

The Danish *Lisbon* Judgment

Danish Supreme Court, Case 199/2012, Judgment of 20 February 2013

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INTRODUCTION

The main legal question in the judgment of 20 February 2013 of the Danish Supreme Court in Case 199/2012 was which procedure Denmark should have followed for approving the Lisbon Treaty. The Constitutional Act of Denmark (*Grundloven* – henceforth ‘the Constitution’) set out two different procedures for Danish participation in international cooperation. By prescribing different degrees of involvement for Parliament and the electorate, the two procedures reflect differences in the intensity of the cooperation. However, the case also raises some broader questions about the separation of powers between the legislature and the courts, about the role of the people and the concept of democracy, about constitutional interpretation (and how and who should interpret), about the grey areas between political and legal statements, and about constitutional identity and the need for constitutional revision.

THE CONSTITUTIONAL FRAMEWORK FOR APPROVING EU TREATY AMENDMENTS

In order to discuss the judgment, it is necessary to explain briefly the relevant constitutional framework. As mentioned above, the Constitution contains two procedures for Danish participation in international cooperation. These procedures are laid down in Articles 19 and 20. If some form of cooperation is so intensive

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that it falls outside these provisions, then it will be necessary to amend the Constitution according to the procedure prescribed in Article 88. Prior to the last amendment of the Constitution in 1953 there was only a procedure similar to the present Article 19 procedure, as well as a procedure for amending the Constitution similar to the present Article 88. Article 20 was added in 1953 in order to make it easier for Denmark to take part in supranational cooperation involving some transfer of sovereignty, without having to amend the Constitution. This provision prescribes a procedure for ceding to an international body specific powers vested in Danish authorities under the Constitution. The Article 20 procedure is more demanding than the normal Article 19 procedure, which requires only the consent of Parliament by means of an Act of Parliament adopted by a simple majority:

Article 19

Subsection 1: The King shall act on behalf of the Realm in international affairs, but, except with the consent of the Folketing, the King shall not undertake any act whereby the territory of the Realm shall be increased or reduced, nor shall he enter into any obligation the fulfilment of which requires the concurrence of the Folketing or which is otherwise of major importance; nor shall the King, except with the consent of the Folketing, denounce any international treaty entered into with the consent of the Folketing.¹

Under Article 20, five-sixths of the members of Parliament must agree to the transfer of power. If a smaller majority is obtained, a referendum must be held in which the electorate votes for or against a Bill to approve a treaty.

Article 20

Subsection 1: Powers vested in the authorities of the Realm under this Constitutional Act may, to such an extent as shall be provided by statute, be delegated to international authorities set up by mutual agreement with other states for the promotion of international rules of law and cooperation.

Subsection 2: For the enactment of a Bill dealing with the above, a majority of five sixths of the Members of the Folketing [*Parliament*] shall be required. If this majority is not obtained, whereas the majority required for the passing of ordinary Bills is obtained, and if the Government maintains it, the Bill shall be submitted to the electorate for approval or rejection in accordance with the rules for referenda laid down in Section 42.2

For a Bill to be defeated, a majority of the electors voting in a referendum, constituting at least 30% of all those entitled to vote, must vote against the Bill (Ar-

¹ Chap. 3 of the Constitution.

² Chap. 3 of the Constitution.

ticle 42(5) of the Constitution).³ However, the Article 20 procedure is not as burdensome as the procedure for amending the Constitution, to which the procedure in Article 88 applies. As explained above, if the Danish Government wants to enter into a form of cooperation that is more far-reaching than permitted pursuant to Article 20, it must follow the procedure prescribed in Article 88. Together Articles 19, 20 and 88 set out the full range of the procedures by which Denmark may enter into international cooperation. The *Lisbon* case concerns the limits of Article 19 and thus where the boundary lies between Article 19 and Article 20. The *Maastricht* case concerned the limits of Article 20 and thus where the boundary lies between Article 20 and Article 88.⁴ Article 88 reads:

Article 88

Should the Folketing pass a Bill for the purposes of a new constitutional provision, and the Government wish to proceed with the matter, writs shall be issued for the election of Members of a new Folketing. If the Bill is passed unamended by the Folketing assembling after the election, the Bill shall, within six months after its final passing, be submitted to the electors for approval or rejection by direct voting. Rules on this voting shall be laid down by statute. If a majority of the persons taking part in the voting, and at least 40 per cent of the electorate, have voted in favour of the Bill as passed by the Folketing, and if the Bill receives the Royal Assent, it shall form an integral part of the Constitutional Act.⁵

In short, the Article 19 procedure only requires the involvement of the government and Parliament; the Article 20 procedure also involves the electorate unless a measure receives the support of five-sixths of the members of Parliament; and the Article 88 procedure involves the electorate twice (first in an election and then in a referendum). Consequently, a government that wants to take part in international cooperation will face greater challenges if an Article 20 or Article 88 procedure has to be followed. It is common knowledge that the Danish electorate is sometimes rather sceptical about closer European cooperation. For instance in the first referendum on the Maastricht Treaty in 1992 the majority voted against the Treaty.⁶ Referendums are notoriously politically sensitive.

Denmark entered into the Lisbon Treaty by an Article 19 procedure. A number of Danish citizens filed a lawsuit against the Danish Prime Minister and the Min-

³ Chap. 5 of the Constitution.

⁴ See U.1998.800H. In the *Maastricht* case a number of citizens filed a lawsuit against the Prime Minister and the Minister for Foreign Affairs claiming that an Art. 88 procedure should have been applied instead of an Art. 20 procedure when Denmark entered the Maastricht Treaty. The Supreme Court ruled in favour of the Government.

⁵ Chap. 10 of the Constitution.

⁶ See H. Krunke, 'From Maastricht to Edinburgh: The Danish Solution', *EuConst* (2005) p. 339-356.

ister for Foreign Affairs, claiming that an Article 20 procedure should have been followed.⁷ However, before the Danish courts could review the merits of the *Lisbon* case, they first had to decide whether the plaintiffs fulfilled the procedural requirement of having a legal interest. On 28 October 2009, the High Court ruled that the plaintiffs did not have a sufficient legal interest to have the merits of the case tried before the courts. However, on 11 January 2011 the Supreme Court reversed that decision and sent the case back to the High Court for a review of the merits of the case.⁸ The High Court gave its decision on 15 June 2012,⁹ ruling in favour of the Government. The plaintiffs appealed, and on 20 February 2013 the Supreme Court made the final ruling in the *Lisbon* case, based primarily on the same arguments as those used by the High Court.¹⁰

THE JUDGMENT OF THE SUPREME COURT

As a starting point, the Supreme Court developed four categories of cases in which the procedure of Article 20 should be followed. Treaty amendments are only required to follow an Article 20 procedure in the following categories of cases (otherwise an Article 19 procedure is sufficient):

- 1) If the international authority is entrusted with the exercise of further legislative, administrative or judicial authority with direct effect in Denmark, regardless of whether the extension concerns the fields of responsibility or the nature of the powers.
- 2) In the event of an extension of the international organisation's authority to exercise other powers that are conferred on the authorities of the Realm by the Constitution.

⁷For the sake of simplicity the citizens who filed the lawsuit are referred to as 'the plaintiffs' throughout this article, though when the case reached the Supreme Court they were formally 'appellants'.

⁸See U.2011.984H and H. Krunke, 'Lissabon-sagen' [The *Lisbon* case], 8 *Juristen* (2011) p. 245-251.

⁹Judgment of 15 June 2012 of the Eastern High Court, 7th division. The Danish transcript is available at: <www.domstol.dk/oestrelandsret/nyheder/Pressemeddelelser/Documents/Udskrift%20af%20Ostre%20Landsrets%20dombog.pdf>, visited 11 Nov. 2013.

¹⁰Supreme Court judgment of 20 Feb. 2013 in Case No. 199/2012, U.2013.1451H. The English transcript is available at: <www.supremecourt.dk/supremecourt/nyheder/ovrigenyheder/Documents/199-12engelsk.pdf>. There are a few differences between the High Court judgment and the Supreme Court judgment. The most important difference is that the High Court interprets Art. 20 slightly differently than the Supreme Court, setting the barrier a little lower for an institutional change of an international organisation to fall under Art. 20. In other words the Supreme Court's interpretation of Art. 20 is narrower. This will be shown below. Another difference concerns whether the interpretation of Art. 20 adopted by the political institutions can be considered a constitutional convention.

- 3) In the event of treaty amendments resulting in such fundamental changes to the organisation of the international authority that the organisation effectively assumes a new identity. This would be comparable to delegating powers to another international authority.
- 4) In the event of changes in the administration of previously delegated powers, in contravention of what may have been provided for in the Act adopted under Article 20 by which such delegation was authorised.¹¹

Moreover, the Supreme Court rejected some of the plaintiffs' arguments on the interpretation of Article 20. Thus, the Supreme Court ruled that:

- a. Article 20 cannot be interpreted in such a way that the organisation and working methods of an international organisation – for instance the distribution of responsibilities between its institutions or its voting rules - must be described in detail when ceding powers to the organisation by an Article 20 procedure. According to the Supreme Court this follows from the fact that neither the wording nor the *travaux préparatoires* of Article 20 support such an interpretation. This means that changes to the organisation or working methods of an international organisation will not require a new Article 20 procedure *based on the supposed 'design' of the organisation* when power was originally ceded to it. Furthermore, the Court emphasised that an Article 20 procedure will not normally be required in order to approve a change to the organisation of an international institution, since this does not follow from the wording, *travaux préparatoires* or purpose of Article 20. The Supreme Court added that this interpretation of Article 20 is consistent with how Article 20 has been understood and applied by successive governments and Parliament.
- b. Whether or not a treaty amendment which leads to significant changes to the organisation will require an Article 20 procedure will not depend on the extent to which Danish parliamentary control is maintained over the exercise of the transferred powers. What is decisive for Article 20 is the specification of the powers that have been transferred and which organisation they have been transferred to; powers can be delegated to an international organisation without specifying the structure and design of the organisation.

The Supreme Court then applied the four categories to a number of treaty changes made by the Lisbon Treaty that the plaintiffs argued required the use of an Article 20 procedure. The Supreme Court divided the changes into four types:

¹¹ The English translation of the *Lisbon* judgment which can be found on the website of the Supreme Court is used as far as possible in this case note in order to ensure consistency; see Supreme Court judgment of 20 Feb. 2013, Case No. 199/2012, U.2013.1451H.

1) changes in the EU's administration of transferred powers, 2) indirect expansion of powers, 3) direct expansion of powers, and 4) the European Convention of Human Rights. This scheme is followed in this section.

1. *Changes in EU's administration of transferred powers*

The plaintiffs claimed that the Lisbon Treaty entails such significant and important changes to the EU's administration of transferred powers (including giving enhanced powers to the European Parliament and increased use of majority votes in the Council, thus reducing national parliamentary powers) that an Article 20 procedure should have been used instead of an Article 19 procedure when entering into the Lisbon Treaty.

First, the Supreme Court applied the third category for the use of Article 20, on the identity of an international organisation. The Supreme Court noted that, in order to establish whether the EU has in fact changed its identity as a result of the Lisbon Treaty, one must compare its institutional organisation after the Lisbon Treaty with its institutional organisation before it. The Supreme Court reviewed the institutional changes brought by Lisbon and showed that their features were present, at least to some extent, in the previous Treaties. For instance, what was formerly called the 'co-decision procedure' (now the 'ordinary legislative procedure') now applies to more areas of legislation, but it was already introduced by the Maastricht Treaty. The Court concluded that these changes have not given the EU a new identity:

Regardless of the treaty amendments mentioned above, the EU is still an organisation consisting of independent, mutually obliged states functioning based on powers delegated by each Member State, and the Supreme Court finds that the changes made to the EU's organisation, working method, voting rules and general administration are not so fundamental in nature that the EU has in effect assumed a new identity.¹²

As in the *Maastricht* judgment,¹³ the Supreme Court emphasised that the member states are still independent states. In that case the argument was used to support the finding that the transfer of powers was within the upper limits of what was required for an Article 20 procedure and thus did not require a constitutional amendment. In the *Lisbon* judgment this argument was used to support a finding that an Article 20 procedure was not required, but that an Article 19 procedure should be used.

¹²Supreme Court judgment of 20 Feb. 2013 in Case No. 199/2012, p. 10, U.2013.1451H, p. 1517.

¹³U.1998.800H.

At the same time, the Supreme Court rejected the idea that Denmark's accession to the EC was conditional on a particular institutional organisational arrangement, as was argued by the plaintiffs. The plaintiffs referred to the Danish Act on Accession to the EC¹⁴ and to certain statements made during discussions in the Danish Parliament prior to Denmark's accession to the EC. They argued that these statements expressed preconditions for accession. According to the plaintiffs, institutional changes introduced after 1972 must be regarded as changes to the preconditions for the transfer of sovereignty, thus requiring an Article 20 procedure. However, according to the Supreme Court, the statements to which the plaintiffs referred did not provide a basis for finding that the surrender of sovereignty is based on legal assumptions about the exercise of delegated powers, i.e. on a particular institutional organisational arrangement, or that the Act on Accession to the EC was based on conditions to this effect. Accordingly, the Lisbon Treaty did not fall within the fourth category for use of Article 20.

2. Indirect expansion of powers

The plaintiffs argued that the changed structure and the 'explicit addition of new policy areas', e.g. the codification of the case-law of the Court of Justice of the European Union (CJEU), entailed an indirect transfer of powers to the EU institutions. In particular they argued that the Lisbon Treaty explicitly adopted the principle of the primacy of EU law, sanctioned a very expansive interpretation of the previous Treaties in certain areas, gave the Charter of Fundamental Rights the same legal status as the Treaties, and gave the EU far greater scope to adjust its competences to the Treaty objectives pursuant to the flexibility clause in Article 352 of the Treaty on the Functioning of the European Union (TFEU).

First, the Supreme Court applied the first category to the use of Article 20 and discussed the possible indirect expansion of powers. The Court referred to its *Maastricht* judgment in which it found, among other things, that it is for the Danish courts to decide whether EU acts exceed the limits to the surrender of sovereignty under the Accession Act.¹⁵ This follows from the demand that specification in Article 20 requires that powers delegated to international authorities should be specified, and that the Danish courts should be able to review the constitutionality of Acts of Parliament. Thus, according to the Supreme Court's *Maastricht* judgment, Danish courts must rule that an EU act is inapplicable in Denmark

¹⁴ Lov om Danmarks tiltrædelse af De europæiske Fællesskaber, L 1972-10-11 nr. 447 [The Danish Act on Accession to the EC].

¹⁵ As discussed below, throughout the judgment the Supreme Court linked admissibility to the merits of the case and emphasised that it has jurisdiction to carry out a judicial review if an act or judicial decision raises doubts as to whether it is based on an application of the Treaties that lies beyond the surrender of sovereignty according to the Accession Act.

in the extraordinary event that it can be established with sufficient certainty that an EU act which has been upheld by the CJEU is based on an application of the Treaty that is beyond the surrender of sovereignty by the Accession Act. Similarly, this applies to EU rules and legal principles that are based on the practice of the CJEU. In the *Lisbon* judgment, the Supreme Court repeated this position, adding that:

The fact that it was stated in Declaration 17 to the Lisbon Treaty that the Conference recalls the case law of the Court of Justice of the European Union regarding the primacy of EU law, and the fact that an Opinion from the Council Legal Service was attached to this Declaration, does not change the Supreme Court's conclusion on the Danish courts' testing of the constitutionality of acts and EU acts.¹⁶

This brings us to the plaintiffs' argument that the Lisbon Treaty explicitly and significantly widened the scope of the flexibility clause. Once again, referring to the *Maastricht* judgment (paras. 9.4 and 9.5), the Supreme Court stated with respect to the flexibility clause:

The flexibility clause, as now laid down in Article 352 TFEU, clarifies that it still only authorises adoption of Acts without specific authority in areas that lie within the framework created by the other provisions of the Treaty, to attain one of the objectives therein, see also Declaration no. 42 appended to the Lisbon Treaty.¹⁷

And further:

As held by the Supreme Court in the *Maastricht* judgment (paragraph 9.4), the Government is obliged to prevent that the provision is used to adopt proposals which fall outside this framework and therefore presuppose additional transfer of sovereignty. A similar obligation applies in respect of the Charter of Fundamental Rights, where Article 6(1) [of the Treaty on European Union] TEU expressly provides that it shall not extend the Union's competences.¹⁸

The Supreme Court then emphasised the presumption that no additional powers were delegated when Denmark acceded to the Lisbon Treaty:

The constitutional assessment has been based on the proviso that the Lisbon Treaty should be interpreted in accordance with the Protocols and Declarations appended

¹⁶Supreme Court judgment of 20 Feb. 2013, Case No. 199/2012, p. 13, U.2013.1451H, p. 1519.

¹⁷Supreme Court judgment of 20 Feb. 2013, Case No. 199/2012, p. 13, U.2013.1451H, p. 1519-1520.

¹⁸Supreme Court judgment of 20 Feb. 2013, Case No. 199/2012, p. 14-15, U.2013.1451H, p. 1520.

to the Treaty. The Court of Justice of the European Union is charged with settling any disputes on the interpretation of EU law, but this must not result in a widening of the scope of Union powers. As mentioned above, Denmark's implementation of the Lisbon Treaty was based on a constitutional assessment that it will not imply delegation of powers requiring application of the Article 20 procedure, and the Danish authorities are obliged to ensure that this is observed.¹⁹

Against this background, the Supreme Court found that the arguments of the plaintiffs did not justify setting aside the constitutional assessments of the Government and Parliament. The Court concluded by referring to its jurisdiction to carry out judicial reviews 'if an Act or a judicial decision that has a specific and real impact on Danish citizens etc. raises doubts as to whether it is based on an application of the Treaties which lies beyond the surrender of sovereignty according to the Accession Act'. The same will apply if EU acts are adopted or if the CJEU delivers judgments based on such applications of the Treaties by reference to the Charter of Fundamental Rights.

3. *Direct expansion of powers*

The plaintiffs argued that the Lisbon Treaty, including its Protocols and Declarations, entailed a direct expansion of transferred powers in a number of fields, such as free movement and the rights of residence of Union citizens, personal data, social security, energy policy, international agreements and the common foreign and security policy. In response, the Government argued that the relevant provisions either clarify the extent to which powers have already been ceded, or they are covered by the Danish opt-outs in respect of free movement and the rights of residence of Union citizens, personal data and restrictive measures.

The Supreme Court applied the first category to the use of Article 20 with regard to a possible direct expansion of powers to the present case and stated:

The Supreme Court finds that there is no basis in this case for concluding that the Act on the Lisbon Treaty delegated additional powers to adopt acts having a direct impact on Danish citizens etc. in a number of policy areas implying that the procedure in s. 20 of the Constitution should have been followed. Furthermore, the Supreme Court finds that this case is not suited to settle the Parties' disagreements concerning these issues. However, a case involving an Act or a judicial decision adopted or delivered pursuant to the relevant Treaty provisions and having a spe-

¹⁹Supreme Court judgment of 20 Feb. 2013, Case No. 199/2012, p. 15, U.2013.1451H, p. 1520.

cific and real impact on citizens etc. would provide a better basis for hearing the dispute.²⁰

4. *The European Convention of Human Rights*

The plaintiffs argued that the authority for the EU to accede to the European Convention on Human Rights is new and that accession is not an option for the member states but an obligation which arose when Denmark acceded to the Lisbon Treaty. Furthermore, the plaintiffs argued that accession to the Lisbon Treaty gives the CJEU further powers and strengthens the potential for direct effect in relation to relations between private parties.

The Supreme Court applied the first criterion for the use of Article 20 to the EU's authority to accede to the European Convention of Human Rights and stated that:

The Supreme Court does not find any basis for setting aside the Government's and Folketing's [Parliament's] constitutional assessment that the Lisbon Treaty does not delegate powers to the EU in this regard which require an Art. 20 procedure – an assessment which is binding on the Danish authorities. If EU acts are adopted or if the Court of Justice delivers judgments with reference to the European Convention on Human Rights, based on an interpretation of the Treaties that contravenes this constitutional assessment, it will be possible to submit this to a judicial review as stated in the Maastricht judgment (paragraph 9.6).²¹

Eleven justices of the Supreme Court participated in the *Lisbon* judgement, and their judgment was unanimous.

COMMENT

The following sections of this article discuss some of specific issues raised by the judgment, including: the identity criterion, the (absence of a) 'structural convergence' requirement, the criterion of changes to the administration of previously delegated powers contrary to previous Accession Acts, direct and indirect expansion of powers including the principle of conferral of power and *ultra vires* review. This will be followed by a discussion of some broader, though related, issues raised by the judgment.

²⁰ Supreme Court judgment of 20 Feb. 2013, Case No. 199/2012, p. 16, U.2013.1451H, p. 1520. While the High Court made a direct reference to specific Danish opt-outs in its reasoning, the Supreme Court did not do so.

²¹ Supreme Court judgment of 20 Feb. 2013, Case No. 199/2012, p. 18, U.2013.1451H, p. 1521.

The Supreme Court's interpretation of article 20 as regards the identity criterion

The *Lisbon* judgment is especially interesting on the idea of there being 'such fundamental changes to the organisation etc. of the international authority that the organisation effectively assumes a new identity'. This idea is not found in the text of Article 20 or in its *travaux préparatoires*.²² It had never come up in the case-law before and very little exists on this specific issue in the legal literature. Only one constitutional scholar, Henrik Zahle, had written on the topic when the *Lisbon* case was brought before the courts.²³ According to Zahle, changes can be made to the organisation of an international organisation without following an Article 20 procedure. However, changes in voting procedures and in the allocation of powers can be so extensive that an Article 20 procedure is required.²⁴ Zahle did not specify the kinds of cases where this applies, nor did he state where the limits lie; he simply said that the interpreter must study the existing treaty and the Act of Accession, including the preconditions attached to them.²⁵ Zahle did not clarify what he meant by 'preconditions'. However, in the *Lisbon* judgment, among other things the Supreme Court studied whether the Parliamentary debates when the Act of Succession was passed showed that the politicians made certain assumptions about how European cooperation would evolve. Zahle stated that an Article 20 procedure must be followed in relation to treaty changes which entail transfers of powers in new policy fields because such changes would clearly correspond to Denmark's accession to a new international organisation.²⁶ The plaintiffs in the *Lisbon* case based their argumentation on Zahle's reasoning.²⁷

Traditionally, the Supreme Court only refers to a list of legal literature in the first footnote of a judgment and not in specific points in the judgment.²⁸ This is also the case with the *Lisbon* judgment. However, the Supreme Court seems to have structured its judgment according to Zahle's comments on studying the existing treaty and the Act of Accession, and the preconditions attached to them. Has the Supreme Court also substantially followed Zahle's reasoning?

²² Governmental *travaux préparatoires* normally have considerable weight in the Danish legal system when interpreting legislation, including the Constitution.

²³ See H. Zahle, *Dansk forfatningsret, Studieudgaven* [Danish Constitutional Law] (Christian Ejler's Forlag 2006) p. 418-422.

²⁴ *Ibid.*, p. 422.

²⁵ *Ibid.*, p. 422.

²⁶ *Ibid.*, p. 419.

²⁷ *Ibid.*, p. 418-422.

²⁸ In the German courts, for instance, references are made more frequently to legal theory and literature. This may reflect a different legal system and tradition of legal argument and writing judgments, but it could also reflect the fact that more German judges have backgrounds as university professors than is the case in Denmark, and that they therefore attach greater value to legal literature.

The Supreme Court stated that an Article 20 procedure had to be followed among others: 'in the event of treaty amendments resulting in such fundamental changes to the organisation etc. of the international authority that the organisation effectively assumes a new identity. This would be comparable to delegating powers to another international authority.'²⁹ First, the argument that changes can be so extensive that the situation in reality corresponds to a transfer of powers to another international organisation (and therefore the procedure in Article 20 must followed) can be found in Zahle's comments on treaty changes that entail the transfer of powers in a new policy field. Second, Zahle's argument about changes to the organisation of an international organisation leaves much room for interpretation, and one might argue that the Supreme Court actually follows his argument but sets the threshold rather high. Obviously, in the view of the Supreme Court there can be quite extensive changes to the organisation of an international organisation before an Article 20 procedure is necessary. One might even argue that, as interpreted by the Supreme Court, the identity criterion will have very little effect in practice. In its judgment in the *Lisbon* case the High Court interpreted Article 20 less restrictively. The High Court stated that, even though the starting position is that organisational changes do not, in principle, require an Article 20 procedure, this is different for *changes to an organisation which, on the basis of a specific assessment, must be regarded as sufficiently far-reaching - this would be the case for instance if the changes are so comprehensive that the identity of the organisation is no longer the same.*³⁰ While the Supreme Court only referred to changes that are so fundamental that in reality they change the identity of the organisation and compared this to the situation where powers are transferred to another international institution, the High Court spoke of far-reaching identity change as being only one example of a situation which requires an Article 20 procedure ('for instance'). Moreover, the High Court did not compare such iden-

²⁹ Just before the Supreme Court gave its judgment in the *Lisbon* case, a former civil servant in the Ministry of Foreign Affairs proposed an interpretation of Art. 20 according to which the provision applies to *all* treaties which transfer powers to international organisations, *including* treaties that change former treaties. See P. Lachmann, 'Grundlovens § 20 og traktater, der ændrer EU's institutioner' [Article 20 of the Constitution and treaties that change the EU's institutions], 5 *Juristen* (2012) p. 259-273. According to this interpretation, changes to existing treaties are already covered by Art. 20. Therefore, according to Lachmann there is no need to establish an argument (as Zahle does) that there must be an Art. 20 procedure in a situation where a treaty is amended in a way that entails making such fundamental changes in the organisation of the international organisation that in reality it *corresponds* to the situation where powers are transferred to *another* international institution. However, in the *Lisbon* judgment the Supreme Court seemed to argue precisely on the basis of this 'correspondence' argument.

³⁰ Judgment of, 15 June 2012 of the Eastern High Court, 7th division, p. 202-203. Danish transcript: <www.domstol.dk/oestrelandsret/nyheder/Pressemeddelelser/Documents/Udskrift%20af%20Ostre%20Landsrets%20dombog.pdf>.

tity change to a transfer of powers to another international institution. The High Court seemed to suggest that there can be other situations which could require the Article 20 procedure to be followed and that there may be identity changes that are far-reaching but do not correspond *de facto* to transfer of powers to another international institution. In other words, the High Court seemed to give a wider interpretation of the scope of application of Article 20 to institutional changes of an international organisation.

Nevertheless, the *Lisbon* judgment makes it clear that there is an identity criterion in relation to Article 20 and that the threshold is set rather high. The criterion has no direct support in the text of Article 20 or in its *travaux préparatoires*. However, if an Article 20 procedure were not required for approval of a treaty that changes the institutional set-up of an organisation so extensively that accession to the treaty is equivalent to accession to a new international organisation, it would be possible to circumvent Article 20. However, the impact of the Lisbon Treaty was not so far-reaching as to be equivalent to accession to a new international organisation. Even if the Supreme Court had interpreted Article 20 a little less restrictively, an Article 20 procedure would not necessarily have been required for approval of the Lisbon Treaty. This is seen in the judgment of the High Court, which interpreted Article 20 less restrictively (see above) but which nevertheless found that an Article 20 procedure was not necessary for accession to the Lisbon Treaty.

How extensive must changes to the institutional set-up of the EU be in order to be considered to change its identity and hence require the Article 20 procedure to be followed? In relation to the Lisbon Treaty the Supreme Court argued:

[...] the EU is still an organisation consisting of independent, mutually obliged states functioning based on powers delegated by each Member State, and the Supreme Court finds that the changes made to the EU organisation, working method, voting rules and general administration are not so fundamental in nature that the EU has in effect assumed a new identity.

What can we derive from this? It is clear that if the EU were no longer an organisation consisting of independent, mutually obliged states functioning on the basis of powers delegated by each member state, an Article 19 procedure would not be sufficient. In fact, in this situation not even an Article 20 procedure would be sufficient; an Article 88 procedure would be required.³¹ On the other hand, the second half of this quotation gives very little guidance, except that the chang-

³¹ Art. 20 requires a cooperation of independent, mutually, obliged states functioning on the basis of powers delegated by each member state. Furthermore, powers can only be transferred to a certain extent. This follows directly from the text of Art. 20 and from the Danish *Maastricht* judgment.

es made by the Lisbon Treaty were not sufficient to require an Article 20 procedure. The Supreme Court did not clarify which particular elements of the Treaty were relevant to its reasoning, so it is not possible to identify more specific criteria for assessing which institutional changes would bring about such an identity change as to require an Article 20 procedure. All that can be said is that the procedure would be required if the institutional changes were so extensive as to correspond to a situation in which powers were transferred to another international institution. For that situation to arise the institutional changes would at least have to be more extensive than the changes caused by the Lisbon Treaty, and that such a situation would certainly arise if the EU were no longer an organisation consisting of independent, mutually obliged states functioning on the basis of powers delegated by each member state.

Nevertheless, two certain conclusions can be drawn from all this. The first is that the *Lisbon* judgment has set the bar high and that it will require extensive institutional changes for an Article 20 procedure to be required. The second conclusion is that the Supreme Court has considerable discretion to decide what particular institutional changes are so important that they amount to a change of identity of the relevant international organisation.

The Supreme Court's interpretation of article 20 with regard to 'structural convergence'

Another interesting aspect of the *Lisbon* judgment is the Supreme Court's interpretation of Article 20 in relation to what is sometimes referred in Danish legal literature as 'structural convergence'.

There is no mention of a convergence criterion either in the text of Article 20 or in the *travaux préparatoires*. However, in legal literature there has been a debate about whether it is possible to cede powers to an international organisation that does not reflect the decision-making processes and structures of the Danish constitutional system. This has been called a requirement for 'structural convergence'.³² The debate in the legal literature about structural congruence has its roots in the late 1950s and the 1960s, long before Denmark joined the European cooperation in 1973.³³ While the starting point was a general discussion of the constitu-

³² See for instance Zahle, *supra* n. 23, p. 414-416; H. Rasmussen, 'On Article 20', in H. Zahle (ed.), *Grundloven. Danmarks Riges Grundlov med kommentarer* [The Constitutional Act of Denmark with commentary] (Jurist- og Økonomforbundets Forlag 2006) p. 211-214; M. Sørensen, *Statsforfatningsret* [Constitutional Law] (Juristforbundets Forlag 1973) p. 312-313; J.P. Christensen et al., *Dansk Statsret* [Constitutional Law] (Jurist- og Økonomforbundets Forlag 2012) p. 213; J. Teilberg Søndergaard, 'Grundlovens forudsætning om demokrati' [The Constitutional Act of Denmark's Precondition of Democracy] *UfR* (2001B), p. 248-253.

³³ See A. Ross, *Dansk Statsforfatningsret* [Danish Constitutional Law], Vol. 1, 1959, p. 349, Max Sørensen, 'Det europæiske økonomiske Fællesskabs og Danmarks grundlov' [The European

tional limits for Danish transfers of powers to international organisations pursuant to Article 20, possible Danish accession to the European cooperation was already present in the minds of scholars. After all, the background to the introduction of Article 20 back in 1953 was the increased and intensified international cooperation and especially kinds of international cooperation like the European Coal and Steel Community. Max Sørensen, a legal scholar who played an important role in the design of Article 20, had also been active in the debate on structural convergence. Max Sørensen argued that constitutional systems differ from state to state and that therefore strict structural convergence requirements would make it very difficult to establish common international cooperation since it would have to reflect the institutional designs of all the states participating in the cooperation. According to Max Sørensen, it was obvious that the European cooperation that inspired the design of Article 20 would not comply with a strict structural convergence criterion. Therefore, it would not be possible to uphold a strict structural convergence criterion on the basis of Article 20. However, Max Sørensen also emphasised that he was reluctant to give up entirely a structural convergence criterion. Thus he supported a limited structural convergence criterion in relation to Article 20, for instance with regard to specific powers of the courts and procedural rules related to these powers that are intended to protect the individual. For example, the Danish courts are impartial and independent of the legislature and the executive, so that according to the theory on structural convergence it is questionable whether judicial powers can be transferred to an international institution that is not also impartial and independent.³⁴ Other constitutional scholars have also argued for the need for a limited structural convergence requirement in relation to democratic control by the Danish Parliament when ceding powers.³⁵ Thus there is support in the legal literature for a limited structural convergence criterion regarding democratic control and specific powers of the courts and procedural rules related to these powers.³⁶

Arguments related to ‘structural convergence’ and ‘a democratic form of government’ were put forward by the plaintiffs in the Danish *Maastricht* case.³⁷ The plaintiffs argued that the transfer of sovereignty contravened the constitutional precondition of a democratic form of government in Denmark. The reasoning

economic cooperation and the Constitution of Denmark], *Juristen* (1963) p. 80; Torben Opsahl, ‘En moderne forfatning under debat’ [A modern constitution under debate], *Tidsskrift for Rettsvitenskap* (1962) p. 395. For a further discussion of the development of a structural convergence criterion in legal literature, see Søndergaard, *supra* n. 32, p. 248-253.

³⁴ See Sørensen, *supra* n. 32, p. 312-313.

³⁵ See Rasmussen, *supra* n. 32, p. 211-214.

³⁶ See Zahle, *supra* n. 23, p. 414-416; Sørensen, *supra* n. 32, p. 312-313 and Rasmussen, *supra* n. 32, p. 212.

³⁷ U.1998.800H.

behind this was that, even though Article 20 does not require the institutions of international organisations to which powers are transferred to have the same democratic structure as the Danish institutions, there are limits in the Danish constitutional system as to the extent to which the relationship between and the responsibilities of the Danish Parliament and Government can be redistributed. The Government argued that the European Parliament contributes to securing a sufficient democratic foundation. On the question of whether the transfer of sovereignty by the Accession Act contravened the constitutional precondition of a democratic form of government, the Supreme Court stated that any transfer of Parliament's legislative powers to an international organisation would entail some intervention in Denmark's democratic form of government. According to the Supreme Court, this was taken into account when the extensive procedures in Article 20 were designed. Most legislative power in the EU rests with the Council in which the Danish Government sits, and the Government is responsible to Parliament. It is up to the Danish Parliament to decide whether more democratic control of the Government is needed. Thus the Supreme Court was not particularly receptive to the structural convergence argument. However, the Court seemed to accept that there is a constitutional precondition of a democratic form of government in Denmark, even though it rejected the idea that this precondition had been contravened.³⁸

In the *Lisbon* case the plaintiffs put forward an argument related to 'structural convergence'. They argued that there should be an Article 20 procedure, since the Lisbon Treaty weakened the Danish Parliament's control of the transferred powers by the increased use of majority voting in the Council and by conferring increased powers on the European Parliament. The Supreme Court stated that the extent to which parliamentary control over the exercise of transferred powers is maintained is not decisive for the application of Article 20, and that the focus of the provision is *what* has been transferred to *whom*. As this shows, the Supreme Court did not accept the structural convergence argument of the plaintiffs in the *Lisbon* case.

³⁸ See U.1998.800H, p. 871 (para. 9.9). It has been argued that a 'constitutional precondition of a democratic form of government' must be understood more broadly than merely 'structural convergence' when interpreting the Supreme Court's decision in the *Maastricht* judgment; see Søndergaard, *supra* n. 32, p. 248-253. For a different view see O. Spiermann, 'Hvad kommer efter tyve' [What comes after thieves]. *UfR* (1998B), p. 325-333. In the present author's opinion the term 'constitutional precondition of a democratic form of government' should be understood more broadly than just as a discussion of 'structural convergence' in Art. 20. It must be seen as a more general precondition that stands behind the Constitution and which is also reflected in other Articles than Art. 20. It is interesting that the Supreme Court seemed to agree with the plaintiffs that there is a constitutional precondition of a democratic form of government, though the Court did not believe that the precondition had been violated (yet). However, the Supreme Court's statements in para. 9.9 simultaneously relate to the discussion in legal theory of 'structural convergence'.

The ‘structural convergence’ argument could have been one way in which the Supreme Court could have reached a less narrow interpretation of Article 20.

Changes in the administration of previously delegated powers in contravention of previous accession acts

As mentioned above, the Supreme Court found that the plaintiffs’ arguments did not provide a basis for assuming that the surrender of sovereignty in 1972 was based on legal assumptions about the administration of the delegated powers, or for assuming that the Accession Act was based on conditions to this effect. Here again, the Supreme Court had some room for manoeuvre. However, when the Court interpreted the statements made by politicians during the Parliamentary debate on Denmark’s accession to the European cooperation, the Court opted for a narrow interpretation of the legal assumptions and conditions attached to the Act of Accession. By doing so the Court also opted for a narrow interpretation of whether an Article 20 procedure should have been followed when Denmark acceded to the Lisbon Treaty.

On the one hand, in his speech introducing the 1972 Accession Act to Parliament, the Minister for European Market Affairs stated that:

At the time when we possibly accede to the Rome Treaty and the other Treaties, we know exactly which matters are delegated to supranational decision-making powers, and which conditions govern the exercise of such powers.³⁹

On the other hand, statements of a majority of the members of the Parliamentary committee on EC affairs show that they were, at least to some extent, aware that EC’s organisation could change over time:

The institutional set-up of the EC is to some extent evolving. Following the addition of new Member States, the number of members in the present institutions will increase. Also, the issue of strengthening the institutions is on the agenda for the planned European summit.⁴⁰

In the latter statement, the phrase ‘to some extent’ seems to leave room for interpretation of how much change to the institutional design of the EC the members of the Parliamentary committee on EC affairs foresaw in 1972. And how the two statements should be weighed against each other is of course also to some extent a matter of interpretation.⁴¹

³⁹ See Folketingstidende 1971-72 [Report of Danish Parliamentary Proceedings 1971-72], column 3631.

⁴⁰ See Folketingstidende 1971-72 [Report of Danish Parliamentary Proceedings 1971-72] supplement B, column 2810 et seq.

⁴¹ See also H.P. Olsen, ‘The Danish Supreme Court’s Decision on the Constitutionality of Denmark’s Ratification of the Lisbon Treaty’, 50 *Common Market Law Review* (2013) p. 1489-1504,

Direct and indirect expansion of powers in the Lisbon judgment

The parts of the judgment that concern the direct expansion of powers, i.e. the transfers of (new) powers via the Lisbon Treaty, are less controversial. First, the criterion for applying Article 20 in situations of direct expansion of powers was clearer since both the wording and the *travaux préparatoires* of Article 20 address the direct expansion of powers, and there was existing case-law and much published literature on this topic. This is not to say that there was no room for interpretation; there is a discussion below of how the Supreme Court traditionally interprets the Constitution. Second, the Danish opt-outs from EU cooperation have resolved some of the sovereignty questions. As regards free movement and the right of residence of Union citizens, Article 77(3) TFEU is covered by the Danish opt-out from cooperation on Justice and Home Affairs. Furthermore, as regards the protection of personal data (see Article 16 TFEU and Article 39 of the Treaty on European Union (TEU)), and cooperation in criminal matters and police cooperation (see Part Three, Title V, Chapters 4 and 5 TFEU), these are covered by Denmark's opt-out from cooperation on Justice and Home Affairs. Finally, as regards restrictive measures for preventing and combating terrorism and related activities, Article 75 TFEU is also covered by the Danish opt-out from cooperation on Justice and Home Affairs. Third, those parts of the proposed Treaty establishing a Constitution for Europe that were not covered by Denmark's opt-outs and which, according to the Danish Ministry of Justice, raised sovereignty questions relevant to Article 20, were not part of the Lisbon Treaty; these included a proposed new legal basis for EU legislation on energy and on cross-border threats to public health.⁴² In the present case the Supreme Court found that there was no basis for concluding that there had been a direct expansion of powers. The Court also stated that the case was not best suited for settling the disagreement between parties, and that a case involving an act or a judicial decision adopted or delivered pursuant to the contested Treaty provisions, and having a specific and real impact on citizens etc., would provide a better basis for a challenge. Thus the impact of the *Lisbon* judgment is that Danish courts will test the constitutionality of concrete acts and judicial decisions based on the Treaty, even though the starting point is that the Supreme Court found no contravention of Article 20 when Denmark acceded to the Treaty. The Danish courts will act as guardians to ensure that the

where it is stated that a minister's introduction of a bill in Parliament normally carries more interpretive weight in Danish law than a statement of a parliamentary committee.

⁴²The Ministry of Justice identified nine policy areas in which the Constitutional Treaty would lead to a transfer of new powers to the EU and which would require an Art. 20 procedure if Denmark wanted to accede to the Treaty. See Justitsministeriet, 'Redegørelse for vise forfatningsretlige spørgsmål i forbindelse med Danmarks ratifikation af Traktat om en Forfatning for Europa' [Report on certain constitutional questions in relation to Denmark's ratification of the Constitutional Treaty], 22 Nov. 2004.

EU institutions interpret the Lisbon Treaty within the limits of the powers delegated to them by Denmark. This opens the door wide for litigation on EU acts, and Danish citizens are more or less invited to file lawsuits against the State challenging aspects of the constitutionality of the Lisbon Treaty.

The part of the judgment that concerns the indirect expansion of powers is also less controversial, since the Supreme Court had already considered the flexibility clause (currently Article 352 TFEU) in its *Maastricht* judgment, when it ruled that under Article 20 of the Constitution there was a requirement to specify the transferred powers. The Court stated that Article 235 of the EC Treaty was an integral part of an institutional system based on the principle of conferred powers, and that it could not serve as basis for widening the scope of the powers of the Union beyond the general framework created by the provisions of the Treaty as a whole and in particular by those defining the tasks and the activities of the Union. Article 235 could not be used as a basis for adopting provisions that would effectively amend the Treaty without following the procedure provided for that purpose. The Court stated that, even though the flexibility clause may sometimes have been applied on the basis of a wider interpretation prior to the Treaty, its stated interpretation of Article 235 was the correct understanding of the provision. The Court also emphasised that any measure adopted pursuant to the flexibility clause must be adopted unanimously, and that it is the responsibility of the Danish Government to prevent the provision being applied to adopt any measure that is beyond the scope of Denmark's delegation of powers to the EU. Given the purpose of Article 235, the precise delimitation of the scope of the provision could inevitably give rise to doubts. The Accession Act gave the Government significant discretion to assess whether a measure would fall within or without the scope of Denmark's delegation of powers to the EU. In the *Lisbon* judgment the Court referred to these statements in the *Maastricht* judgment and extended this thinking to the Charter of Fundamental Rights, referring to Article 6(1), second sentence, TEU ('The provisions in the Charter shall not extend in any way the competences of the Union as defined in the Treaties').

Furthermore, in the part of the judgment concerning the indirect expansion of powers, the Supreme Court maintained the position it took in the *Maastricht* judgment that Danish courts are entitled to make *ultra vires* reviews of EU acts. The Supreme Court stated the following:⁴³

In the *Maastricht* judgment, the Supreme Court found, among other things, that *it is for the Danish courts to decide whether EU acts exceed the limits for the surrender of sovereignty which has taken place by the Accession Act*. Paragraph 9.6 of the judgment thus reads:

⁴³ Supreme Court judgment of 20 Feb. 2013, Case No. 199/2012, p. 15, U.2013.1451H, p. 1518.

'9.6. [...] By adopting the Accession Act, it has been recognised that the power to test the validity and legality of EC acts of law lies with the EC Court of Justice. This implies that Danish courts of law cannot hold that an EC act is inapplicable in Denmark *without the question of its compatibility with the Treaty having been tried by the EC Court of Justice*, and that Danish courts of law can generally base their decision on decisions by the Court of Justice on such questions being within the limits of the surrender of sovereignty. However, the Supreme Court finds that it follows from the demand for specification in s. 20(1) of the Constitution, held against the Danish courts' access to test the constitutionality of acts, that the courts of law cannot be deprived of their right to try questions as to whether an EC act of law exceeds the limits for surrender of sovereignty determined by the Accession Act. Therefore, *Danish courts must rule that an EC act is inapplicable in Denmark if the extraordinary situation should arise that with the required certainty it can be established that an EC act which has been upheld by the EC Court of Justice is based on an application of the Treaty which lies beyond the surrender of sovereignty according to the Accession Act. Similarly, this applies with regard to community-law rules and legal principles which are based on the practice of the EC Court of Justice.*' [Author's italics]

And it further stated that:

[...] the Court of Justice of the European Union is charged with settling any disputes on the interpretation of EU law, but this must not result in widening of the scope of Union powers. As mentioned above, Denmark's implementation of the Treaty of Lisbon was *based on a constitutional assessment* that it will not imply delegation of powers requiring application of the s. 20 procedure, and the Danish authorities are obliged to ensure that this is observed. [...] *if an act or a judicial decision which has a specific and real impact on Danish citizens etc. raises doubts as to whether it is based on an application of the Treaties which lies beyond the surrender of sovereignty according to the Accession Act, as amended, this may be made subject to a judicial review, as stated in paragraph 9.6 of the Maastricht judgment. The same applies if EU acts are adopted – or if the Court of Justice delivers judgments – based on such application of the Treaties with reference to the Charter of Fundamental Rights.* [Author's italics]

Thus in the *Lisbon* judgment the Supreme Court simply affirmed its position stated in the *Maastricht* judgment: if it can be established with the required degree of certainty that an EU act that has been upheld by the CJEU is based on an application of the Treaty that is beyond the surrender of sovereignty pursuant to the Accession Act, the Danish courts must rule that the EU act is not applicable in Denmark. This also applies to EU law rules and legal principles developed by the CJEU.

It is interesting to compare the Danish position in this area with the developments in Germany from the Maastricht Treaty to the Lisbon Treaty. Since its

Maastricht judgment,⁴⁴ the German Constitutional Court has refined its concept of *ultra vires* review, first in its *Lisbon* judgment⁴⁵ (especially in the *obiter dictum* in which it limited *ultra vires* reviews to obvious transgressions and to cases where legal protection cannot be obtained at the EU level⁴⁶) and later even more so in the *Honeywell* case⁴⁷ (the German ‘*Mangold* case’).⁴⁸ In its *Honeywell* judgment, the German Constitutional Court stated that *ultra vires* reviews of EU acts must focus on evident or obvious cases of powers being exceeded; the German Constitutional Court may only use its own standard of review in a restrained way. EU acts will be declared *ultra vires* if an obvious lack of authority were to lead to a serious shift of the power structure between the EU and the member states.⁴⁹ Furthermore, procedurally a German *ultra vires* review requires a prior reference to the CJEU.⁵⁰ While, in recent years, the German Constitutional Court has thus limited and made conditional its jurisdiction to carry out *ultra vires* reviews, the Danish Supreme Court has chosen a different approach in its *Lisbon* judgment, simply maintaining its position from the *Maastricht* judgment. However, this difference must be seen in light of the fact that the *Maastricht* judgment already made many reservations as regards *ultra vires* review when it stated that:

Therefore, Danish courts must rule that an EC act is inapplicable in Denmark if the *extraordinary* situation should arise that *with the required certainty* it can be established that an EC act *which has been upheld by the EC Court of Justice* is based on an application of the Treaty which lies beyond the surrender of sovereignty according to the Accession Act’ [Author’s italics].

Thus an *ultra vires* review is conditional on a prior assessment having been made by the CJEU. Furthermore, the Danish courts can only rule that an EU act is inapplicable if authority is clearly exceeded.⁵¹ This would be an exceptional situ-

⁴⁴ BVerfGE 89, 155 of 12 Oct. 1993.

⁴⁵ See BVerfG, Case 2 be 2/08 et al., Lisbon Treaty, judgment of 30 June 2009.

⁴⁶ *Ibid.*, para. 240.

⁴⁷ See BVerfG, BvR 2661/06 of 6 July 2010.

⁴⁸ See M. Wendel, ‘Lisbon before the Courts: Comparative Perspectives’, 7 *European Constitutional Law Review* (2011) p. 129.

⁴⁹ See Christoph Möllers, ‘German Federal Constitutional Court: Constitutional *ultra vires* Review of European Acts Only under Exceptional Circumstances; Decision of 6 July 2010, 2 BvR 2661/06’, 7 *European Constitutional Law Review*, p. 161-167 at p. 165.

⁵⁰ See Wendel, *supra* n. 48, p. 129.

⁵¹ It might also be questioned whether this requirement should also affect the prior decision on whether the plaintiff has a sufficient legal interest for the courts to review the merits of the case. There has been discussion in the Danish legal literature as to whether it follows from the Danish judgment on the war in Iraq (U 2010.1547H) that uncertainty about how a provision of the Constitution should be interpreted is an argument for finding that there is a legal interest and that, conversely, if the interpretation of a constitutional provision is clear then it can be argued that there

ation. Therefore, while the conditions for an *ultra vires* review in Germany now seem to be more limited and conditional than in Denmark, already in its *Maastricht* decision the Danish Supreme Court made reservations which have some similarities with the conditions developed by the German Constitutional Court.

Finally, in connection with *ultra vires* review, one of the most interesting aspects of the part of the *Lisbon* judgment on the indirect expansion of powers is that the Supreme Court places on the Danish authorities and the CJEU responsibility for ensuring that the scope of Union powers is not widened. Danish authorities must ensure that there is respect for the fact that Denmark's implementation of the Lisbon Treaty was based on the constitutional assessment that it does not imply delegation of powers requiring application of an Article 20 procedure. The Danish authorities must accept continuing responsibility for the fact that Denmark entered into the Lisbon Treaty by an Article 19 procedure. This may not be subsequently circumvented. As for the CJEU, the Supreme Court stated that the CJEU is charged with settling disputes about the interpretation of EU law, but this must not result in widening the scope of Union powers. The responsibility which the Supreme Court places on the Danish authorities and the CJEU must be seen in connection with the Supreme Court's jurisdiction to carry out an *ultra vires* review and to ensure that this responsibility is upheld in practice.

UNDERSTANDING THE JUDGMENT IN A COMPARATIVE PERSPECTIVE AND IN A DANISH CONSTITUTIONAL CONTEXT

As mentioned, the *Lisbon* judgment raises some broader questions about the separation of powers between the legislative authority and the judicial authority, about the role of the people and the concept of democracy, about constitutional interpretation (how it should be interpreted and by whom), about grey areas between political statements and legal statements, and about constitutional identity and the need for constitutional revision. These issues will be discussed in the following sections.

It is interesting that in both its *Lisbon* judgment and its *Maastricht* judgment, the Danish Supreme Court sets few limits to the transfers of powers to international organisations compared to the German Federal Constitutional Court, for example.⁵² For instance, the Danish Supreme Court does not define a number of

is not a legal interest. Thus the merits of the case could affect a prior decision as to whether a plaintiff had a sufficient legal interest. However, the judgment is not clear. See H. Krunke, 'Prøvelse af lovligheden af Danmarks deltagelse i Irak-krigen' [Review of the legality of Denmark's participation in the war in Iraq], 8 *Juristen* (2010) p. 226-232.

⁵²On the other hand some countries, such as the Netherlands, have fewer restrictions than Denmark. The Dutch Constitution is more open to international cooperation than the Danish Constitution.

'inalienable' policy domains, as the German Federal Court has done.⁵³ Nor does it emphasise the need to protect (national) democracy as much as the German Federal Court has done.^{54,55} How can this difference be explained? The answer can be found in the Danish constitutional context.

First, the Danish Constitution allows for the transfer of a good deal of powers to international organisations. Under Article 20, powers vested in the authorities can be ceded 'to a specific extent'. Since there are few restrictions on legislation in the Danish constitutional setting, there are few limits on the transfer of powers, whether legislative, executive or judicial. Moreover, the Danish catalogue of human rights is old and has not been updated; in fact the European Convention on Human Rights plays a more significant role in constitutional practice. Thus in this respect too, the Constitution does not impose clear limits. If it were necessary, an Article 88 procedure could be initiated and the Constitution could be amended, however difficult this may be in practice. This would be necessary if powers were transferred to a non-specific extent contrary to Article 20 – as was at issue in the *Maastricht* judgment. Moreover, there are no substantive limits to what can be achieved through constitutional amendments. This is because the Danish Constitution has no 'eternity clause', intended to ensure that certain core elements of the constitution cannot be changed. In Denmark the transfer of powers to international organisations is essentially a question of procedures.

Another key to understanding the *Lisbon* judgment is the prevailing interpretation of the separation of powers between the legislative and judicial authorities in the Danish constitutional setting. The constitutional tradition is to have a strong Parliament and cautious courts. The jurisdiction of the courts to review the constitutionality of legislation is not mentioned in the Constitution, and Denmark does not have a constitutional court. However, the ordinary courts can carry out a constitutional review but they will only set aside legislation if it clearly contravenes the Constitution. Moreover, the courts do not carry out abstract reviews, so that a plaintiff must have a specific legal interest to bring a case before the courts.

This tradition of cautious courts and a strong Parliament can also be found in other Nordic countries, but Sweden and Finland amend their constitutions more frequently which leaves a little less room for constitutional interpretation than in Denmark. The Danish Constitution dates back to 1849 and has only been revised four times (not including a minor change on succession to the throne a few years

⁵³ See BVerfG, Case 2 be 2/08 et al. Lisbon Treaty, judgment of 30 June 2009, BVerfGE 123, 267 et seq., paras. 252-260.

⁵⁴ On the principle of democracy, see BVerfG, Case 2 be 2/08 et al. Lisbon Treaty, judgment of 30 June 2009, BVerfGE 123, 267 et seq., paras. 211, 236, 248, 280 and 293.

⁵⁵ On the other hand, as discussed in the preceding section, while the German Federal Court has moved towards a more limited and conditional *ultra vires* review, the Danish Supreme Court has maintained its position in the *Maastricht* judgment.

ago). The last substantial revision was in 1953, and some provisions still have the same wording as in 1849. As seen already, the Danish Constitution is very difficult to change. Nevertheless, the Constitution must function in a modern constitutional context and therefore its interpretation is important. By focusing on *not* making 'political' decisions or interfering in the legislative process, the courts leave much room for Parliament and the Government. This relationship between the legislature and the courts is directly reflected in several paragraphs in the *Maastricht* and *Lisbon* judgments.

In the *Maastricht* judgment, the Supreme Court stated that the transfer of powers under Article 20 need not mean that Denmark is no longer an independent state. While it concluded that this constitutional precondition had not been breached by the Maastricht Treaty, the Court did not define what is meant by an 'independent state', it merely stated that the limits to transfers under Article 20 must primarily rely on considerations of a *political character*. The plaintiffs in that case had argued that so much sovereignty had been ceded that the constitutional precondition for a democratic form of government had been nullified. The Supreme Court answered that any transfer of legislative powers implies a certain encroachment on the Danish democratic form of government, but that this had been taken into consideration when Article 20 was designed. The Court further stated that *it is for the Danish Parliament to decide whether the Government's participation in the European cooperation should be conditional on more democratic control*.

These statements of the Supreme Court are in line with the traditional role of the political actors in interpreting the Danish Constitution, in a constitutional climate in which the courts only declare legislation unconstitutional if it manifestly breaches the Constitution, and political practice can become a legally binding constitutional convention which can even alter the Constitution. This is because the legislature is legitimated by popular elections, whereas the courts in Denmark have no such democratic legitimacy. At first glance, this seems a reasonable view. However, when it comes to protecting the rights of a minority in Parliament, a minority in the population, or in the electorate, one may ask whether this argument stands up to scrutiny. Of course, the electorate can 'punish' the politicians in the next election. However, in reality, an election concerns many issues, people tend to forget, and it is difficult for the electorate to form an opinion on whether the Constitution has been interpreted correctly (ordinary people are not legal experts).

In this respect, the *Lisbon* judgment is innovative to the extent that, while the Court upheld the traditional relationship between the legislature and the courts, it also emphasised that the political actors' comprehensive powers go hand in hand with responsibility. In relation to the indirect transfer of powers, the Court said that the Danish authorities must ensure that there is no creeping transference of

powers and ensure that the constitutional assumption that the approval of the Lisbon Treaty did not require an Article 20 procedure is respected. The Supreme Court also emphasised that the CJEU may not expand the powers of the EU by means of its interpretations:

The Court of Justice of the European Union is charged with settling any disputes on the interpretation of EU law, but this must not result in widening of the scope of Union powers. As mentioned above, Denmark's implementation of the Lisbon Treaty was based on a constitutional assessment that it will not imply delegation of powers requiring application of the s. [Article] 20 procedure, and the Danish authorities are obliged to ensure that this is observed.⁵⁶

In other words, the political actors are bound by the constitutional preconditions for the assessment and must act as a watchdog.⁵⁷ If they do not adequately fulfil this role, the Supreme Court can review the constitutionality of (secondary) EU law in specific cases.

THE ROLE OF THE ELECTORATE – POLITICAL ELITE VS. THE PEOPLE

It is important to bear in mind that constitutional reviews of legislation and constitutional interpretation do not just concern the relationship between the legislative and the judicial powers. In Denmark, the constituent power lies with the electorate together with Parliament and the Government, as prescribed in Article 88 of the Constitution. Furthermore, the electorate plays a role in the very provision that was interpreted in both the *Maastricht* and the *Lisbon* cases, namely Article 20. According to Article 20, there must be a referendum if more than half but fewer than five-sixths of the members of Parliament agree to enter into a treaty. If the treaty falls outside the limits of Article 20, the Article 88 procedure must be followed, according to which the electorate plays a role both in an election and in a referendum to amend the Constitution. It could be argued that Article 20(2) protects parliamentary minorities to a certain extent, because a simple majority can decide to enter into a treaty when an Article 19 procedure is followed, whereas five-sixths of the members of Parliament must agree to enter a treaty if an Article 20 procedure is required. However, in the traditional Danish constitutional context, as witnessed by the *Lisbon* judgment, by interpreting the Constitution the political majority can decide on the role of the electorate. This follows

⁵⁶Supreme Court judgment of 20 Feb. 2013, Case No. 199/2012, p. 15, U.2013.1451H, p. 1520.

⁵⁷As regards Art. 352 TFEU and Art. 6(1) TEU, both in the *Maastricht* judgment and in the *Lisbon* judgment the Supreme Court emphasised that the Government must prevent decisions that would lead to further surrender of sovereignty.

from the fact that the political institutions are free to interpret constitutional provisions as long as their interpretations do not clearly contravene the Constitution.⁵⁸ Against this background, it is possible to place the *Maastricht* and *Lisbon* cases in the perspective of competing perceptions of democracy and the role of the electorate.⁵⁹

The plaintiffs in the *Lisbon* case were a group of ordinary Danish citizens who argued for an interpretation of Article 20 that would potentially directly involve the electorate. The Danish Government argued that an Article 19 procedure was sufficient, which gives no role to the electorate. Thus it is possible to see the two cases from the perspective of the electorate's role in important political decisions, such as the transfer of power to international institutions. The plaintiffs' (meaning the ordinary citizens') perception of democracy is closer to the idea of direct democracy than the perception of the Government is. From this perspective, the Supreme Court's *Maastricht* and *Lisbon* judgments hold the line between the two competing perceptions of democracy.

Whereas the Supreme Court's decisions on the merits (the interpretation of Article 20) in the *Maastricht* and *Lisbon* cases leave little scope for the electorate, its decisions on the admissibility of the two cases⁶⁰ might be said to have the opposite effect. According to Danish procedural law, a plaintiff must have a specific legal interest in a legal question before the courts will admit a case; as said before, Danish courts do not carry out abstract reviews. However, in deciding to admit the Danish *Maastricht* case, the Supreme Court widened the scope of what constitutes a legal interest based on the argument that accession to the Maastricht Treaty involved a transfer of legislative powers in a number of general and important public policy areas, having an impact on ordinary people's lives and thus on the Danish population in general.⁶¹

By interpreting the procedural criteria comprehensively and innovatively, the Court gave ordinary citizens the possibility of having a judicial review of the constitutionality of the procedures used by the Danish authorities for entering into the Maastricht and Lisbon Treaties. In the Danish constitutional setting, with cautious courts, this 'touch of judicial assertiveness' is quite exceptional. It reflects a wish to extend the judicial protection of citizens against the actions of the State in matters involving the transfer of powers to international institutions. This wish is also reflected in the repeated statements of the Court on the rights of Danish

⁵⁸ This principle has been accepted by the Danish Supreme Court, for instance in the *Maastricht* and *Lisbon* judgments. In both cases, the scope for interpretation vested in the political actors affects the extent of the role of the electorate when Denmark enters into EU treaties.

⁵⁹ See H. Krunke, 'Lissabonsagen – Med magt følger ansvar' [The Lisbon case – with power comes responsibility], 5 *Juristen* (2013) p. 224.

⁶⁰ U.1996.1300H (Maastricht) and U.2011.984H (Lisbon).

⁶¹ U.1996.1300H.

citizens to have specific cases tried before the courts if they find that it is questionable whether an act or a judicial decision, which has a specific and real impact on Danish citizens, is based on an application of the Treaties that lies beyond the transfer of sovereignty under the Accession Act. Thus, the procedural rights of citizens are used to balance the Court's narrow interpretation of Article 20, and so the procedural aspects and the substance of the case are linked. At the same time the different conceptions of democracy are balanced and bound to each other.

THE LISBON JUDGMENT, THE MAASTRICHT JUDGMENT AND NATIONAL CONSTITUTIONAL IDENTITY

Article 4(2) TEU has stimulated growing awareness of and debate about how to define national identity in the Nordic countries.⁶² The provision states: 'The Union shall respect the equality of Member States before the *Treaties* as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.' As part of the Nordic debate there have been questions about the role played by national court rulings on EU treaties, such as the Danish *Maastricht* and *Lisbon* judgments, in defining national identity. It has been argued that both decisions may contribute to defining national identity under Article 4(2).⁶³ Their main contribution is that they confirm that, under its present Constitution, Denmark must remain an independent state; this is a constitutional precondition for transfers of powers under Article 20. Another contribution is that, under its present Constitution, Denmark must have a democratic form of government; this is also stated to be a constitutional precondition. However, while the Supreme Court may be said to have contributed to the definition of Danish national identity by the two judgments, its contribution is rather limited compared to that of the German Federal Constitutional Court. The reason for the difference is, of course, the difference in the

⁶² A forthcoming issue of the Nordic legal journal *Retfærd. Nordic Journal of Law and Justice* is dedicated to the theme national identity in the Nordic countries. It will be based on papers from a seminar on the topic in Turku, Finland, in April 2013. See also J. Salminen, 'Europeiska unionen och den nationella konstitutionella identiteten' [The European Union and the national constitutional identity], 3 *Europarättslig Tidskrift* (2013) p. 459-480 and J. Salminen, 'Europeiska unionen och den nationella konstitutionella identiteten' [The European Union and the national constitutional identity], 4 *Europarättslig Tidskrift* (2013) p. 715-727.

⁶³ See H. Krunke, 'Constitutional Identity – Seen through a Danish Lens', *Retfærd. Nordic Journal of Law and Justice* (2014 forthcoming) and H. Krunke and F. Schulyok, 'National Citizenship and EU Citizenship. What Actual Competence Is Left for the Member States in the Field of Citizenship?', in T. Giegerich et al. (eds.), *The EU between 'an Ever Closer Union' and Inalienable Policy Domains of Member States* (Nomos 2014), p. 107-151.

role of the German Court in the German constitutional setting and that of the Danish Supreme Court in the Danish constitutional setting.

This last observation leads to a further reflection. It is tempting to view the Danish opt-outs from European cooperation as a part of Danish national identity, at least for the moment. These opt-outs are defined by Parliament and the Government and this fits well with the Danish constitutional tradition, whereas in the German constitutional setting the Federal Court plays a significant role in defining constitutional identity. Thus the constitutional setting of a member state is reflected in how national identity is defined, including who defines it.⁶⁴ Also, in the Danish constitutional setting the leading role of Parliament and the more restrained role of the courts may also be considered part of Danish national identity.

CONCLUDING OBSERVATIONS

In the *Maastricht* judgment, the Danish Supreme Court interpreted the upper limits of Article 20, i.e. up to what point powers can be transferred to the EU without amendment of the Constitution. With the *Lisbon* judgment, we now also have the Court's interpretation of the lower limits of Article 20, i.e. up to what point Denmark can enter into treaties without following an Article 20 procedure. With this judgment, the Supreme Court has made clearer when an Article 20 procedure is necessary in relation to institutional changes. It is now clear that if a treaty changes the institutional set-up to such an extent that the identity of the relevant organisation is changed, an Article 20 procedure is required. However, this identity criterion is interpreted as a narrow exception to the general rule that institutional changes do not require an Article 20 procedure. The focus of Article 20 is on whether powers are ceded in new areas and whether the international organisation acquires new supranational instruments. Changes in the way an organisation is organised do not generally require an Article 20 procedure.

The way in which Article 20 is designed and the way in which it is interpreted by the Supreme Court implies that changes that are quite technical (for instance, the Amsterdam Treaty) would require an Article 20 procedure because accession would involve the transfer of powers granted to Danish authorities by the Constitution and fewer than five-sixths of the members of Parliament supported accession. However, more fundamental changes, such as the institutional changes brought by Lisbon Treaty, do not require such a procedure. For example, Denmark's accession to the European Patent Convention required an Article 20 procedure and was subject to a referendum, as the Convention meant that powers granted

⁶⁴Ibid., p. 150-151.

to Danish authorities by the Constitution would be transferred to the European Patent Court. The new European Patent Court has jurisdiction to make final decisions in proceedings between private parties on patents covered by the Treaty, and to make decisions regarding evidence in such cases.⁶⁵ This transfer of sovereignty, combined with the fact that accession to the Convention was not supported by five-sixths of the members of Parliament, meant that a referendum was required. It is questionable whether Article 20 actually reflects the importance of the Treaties mentioned, not least in the eyes of the electorate. After all, institutional changes will often relate to the democratic structure of the institutions. However, after the *Lisbon* judgment, it is clear that if there is to be a more comprehensive involvement of Parliament and of the electorate in the approval of treaties that change an international organisation's institutional set-up without changing the organisation's identity, it will require an amendment of the Constitution. The current Government has in fact stated that it intends to start a political and public discussion about a general revision of the Constitution.⁶⁶ Article 20 should be part of that discussion.



⁶⁵ See Notat om dansk tilslutning til aftale om en fælles europæisk domstol/grundlovens § 20 [Memorandum on Danish accession to agreement on a common European Court/Article 20 of the Constitution], Ministry of Justice, 7 May 2013.

⁶⁶ See the Danish Government's platform, *Et Danmark der står sammen* [A Denmark that stands together] (The Prime Minister's Office 2011), p. 61. <www.stm.dk/publikationer/Et_Danmark_der_staar_sammen_11/Regeringsgrundlag_okt_2011.pdf>.