new identity review. Introduced by the Lisbon decision in order to complement the ultra vires review, it is intended to allow the preservation of the specific constitutional identity of the *Grundgesetz* against actions that appear to violate the limits to integration as set out in the Lisbon decision.⁵⁵¹ Such transgressions may be either procedural or substantive in nature, e.g. that the German representative participated in the Council without necessary prior instruction by the *Bundestag* or that the action in question infringed the necessary 'space for the political formation of the economic, cultural and social circumstances of life'.⁵⁵² Such actions could normally not be classified as 'ultra vires' as they would fall within the limits of the competences actually transferred and thus be valid despite the violation of national constitutional limits.⁵⁵³ Despite this, the Court considered it necessary to provide a remedy to address these situations.

So far, this remedy has only been used once – in the Greek bailout decision of September 2011.⁵⁵⁴ There, the Court rejected the motion of the applicants on this point, arguing that financial commitments were as such an accepted part of Germany's participation in the European integration process. It was up to the *Bundestag* to evaluate Germany's budgetary capacities and economic strength and to balance these against the likelihood that the EFSF guarantees be realised. As long as fundamental fiscal decisions

⁵⁴⁹ BVerfG, 'Mangold/ Honeywell' (n 351) 61. The official English translation uses at this point the phrase 'sufficiently qualified', but the context makes it clear that it should read 'sufficiently serious'.

⁵⁵⁰ *ibid.*

⁵⁵¹ BVerfG, 'Lissabon' (n 38) 340.

⁵⁵² *ibid* 249.

⁵⁵³ Kiiver (n 421) 1289–1290.

⁵⁵⁴ BVerfG, 'Greek Bailout/ EFSF' (n 294).

were taken by, or with the consent of, the *Bundestag*, they would not violate the constitutional core even if they reached substantial proportions.⁵⁵⁵ However, this case is not likely to be a typical example for an identity review considering that it dealt with the ratification of the EFSF and thus dealt with the question of acts of European institutions yet to come and not those already made. Unfortunately, the Court did not provide a test that one could apply in order to determine whether the creation of sizeable financial obligations as the consequence of individual decisions of European institutions would constitute a violation of the *Grundgesetz's* identity. Therefore it has to be considered an open question whether the *Bundesverfassungsgericht* would consider using the identity review for this scenario and with that would consider declaring void a legally binding act of the European institutions that seemingly violates the budgetary responsibility of the *Bundestag*.

C. Conclusion

In conclusion it is submitted that the ESM cases do not constitute the paradigm shift in the relationship between *Bundesregierung* and *Bundestag* that they were hailed to be. They do include a number of changes as to the theoretical conceptualisation of that relationship when it comes to decisions that fundamentally impact on the budgetary control. As far as that goes, the changes do indeed alter the balance of power between the *Bundestag* and the *Bundesregierung* to a certain extent and the Court seems intent on enforcing the *Bundestag's* rights to exercise effective influence before decisions become definite at European level. However, when compared to the Court's previous jurisprudence, it can be seen that even those changes are very much in line with the Court's approach to the relationship of those two institutions in the domestic context and in the area of classic Foreign Affairs. It is submitted that the rather prominent role of the *Bundestag* in the ESM cases is largely due to the fact that they concerned the question of budgetary control and that they do not constitute a first step towards a fundamental review of the balance of power between the *Bundestag* and *Bundesregierung* in the European context.

⁵⁵⁵ *ibid* 124.

Part III: Conclusion

Part III explored how the *Bundesverfassungsgericht* transferred the approach used in the area of Foreign Affairs to the European context. Chapter V reviewed the years up to the ratification of the treaty of Lisbon. In the decades between the ratification of the Treaty of Rome and the treaty of Maastricht, the Court did not see the need to distinguish between Foreign Affairs and European matters. As a consequence, the *Bundesregierung* could rely on its foreign policy prerogative in order to shape European matters as it chose. The *Bundestag* was relegated to providing after-the-fact legal control of the *Bundesregierung's* activities. The new 'Europe-Article' Article 23 introduced into the *Grundgesetz* in 1993 did contain a greater range of rights for the *Bundestag* but did not have a noticeable impact on the Court's approach to the separation of powers and its way of conceptualising the relationship between the institutions in practice.

Chapter VI surveyed the ESM cases and concluded that a *prima facie* case may be made that the *Bundesverfassungsgericht's* approach had changed at fundamental level. The analysis conducted in Chapter VII, however, revealed that this was not the case. The Court had merely introduced a new 'reserve' in favour of the *Bundestag*, not undertaken a qualitative shift towards a new conceptualisation of the separation of powers in the area of European law with repercussions for the relationship of the executive and the legislative in that area.

CONCLUSION

The thesis explored whether the recent decisions on the ESM and Fiscal treaties may be considered a 'paradigm shift' in the approach of the *Bundesverfassungsgericht* with regard the relationship of the *Bundestag* and the *Bundesregierung* in the European context in light of the model of the separation of powers the Court use to conceptualise it.

Part I investigated the role and status of the theory of the separation of powers in constitutional systems with particular reference to German legal scholarship.

Chapter I concluded that for Locke, Montesquieu and the Federalists the separation of powers constituted an indispensable element of a constitutional system in order to avoid the establishment of a tyrannical regime. The separation of powers enabled the three powers to influence and control each other from *within* the political process, thus preventing any one power from becoming too dominant. These authors used the social power embodied in the classes (Locke, Montesquieu) or in the diverse factions existing in the population (the Federalists) in order to provide the institutions those groupings constituted with the necessary standing and ambition to exercise the desired control. Additionally, this made the people, or rather their representatives, part of the constitutional process and thus provided them with a direct conduit to the exercise of state power and with the means to controlling it.

Chapter II explored how general constitutional developments, the values embodied in constitutions, but also the legal tradition as such and philosophical traditions on the nature and role of the state and the constitution itself influence the role and status of the separation of powers within that system. As a consequence, present-day approaches as presented by lawyers accord the separation of powers a high status for theoretical discussions but see its value for the solution of practical conflicts as negligible.

Following on from the investigation of the theory of the separation of powers in Part I, **Part II explored** the implementation of the separation of powers into the German constitutional system with regard to the domestic context as well as Foreign Affairs. It is submitted that the perception in the literature – that the theory is fairly useless in practice – does not hold true. The cases surveyed here provide critical dividing lines for the behaviour of the legislative and the executive, both in the domestic context as well as in the area of Foreign Affairs.

The contrast between the courts approach in the domestic context compared to that in the area of Foreign Affairs is quite striking. In the domestic context, the Court differentiates between various areas of interaction and creates 'area specific' balances of power between the legislative and the executive. For example, as far as matters of the budget are concerned, the executive is in a fairly weak position. However, in general the executive is fairly free to use its procedural and political predominance in order to implement its political agenda. The case also illustrates how the Court sees the separation of powers as one principal among a number that determine the outcome of the case, fairly often considerations of fundamental rights protection and the freedom of the individual – very much in keeping with the classic rendition of the separation of powers – inform the Court solution more than arguments specifically relating to the separation of powers.

In striking contrast, none of this seems to matter in the area of Foreign Affairs. Here the *Bundesverfassungsgericht* merely considers the suitability of the legislative and the executive respectively to handle Foreign Affairs as a matter of principle. The Court does not differentiate among for example treaty negotiations, everyday work in international organisations like NATO or the UN, or indeed sensitive diplomatic manoeuvres in order to achieve a tiered pattern of involvement that would allow the *Bundestag* much greater influence and thus create more accountability for the actions of the government. In addition, the set of values and principles employed in the domestic context like the principle of democracy, *Rechtsstaat* principle and human rights protection, are not used here to modify the solution found based on essentially organisational efficiency considerations.

Part III explored how the *Bundesverfassungsgericht* transferred the approach used in the area of Foreign Affairs to the European context. Chapter V reviewed the years up to the ratification of the treaty of Lisbon. In the decades between the ratification of the Treaty of Rome and the treaty of Maastricht, the Court did not see the need to distinguish between Foreign Affairs and European matters. As a consequence, the *Bundesregierung* could rely on its foreign policy prerogative in order to shape European matters as it chose. The *Bundestag* was relegated to providing after-the-fact legal control of the *Bundesregierung's* activities. The new 'Europe-Article' Article 23 introduced into the *Grundgesetz* in 1993 did contain a greater range of rights for the *Bundestag* but did not have a noticeable impact on the Court's approach to the separation of powers and its way of conceptualising the relationship between the institutions in practice.

Chapter VI surveyed the ESM cases and concluded that a prima facie case may be made that the *Bundesverfassungsgericht's* approach had changed at fundamental level. The analysis conducted in Chapter VII, however, revealed that this was not the case. The Court had merely introduced a new 'reserve' in favour of the *Bundestag*, not undertaken a qualitative shift towards a new conceptualisation of the separation of powers in the area of European law with repercussions for the relationship of the executive and the legislative in that area.

A. Evaluation of the findings

By using separation of powers instead of democracy and sovereignty as the framework for analysis, this thesis was able to demonstrate how much the relationship between the *Bundesregierung* and the *Bundestag* in the European context is defined by the Court's insistence to retain the traditional dichotomy of 'domestic' versus 'Foreign' affairs and to classify European matters as 'Foreign' affairs, albeit a special kind. This means that the executive's foreign policy prerogative provides it with almost exclusive responsibility to handle all European matters.

As was highlighted in Chapter IV, the *Bundesverfassungsgericht's* reasoning for allocating the responsibility for Foreign Affairs to the executive rests on its approach to separation of powers. In the German constitutional tradition that theory is seen as an ele-

ment of the *Rechtsstaat* principle that embodies an organisational *Ordnungsidee* and is meant to supply effective mechanisms for the comprehensive control of state power – in contrast to e.g. Locke and Montesquieu who saw it as a guarantee for liberty and an enabler of democratic government. The analysis of the general repercussions as explored in Chapters I to IV highlighted the crucial difference between the two conceptualisations: separation of powers aims to resolve practical conflicts between powers by answering mainly these two questions: *who should be deciding this issue? Who should participate in the decision?* If one anchors separation of powers within democracy and with the protection of liberty as the key objective, the answers to those questions will look at the legitimacy of decision-making; if one anchors it within the *Rechtsstaat* principle with organisational efficiency as the key objective, the answers to those questions will focus on the 'suitability' (and not the legitimacy) of the power in question to decide the issue.

Using the argument of organisational suitability and efficiency, the *Bundesverfassungsgericht* considered the executive to be the most suitable power to handle Foreign Affairs – and thus European matters. However, this meant that the *Bundestag* was limited to very few options of controlling the activities of the executive most of which came into play after the executive had already taken action. Moreover, since the *Bundesregierung* was conducting European matters 'as of right', the *Bundestag* was put in the unenviable position of having to justify its involvement instead of the *Bundesregierung* having to justify its actions, thus turning the idea of government accountability on its head.

The question arises what the consequences of this approach are with regard to the ability of the German constitutional system to deal with European matters, to ensure the legitimacy of the decisions made by the political institutions and potentially even its credibility as a system of democratic governance.

The Court has an impressive track record with regard to its demands that the safeguards for the protection of liberty and the preservation of democratic structures of government that exist in the national constitutional systems be re-created at European

level. The notion of sovereignty and the principle of democracy are pivotal for its analysis of the constitutionality of amendment treaties where its reasoning usually revolves around the importance of democracy as a fundamental value and the importance of the parliament remaining the central forum and locus for decision-making. Such reasoning is fairly absent in the ESM cases. The Court does not compensate for the perceived loss of democratic decision-making power by according greater weight to maintaining the democratic structures of the decision-making processes that have remained at national level. It actually uses separation of powers to protect the executive's foreign policy/ European matters prerogative and rejects demands for a greater involvement of the *Bundestag* which are backed by the principle of democracy. This line of argument has been employed by the Court in purely domestic matters with the aim of preventing what it calls a power 'monism' of the legislative. The irony is that, in doing so, the Court actually creates an almost power monism of the executive.

European decision-making processes are different and the way European law impacts on the national legal systems of the Member States also differs from classic international law - simply to adapt in a superficial fashion one's traditional approaches which were created for 'classic' domestic and International scenarios appears inadequate.

The result of the Court's approach is the exacerbation of the shift of political decision-making power towards the executive that had occurred in the European context as it does not allow the legislative to increase the level of control correspondingly. Considering that the Court champions the values of democratic government, it is rather ironic that the disempowerment of the German parliament is largely the result of it maintaining its traditional conceptualisation of separation of powers and Foreign Affairs.

It is submitted that the Court neglects the interaction of democracy and separation of powers in the European context and thus undermines the very purpose of separation of powers. It also overlooks the potential that the doctrine of separation of powers could have to protect the values it holds so dear. Due to the impact of European law on the constitutional and legal systems of the Member States, the hitherto unconstrained use of the national level safeguards mentioned above is impaired to a consid-

erable extent. However, that is exactly why separation of powers may provide an alternative as it was originally designed to operate without those safety mechanisms: it does not need a democratic system of governance, and effective implementation of the rule of law or access to effective legal remedies for individuals – it provides *institutional* safeguards from *within* the system for the control of the exercise of state power. In doing so, it could support the reform efforts of the Member States not only by highlighting areas of concern but also by providing practical solutions that are not likely to violate the fundamental precepts of the constitutional systems of the Member States.

B. Outlook

The analysis conducted in the thesis raises a number of follow-up questions both with regard to the theoretical as well as the methodological and practical angle that are worth pursuing: the investigation identified weaknesses in the decision-making structures at national level due to the theoretical conceptualisation of the relationship between the government and the parliament. In order to remedy those issues, one could explore whether there may be alternatives to the *Bundesverfassungsgericht's* approach to Foreign Affairs, for example considering the notion of a joint responsibility of the legislative and executive. If both powers are deemed to be equal partners with equal rights to influence the decision-making, it could provide the legislative at the very least with more effective opportunities to review the executive's activities and to provide effective input before decisions become final at European level. As the reasons for the exclusive allocation of Foreign Affairs to the executive rests within the current conceptualisation of separation of powers, this would necessitate a change at fundamental level.

As has been outlined in Chapters I-IV, the currently used definition of the *Grundsatz der funktionsgerechten Organstruktur* as constructed by Danwitz implies that the institutional structures in the constitutional context are set by the *Grundgesetz* and are thus not adaptable. Therefore the question "who should deal with this task?" became redundant and the only question left to ask was "what institution is 'suitable' to handle this task?". As the *Bundesverfassungsgericht* has confirmed consistently since its decision in the NATO case in 1984, the *Bundestag* is 'institutionally unsuitable' to handle

Foreign Affairs as a matter of principle: its procedures for decision-making, rules on confidentiality, speed of decision-making, etc. all made it ill-equipped to handle Foreign Affairs.⁵⁵⁶ However, in the ESM cases the Court involved the *Bundestag* in the 'day-to-day' work of the ESM almost as a 'matter of course'. It even set out specific procedural requirements, all without discussing as to why the *Bundestag* was suddenly deemed 'suitable', or could be 'made' suitable to handle such matters – a notion the Court had consistently rejected until that point. As has been already pointed out in Chapters IV and VII, this challenges the very foundation of the Court's reasoning in the NATO case and thus could open the door to a fundamental reconceptualization. As a basis for this reconceptualization one could make use of the Court's own arguments put forward in one of its earliest cases on the restructuring of certain administrative bodies attempted by the Bremen parliament.⁵⁵⁷ There, the Court had rejected those changes as unconstitutional as they deprived the executive of the control over crucial personnel decisions. The Court argued that the executive was accountable for those decisions vis-à-vis the parliament and therefore had to be in control of the administrative bodies making those decisions. It is worth exploring whether that logic can be applied to the Foreign Affairs context as well since the *Bundesverfassungsgericht* consistently stresses that the *Bundestag* is responsible for the actions of the government vis-à-vis the people.

A different approach to the reconceptualization would be to explore the possibility of returning to liberty as the primary objective of separation of powers. As was outlined above, this would lead to institutional relationships being based on a view of which institution would provide the highest level of protection for the individual and collective liberty of the citizens instead of asking 'the institutional structure and decision-making processes of which institution are best suited and most efficient'. Such an exploration would have to address the potential repercussions of such a reconceptualization for the German constitutional system as a whole. For example if the assumption is that this would strengthen the *Bundestag*, does this create a realistic danger of a power

⁵⁵⁶ BVerfG, 'Atomwaffenstationierung' (n 320).

⁵⁵⁷ BVerfG, 'Bremer Personalvertretung' (n 235).

monism of the legislative? Potential arguments against this could be drawn from the Kalkar decision of the *Bundesverfassungsgericht*⁵⁵⁸ and the notions on institutional legitimacy put forward by the literature.⁵⁵⁹

A solution leading into the opposite direction could be sought by taking the *Bundesverfassungsgericht*'s reasoning with regard to the preservation of sovereignty to its logical conclusion. Since the Court seems intent on framing the debate by delineating the spheres of influence along the lines of the classic domestic sphere/ international sphere divide and to maintain its stance on Foreign Affairs, one of the solutions available to remedy the problem identified in this thesis could be the 'domestication' of European matters. In other words: one would conceptualise them no longer as 'Foreign Affairs', but as 'domestic matters' – with the consequence that the government would be subject to the full range of participation rights and control powers that the parliament has at its disposal in the domestic context.

A further route that could be pursued is to connect the findings in this thesis with the literature on Federalism and/ or Multilevel Governance in order to explore whether one could develop a truly multilevel concept of separation of powers that not only provided a framework for the interaction between the levels (vertical perspective), but also comprised rules for the interaction of the institutions within each level (horizontal perspective).

The investigation conducted here deliberately focused on the establishment of the legal framework. Therefore, apart from the more theoretical follow-up projects sketched out above, the results of the thesis also provide a solid foundation for empirical studies into the repercussions of this new reserve on the relationship of the *Bundesregierung* and the *Bundestag* in everyday practice. Interviews, questionnaires and e.g. the analysis of parliamentary documents could prove highly interesting in order to determine i.a. how the members of the *Bundestag* (government coalition and opposition) use the powers they have within the ESM framework, how the *Bundesregierung* complies with

⁵⁵⁸ BVerfG, 'Kalkar I' (n 248).

⁵⁵⁹ Ossenbühl (n 9).

the requirements laid down by the *Bundesverfassungsgericht* as regards i.a. its duties to provide the *Bundestag* with enough information to enable its effective participation, the flow of information between the *Bundesregierung* and the *Bundestag* as such, between the *Bundesregierung* and individual members, whether there is differential treatment between the members of the government coalition and those of the opposition, etc.

The information gathered in such surveys could provide valuable insights as to whether this increased level of participation in one particular area may have changed, or is likely to change, the self-confidence of the members of the *Bundestag* in the use of their political control powers vis-à-vis the *Bundesregierung* which could have repercussions for the relationship between the *Bundestag* and *Bundesregierung* in general. Inversely, the material could also provide insights as to whether there has been a change in attitude on the part of the *Bundesregierung* with regard to European matters in general, in other words whether it has lost its 'gatekeeper' mentality that was so evident in the events leading up to the ratification of the ESM and Fiscal treaties - as related in the facts of the decision of 19/06/2012.⁵⁶⁰ This would also provide a follow-up study to the enquiry conducted by Sprungk in 2003.⁵⁶¹

Finally, this thesis could lead to similar studies in other Member States which could provide a comprehensive picture of how the national parliaments participate at national level in decision-making in the European context. Such studies could provide the foundation for a comparative project in order to investigate the particular interaction between the governments and the parliaments and the role of the constitutional courts (as far as existing) in the respective Member States.

⁵⁶⁰ BVerfG, 'Duty to Inform the *Bundestag* (ESM)' (n 15).

⁵⁶¹ Sprungk (n 280).

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Annex

Provisions of the Grundgesetz - German original

Artikel 1

(1) Die Würde des Menschen ist unantastbar. Sie zu achten und zu schützen ist Verpflichtung aller staatlichen Gewalt.

(2) Das Deutsche Volk bekennt sich darum zu unverletzlichen und unveräußerlichen Menschenrechten als Grundlage jeder menschlichen Gemeinschaft, des Friedens und der Gerechtigkeit in der Welt.

(3) Die nachfolgenden Grundrechte binden Gesetzgebung, vollziehende Gewalt und Rechtsprechung als unmittelbar geltendes Recht.

Artikel 10

(1) Das Briefgeheimnis sowie das Post- und Fernmeldegeheimnis sind unverletzlich.

(2) Beschränkungen dürfen nur auf Grund eines Gesetzes angeordnet werden. Dient die Beschränkung dem Schutze der freiheitlichen demokratischen Grundordnung oder des Bestandes oder der Sicherung des Bundes oder eines Landes, so kann das Gesetz bestimmen, daß sie dem Betroffenen nicht mitgeteilt wird und daß an die Stelle des Rechtsweges die Nachprüfung durch von der Volksvertretung bestellte Organe und Hilfsorgane tritt.

Artikel 19

(1) Soweit nach diesem Grundgesetz ein Grundrecht durch Gesetz oder auf Grund eines Gesetzes eingeschränkt werden kann, muß das Gesetz allgemein und nicht nur für den Einzelfall gelten. Außerdem muß das Gesetz das Grundrecht unter Angabe des Artikels nennen.

(2) In keinem Falle darf ein Grundrecht in seinem Wesensgehalt angetastet werden.

(3) Die Grundrechte gelten auch für inländische juristische Personen, soweit sie ihrem Wesen nach auf diese anwendbar sind.

(4) Wird jemand durch die öffentliche Gewalt in seinen Rechten verletzt, so steht ihm der Rechtsweg offen. Soweit eine andere Zuständigkeit nicht begründet ist, ist der ordentliche Rechtsweg gegeben. Artikel 10 Abs. 2 Satz 2 bleibt unberührt.

Artikel 20

- (1) Die Bundesrepublik Deutschland ist ein demokratischer und sozialer Bundesstaat.*
- (2) Alle Staatsgewalt geht vom Volke aus. Sie wird vom Volke in Wahlen und Abstimmungen und durch besondere Organe der Gesetzgebung, der vollziehenden Gewalt und der Rechtsprechung ausgeübt.*
- (3) Die Gesetzgebung ist an die verfassungsmäßige Ordnung, die vollziehende Gewalt und die Rechtsprechung sind an Gesetz und Recht gebunden.*
- (4) Gegen jeden, der es unternimmt, diese Ordnung zu beseitigen, haben alle Deutschen das Recht zum Widerstand, wenn andere Abhilfe nicht möglich ist.*

Artikel 23

(1) Zur Verwirklichung eines vereinten Europas wirkt die Bundesrepublik Deutschland bei der Entwicklung der Europäischen Union mit, die demokratischen, rechtsstaatlichen, sozialen und föderativen Grundsätzen und dem Grundsatz der Subsidiarität verpflichtet ist und einen diesem Grundgesetz im wesentlichen vergleichbaren Grundrechtsschutz gewährleistet. Der Bund kann hierzu durch Gesetz mit Zustimmung des Bundesrates Hoheitsrechte übertragen. Für die Begründung der Europäischen Union sowie für Änderungen ihrer vertraglichen Grundlagen und vergleichbare Regelungen, durch die dieses Grundgesetz seinem Inhalt nach geändert oder ergänzt wird oder solche Änderungen oder Ergänzungen ermöglicht werden, gilt Artikel 79 Abs. 2 und 3.

(1a) Der Bundestag und der Bundesrat haben das Recht, wegen Verstoßes eines Gesetzgebungsaktes der Europäischen Union gegen das Subsidiaritätsprinzip vor dem Gerichtshof der Europäischen Union Klage zu erheben. Der Bundestag ist hierzu auf Antrag eines Viertels seiner Mitglieder verpflichtet. Durch Gesetz, das der Zustimmung des Bundesrates bedarf, können für die Wahrnehmung der Rechte, die dem Bundestag und dem Bundesrat in den vertraglichen Grundlagen der Europäischen Union eingeräumt sind, Ausnahmen von Artikel 42 Abs. 2 Satz 1 und Artikel 52 Abs. 3 Satz 1 zugelassen werden.

(2) In Angelegenheiten der Europäischen Union wirken der Bundestag und durch den Bundesrat die Länder mit. Die Bundesregierung hat den Bundestag und den Bundesrat umfassend und zum frühestmöglichen Zeitpunkt zu unterrichten.

(3) Die Bundesregierung gibt dem Bundestag Gelegenheit zur Stellungnahme vor ihrer Mitwirkung an Rechtsetzungsakten der Europäischen Union. Die Bundesregierung berücksichtigt die Stellungnahmen des Bundestages bei den Verhandlungen. Das Nähere regelt ein Gesetz.

(4) Der Bundesrat ist an der Willensbildung des Bundes zu beteiligen, soweit er an einer entsprechenden innerstaatlichen Maßnahme mitzuwirken hätte oder soweit die Länder innerstaatlich zuständig wären.

(5) Soweit in einem Bereich ausschließlicher Zuständigkeiten des Bundes Interessen der Länder berührt sind oder soweit im Übrigen der Bund das Recht zur Gesetzgebung hat, berücksichtigt die Bundesregierung die Stellungnahme des Bundesrates. Wenn im Schwerpunkt Gesetzgebungsbefugnisse der Länder, die Einrichtung ihrer Behörden oder ihre Verwaltungsverfahren betroffen sind, ist bei der Willensbildung des Bundes insoweit die Auffassung des Bundesrates maßgeblich zu berücksichtigen; dabei ist die gesamtstaatliche Verantwortung des Bundes zu wahren. In Angelegenheiten, die zu Ausgabenerhöhungen oder Einnahmемinderungen für den Bund führen können, ist die Zustimmung der Bundesregierung erforderlich.

(6) Wenn im Schwerpunkt ausschließliche Gesetzgebungsbefugnisse der Länder auf den Gebieten der schulischen Bildung, der Kultur oder des Rundfunks betroffen sind, wird die Wahrnehmung der Rechte, die der Bundesrepublik Deutschland als Mitgliedstaat der Europäischen Union zustehen, vom Bund auf einen vom Bundesrat benannten Vertreter der Länder übertragen. Die Wahrnehmung der Rechte erfolgt unter Beteiligung und in Abstimmung mit der Bundesregierung; dabei ist die gesamtstaatliche Verantwortung des Bundes zu wahren.

(7) Das Nähere zu den Absätzen 4 bis 6 regelt ein Gesetz, das der Zustimmung des Bundesrates bedarf.

Artikel 24

(1) Der Bund kann durch Gesetz Hoheitsrechte auf zwischenstaatliche Einrichtungen übertragen.

(1a) Soweit die Länder für die Ausübung der staatlichen Befugnisse und die Erfüllung der staatlichen Aufgaben zuständig sind, können sie mit Zustimmung der Bundesregierung Hoheitsrechte auf grenznachbarschaftliche Einrichtungen übertragen.

(2) Der Bund kann sich zur Wahrung des Friedens einem System gegenseitiger kollektiver Sicherheit einordnen; er wird hierbei in die Beschränkungen seiner Hoheitsrechte einwilligen, die eine friedliche und dauerhafte Ordnung in Europa und zwischen den Völkern der Welt herbeiführen und sichern.

(3) Zur Regelung zwischenstaatlicher Streitigkeiten wird der Bund Vereinbarungen über eine allgemeine, umfassende, obligatorische, internationale Schiedsgerichtsbarkeit beitreten.

Artikel 32

(1) Die Pflege der Beziehungen zu auswärtigen Staaten ist Sache des Bundes.

(2) Vor dem Abschlüsse eines Vertrages, der die besonderen Verhältnisse eines Landes berührt, ist das Land rechtzeitig zu hören.

(3) Soweit die Länder für die Gesetzgebung zuständig sind, können sie mit Zustimmung der Bundesregierung mit auswärtigen Staaten Verträge abschließen.

Artikel 38

(1) Die Abgeordneten des Deutschen Bundestages werden in allgemeiner, unmittelbarer, freier, gleicher und geheimer Wahl gewählt. Sie sind Vertreter des ganzen Volkes, an Aufträge und Weisungen nicht gebunden und nur ihrem Gewissen unterworfen.

(2) Wahlberechtigt ist, wer das achtzehnte Lebensjahr vollendet hat; wählbar ist, wer das Alter erreicht hat, mit dem die Volljährigkeit eintritt.

(3) Das Nähere bestimmt ein Bundesgesetz.

Artikel 51

(1) Der Bundesrat besteht aus Mitgliedern der Regierungen der Länder, die sie bestellen und abberufen. Sie können durch andere Mitglieder ihrer Regierungen vertreten werden.

(2) Jedes Land hat mindestens drei Stimmen, Länder mit mehr als zwei Millionen Einwohnern haben vier, Länder mit mehr als sechs Millionen Einwohnern fünf, Länder mit mehr als sieben Millionen Einwohnern sechs Stimmen.

(3) Jedes Land kann so viele Mitglieder entsenden, wie es Stimmen hat. Die Stimmen eines Landes können nur einheitlich und nur durch anwesende Mitglieder oder deren Vertreter abgegeben werden.

Artikel 59

(1) Der Bundespräsident vertritt den Bund völkerrechtlich. Er schließt im Namen des Bundes die Verträge mit auswärtigen Staaten. Er beglaubigt und empfängt die Gesandten.

(2) Verträge, welche die politischen Beziehungen des Bundes regeln oder sich auf Gegenstände der Bundesgesetzgebung beziehen, bedürfen der Zustimmung oder der Mitwirkung der jeweils für die Bundesgesetzgebung zuständigen Körperschaften in der Form eines Bundesgesetzes. Für Verwaltungsabkommen gelten die Vorschriften über die Bundesverwaltung entsprechend.

Artikel 65

Der Bundeskanzler bestimmt die Richtlinien der Politik und trägt dafür die Verantwortung. Innerhalb dieser Richtlinien leitet jeder Bundesminister seinen Geschäftsbereich selbständig und unter eigener Verantwortung. Über Meinungsverschiedenheiten zwischen den Bundesministern entscheidet die Bundesregierung. Der Bundeskanzler leitet ihre Geschäfte nach einer von der Bundesregierung beschlossenen und vom Bundespräsidenten genehmigten Geschäftsordnung.

Artikel 67

(1) Der Bundestag kann dem Bundeskanzler das Mißtrauen nur dadurch aussprechen, daß er mit der Mehrheit seiner Mitglieder einen Nachfolger wählt und den Bundespräsidenten ersucht, den Bundeskanzler zu entlassen. Der Bundespräsident muß dem Ersuchen entsprechen und den Gewählten ernennen.

(2) Zwischen dem Antrage und der Wahl müssen achtundvierzig Stunden liegen.

Artikel 68

(1) Findet ein Antrag des Bundeskanzlers, ihm das Vertrauen auszusprechen, nicht die Zustimmung der Mehrheit der Mitglieder des Bundestages, so kann der Bundespräsident auf Vorschlag des Bundeskanzlers binnen einundzwanzig Tagen den Bundestag auflösen. Das Recht zur Auflösung erlischt, sobald der Bundestag mit der Mehrheit seiner Mitglieder einen anderen Bundeskanzler wählt.

(2) Zwischen dem Antrage und der Abstimmung müssen achtundvierzig Stunden liegen.

Artikel 79

(1) Das Grundgesetz kann nur durch ein Gesetz geändert werden, das den Wortlaut des Grundgesetzes ausdrücklich ändert oder ergänzt. Bei völkerrechtlichen Verträgen, die eine Friedensregelung, die Vorbereitung einer Friedensregelung oder den Abbau einer besatzungsrechtlichen Ordnung zum Gegenstand haben oder der Verteidigung der Bundesrepublik zu dienen bestimmt sind, genügt zur Klarstellung, daß die Bestimmungen des Grundgesetzes dem Abschluß und dem Inkraftsetzen der Verträge nicht entgegenstehen, eine Ergänzung des Wortlautes des Grundgesetzes, die sich auf diese Klarstellung beschränkt.

(2) Ein solches Gesetz bedarf der Zustimmung von zwei Dritteln der Mitglieder des Bundestages und zwei Dritteln der Stimmen des Bundesrates.

(3) Eine Änderung dieses Grundgesetzes, durch welche die Gliederung des Bundes in Länder, die grundsätzliche Mitwirkung der Länder bei der Gesetzgebung oder die in den Artikeln 1 und 20 niedergelegten Grundsätze berührt werden, ist unzulässig.

Provisions of the Grundgesetz - English translation⁵⁶²

Article 1

[Human dignity –Legally binding force of basic rights]

(1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.

(2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.

(3) The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law.

Article 10

[Privacy of correspondence, posts and telecommunications]

(1) The privacy of correspondence, posts and telecommunications shall be inviolable.

(2) Restrictions may be ordered only pursuant to a law. If the restriction serves to protect the free democratic basic order or the existence or security of the Federation or of a Land, the law may provide that the person affected shall not be informed of the restriction and that recourse to the courts shall be replaced by a review of the case by agencies and auxiliary agencies appointed by the legislature.

Article 19

[Restriction of basic rights – Legal remedies]

(1) Insofar as, under this Basic Law, a basic right may be restricted by or pursuant to a law, such law must apply generally and not merely to a single case. In addition, the law must specify the basic right affected and the Article in which it appears.

(2) In no case may the essence of a basic right be affected.

(3) The basic rights shall also apply to domestic artificial persons to the extent that the nature of such rights permits.

(4) Should any person's rights be violated by public authority, he may have recourse to the courts. If no other jurisdiction has been established, recourse shall be to the ordinary courts. The second sentence of paragraph (2) of Article 10 shall not be affected by this paragraph.

⁵⁶² 'Grundgesetz für die Bundesrepublik Deutschland, Translated by Prof. Christian Tomuschat, David P. Currie and Donald P. Kommers' <http://www.gesetze-im-internet.de/englisch_gg/index.html> accessed 15 April 2016.

Article 20

[Constitutional principles – Right of resistance]

(1) The Federal Republic of Germany is a democratic and social federal state.

(2) All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive and judicial bodies.

(3) The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice.

(4) All Germans shall have the right to resist any person seeking to abolish this constitutional order, if no other remedy is available

Article 23

[European Union]

(1) 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.

(1a)⁵⁶³ The Bundestag and the Bundesrat shall have the right to bring an action before the Court of Justice of the European Union to challenge a legislative act of the European Union for infringing the principle of subsidiarity. The Bundestag is obliged to initiate such an action at the request of one fourth of its Members. By a statute requiring the consent of the Bundesrat, exceptions from the first sentence of paragraph (2) of Article 42, and the first sentence of paragraph (2) of Article 52, may be authorised for the exercise of the rights granted to the Bundestag and the Bundesrat under the contractual foundations of the European Union.

(2) The Bundestag and, through the Bundesrat, the Länder shall participate in matters concerning the European Union. The Federal Government shall keep the Bundestag and the Bundesrat informed, comprehensively and at the earliest possible time.

(3) Before participating in legislative acts of the European Union, the Federal Government shall provide the Bundestag with an opportunity to state its position. The Federal Government shall take the position of the Bundestag into account during the negotiations. Details shall be regulated by a law.

(4) The Bundesrat shall participate in the decision-making process of the Federation insofar as it would have been competent to do so in a comparable domestic matter, or insofar as the subject falls within the domestic competence of the Länder.

⁵⁶³ Added with the ratification of the Lisbon Treaty.

(5) Insofar as, in an area within the exclusive competence of the Federation, interests of the Länder are affected, and in other matters, insofar as the Federation has legislative power, the Federal Government shall take the position of the Bundesrat into account. To the extent that the legislative powers of the Länder, the structure of Land authorities, or Land administrative procedures are primarily affected, the position of the Bundesrat shall be given the greatest possible respect in determining the Federation's position consistent with the responsibility of the Federation for the nation as a whole. In matters that may result in increased expenditures or reduced revenues for the Federation, the consent of the Federal Government shall be required.

(6) When legislative powers exclusive to the Länder concerning matters of school education, culture or broadcasting are primarily affected, the exercise of the rights belonging to the Federal Republic of Germany as a Member State of the European Union shall be delegated by the Federation to a representative of the Länder designated by the Bundesrat. These rights shall be exercised with the participation of, and in coordination with, the Federal Government; their exercise shall be consistent with the responsibility of the Federation for the nation as a whole.

(7) Details regarding paragraphs (4) to (6) of this Article shall be regulated by a law requiring the consent of the Bundesrat.

Article 24

[Transfer of sovereign powers – System of collective security]

(1) The Federation may by a law transfer sovereign powers to international organisations.

(1a) Insofar as the Länder are competent to exercise state powers and to perform state functions, they may, with the consent of the Federal Government, transfer sovereign powers to transfrontier institutions in neighbouring regions.

(2) With a view to maintaining peace, the Federation may enter into a system of mutual collective security; in doing so it shall consent to such limitations upon its sovereign powers as will bring about and secure a lasting peace in Europe and among the nations of the world.

(3) For the settlement of disputes between states, the Federation shall accede to agreements providing for general, comprehensive and compulsory international arbitration.

Article 32

[Foreign relations]

(1) Relations with foreign states shall be conducted by the Federation.

(2) Before the conclusion of a treaty affecting the special circumstances of a Land, that Land shall be consulted in timely fashion.

(3) Insofar as the Länder have power to legislate, they may conclude treaties with foreign states with the consent of the Federal Government.

Article 38
[Elections]

(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.

Article 51
[Composition – Weighted voting]

(1) The Bundesrat shall consist of members of the Land governments, which appoint and recall them. Other members of those governments may serve as alternates.

(2) Each Land shall have at least three votes; Länder with more than two million inhabitants shall have four, Länder with more than six million inhabitants five, and Länder with more than seven million inhabitants six votes.

(3) Each Land may appoint as many members as it has votes. The votes of each Land may be cast only as a unit and only by Members present or their alternates.

Article 59
[Representation of the Federation for the purposes of international law]

(1) The Federal President shall represent the Federation for the purposes of international law. He shall conclude treaties with foreign states on behalf of the Federation. He shall accredit and receive envoys.

(2) Treaties that regulate the political relations of the Federation or relate to subjects of federal legislation shall require the consent or participation, in the form of a federal law, of the bodies responsible in such a case for the enactment of federal law. In the case of executive agreements the provisions concerning the federal administration shall apply mutatis mutandis.

Article 65
[Power to determine policy guidelines – Department and collegiate responsibility]

The Federal Chancellor shall determine and be responsible for the general guidelines of policy. Within these limits each Federal Minister shall conduct the affairs of his department independently and on his own responsibility. The Federal Government shall resolve differences of opinion between Federal Ministers. The Federal Chancellor shall conduct the proceedings of the Federal Government in accordance with rules of procedure adopted by the Government and approved by the Federal President.

Article 67
[Vote of no confidence]

(1) The Bundestag may express its lack of confidence in the Federal Chancellor only by electing a successor by the vote of a majority of its Members and requesting the Federal President to dismiss the Federal Chancellor. The Federal President must comply with the request and appoint the person elected.

(2) Forty-eight hours shall elapse between the motion and the election.

Article 68
[Vote of confidence]

(1) If a motion of the Federal Chancellor for a vote of confidence is not supported by the majority of the Members of the Bundestag, the Federal President, upon the proposal of the Federal Chancellor, may dissolve the Bundestag within twenty-one days. The right of dissolution shall lapse as soon as the Bundestag elects another Federal Chancellor by the vote of a majority of its Members.

(2) Forty-eight hours shall elapse between the motion and the vote.

Article 79
[Amendment of the Basic Law]

(1) This Basic Law may be amended only by a law expressly amending or supplementing its text. In the case of an international treaty regarding a peace settlement, the preparation of a peace settlement, or the phasing out of an occupation regime, or designed to promote the defence of the Federal Republic, it shall be sufficient, for the purpose of making clear that the provisions of this Basic Law do not preclude the conclusion and entry into force of the treaty, to add language to the Basic Law that merely makes this clarification.

(2) Any such law shall be carried by two thirds of the Members of the Bundestag and two thirds of the votes of the Bundesrat.

(3) Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.