Case Note

# Parliaments – Fig Leaf or Heartbeat of Democracy?

## German Federal Constitutional Court

### Judgment of 7 September 2011– *Euro Rescue Package*[1]

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## Introduction

Europe's debt and financial crisis has reached the courts. On 7 September 2011, the German Federal Constitutional Court paved the way for Germany's participation in the 'Euro rescue package'. In a nutshell, the Court held constitutional Germany's participation both in the specific aid measures for Greece and in the more general framework of the rescue package. At the same time, it stressed the parliament's budgetary responsibility which, in principle, cannot be delegated to the government. Thus, for approving specific measures under the European Financial Stability Facility, the German Government has to obtain the consent of the German *Bundestag* or of its budget committee.[2]

In thereby strengthening the parliament, the Court follows its well-established jurisprudence. The reason for this seems obvious: in parliamentary democracy, legislative and budgetary powers are vested in the parliament. Critics, however, deplore what they perceive as a general trend towards 'de-parliamentarisation' and argue that parliamentary participation has become a mere formality, a democratic fig leaf, since parliaments have no choice other than to approve the decision negotiated at governmental level.[3] After briefly depicting the widely perceived trends of 'de-parliamentarisation', this article illustrates that the Federal Consti-

[1] I am grateful to Julian Krüper, Stephan Lorentz and two anonymous reviewers for helpful comments on an earlier version of this article.

[2] BVerfG, NJW 2011, p. 2946 et seq. For an English press release *see* <www.bundesverfassungsgericht.de/pressemitteilungen/bvg11-055en.html>, visited 26 Jan. 2012.

[3] G. Beck, 'The German Constitutional Court versus the EU: Self assertion in Theory and Submission in Practice – Euro Aid and Financial Guarantees, Part 3',eutopialaw.com/2011/10/26/the-german-constitutional-court-versus-the-eu-self-assertion-in-theory-and-submission-in-practice-%E2%80%93-euro-aid-and-financial-guarantees-part-3/>, visited 26 Jan. 2012.

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tutional Court has a long tradition of strengthening parliament in different areas of law and that the *Euro rescue package* continues along this path. The concluding section attempts to assess this development. In other words: does parliament make a difference?

## Decline of parliament

Parliaments perform several functions: they elect the heads of government and/or other officials (elective function);[4] they make laws and decide on other fundamental issues (legislative and decision-making function); they act as a check on the executive (control function), and they are mediators between the general public and the political rulers (communicative function).[5] However, complaints about the 'decline of parliament' or 'de-parliamentarisation', i.e., the malfunctioning and the diminishing influence of parliaments, have a long history.[6] They commonly reflect changes in the function and nature of parliaments,[7] caused, for example, by the establishment of powerful political parties or the rise of mass media. A further point of concern is the strength of a well-equipped and highly specialised executive branch, which – as it seems – cannot be counterbalanced, let alone fully controlled, by parliaments.

Currently, commentators focus particularly on the two trends of internationalisation and privatisation, as being those which most notably diminish the legislative function of parliament. The process of *internationalisation* leads to an increase in law-making at European and international level, which is dominated by the executive, the judiciary, and partly even by private actors, but not by parliaments. It is the executive which is in charge of negotiating treaties, passing acts of secondary law in international organisations or building international networks which set informal standards. Besides, national and international courts and tribunals, including private arbitral tribunals, play a crucial role in interpreting and developing international law. Other private actors may also be involved in international

[4] Of course, these functions vary across different political systems. With respect to different elective competences, *see* U. Sieberer, *Parlamente als Wahlorgane* (Nomos 2010) p. 118 seq. (election of government) and p. 143 (election of other officials).

[5] J.S. Mill, *Considerations on Representative Government* (1881; Serenity 2008) p. 69 et seq.; W. Bagehot, *The English Constitution* (1867; Oxford University Press 2001) p. 99 et seq.; K. von Beyme, *Die parlamentarische Demokratie* (WestdeutscherVerlag 1999) p. 253 et seq.; S. Marschall, *Parlamentarismus. Eine Einführung* (Nomos 2005) p. 145 et seq.

[6] J. Bryce, 'The decline of legislatures', in id., *Modern Democracies*, Vol. 2 (Macmillan 1921) ch. LVIII.

[7] Cf. G. Loewenberg, 'The Role of Parliaments in Modern Political Systems', in id., *Parliaments, Change or Decline?* (Aldine – Atherton 1971) p. 1 at p. 4 et seq.; Beyme, *supra* n. 5, p. 530 et seq.

law-making, for example multinationals concluding investor-state treaties or non-governmental organisations developing standards of 'soft' (but effective) law.[8] The latter is also a characteristic of the more general phenomenon of *privatisation*, i.e., forms of law-making or agreements between the state and private actors which either wholly replace parliamentary law-making or *de facto* leave parliaments merely the decision to ratify the agreement negotiated by the executive.[9] As a consequence, internationalisation and privatisation may imply that parliaments keep a formal (but not very influential) role ratifying decisions taken by others or that law-making wholly shifts to other actors.

Budgetary powers form yet another important aspect of parliamentary work of particular relevance to the present case. It includes the power to adopt the budget, i.e., to decide on revenues and expenditure, and to authorise other financial measures such as borrowing or the assumption of surety obligations. Thus parliaments, by governing the financial foundations of any field of politics, exercise decision-making and control functions.[10] Parliamentary influence, however, seems to be diminishing in this area as well.[11] This is partly due to general factors such as privatisation and the preponderant role of the executive and partly due to parliamentary measures of the past: if a high percentage of revenues has to be spent on the discharge of debts and on other financial and legal commitments in the area of social policy or personnel, budgetary options are effectively limited.[12]

In the case at hand, the German Federal Constitutional Court had to examine the constitutionality of two Acts of the German *Bundestag* under Article 115.1 of

[8] For the above mentioned developments in the sphere of international law *see* the contributions in R. Wolfrum and V. Röben (eds.), *Developments of International Law in Treaty Making* (Springer 2005); A. von Bogdandy et al. (eds.), *The Exercise of Public Authority by International Institutions* (Springer 2010); on the resulting challenges from a national point of view, *see* M. Herdegen, 'Informalisierung und Entparlamentarisierung politischer Entscheidungen als Gefährdungen der Verfassung?', 62 *VVdStRL* (2003) p. 7 et seq.; M. Morlok, 'Informalisierung und Entparlamentarisierung politischer Entscheidungen als Gefährdungen der Verfassung?', 62 *VVdStRL* (2003) p. 37 et seq.

[9] L. Michael, *Rechtsetzende Gewalt im kooperierenden Verfassungsstaat* (Duncker & Humblot 2002) p. 83 et seq., p. 488 et seq.; F. Becker, *Kooperative und konsensuale Formen in der Normsetzung* (Mohr-Siebeck 2005) p. 230 et seq. (legislation deals); p. 351 et seq. (legislative outsourcing).

[10] On both functions of the budgetary power (governing and controlling), *see* U. Bergmoser, *ZweckgerechteVitalisierung des Budgetrechts der Legislative* (Berliner Wissenschaftsverlag 2011) p. 264 et seq.

[11] T. Puhl, 'Entparlamentarisierung und Auslagerung staatlicher Entscheidungsverantwortung', in J. Isensee and P. Kirchhof (eds.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, Vol. 3 (C.F. Müller 2005) § 48, at paras. 33 et. seq.

[12] Interest payments and social and personnel expenditure amounted to roughly 75% of the federal budget in the last ten years; Bundesrechnungshof, *Bemerkungen 2011 zur Haushalts- und Wirtschaftsführung des Bundes*, 93, chart 2.4, <www.sam-consulting.de:7070/Testportal/veroeffentlichungen/bemerkungen-jahresberichte>, visited 26 Jan. 2012.

the Basic Law.[13] These authorised the Federal Ministry of Finance to give guarantees, first, up to the total amount of EUR 22.4 billion to Greece and, secondly, up to a total amount of EUR 147.6 billion (EUR 123 billion plus 20%) for purposes of the general 'Euro rescue package', i.e., for loans raised by the 'special purpose vehicle' of the Euro states (the European Financial Stability Facility (EFSF)). The respective bills were passed within days after the decisions on the loans for Greece and the 'Euro rescue package' had been taken at the European level.[14] The widely perceived necessity and urgency of the measures, which had already been agreed upon among the members of the Eurogroup, the IMF, and the EU, left the German Parliament with little time and – supposedly – little choice. It seems that parliament, once again, was in the position of having only formal power, whereas other actors – financial markets, the governments of the Eurogroup, potential creditors such as the IMF– controlled the outcome.

## The Constitutional Court's commitment to parliamentary powers

In stark contrast to these trends of 'de-parliamentarisation', the Federal Constitutional Court remains committed to a strong and powerful parliament, which – in the German context – refers to the *Bundestag*.[15]

### *Legislative and control functions*

The commitment to a strong *Bundestag* may be illustrated by some examples of the Court's general jurisprudence concerning the parliament's legislative and control functions.

First of all, parliamentary *legislation* plays a crucial role in the field of fundamental rights. According to the Constitutional Court, the parliament itself must regulate all relevant questions such as the scope and the modalities of the enjoyment of the rights, i.e., it may not leave them to the executive or the judiciary. This so-called 'theory of materiality' (*Wesentlichkeitstheorie*), which the Court

[13] 'The borrowing of funds and the assumption of surety obligations, guarantees, or other commitments that may lead to expenditures in future fiscal years shall require authorisation by a federal law specifying or permitting computation of the amounts involved.'

[14] The loans for Greece were agreed upon on 2 May 2010 by the Eurogroup, the respective German Bill was introduced on 3 May 2010 and passed on 7 May 2010; the 'Euro rescue package' was decided at the European level on 9 May 2010, the respective German Bill was introduced on 11 May 2010 and passed on 22 May 2010.

[15] The *Bundestag* is the directly elected Federal Parliament. Some of its decisions (for example the amendment of the Constitution or of bills affecting the *Länder*) require the consent of the *Bundesrat*, i.e., the chamber composed of the governments of the *Länder*.

bases on the principles of democracy and of *Rechtsstaatlichkeit* (rule of law), requires not only that certain areas of law are governed by parliamentary statute but also that this statute is sufficiently detailed and precise.[16] As a consequence, interferences with fundamental rights require specific parliamentary authorisation and cannot be justified by general provisions.[17]

Besides, the Constitutional Court has also strengthened the powers of (plenary) parliament in the course of law-making. If bills passed by the *Bundestag* require the consent of the *Bundesrat* but face opposition in that chamber, further negotiations regularly will take place in the common 'Mediation Committee'. This committee sits in private. Solutions often take the form of package deals which comprise all sorts of issues relevant to the Federation or to certain *Länder*. In this context, plenary parliament could effectively be sidestepped if matters of legislation were introduced only at a later stage in the Mediation Committee. Although plenary parliament would still have formally to ratify the package deal, it would no longer control which issues become part of the package deal and it would lose the opportunity to discuss it in public session. The Constitutional Court, however, stressed the pivotal role of the *Bundestag* in law-making (as opposed to the participatory role of the *Bundesrat*), highlighted the importance of a public parliamentary debate and ruled that the 'Mediation Committee' may not take up issues which go beyond the bill(s) formally introduced in plenary parliament.[18]

Furthermore, the Constitutional Court has also continuously strengthened the powers of parliamentary *control*. As regards access to court, it has generously admitted disputes raised by parliamentary groups or even members of parliament, which renders judicial control very effective and supplements the ordinary, political forms of control. Thus, parliamentary groups or members of parliament, by invoking an infringement of their own rights or (in representative action) of the rights of parliament,[19] may initiate a rather comprehensive constitutional review of the measure challenged.[20] As regards powers of control, the Court recently

[16] Established jurisprudence, *see* BVerfGE 83, 139 (142); 95, 267 (307); 98, 218 (251); 101, 1 (34); 116, 24 (58).

[17] Banning teachers from wearing religious garments, for example, cannot be authorised by general rules regarding a civil servants' duty of neutrality; it requires a specific legal basis, *see* BVerfGE 108, 282 (306 et seq.).

[18] BVerfGE 120, 56 (73 et seq.); 125, 104 (121 et seq.); cf. S. Emmenegger, 'Die Stärkung des Parlaments in der neueren Rechtsprechung des Bundesverfassungsgerichts', in id. and A. Wiedmann (eds.), *Linien der Rechtsprechung des Bundesverfassungsgerichts* (de Gruyter 2011) p. 447 at p. 459 et seq.

[19] Representative action is, however, reserved to parliamentary groups or their representatives, *see* BVerfGE 1, 351 (359); more recently BVerfGE 123, 267 (338 et seq.); 124, 78 (107).

[20] The Court does not examine only whether the invoked (subjective) rights are violated, but reviews also the formal constitutionality of the challenged measures. It sometimes also reviews other aspects of (objective) constitutionality such as the legality of military deployments under German

strengthened the interrogatory powers of parliament. The government is no longer entitled to withhold information by referring to a 'sphere of exclusive executive competence' or by generally invoking confidentiality. If the government cannot present plausible and comprehensive arguments establishing confidentiality or if these arguments are outweighed by legitimate parliamentary interests, the information must be disclosed.[21]

*Foreign affairs*

Faced with the growing importance of international and European affairs, the Federal Constitutional Court has, in particular, strengthened the role of parliament. This may be illustrated, first, by the Court's jurisprudence regarding military deployments. Generally, it is the executive that dominates decisions taken within international organisations like NATO. Even new interpretations and evolutions of old treaties, for example NATO's post-Cold War 'New strategic concept' (which effectively opened the former defence alliance[22] for global military missions in support of international peace and security) were developed by the heads of states and government without the consent of parliaments. In this matter, the Court had to decide whether formal parliamentary ratification of the concept was necessary. It ruled that the ratification requirement did not apply only to formal but also to factual treaty amendments. It concluded, however, that the 'new strategic concept' – in adding crisis response operations to the existing tasks of self-defence – could still be based on a (progressive) understanding of the North Atlantic Treaty and did not amount to a material amendment.[23] This jurisprudence acknowledges that the executive possesses a broad margin of treaty re-interpretation and evolution.[24] At the same time, the opposition might challenge those re-interpretations and evolutions in Court by invoking the need for parliamentary ratification.

While the Court respected the executive's power to re-interpret and evolve treaties on the one hand, it also considerably strengthened the position of parlia-

constitutional law, cf. BVerfGE 90, 286 (344 et seq.); T. Barczak and C. Görisch, 'Das Organstreit verfahren als Objektives Rechtsschutzverfahren', *DVBl* (2011) p. 332 et seq.

[21] BVerfGE 124, 78 (114 et seq.); 124, 161 (188 et seq.); *see* Emmenegger, *supra* n. 18, p. 452 et seq.

[22] The North Atlantic Treaty refers only to military measures of self-defence in response to an 'armed attack', cf. Arts. 3, 5, and 6.

[23] BVerfGE 104, 151 (199 et seq.).

[24] According to one commentator, the ruling entails an 'explicit endorsement of a general doctrine of judicial (and parliamentary) restraint in foreign policy', cf. A. Paulus, 'Quo Vadis Democratic Control? The Afghanistan Decision of the Bundestag and the Decision of the Federal Constitutional Court in the NATO Strategic Concept Case', 3 *German Law Journal* (2002), n. 29, available at <www.germanlawjournal.com/index.php?pageID=11&artID=123>, visited 26 Jan. 2012.

ment on the other hand. It established a principle – lacking an explicit foundation in the Basic Law – that military operations require parliamentary assent.[25] One could say that the executive's ability to bring about a new, evolutionary, understanding of an old treaty on a military alliance is counterbalanced by the need for parliamentary approval for each military deployment.[26] What is more, the Court has also changed its view on the function of the parliament in the area of foreign affairs. It used to see foreign affairs as part of the exclusive domain of the executive and therefore held that parliamentary power to approve certain international treaties (Article 59.2.1 Basic Law) constituted a narrow exception to that rule.[27] In a more recent judgment, the Court spoke of the 'appropriate division of state power in the field of foreign affairs'. It explained that, in the system of mutual collective security, the parliament assumes fundamental responsibility for the treaty basis of the system and for the concrete deployment of armed forces, whereas the specific structure of alliance policy and concrete planning of deployments are both the responsibility of the Federal Government.[28] This conceptual change implies that foreign affairs are no longer the government's prerogative alone (notwithstanding the exceptional parliamentary power to ratify treaties), but that the executive and the legislative branch rather have to share powers, which might lead to an increased role for parliament in other areas of foreign affairs.

The Federal Constitutional Court has also affirmed the importance of parliament with regard to European law: parliament must adequately participate in any step of further European integration. This implies that treaty amendments and other forms of transfer of power to the European level have not only to be approved by parliament[29] but must also be sufficiently precise in scope and content – even though the Court acknowledges that treaties are negotiated between the member states and may therefore not be as precise as statutes under national law. This also means that EU organs must not implicitly modify the European treaties nor otherwise exceed the authorised 'programme of integration'.[30] Parliamentary 'responsibility for integration'[31] may also require parliamentary consent to specific decisions taken at the European level. According to the Court's Lisbon judgment, for ex-

[25] BVerfGE 90, 286 (381 et seq.).

[26] BVerfGE 121, 135 (158 et seq.).

[27] BVerfGE 1, 251 (369); 68, 1 (87 et seq.); 90, 286 (357); *see* H.-J. Cremer, 'Das Verhältnis von Gesetzgeber und Regierung im Bereich der auswärtigen Gewalt in der Rechtsprechung des Bundesverfassungsgerichts: eine kritische Bestandsaufnahme', in R. Geiger (ed.), *Neuere Probleme der parlamentarischen Legitimation im Bereich der auswärtigen Gewalt* (Nomos 2003) p. 11 et seq.

[28] BVerfGE 121, 135 (162); *see* H. Sauer, 'Das Verfassungsrecht der nationalen Sicherheit', in H. Rensen and S. Brink (eds.), *Linien der Rechtsprechung des Bundesverfassungsgerichts* (de Gruyter 2009) p. 585 at p. 612 et seq.

[29] Cf. Art. 23.1 Basic Law.

[30] BVerfGE 89, 155 (187 et seq.); 123, 267 (351 et seq.).

[31] BVerfGE 123, 267 (351).

ample, amendments of primary law in the simplified procedure (Article 48.6 TEU), and decisions applying the general bridging procedure (Article 48.7 TEU) or the flexibility clause (Article 352 TFEU), require parliamentary approval even though the parliament has already consented to the Lisbon Treaty providing for these options.[32]

In sum, the Court has never prevented further steps of international or European integration, while at the same time safeguarding adequate parliamentary participation at the national level.

*Trends of 'de-parliamentarisation' in the areas of privatisation and budgetary powers*

Given the Federal Court's overall commitment to the parliament, it is worth mentioning that, by contrast, it had little opportunity (or was less eager) to counterbalance 'de-parliamentarisation' in other areas of law such as privatisation or in relation to budgetary powers, which are of particular relevance to the present case.

'De-parliamentarisation' by way of privatisation comes in different guises. Parliaments lose important powers of control if public agencies are set up in private forms or if private actors are entrusted with fulfilling public duties.[33] Parliaments' legislative powers may equally decrease to the benefit of private actors and, possibly, the executive, if legislation is outsourced or if deals on legislation are struck between government and industry. There is little case-law by the Federal Constitutional Court on these issues. It has confirmed, for example, that assets of a privatised company such as Deutsche Bahn AG may be sold without parliamentary consent.[34] With regard to the legislative powers of parliament, the Court's general jurisprudence indicates some limits for privatisation. It can be argued that legislative outsourcing by statutory reference is constitutional only if parliament 'statically' refers to a given norm established by another (private) actor, but not, in general, if it 'dynamically' refers to norms that will be created or that can be amended over time.[35] Faced with the phenomenon of 'legislation deals' between government and domestic industry, for example on nuclear phase-out or carbon emissions, legal scholars have rightly pointed out that this technique of sidestepping parliament is highly questionable,[36] which is supported by the Court's case-

[32] BVerfGE 123, 267 (434 et seq.).

[33] C. Gusy, 'Privatisierung und parlamentarische Kontrolle', *ZRP* (1998) p. 265 et seq.

[34] BVerfG, decision of 22 Nov. 2011, 2 BvE 3/08, <www.bundesverfassungsgericht.de/entscheidungen/es20111122_2bve000308.html>, visited 26 Jan. 2012.

[35] BVerfGE 78, 32 (36); cf. Becker, *supra* n. 9, at p. 545 et seq.

[36] F. Schorkopf, 'Die "vereinbarte" Novellierung des Atomgesetzes', *NVwZ* (2000) p. 1111 at p. 1113 et seq.; M. Kloepfer and D. Bruch, 'Die Laufzeitverlängerung im Atomrecht zwischen Gesetz und Vertrag', *JZ* (2011) p. 377 at p. 381 et seq.; less critically Becker, *supra* n. 9, p. 290 et seq.

law affirming that the *Bundestag* plays the decisive role in law-making.[37] However, specific jurisprudence safeguarding parliamentary powers in this respect is still missing.

In the area of budget law, certain tendencies of 'de-parliamentarisation' have not been sanctioned by the Constitutional Court. Two examples may be given to illustrate this point. First, the Federal Budget does not comprise all public revenue and expenditure, because considerable parts are accounted for in separate budgets of distinct public or private legal entities. This form of 'escape' from budgetary restraints and parliamentary control is criticised by scholars.[38] In a recent decision, however, the Court has at least raised the question – in an *obiter dictum* – whether there are constitutional prerequisites for those separate budgets.[39] Secondly, the trend of an ever rising level of debt, which increases debt service and reduces parliamentary options, has not been stopped by constitutional provisions limiting borrowing. A constitutional ceiling stipulating that loans should not exceed investment unless required in order to prevent a disorder of the economic equilibrium[40] was interpreted by the Federal Constitutional Court in such a broad way that it effectively lost its limiting effect.[41] Thus, the risks for parliamentary autonomy posed by these developments do not seem to trouble the Constitutional Court in the same way as do the challenges of internationalisation.

## The Court's ruling in *Euro rescue package*

In *Euro rescue package*, the Constitutional Court affirmed its strong commitment to parliamentary powers in the overlapping areas of foreign affairs and budgetary law.

### *The right to vote gives individual access to constitutional review*

Procedurally, the applications for constitutional review – duly directed against the statutes authorising the Federal Ministry of Finance to give guarantees to Greece and guarantees for loans raised by the EFSF – needed to invoke the infringement of a fundamental right. The applicants relied on the right to vote (Article 38.1 Basic Law) and the right to property (Article 14 Basic Law). The latter complaint was held inadmissible since the applicants had not shown that the measures had

[37] *Supra* n. 18.

[38] Puhl, *supra* n. 11, at paras. 37 et seq.; J. Isensee, 'Budgetrecht des Parlaments zwischen Schein und Sein', *JZ* (2005) p. 971 at p. 979 et seq.

[39] *Supra* n. 34, at para. 29.

[40] Art. 115.1 Basic Law (former version).

[41] BVerfGE 119, 96 (137 et seq.); cf. the dissenting opinions of Justices Di Fabio and Mellinghoff at p. 155 et seq. and Justice Landau at p. 174 et seq.

an inflationary effect or impaired the purchasing power of the Euro.[42] The Court held, however, that the claim based on the right to vote was admissible. It thereby not only confirmed but even extended its previous jurisprudence on European integration.

Article 38.1.1 Basic Law simply states: 'Members of the German *Bundestag* shall be elected in general, direct, free, equal and secret elections.' Read in conjunction with the more general principle of democracy, the right to vote has become an effective tool with which to challenge steps towards further European integration. In its *Maastricht* and *Lisbon* judgments, the Federal Constitutional Court has developed a substantive understanding of this right. It comprises not only the right to elect the *Bundestag*, but also protection against a loss of substance of the *Bundestag's* powers, i.e., by transfer of powers to supranational institutions. According to the Court, the vote would lose its meaning if parliament did not dispose of sufficient powers.[43] As a consequence, transfers of power to Europe can be taken to the Federal Constitutional Court by any adult German citizen. This effectively makes possible constitutional scrutiny since the political actors regularly endorse those transfers by almost unanimous votes.

In *Euro rescue package*, the Court, while acknowledging that its jurisprudence has met with considerable criticism, reaffirmed this position.[44] It clarified that the right to vote, in principle, did not grant a right to have the lawfulness of parliamentary majority decisions reviewed. It argued, however, that the constitutional principle of democracy demanded an exception if a 'depletion' or a 'substantial loss' of the *Bundestag's* powers were at stake. This exceptional access to court based on the right to vote rests on two presumptions regarding democracy as enshrined in the Basic Law. First, democracy is ultimately rooted in human dignity[45] and therefore entails a citizen's subjective claim to democracy. Secondly, democracy is intrinsically tied to the state and must therefore not be undermined by transfer of powers to supranational or international organisations. To the extent that this principle is part of the un-amendable constitutional 'identity' (Art. 79.3 Basic Law), a citizen must have the right to challenge a relinquishment of parliamentary powers.[46]

In reaching this decision, the Constitutional Court extends this procedural exception: Article 38.1 of the Basic Law can also be invoked against guarantee authorisations under Article 115.1 Basic Law which implement international agreements if these authorisations may by their nature and scope lead to a massive

[42] BVerfG, NJW 2011, p. 2946 et seq., at § 112.
[43] BVerfGE 89, 155 (172); 123, 267 (330).
[44] §§ 100 et seq.
[45] This was first formulated in BVerfGE 123, 267 (341).
[46] § 101.

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encroachment upon budgetary autonomy. The qualification 'implement international agreements' is crucial: the Court did not pave the way for individual complaints directed against any measure affecting budgetary autonomy, but only for complaints directed against guarantee authorisations that are functional equivalents to parliamentary ratification of international and European agreements. In our context, the financial aid for Greece and the Euro rescue system had been agreed upon by the states of the Eurogroup and implemented by interstate agreements, by an EU regulation and by the creation of the EFSF under Luxembourg civil law.[47] None of these acts requires parliamentary consent in itself. Parliamentary consent by law is mandatory for the transfer of sovereign powers to the European Union, for the amendment of European treaties and for international treaties regulating the political relations of the Federal Republic or relating to subjects of federal legislation (Articles 23.1.2, 23.1.3, 59.2.1 Basic Law). However, preparatory agreements and acts of European secondary law do not require the consent of parliament. The same holds traditionally true for commercial and financial treaties which are deemed non-political.[48] Thus, it is argued that even the Framework Treaty on the EFSF needed not be approved by parliament.[49] This seems to have been implicitly accepted by the Federal Constitutional Court. Instead, the specific authorisation under Article 115.1 Basic Law, as interpreted by the Constitutional Court, guarantees parliamentary participation.

### *The* Bundestag*'s international budgetary responsibility*

In the merits, the Court lays down the specific constitutional requirements for the rescue measures in general and for authorisations under Article 115.1 Basic Law in particular. The reasoning begins with the right to vote as part of the constitutional 'identity' under Article 79.3 Basic Law. This right would be violated not only if the *Bundestag* no longer had the necessary means to fulfil state functions and to exercise its powers,[50] but also if parliament could no longer decide on the budget on its own responsibility – now or in the future.[51] Moreover, the right to vote might either impose absolute limits to European rescue measures and further steps of integration or it might require that certain conditions have to be met if those measures are taken. According to the *Lisbon* decision, the principle of democracy and the right to vote prohibit budgetary powers from being 'suprana-

[47] N. 42, §§ 4 et seq.

[48] Cf. M. Nettesheim in: T. Maunz and G. Dürig, *Grundgesetz* (C.H. Beck), Art. 59, at para. 99.

[49] D. Thym, 'Euro-Rettungsschirm: zwischen staatliche Rechtskonstruktion und verfassungsgerichtliche Kontrolle', *EuZW* (2011) p. 167 at p. 171.

[50] § 104.

[51] § 121.

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tionalised' 'to a considerable extent'.[52] The decision reaffirms this principle, but at the same time seems to leave ample room for intergovernmental and supranational measures, provided that the *Bundestag* participates in the decision-making.

The Court's respective reasoning is divided into two parts, the first ('C.I') establishing general and abstract standards of the *Bundestag's* international budgetary responsibility, the second ('C.II') applying those standards to the present case and concluding that they have been met. As a consequence of this structure (a usual pattern of the Court's jurisprudence), the first part tends to be open to different interpretations, whereas the Court must be more specific in the second part in assessing the constitutionality of the measure at stake. Thus, a separate reading of the first part might give the impression of a rather high threshold for international measures of financial aid; a reading of both parts, however, reveals that it is considerably lower.

In the relevant first part of *Euro rescue package*, the Court held it to be necessary 'that the budget legislature makes its decision on revenue and expenditure free of the imposition of the will of the bodies and of other member states of the European Union and that it remains the "master of its decisions' in a permanent way'. The Court continued that the *Bundestag*

> may not consent to an intergovernmental or supranational mechanism of guarantees and expenditures which is not subject to strict conditions and whose effects are not limited and which – once it has been set in motion – is removed from its control and influence.[53]

According to the Court, 'no permanent mechanisms may be created by international treaties which result in assuming liability for decisions freely taken by other states'. It follows:

> Every publicly financed large-scale measure of aid which the Federal Government takes, for reasons of solidarity, on the international or European Union level must be specifically approved by the *Bundestag*. Insofar as international agreements are entered into which, by reason of their magnitude, may be of structural significance for (parliamentary) budgetary powers, for example due to guarantees which, if honoured, may endanger budget autonomy, or due to the participation in respective financial safeguarding systems, not only every individual disposal requires the approval of the *Bundestag*; in addition it must be secured that adequate parliamentary influence will continue to exist on the manner in which the funds made available are dealt with.[54]

[52] BVerfGE 123, 267 (361).
[53] § 127, all translations are by the author.
[54] § 128.

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The second part of the merits, in which the Court judged the existing authorisations on the basis of the aforementioned framework, clarifies what those standards effectively entail. At first sight, one could think that the Court imposes absolute limits to international guarantees based on their magnitude. The Court made it clear, however, that it will exercise considerable judicial restraint with regard to the amount of the guarantees given and the potential dangers posed to the federal budget and the national economy if the guarantees were to be honoured. It did not establish a definite ceiling, for example in relation to the total of the annual federal budget (ca. EUR 320 billion in 2010); instead, it merely made the vague statement that an upper limit would only be exceeded if honouring the guarantees effectively terminated, not only restricted, budgetary autonomy for a considerable period of time. As a consequence, the existing guarantees, i.e., EUR 22.4 billion in favour of Greece and EUR 147.6 billion in favour of the EFSF, were not too high.[55]

Furthermore, the Court's general concern with parliamentary budgetary autonomy and its independence of the will of other states or of the EU could indicate, *prima facie*, that the *Bundestag* may not give any guarantees if either the way the financial crisis is handled or the way(s) in which the guarantees have to be honoured depends upon others – the Euro group or the beneficiary of financial aid. Some of the Court's broad wording in the first part further enhances this impression – the *Bundestag* must retain control over international guarantee mechanisms and their performance even after they have been set in motion[56] and must have sufficient parliamentary influence on the manner in which the funds made available are dealt with.[57] The Court's approval of the *Euro rescue package* and the financial aid in favour of Greece shows, however, that this is not the case. Instead, parliamentary independence and control demands, first, that parliamentary consent is required for large-scale measures of financial aid and, second, that establishing an international financial mechanism does not 'create or consolidate an automatism leading to a relinquishment of budget autonomy'.[58] Rather, parliament must also retain the power to approve large-scale measures of financial aid within the framework of this mechanism. The first condition did not pose a problem in the present case, since the *Bundestag* had approved the guarantees in favour of Greece and of the EFSF. With regard to the second requirement, the Court denied that the two respective statutes under Article 115.1 Basic Law created an uncontrollable automatism since they laid down the amount, the purpose and the general framework

[55] §§ 130 et seq., 134 et seq.
[56] § 127.
[57] § 128.
[58] § 136

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of the financial guarantees in a sufficiently precise manner.[59] However, the Court held the *Bundestag* to be entitled also to approve specific guarantees under the EFSF. At the European level, such a financial measure requires a unanimous decision by the Euro states. Under domestic law, the statute on the 'Euro rescue package' merely stipulated that the Federal Government, before giving a guarantee, would 'endeavour to reach an agreement with the budget committee'. As a consequence, the wording of the statute itself did not ensure parliamentary consent. The Court, however, reinterpreted the provision in the light of the constitutional requirements (a common method of statutory interpretation in the German legal system) which means that the government effectively has to obtain previous parliamentary consent.[60] As a consequence, the constitutional complaints were unfounded.[61]

*Assessment*

Two aspects of the judgment merit closer consideration. First, the Court has again safeguarded parliamentary powers in the area of foreign affairs. Only in this area, any German citizen may challenge a decision taken by a (usually overwhelming) parliamentary majority in order to uphold parliamentary powers. As in *Maastricht* and *Lisbon*, the Court established limits to, and conditions for, further steps of European integration which secure parliamentary influence, relying on the principles of sovereignty and democracy then[62] and on democracy and parliamentary autonomy now. As set out in *Lisbon* and in the rulings on military deployments, German participation in certain international actions – in applying the simplified amendment procedure, the general bridging procedure or the flexibility clause

[59] §§ 136 et seq.

[60] § 141.

[61] Note that two related questions of parliamentary participation have been brought before the Court. The first concerns the problem of whether parliamentary consent to financial aid given by the EFSF requires a decision by the *Bundestag* (620 members) or its budget committee (41 members) or whether it might be delegated to a smaller committee (currently counting 9 members) if the measure requires swift action and/or confidentiality. On 28 Feb. 2012 (2 BvE 8/11), the Court held the delegation to the smaller committee to be largely unconstitutional, affirming the principle of plenary decision in budgetary matters, cf. BVerfG, NJW 2012, p. 495 et seq.; for an English press release *see* <www.bundesverfassungsgericht.de/pressemitteilungen/bvg12-014en.html>, visited 30 March 2012. The second relates to the parliamentary right of information. Art. 23.2, Basic Law requires the Federal Government to keep the *Bundestag* and *Bundesrat* informed on European Union matters. It has been invoked based on the proposition that this also includes information about negotiations on further measures and reforms to the rescue of the Euro (still pending, 2 BvE 4/11).

[62] BVerfGE 123, 267, particularly at §§ 342 et seq., 346 seqq., 357 et seq.

under European law,[63] in military missions[64] or large-scale measures of international financial aid[65] – requires parliamentary consent. In sum, it appears that the Federal Constitutional Court is particularly troubled in regard to the risks and trends of 'de-parliamentarisation' at the international level, but less so over comparable domestic developments. The Court's drastic wording is revealing: the budget legislature should decide 'free of the imposition of the will' of EU bodies and of other EU member states, i.e., remain permanently the 'master of its decisions'.[66]

Secondly, the Court's approach is rather flexible. On the one hand, it establishes general standards which appear very high and which seem to be considerable obstacles to further steps towards European integration. On the other hand, those standards are flexible enough to allow for the these measures to be declared constitutional. This may be illustrated by several examples. Technically, the Court, in the constitutional complaint procedure, examines a possible violation of the right to vote only in so far as it belongs to the constitutional 'identity' protected by Article 79.3 Basic Law, not a violation of the right to vote in its entirety.[67] Thus, the Court does not have to apply the stricter standards of constitutionality, but only the standard of the 'eternity clause', i.e., those constitutional principles which are exempt from constitutional amendment. Furthermore, the Court shows judicial restraint when assessing the constitutionality of the authorisations, i.e., examining only 'manifest violations' of the budget autonomy with regard to the extent of the guarantee given and respecting a margin of appreciation in the parliament's assessment of the risk of guarantees being called upon.[68] Last but not least, the Court's wording itself permits flexibility: the *Bundestag* has to retain control of *fundamental* budgetary decisions in an intergovernmental system,[69] budgetary powers must not be 'supranationalised' to a *considerable* extent,[70] and only *large-scale* measures authorising aid require the consent of parliament.[71]

The Court's flexible approach reflects a general pattern of its jurisprudence. On the one hand, it is able to establish constitutional limits that are meant to rein in international developments that impair national parliamentary autonomy and democracy. On the other hand, it has never actually blocked international coop-

[63] *See* n. 32 *supra*.
[64] *See* n. 25 *supra*.
[65] § 128.
[66] § 127.
[67] §§ 101, 107, 120, 127.
[68] §§ 127, 130-132.
[69] § 124.
[70] § 126; BVerfGE 123, 267 (361).
[71] § 128.

eration or integration.[72] Revealing in this respect is the Court's claim to be – exceptionally– entitled to review whether European organs act *ultra vires*.[73] The case being considered illustrates again[74] that this power is unlikely to be applied even if the legality of the contested measure is very much in dispute. The Constitutional Court did not review the *ultra vires* claim of the applicants even though several commentators have plausibly argued that the Euro rescue measures contravened European Primary Law and that the EU lacked competence.[75] As a consequence, the Court's approach expresses openness towards international cooperation or integration while at the same time obliging parliament to fulfil its responsibility.

## Does parliament make a difference?

Is the Constitutional Court's commitment to parliamentary powers justified? In other words, does it make sense to strengthen parliament, particularly in the area of European and foreign affairs, even though it very often seems as if parliament more or less automatically approves the decisions taken by government?

The answer to this question depends on the role attributed to parliament in a democracy. According to the *traditional German model* as developed by the Federal Constitutional Court, all public authority must emanate from the people (Article 20.2 Basic Law), which assigns a pivotal role to parliament. Parliament, which is directly elected by the people and therefore enjoys the highest possible degree of democratic legitimacy, confers legitimacy upon the other bearers of public authority by electing the government and other officials (personal legitimacy) and by legislating and controlling the executive (material legitimacy).[76] Thus, parliamentary consent to measures decided at European or international level guarantees legitimacy in itself.

Other concepts of democracy paint a slightly different picture of parliament's role. *Competitive* models of democracy, for example, tend to focus on power, i.e.,

[72] For a similar assessment *see* the case comment by D. Thym, *JZ* (2011) p. 1011 at p. 1014 et seq.

[73] BVerfGE 89, 155 (123); 267, 123 (353 et seq.); 126, 286 (302 et seq.).

[74] In BVerfGE 126, 286, the Court had already found that a much contested ruling of the ECJ was not *ultra vires*.

[75] On possible violations of Arts. 123, 124 and 125 TFEU and a lack of competence under Art. 122.2 TFEU, *see* S. Korioth, 'Das Rechtsregime für die Unterstützung notleidender Staaten des Euro-Raums', in: E. Pache and K. A. Schwarz (eds.), *Grundlagen, aktuelle Entwicklungen und Perspektiven der Europäischen Währungsunion*, forthcoming; M. Ruffert, 'The European Debt Crisis and European Union Law', 48 *CMLR* (2011) p. 1777 at p. 1785 et seq.; cf., also idem., case comment, *EuR* (2011) p. 842 at p. 847.

[76] E.-W. Böckenförde, 'Demokratie als Verfassungsprinzip', in J. Isensee and P. Kirchhof (eds.), *Handbuch des Staatsrechts*, Vol. 2, (C.F. Müller 2004) § 24, at para. 35 et seq.

governments, and on the antagonistic struggle for power between government and opposition.[77] As a consequence, the elective function of parliament by which it brings government into power is highlighted: parliamentary decision-making is seen as a vote of confidence 'by which parliament accepts or refuses to accept the Prime Minister's leadership'.[78] A broader understanding of parliamentary decision-making in this concept of democracy could imply that the antagonism between government and opposition particularly unfolds in parliament. Thus, parliament is the place where the opposition criticises the decision advanced by government and where it can present alternatives (which is illustrative of parliament's communicative function). *Deliberative* concepts of democracy focus on the modalities of decision-making. They rest on the assumption that democratic decision-making needs deliberation, i.e., the free exchange of arguments as opposed to strategic negotiation, which improves a decision's quality and persuasiveness.[79] Many of their proponents advocate new *fora* of deliberation such as deliberative polls or citizen juries,[80] but the idea of deliberation can also be applied to an existing institution like parliament. In this view, parliament's role in decision-making is to enable deliberation to take place.

It seems wise to combine these concepts: On the one hand, the democratic legitimacy of a political decision flows from its author. One should therefore argue that all fundamental political decisions in a parliamentary democracy need to be taken by parliament which, by direct election, enjoys the highest degree of democratic legitimation. This leaves enough room to acknowledge the leading role of government in agenda-setting and policy-shaping,[81] as long as the fundamental decisions are accounted for by parliament. On the other hand, democratic legitimacy also flows from procedure. Thus, parliamentary decisions should be reached after the presentation of alternatives and the free deliberation of arguments. Of course, these procedural requirements need to be realistic. One has to take into account, in particular, that parliamentary work will inevitably be shaped and structured by party politics and the trend of specialisation[82] i.e., that parliamen-

[77] J.A. Schumpeter, *Capitalism, Socialism and Democracy* (1942; Harper 2008) p. 269 et seq.; A. Lijphart, *Patterns of Democracy* (Yale University Press 1999) p. 9 et seq.; I. Shapiro, *The State of Democratic Theory* (Princeton University Press 2003) p. 50 et seq.

[78] Schumpeter, *supra* n. 77, p. 279 et seq.

[79] J. Cohen, 'Deliberation and Democratic Legitimacy', in A. Hamlin and P. Pettit (eds.), *The Good Polity* (Blackwell 1989) p. 17 et seq.; J.H. Habermas, *Faktizität und Geltung* (Suhrkamp 1992) p. 370 et seq.

[80] D. Held, *Models of Democracy* (Stanford University Press 2006) p. 246 et seq.

[81] Including lawmaking, cf. A. von Bogdandy, *Gubernative Rechtsetzung* (Mohr-Siebeck 2000) p. 55 et seq.

[82] On this point Morlok, *supra* n. 8, p. 64 et seq.

tary debate is prepared and complemented by debates within the parties and specialised bodies.

Against this background, one might ask whether the Federal Constitutional Court's repeated attempts to strengthen parliament will effectively be taken up by the latter. Parliamentary decisions like the *Bundestag*'s financial authorisations in the present case might raise suspicion.

At least from an outsider's perspective, it sometimes seems as if parliament merely rubber-stamped the proposals made by the government within weeks or even days. However, the idea that government has to seek parliamentary approval of fundamental decisions because of the higher democratic legitimacy of parliament presupposes that the latter shows a certain degree of independence from the former, i.e., that it reaches a decision of its own after adequately assessing and discussing different options.

Is it possible that parliament remains the heartbeat of democracy instead of becoming its fig leaf – even in the difficult area of foreign affairs which is particularly dominated by the executive and by external constraints? From a normative point of view, this article has demonstrated that the Federal Constitutional Court ensures that parliament has the last word in fundamental questions. From an empirical point of view, research by legal scholars and political scientists on different parliamentary systems affirms the importance of parliamentary decision-making. Two examples illustrate this point. An empirical review of the quality of parliamentary debates concluded that 'classic and Habermasian-inspired deliberation can flourish within parliaments'.[83] Other studies demonstrate considerable parliamentary influence on and control of government activities. This holds true not only for legislation, parliament's core competence,[84] but also for foreign affairs, formerly part of the exclusive powers of government.[85] The studies reveal that parliaments and their members rely not only on formal powers but also on informal mechanisms to influence and control government policies. In this respect in particular, it appears that specific parliamentary powers to authorise military de-

[83] A. Tschentscher et al., 'Deliberation in parliament. Research Objectives and Preliminary Results of the Bern Center for Interdisciplinary Deliberation Studies (BID)', 4 *Legisprudence*(2010) p. 13 et seq. at p. 30; *see also* H. Agné, 'Answering Questions in parliament During Budget Debates: Deliberative Reciprocity and Globalisation in Western Europe', 64 *Parliamentary Affairs* (2010) p. 153 et seq.

[84] K. Blidook, 'Exploring the Role of 'Legislators' in Canada: Do Members of parliament Influence Policy?',16 *The Journal of Legislative Studies* (2010) p. 32 et seq.; S. Kalitowski, 'Rubber Stamp or Cockpit? The Impact of parliament on Government Legislation'. 61 *Parliamentary Affairs* (2008) p. 694 et seq.

[85] M. Olbrecht, *Niedergang der Parlamente? Transnationale Politik im Deutschen Bundestag und der Assemblée nationale* (Ergon 2006); T. Jäger et al., 'The Salience of Foreign Affairs Issues in the German *Bundestag*' 62 *Parliamentary Affairs* (2009) p. 418 et seq.; R. Lüddecke, *Parlamentarisierung der nationalen Außenpolitik* (Nomos 2010).

ployments are very significant as opposed to the general prerogative of treaty ratification.[86] One can expect that the specific parliamentary powers established in the Federal Constitutional Court's ruling on the 'Euro rescue package', i.e., the powers to authorise large-scale measures of international financial aid, will become similarly important in practice. Thus, the Court's commitment to parliament effectively strengthens parliamentary powers. It is up to parliament to use them.

[86] Lüddecke, *supra,* n. 85, p. 338.

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