



**Dissenting opinion of Judges König, Langenfeld and Maidowski on the decision of the
Second Senate of 13 February 2020**

- 2 BvR 739/17 -

- 1 We are not able to agree with the Senate's assumption that the "claim to democracy" in Article 38 (1) sentence 1, Article 20 (1) and 20 (2) in conjunction with Article 79 (3) of the Basic Law gives rise to a right to compliance with the formal requirements for the transfer of sovereign rights (so-called formal transfer control) provided for in Article 20 (1) and 20 (2) in conjunction with Article 79 (3) of the Basic Law, on which right a constitutional complaint can be based.
- 2 The question of how the participation of the Federal Republic of Germany in the development of the European Union, legitimised by Article 23 of the Basic Law, can be realised within the framework of constitutionally guaranteed discretion and without encroaching on the identity of the constitution protected by Article 79 (3) of the Basic Law, has occupied the case-law of the Federal Constitutional Court intensively and for a long time. This case-law is based on the - correct – realisation that the transfer of sovereign rights in particular entails risks: On the one hand, the transfer of sovereign rights necessarily entails structural changes in the domestic constitutional area, which find their basis in the constitutional mandate to help shape European integration and must therefore be accepted. On the other hand, the constitution has established safeguards against the abandonment of constitutional elements which constitute the identity of the constitutional order and which are therefore not available for disposition, neither through domestic constitutional amendment nor as a consequence of integration into European or international structures. The reservations of identity control and ultra vires control developed by the Senate's judicature have the task of giving these safeguards practical effectiveness.
- 3 A central question in the realisation of effective monitoring of compliance with constitutional limits in the fulfilment of the constitutional mandate to play a constructive role in European integration is by whom proceedings can be initiated before the Federal Constitutional Court with the aim of having examined whether the constitutional bodies have fulfilled their responsibility for integration or whether they have exceeded the limits set for the integration process. Irrespective of organ dispute proceedings and constitutional complaints by persons



whose fundamental rights may be specifically affected by sovereign acts that are ultra vires or have been issued in an identity-breaking manner, any person entitled to vote may bring a constitutional complaint based on Article 38 (1) sentence 1 of the Basic Law before the Federal Constitutional Court on account of a violation of the "right to democracy". All voters thus have an equal fundamental right to protection against the deprivation of the power of the German state that they democratically legitimise. This protection applies equally to the transfer of sovereign power and to the defence against measures taken by institutions, bodies, offices and agencies of the European Union which are ultra vires in the sense of the Senate's case law. Article 38 (1) of the Basic Law thus includes a claim to the exercise of responsibility for integration by the constitutional bodies responsible for this. According to its scope of protection and reason for its validity, the provision aims - exclusively - at the realisation of democratic rights of participation, but not at a comprehensive review of the legality of democratic majority decisions; it does not serve the purpose of monitoring the content of democratic processes, but is aimed at making them possible (see BVerfGE 129, 124 <168>; 134, 366 <396 et seq. marginal 52>; 142, 123 <190 marginal 126>).

- 4 The novel formal control of transmission based on Article 38 (1) sentence 1 of the Basic Law differs in principle from the reservations of control in the form of identity control and ultra vires control (I.) derived in the previous case-law of the Federal Constitutional Court from the "claim to democracy" to secure the democratic influence of those entitled to vote in the process of European integration. The extension of the right under Article 38 (1) sentence 1 of the Basic Law on which the formal control of transmission is based fails to recognise its substance and limits. There is no room for a violation of the substance of the right to vote, understood as the core of the principle of democracy rooted in human dignity, in a case involving the failure to comply with the formal requirements of the law of consent (II.). As is shown in the present case, the formal control of transfer could, contrary to the intentions of the Senate, ultimately lead to the political process in the context of European integration not being made possible and secured, but rather narrowed and hindered (III.). The constitutional complaint that is the subject of the dispute was therefore to be dismissed as inadmissible in its entirety for lack of the complainant's right to complain.



I.

- 5 1. In its judgment on the Banking Union, the Senate summarised the content of the 'right to democracy' under Article 38 (1) sentence 1 of the Basic Law (BVerfG, judgment of the Second Senate of 30 July 2019 - 2 BvR 1685/14, 2 BvR 2631/14 -, paras 91-94):

Article 38 (1) sentence 1 of the Basic Law guarantees citizens political self-determination and guarantees them free and equal participation in the legitimation of the state authority exercised in Germany (see BVerfGE 123, 267 <340>; 132, 195 <238 marginal no. 104>; 135, 317 <399 marginal no. 159>; 142, 123 <190 marginal no. 126>; 146, 216 <249 f. marginal 46>). This right, which is equal to fundamental rights, is not exhausted in a formal legitimation of (federal) state power, but also gives the individual a claim to be able to influence the formation of political will and to be able to achieve something with his or her election decision. Within the scope of application of Article 23 of the Basic Law, it protects citizens from the fact that the legitimation of state power brought about by the election and the influence on its exercise is emptied by the transfer of tasks and powers of the German Bundestag to the European Union in such a way that the principle of democracy is violated (see BVerfGE 89, 155 <172>; 123, 267 <330>; 134, 366 <396 marginal no. 51>; 142, 123 <173 et seq. marginal 81>; 146, 216 <249 marginal 45>).

Article 38 (1) sentence 1 of the Basic Law in the manner prescribed by Article 20 (1) and (2) in conjunction with Article 79 (1) of the Basic Law. 3 of the Basic Law provides citizens with protection not only from a substantial erosion of the power of the German Bundestag's political power, but also gives them the right to have organs, institutions and other bodies of the European Union exercise only those competences that have been transferred to them in accordance with Article 23 of the Basic Law (see BVerfGE 142, 123 <173 marginal no. 80 et seq.) This right is violated if the limits of Article 79 (3) of the Basic Law are not observed in the transfer of sovereign rights or in the implementation of the integration programme (cf. BVerfGE 123, 267 <353>; 126, 286 <302>; 133, 277 <316>; 134, 366 <382 marginal no. 22, 384 et seq. marginal no. 27 et seq.>; 140, 317 <336 et seq. marginals 40 et seq.; 142, 123 <203 marginals 153>; 146, 216 <253 marginals 54>), or institutions, bodies, offices and agencies of the European Union (within the limits of Art. 79 (3) of the Basic Law) take measures that are not covered by the integration programme (cf. BVerfGE 75, 223 <235, 242>; 89, 155 <188>; 123, 267



<353>; 126, 286 <302 et seq. marginal 23 et seq.; 142, 123 <203 marginal 153>; 146, 216 <252 et seq. marginals 52 et seq.) Article 38 (1) sentence 1 of the Basic Law thus conveys a "claim to democracy" insofar as democratic principles are affected by a process, which Article 79 (3) of the Basic Law withdraws from the legislature's competence to amend the constitution, and in relation to obvious and structurally significant transgressions of competences by the European bodies (see BVerfGE 89, 155 <171>; 129, 124 <168>; 134, 366 <396 marginal note 51>; 135, 317 <386 marginal note 125>; 142, 123 <219 marginal note 185>).

Nor may the legislator authorise the Federal Government to approve an ultra vires act by institutions, bodies, offices and agencies of the European Union. Otherwise, the democratic decision-making process guaranteed by Article 23 (1) in conjunction with Article 20 (1) and 20 (2) in conjunction with Article 79 (3) of the Basic Law would be undermined. Parliament is obliged to decide in a formal procedure on the transfer of competences within the framework of European integration, so that the principle of limited individual empowerment is maintained (cf. BVerfGE 134, 366 <395 marginal no. 48>). Article 38 (1) sentence 1 of the Basic Law has not only a substantive but also a procedural component in relation to obvious and structurally significant transgressions of competences by the European institutions. In order to secure his or her democratic influence in the process of European integration, the citizen with the right to vote has the right that a transfer of sovereign rights only takes place in the forms provided for this purpose in Article 23 (1) sentence 2 and sentence 3, Article 79 (2) of the Basic Law (cf. BVerfGE 134, 366 <397 marginal no. 53>).

Furthermore, the constitutional bodies, on account of the responsibility for integration incumbent upon them, have an obligation to counter measures by organs, bodies, offices and agencies of the European Union that cause identity violations, as well as ultra vires acts, even if they do not concern the area resistant to integration pursuant to Article 23 (1) sentence 3 in conjunction with Article 79 (3) of the Basic Law (cf. BVerfGE 142, 123 <20 et seq.) The Federal Government and the Bundestag must monitor compliance with the integration programme and, in the case of obvious and structurally significant transgressions of competences by organs of the European Union, must refrain from participation and implementation actions and must actively work towards compliance



with the integration programme (cf. BVerfGE 134, 366 <395 marginal no. 49>; 142, 123 <209 et seq. marginal no. 167>).

- 6 2. The formal complaint of transfer now permitted by the Senate goes beyond the Senate's previous statements on Article 38 (1) sentence 1 of the Basic Law and is in addition to the complaint of identity and the ultra vires complaint. These complaints therefore remain unaffected. The novelty of the formal complaint of transfer lies in the fact that it also covers the failure to comply with the formal requirements for an effective transfer of sovereign rights to the European Union and to such intergovernmental bodies that are in a complementary or other special relationship to the integration programme of the European Union by an act of transfer adopted by the Bundestag and Bundesrat in accordance with Article 23 (1) of the Basic Law. An act of approval of an international treaty that was passed in violation of Article 23 (1) in conjunction with Article 79 (2) of the Basic Law cannot legitimise the exercise of official authority by the institutions, bodies, offices and other agencies of the European Union or by an intergovernmental institution that has a complementary or other special relationship with it and - according to the Senate - violates the citizens' fundamental rights under Article 38 (1) sentence 1, Article 20 (1) and 20 (2) in conjunction with Article 79 (3) of the Basic Law. Subsequently, the constitutional complaint based on Article 38 (1) sentence 1 of the Basic Law supposedly allows a complaint against, in the case of Article 23 (1) sentence 2 of the Basic Law, the absence of a federal law requiring consent and, in the case of Article 23 (1) sentence 3 of the Basic Law, the absence of the qualified majority pursuant to Article 79 (2) of the Basic Law (see marginal no. 98 of the decision). Since the Senate refers to the invalidity of the transfer act and thus the transfer of sovereignty, this must also apply to any other formal defect in the legislative procedure to the extent that this defect leads to the invalidity of the transfer act.
- 7 3. a) The formal control of transfer leads to a further subjectivisation of objective constitutional law, namely the formal requirements for a transfer of sovereign rights under Article 23 (1) of the Basic Law. Up to now, the "right to democracy" enshrined in Article 38 (1) sentence 1 of the Basic Law has given voters the opportunity to have compliance with the principles of the principle of democracy pursuant to Article 79 (3) of the Basic Law checked by means of a constitutional complaint without any further specific fundamental rights being affected. According to settled case-law, this is also already possible on a preventive basis, i.e. before the transfer or approval statute comes into force, if the legislative procedure has been



completed except for the signing by the Federal President and the promulgation (see only BVerfGE 123, 267 <329>; 132, 195 <234 et seq. marginal 92>; 134, 366 <391 f. marginal 34>; 142, 123 <177 marginal 91>). Such constellations were the basis for the judgments on the Treaties of Maastricht and Lisbon (BVerfGE 89, 155 <171>; 123, 267 <329>) and on the Treaty of 2 February 2012 establishing the European Stability Mechanism (hereinafter: ESM Treaty; BVerfGE 135, 317 <384 et seq para 122>). According to previous case-law, however, only those losses of competence of the German Bundestag that threaten to expose the essential content of the principle of sovereignty of the people and thus affect the right to vote in its substance can be reprimanded. Specifically, the proceedings on the Maastricht Treaty and the Lisbon Treaty were primarily concerned with the question of whether the planned transfer of sovereignty threatens to deprive the Bundestag of its competences, either because of the abundance and/or the weightiness of the transferred competences or because of possible blanket authorisations anchored in Union law which allow an uncontrolled further development of the integration programme contrary to the principle of limited individual authorisation. A further variant of the deprivation complaint was dealt with in the judgments on the ESM Treaty. Here, the complaint was that the German Bundestag's approval of the establishment of the European Stability Mechanism and the corresponding accompanying legislation exceeded the limits of Article 79 (3) of the Basic Law by impairing the overall budgetary responsibility of the German Bundestag.

- 8 b) The starting point for a subjective right to safeguarding the principles of democracy as a component of constitutional identity is the right to vote in Article 38 (1) sentence 1 of the Basic Law, to which material substance was attributed for the first time in the judgment on the Maastricht Treaty (cf. BVerfGE 89, 155 <171 f.>). The precondition for the admissibility of the constitutional complaints was and is therefore - also and particularly with regard to complaints that relate to the impairment of other principles of state structure, such as the principle of the rule of law or the principle of the welfare state - logically the demonstration of the necessary connection to the principle of democracy that can be directly objected to by way of Article 38 (1) sentence 1 of the Basic Law. This necessary reference to the democratic shaping possibilities of the legislature becomes particularly clear in the Lisbon judgment when it is explained there (BVerfGE 123, 267 <332 f.>):

Insofar as the complainants (...) on the basis of Article 38 (1) sentence 1 of the Basic Law complain of the violation of other principles of state structure, the constitutional



complaints are only admissible with regard to the alleged violation of the principle of the welfare state.

The complainants (...) establish the necessary connection with the principle of democracy, which is directly objectionable under Article 38 (1) sentence 1 of the Basic Law, by stating in sufficient detail that the democratic possibilities of the German Bundestag in the field of social policy would be restricted by the competences of the European Union under the Treaty of Lisbon in such a way that the German Bundestag could no longer fulfil the requirements of the principle of the welfare state resulting from Article 23 (1) sentence 3 in conjunction with Article 79 (3) of the Basic Law.

In so far as the complainants (...) allege infringement of the principle of the rule of law and the principle of the separation of powers, they do not show a comparable connection. The constitutional complaints are inadmissible in this respect.

9 c) In the case at hand, the judgments on the Maastricht and Lisbon Treaties as well as on the European Stability Mechanism dealt with the compatibility of the respective approval laws with the substantive core content of the right to vote, as protected by Article 38 (1) sentence 1 in conjunction with Article 1 (1) and Article 79 (3) of the Basic Law. The subject of the constitutional review of the approval laws was in particular the question of whether the transfer of sovereign rights to the European Union brought about by these laws or the restriction of the budgetary sovereignty of the parliament associated with the ESM Treaty lead to a depletion of the tasks and powers of the Bundestag and thus to a violation of the *core of the democratic principle*, which is absolutely protected in Article 79 (3) of the Basic Law. Such depletion, which can occur in various constellations, should be allowed to be countered by those entitled to vote by lodging a constitutional complaint, citing the "claim to democracy" rooted in Article 38 (1) sentence 1 of the Basic Law (see BVerfGE 129, 124 <169 et seq.) This is examined by the Federal Constitutional Court in the context of the identity check (see marginal no. 96, 136 of the decision).

10 4. a) The protection against the loss of autonomous democratic power to shape public policy is also the central content of the ultra vires complaint based on Article 38 (1) sentence 1 of the Basic Law, which is about protecting those entitled to vote from exercising sovereign powers that they cannot legitimise or influence (see BVerfGE 142, 123 <189 marginal no. 123; 194



marginal no. 135>). Notice of identity and ultra vires have in this respect the same constitutional root, namely the "right to democracy" enshrined in Article 38 (1) sentence 1, Article 20 (1) and 20 (2) in conjunction with Article 79 (3) of the Basic Law (cf. BVerfG, Judgment of the Second Senate of 30 July 2019 - 2 BvR 1685/14, 2 BvR 2631/14 -, marginal no. 205). However, ultra vires control on the one hand and identity control on the other hand are based on a different examination approach in each case. Thus, the subject of ultra vires control is whether the actions of the institutions, bodies, offices and agencies of the European Union and of the intergovernmental bodies which have a complementary or other special relationship to the European Union differ from the actions of the institutions, bodies, offices and agencies of the European Union and of the intergovernmental bodies which have a complementary or other special relationship to the European Union and which are subject to a special relationship to the European Union. 23 (1) of the Basic Law or whether the measures break out of the framework set by the parliamentary legislature (see BVerfGE 89, 155 <188>; 123, 267 <353>; 126, 286 <302 et seq. marginal 23 ff.>; 142, 123 <198 ff. marginal no. 143 et seq.>), while the identity check does not concern compliance with the scope of the delegated competence, but rather the "absolute limit" of Article 79 (3) of the Basic Law (cf. BVerfGE 123, 267 <343, 348>; 134, 366 <386 marginal 29>; 142, 123 <203 marginal 153>; BVerfG, judgment of the Second Senate of 30 July 2019 - 2 BvR 1685/14, 2 BvR 2631/14 -, marginal 204). The persons entitled to vote should be able to defend themselves with the constitutional complaint based on Article 38 (1) sentence 1 of the Basic Law against an arbitrary use of sovereign power by supranational bodies.

- 11 b) So far, the procedural component of ultra vires control, which the Senate has repeatedly emphasised, has stood alone in this context (see BVerfGE 134, 366 <397 marginal no. 53>; 142, 123 <174 marginal 82; 193 marginal 134>; 146, 216 <251 marginal 50>; BVerfG, judgment of the Second Senate of 30 July 2019 - 2 BvR 1685/14, 2 BvR 2631/14 -, marginal 93). According to this judgment, citizens with the right to vote, in order to secure their democratic influence in the process of European integration, have, under Article 38 (1) sentence 1 of the Basic Law, "in principle a right that a transfer of sovereign rights only takes place in the forms provided for this purpose in Article 23 (1) sentences 2 and 3, Article 79 (2) of the Basic Law. The democratic decision-making process that these provisions guarantee, in addition to the required certainty of the transfer of sovereign rights (...), is undermined in the case of an arbitrary assumption of competences by organs and other bodies of the European



Union" (BVerfGE 134, 366 <397 marginal no. 53>). According to this, an "unauthorised assumption of competences" refers to constellations in which institutions, bodies, offices or other bodies of the European Union, in their actions, clearly and structurally exceed the competences conferred on them by the Approval Act and thus move away from the principle of limited individual authorisation. By contrast, this does not include constellations in which the German Act of Consent under Article 23 (1) of the Basic Law is null and void for formal reasons, for example because the required two-thirds majority is not achieved, and a transfer of sovereign rights would thus be ineffective. The Senate now also speaks in this respect of ultra vires acts (see marginal nos. 97, 99 and 133 of the resolution), which must be prevented as a precaution.

- 12 5. In the judgment on the European Stability Mechanism, the Senate made it clear in unequivocal terms that "Article 79 (2) of the Basic Law - also in conjunction with Article 23 (1) sentence 3 of the Basic Law - is a rule of objective constitutional law that concerns the decision-making process within the Bundestag and the Bundesrat. It does not confer any rights on those entitled to vote (...) - apart from the cases of an ultra vires constellation (cf. BVerfGE 134, 366 <383 et seq. marginal 25>) - because the scope of the decision-making powers of the Bundestag, and hence the substance of the right to vote, does not depend on the majority with which the Bundestag passes its resolutions" (BVerfGE 135, 317 <386 et seq. marginal 129>). Both the reference to the OMT proposal resolution in Volume 134, which concerned an ultra vires constellation in the sense of an obvious and structurally significant transgression of competences, and the justification for the necessity of ultra vires control, namely the verification of compliance with the limits of competences that have already been effectively transferred (cf. e.g. BVerfGE 142, 123 <198 marginal no. 143>), speak for the fact that the reservation does not refer to a constellation such as that in dispute here. The Senate, on the other hand, sees itself - with reference to the express reservation for ultra vires constellations (BVerfGE 135, 317 <387 et seq. marginal 129>) - in continuity with previous case-law in cases of the transfer of sovereign rights (cf. marginal 99 of the resolution). For other threats to constitutional identity, such as those on which the judgments on the European Stability Mechanism were based and which can also be challenged under Article 38 (1) sentence 1 of the Basic Law, it would then remain the case, however, that the formal challenge of transfer is not admissible, since Article 79 (2) in conjunction with Article 23 (1) sentence 3 of the Basic Law is a rule of objective constitutional law which does not affect the substance of the right to vote. In our opinion, the



Senate's argument in favour of a (further) extension of the right of complain under Article 38 (1) sentence 1 of the Basic Law departs from the clear statement in the judgment on the European Stability Mechanism (BVerfGE 135, 317) on the ability to complain about the lack of a two-thirds majority, but the better reasons speak for retaining it.

II.

- 13 1. a) The extension of the right to democratic self-determination from Article 38 (1) sentence 1 of the Basic Law on which the formal control of transfer is based fails to recognise its material substance and thus goes beyond the immanent limits of the provision. For this right is also supposed to be affected in constellations in which the German Bundestag is concerned precisely with the creation of democratic legitimation for a transfer of sovereign rights by law that is permissible in principle, i.e. where the German Bundestag has exercised the responsibility for integration incumbent on it within the framework of a democratic process - albeit possibly formally incorrectly. With the extension by the Senate of the "claim to democracy" to compliance with the formal prerequisites for the validity of a transfer of sovereign rights, this claim loses its specific material substance directed towards the preservation of democratic self-determination, as protected by identity and ultra vires controls. For a "claim to democracy" "is conveyed by Article 38 (1) sentence 1 of the Basic Law beyond ultra vires constellations (...) only insofar as democratic principles are affected by a process which Article 79 (3) of the Basic Law also deprives the legislature amending the constitution of its power (...)" (BVerfGE 135, 317 <386 marginal no. 125>). Failure to comply with the requirement of constitution-altering majorities or other formal prerequisites in the transfer of sovereign rights does not fall within the ultra vires constellations that have been recognised to date, nor are the basic principles of the principle of democracy that are resistant to amendment in Article 79 (3) of the Basic Law affected by this. As a result, the admission of the formal complaint of transfer of sovereignty leads to the fact that the scope of protection of Article 38 (1) sentence 1 of the Basic Law completely loses its contours in the context of European integration.
- 14 b) This is not changed by the fact that the Senate now assumes that the substance of Article 38 (1) sentence 1 of the Basic Law, which is protected by Article 79 (3) of the Basic Law, is always affected by the transfer of sovereign rights (see marginal no. 97 of the resolution) and concludes from this that their formal effectiveness must be subject to the constitutional review



programme based on Article 38 (1) sentence 1 of the Basic Law. In our opinion, the right to vote is not affected in the case of every transfer of sovereign rights in its material substance protected by Article 79 (3) of the Basic Law - the principles of the principle of democracy that cannot be changed - to which the Senate also expressly refers when establishing a violation (see marginal no. 134, 138 of the decision). For the substance of the right to vote protected by Article 79 (3) of the Basic Law is concerned with preserving for the German Bundestag sufficient democratic room for manoeuvre which, according to previous case-law, is threatened either by depriving the Bundestag of its duties and powers because of excessively far-reaching transfers of sovereign powers, by blanket authorisations, by creating liabilities that make it impossible for the Bundestag to exercise overall responsibility for the budget, or by ultra vires acts. In all these cases - unlike in the case of a failure to meet the formal requirements of a law on the transfer or approval of sovereign powers under Article 23 (1) sentence 2 and sentence 3 of the Basic Law - there is a danger that the democratic process will be undermined or undermined and that those entitled to vote will be exposed to a sovereign power that does not legitimise them and over which they cannot exercise influence in freedom and equality (see BVerfGE 142, 123 <194 marginal no. 135>).

- 15 c) Moreover, the non-observance of democratic rules of procedure and majority rules - and the isolated assertion of these rules in the context of the formal complaint of transfer - in the course of parliamentary participation cannot affect the substance of electoral law, if only because the "claim to democracy" cannot in principle be turned against the democratic process as such. Otherwise, the right under Article 38 (1) sentence 1 of the Basic Law would be transformed into a right of every electoral citizen to a general review of the legality of democratic majority decisions that goes beyond the safeguarding of democratic processes. The danger that Article 38 (1) sentence 1 of the Basic Law might open the door to a general right to enforcement of laws for every person with the right to vote has already been pointed out elsewhere (see BVerfGE 134, 366, 430 <432 marginal no. 138>, Special Vote of Judge Gerhardt, with reference to the admission of ultra vires review based on the assertion of a violation of Article 38 (1) of the Basic Law). With the renewed extension of the possibility to complain to the disregard of formal requirements for the transmission or approval law by means of Article 38 (1) sentence 1 of the Basic Law, the Senate has once again opened this door further. However, the claim to a general review of the legality of laws that thus arises in practice cannot be derived from Article 38 (1) sentence 1 of the Basic Law for the simple reason that this provision - as



the Senate has repeatedly stated - serves solely to make democratic processes possible, but not to review the content (see BVerfGE 129, 124 <168>; 134, 366 <396 et seq. marginal 52>; 142, 123 <190 marginal 126>; 146, 216 <249 f. marginal 46>; BVerfG, judgment of the Second Senate of 30 July 2019 - 2 BvR 1685/14, 2 BvR 2631/14 -, marginal 118). As a fundamental right to participate in the democratic self-rule of the people, Article 38 (1) of the Basic Law therefore in principle does not confer any power of appeal against parliamentary decisions, in particular legislative decisions (see BVerfGE 1685/14, 2 BvR 1685/14; BVerfG, judgment of the Second Senate of 30 July 2019 - 2 BvR 2631/14 -, marginal no. 118). BVerfGE 129, 124 <168>; 142, 123 <190 marginal no. 126>; 146, 216 <250 marginal no. 46>; BVerfG, judgment of the Second Senate of 30 July 2019 - 2 BvR 1685/14, 2 BvR 2631/14 -, marginal no. 118). This must also apply - beyond the protection of the principles of the democratic principle enshrined in Article 79 (3) of the Basic Law - to laws on the transfer or approval of laws within the framework of the European integration process.

16 d) The necessary reference to the core of the principle of democracy and thus to the "claim to democracy" from Article 38 (1) sentence 1 of the Basic Law cannot be established either by stating that no electoral citizen may be subjected to supranational sovereignty based on a formally unconstitutional and thus ineffective act of transfer. This, however, is a core argument of the Senate for the formal complaint of transfer: It argues that the necessary democratic legitimation is lacking if the transfer law is formally unconstitutional and ineffective and consequently cannot bear the exercise of the transferred sovereign power (see nos. 133 and 137 of the resolution). This consideration makes it clear that the formal control of transfer is no longer about protecting the substance of the electoral law from "disempowerment" of the German Bundestag, but about a general control of legality. For the absence of the democratic legitimation context as a result of the ineffectiveness of the transfer of sovereign rights for formal reasons does not constitute a substantial endangerment of the democratic process itself, which could result in a violation of the corresponding "claim to democracy" (see also 2. a). There is therefore no room for an intervention by the Federal Constitutional Court, brought about by Article 38 (1) sentence 1 of the Basic Law, to protect precisely this democratic process.

17 2. a) Nor is the substance of the right to vote, which is protected by Article 79 (3) of the Basic Law, affected because, in the case of a transfer of sovereign rights to another subject of international law such as the European Union or to an intergovernmental institution with which



it has a complementary or other special relationship, competences are generally "lost" and - in contrast to a constitutional amendment - "cannot easily be 'retrieved' by own efforts" (see marginal nos. 97 and 137 of the decision). In the view of the Senate, the fact that such structural changes in the structure under the law on the organisation of the state can no longer be easily remedied requires that the persons entitled to vote must - as a preventive measure - be granted an opportunity to complain under Article 38 (1) sentence 1 of the Basic Law. This is probably the Senate's central motive for continuing to reject comprehensive formal and substantive control, in other words general control of legality, in the domestic sphere with regard to parliamentary and in particular legislative resolutions, but now to allow it for comparable resolutions within the framework of the European integration process, thereby creating a "special right" for this area. For what reason the *substance of the right to vote* in the sense set out above is to be affected from this point of view, and consequently the necessity of a formal control of the transfer of sovereignty in all transfers of sovereignty in the context of European integration (Article 23 (1) of the Basic Law), does not become clear - in contrast to identity control and ultra vires control. For ensuring compliance with the formal prerequisites of Article 23 (1) sentence 2 and sentence 3 of the Basic Law is not about enabling or keeping open a democratic process that would otherwise be endangered or even prevented. This is illustrated by the present case: The German Bundestag has carried out a legislative procedure; it has transferred competences in the transferable area, that is, within the limits of Article 79 (3) of the Basic Law. Its decision-making powers are also not diminished against or without its will, the integration programme accepted by it is not exceeded by the Unified Patent Court if the agreement on a Unified Patent Court comes into force.

- 18 b) The Senate's concern is understandable. If the act of transfer subsequently proves to be formally unconstitutional and thus ineffective, countless measures of the holder of the transferred sovereignty are to be classified as ultra vires acts in the Senate's diction for lack of the necessary statutory approval (see paras 97, 99 and 133 of the decision). It is precisely in order to avoid such a situation that the formal control of transfer is intended to serve. It is also true that the invalidity of the national act of transfer does not affect the existence of a supranational body established on the basis of an act under international law or Union law, with the consequence that supranational sovereignty can continue to be exercised within the framework of the existing integration programme. However, the German (integration) legislature itself can remedy this situation by enacting a formally constitutional transfer law.



The possibility of remedying the procedural error and thus the constitutional violation (exercise of sovereign power without a legal basis) is thus within the domestic sphere. In contrast, such a remedy is not available to the legislature in the case of a violation of identity or ultra vires, in the case of a violation of identity because the legislature may not transfer sovereignty beyond the constitutional identity protected in Article 79 (3) of the Basic Law, and in the case of a conventional ultra vires violation because the obvious and structurally significant transgression of competences by Union or treaty bodies (and the resulting constitutional violation) cannot be eliminated by unilateral action of the competent constitutional bodies. If the two-thirds majority in the Bundestag and Bundesrat required in the case of Article 23 (1) sentence 3 of the Basic Law cannot be achieved, the constitutional bodies are required to exercise their responsibility for integration with the aim of resolving the contradiction between international/union law and constitutional law and thus to eliminate the constitutional violation.

- 19 3. In addition, there are possibilities for asserting the formal unconstitutionality of the law approving the Agreement on a Unified Patent Court even after its entry into force. If, for example, the enforcement of the decisions of the Unified Patent Court is at issue, which according to Art. 82 EPC is governed by the national law of the respective member state, there is the possibility of legal protection against the national enforcement measures before the specialised courts. In these proceedings, the formal unconstitutionality of the Consent Act could also be challenged, since the validity and enforceability of the decisions of the Unified Patent Court in Germany depends on the validity of the Consent Act and thus the transfer of sovereignty. In this respect, a constitutional review of the consent law could be achieved both by means of a concrete review of the statute in accordance with Article 100 (1) of the Basic Law and by means of a constitutional complaint lodged against a decision of a specialised court of last instance. However, in contrast to a complaint of a violation of the "right to democracy" under Article 38 (1) sentence 1 of the Basic Law, it is always a precondition that the plaintiff or complainant is specifically affected by the challenged measure in a fundamental right in the individual case, for example, that he defends himself against enforcement measures. In this respect, these cases involve a specifically affected constitutional right.

III.

- 20 It is to be expected that the broad opening of access to the Federal Constitutional Court by enabling formal transfer control for virtually every transfer of competence in the scope of



application of Article 23 (1) of the Basic Law will lead the German Bundestag and Bundesrat to strive for a two-thirds majority in order to be on the "safe side" and not to expose themselves to the risks of formal transfer control. The need for a majority to amend the constitution thus becomes the de facto rule not only in the case of transfers of sovereign rights to institutions, bodies, offices or other bodies of the European Union, but also to all bodies established by international treaty which have a complementary or other special relationship with it. This is neither the intention of the constitutional legislature, which in Article 23 (1) sentence 1 of the Basic Law obliged the Federal Republic of Germany to participate in the process of European integration and accordingly opened the constitutional order in principle to the exercise of supranational sovereignty, nor is it necessary or even conducive to making possible the democratic process protected by Article 20 (1) and 20 (2) of the Basic Law, because it must also be possible to decide by narrow majorities. The broad opening of access to the Federal Constitutional Court by means of Article 38 (1) sentence 1 of the Basic Law could in future prejudice the democratic process in the Bundestag and Bundesrat in a problematic way and could considerably delay, if not prevent, further steps towards integration. By including in Article 23 (1) of the Basic Law intergovernmental institutions that have a complementary or other special relationship with the European Union and a rather broad understanding of Article 23 (1) sentence 3 of the Basic Law, the scope of application of the requirement of a two-thirds majority is considerably extended into an area that was previously assigned to Article 24 (1) of the Basic Law. This only requires a simple federal law for the transfer of sovereign rights.

21 We do not want to close ourselves to a broad understanding of the scope of application of Article 23 (1) of the Basic Law against the background of the development of the European integration process and in view of the growing scope of the competences of the European Union. Nevertheless, we would like to point out that the admission of formal transfer control opens up a further field of constitutional court disputes in view of the value-dependent and in many cases unclear delimitation of Article 23 (1) sentence 2 and sentence 3 of the Basic Law. The consequence of this will be that necessary political scope for shaping Parliament in the process of European integration could be narrowed, contrary to the intentions of the constitution-amending legislature, and thus the protection of the democratic process intended in Article 38 (1) sentence 1 of the Basic Law could be reversed.

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Maidowski

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