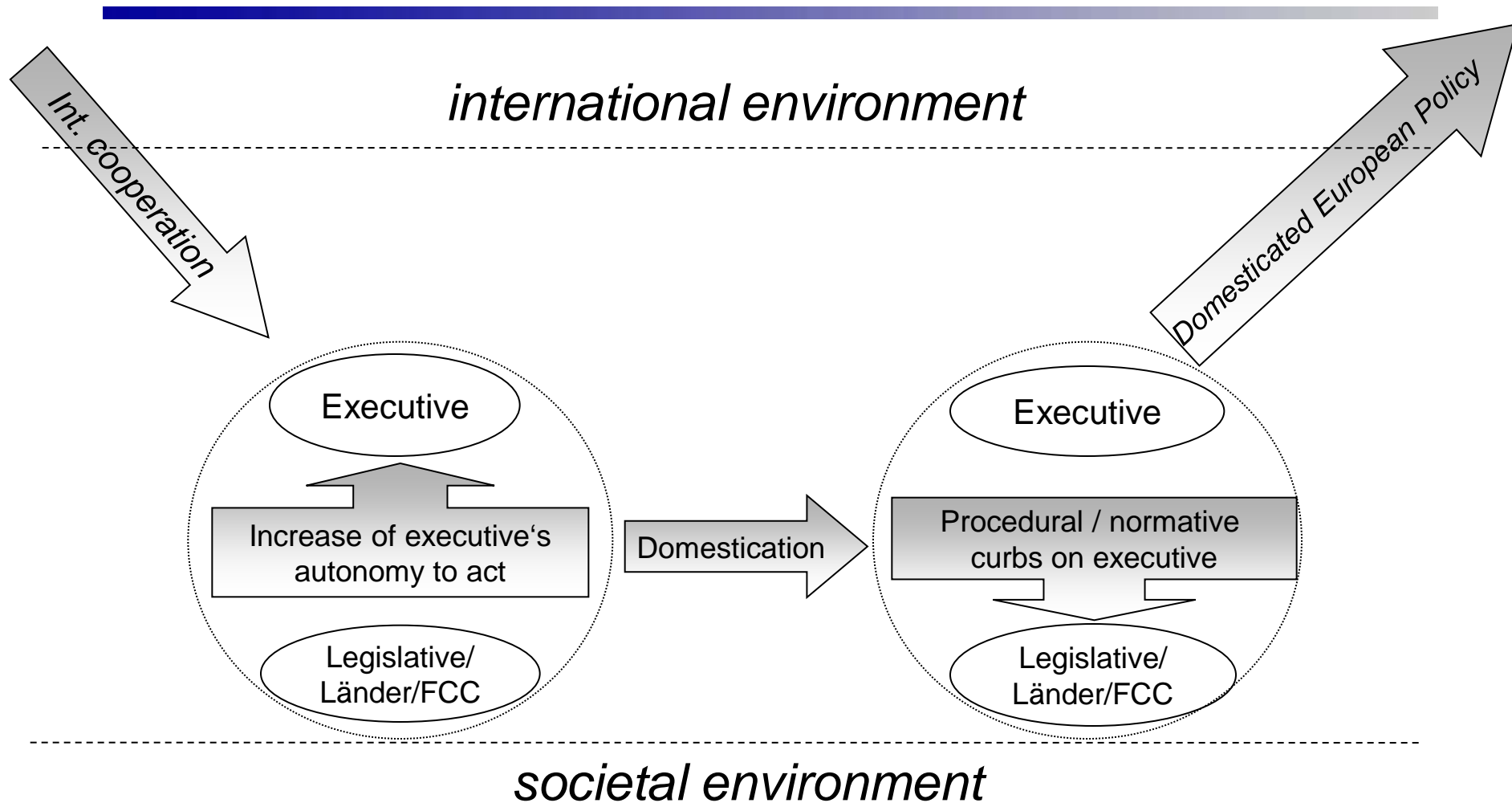

Transatlantic Cultures of Rights: The German Case

Presentation at the Workshop
The Transcultural Atlantic:
Constructing Communities in a Global Context

Propositions and the Argument

1. The legalization of world politics is rapidly advancing.
2. Several analysts suggest that the US does regard multilateralism/international law with growing scepticism, because it undermines on American (supreme) sovereignty and democracy. Europeans, however, subject themselves to both ever more willfully (Kagan; Haller; Krakau/Streng).
3. A first-cut analysis of domestication, i.e. a legal strategy by legislators and judges to reign in executive autonomy seeking in international Organisation, in German European and Security policy suggests otherwise:
 1. The FCC has set fixed limits for the delegation of competences to supranational bodies in both policy areas.
 2. The FCC has increasingly done so and its rulings (e.g. Maastricht Treaty) have had an important impact on national constitutional courts in the EU.

Process of Domestication



Article 23 [Struktursicherungsklauseln]

(1) With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights **essentially comparable to that afforded by this Basic Law.**

Definition: Domestication

„Domestication is a process by which domestic political actors aim at limiting the executive’s autonomy in foreign policy through improved procedural participation and normative preservation guarantees in both legislative acts and constitutional law.“

FCC Judgement on the Maastricht Treaty 12.03. 1993

- Art. 38 in conjunction with Art. 23 excludes the possibility of a delegation of competences onto the EU that violates the GG core norms in Art. 79, 3.
- The principle of democracy does not prevent Germany's membership in a supranationally organised "association of states", but the main source of legitimacy must remain the "national demos" (das Volk).
- Thus, the German *Bundestag* must retain tasks and powers of substantial weight. The European Parliament has only a supportive role in providing legitimacy, which can be strengthened when it is elected by a procedure common to all the Member States and its influence on the politics and law-making of the European Communities increases.
- The Treaty follows the principle of limited individual authorisation. It allows activity by the Union exclusively on the basis of an *expressis verbis* treaty authorisation. The Treaty does not empower the Union to obtain in its own right the financial or other means it considers necessary for fulfilling its aims.
- Sovereign acts of the European Communities touch on the guarantees of the Constitution and the role of the *FCC* which is responsible for the protection of fundamental rights in Germany, and to that extent not only against German state organs. The FCC exercises its jurisdiction over the applicability of secondary Community Law in Germany in a "relationship of cooperation" with the European Court of Justice.

FCC Judgement on European Arrest Warrant 18.07. 2005: Institutional preservation and institutional resemblance

- “As a qualified proviso of legality, Article 16.2 sentence 2 of the Basic Law permits the extradition of Germans only “as long as the rule of law is upheld”. Such prerequisite for an extradition not merely repeats the validity of the principle of the rule of law, which is not open to restrictions of fundamental rights anyhow, and in particular of the principle of proportionality. It rather constitutes an expectation referring to the requesting Member State and to the international court in terms of **structural correspondence**, as has also been set out in Article 23.1 of the Basic Law. When permitting the extradition of Germans, the legislature must examine in this context whether the prerequisites of the rule of law are complied with by the requesting authorities.”

http://www.bundesverfassungsgericht.de/entscheidungen/rs20050718_2bvr223604en.html

www.harnisch.uni-hd.de

Domestizierungsbestrebungen in anderen EU-Staaten

- Rechtssprechung
 - Frankreich: Entscheidung des Conseil Constitutionnel (31.12.1997)
 - Italien: Corte Costituzionale (Granital-Rechtssprechung 1973)
 - Belgien: Urteil des Schiedshofs (03.02. 1994)
 - Spanien: Tribunal Constitucional (01. 07. 1992)
 - Dänemark: Oberster Gerichtshof (Urt. vom. 06.04. 1998)
- Verfassungsrecht (Präponderanz des nationalen Rechtsanwendungsbefehls)
 - Schweden: Kap. 10 § 5 Verfassung
 - Großbritannien: Grundsatz des Parlamentssouveränität
 - Frankreich: Art. 89 Verfassung (Souveränitätsgebot)
 - Österreich: Art. 9 Abs. 2 B-VG (einzelne Hoheitsrechte)

Graphik: Drei Analyseschritt im Domestizierungsprozess

Struktur => Akteur

Akteur => Struktur

**Struktur-
veränderung I:**
Europäisierung

Akteur Veränderung

**Struktur-
veränderung II:**
bspw. Verlangsamung
Europäisierung

Domestizierungsthese

Wahrnehmung der
Strukturveränderung

Argumentation
in Reformdebatte

Umsetzung
und
Normkontrolle

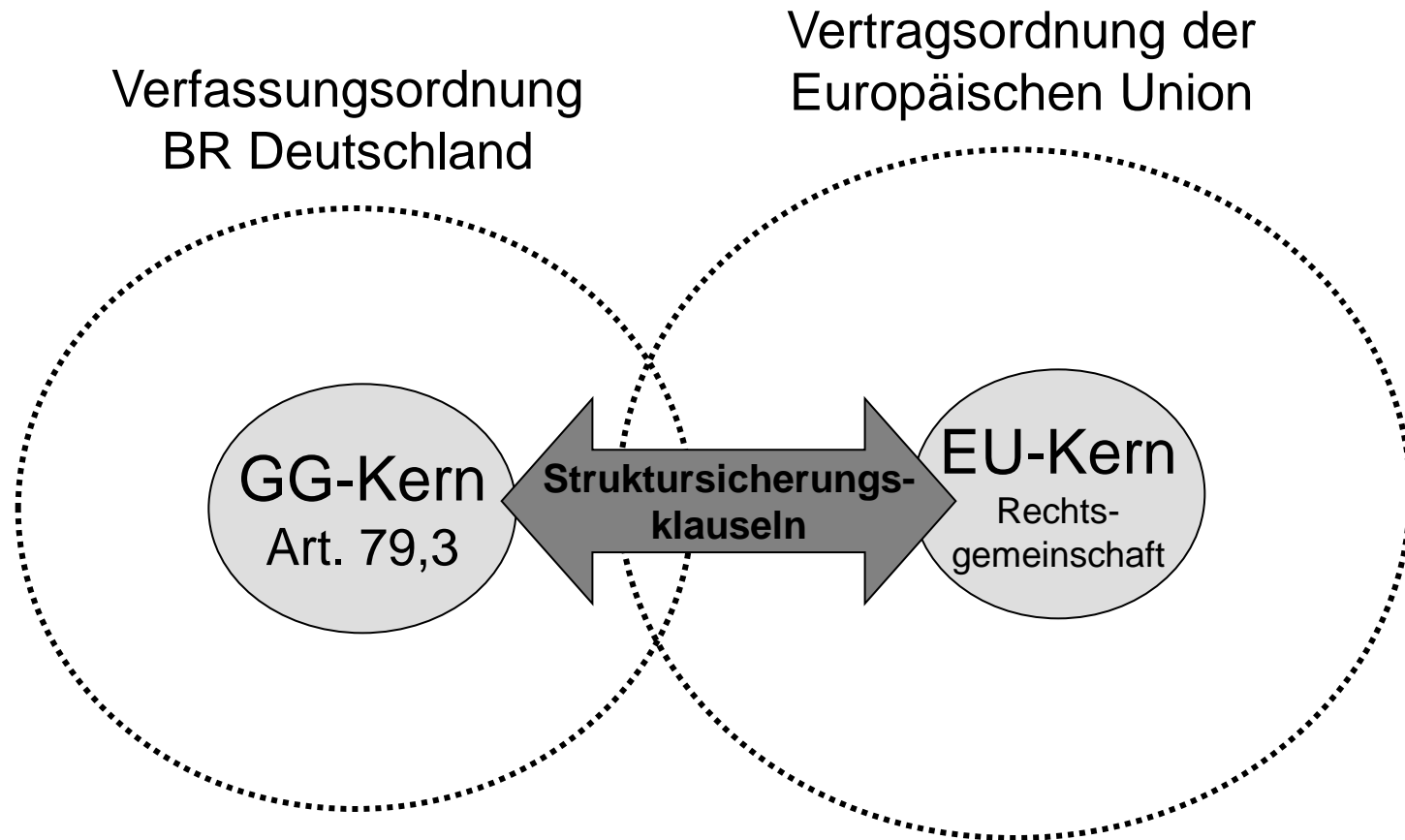
Außenpolitisches
Verhalten

1. Diskursanalyse

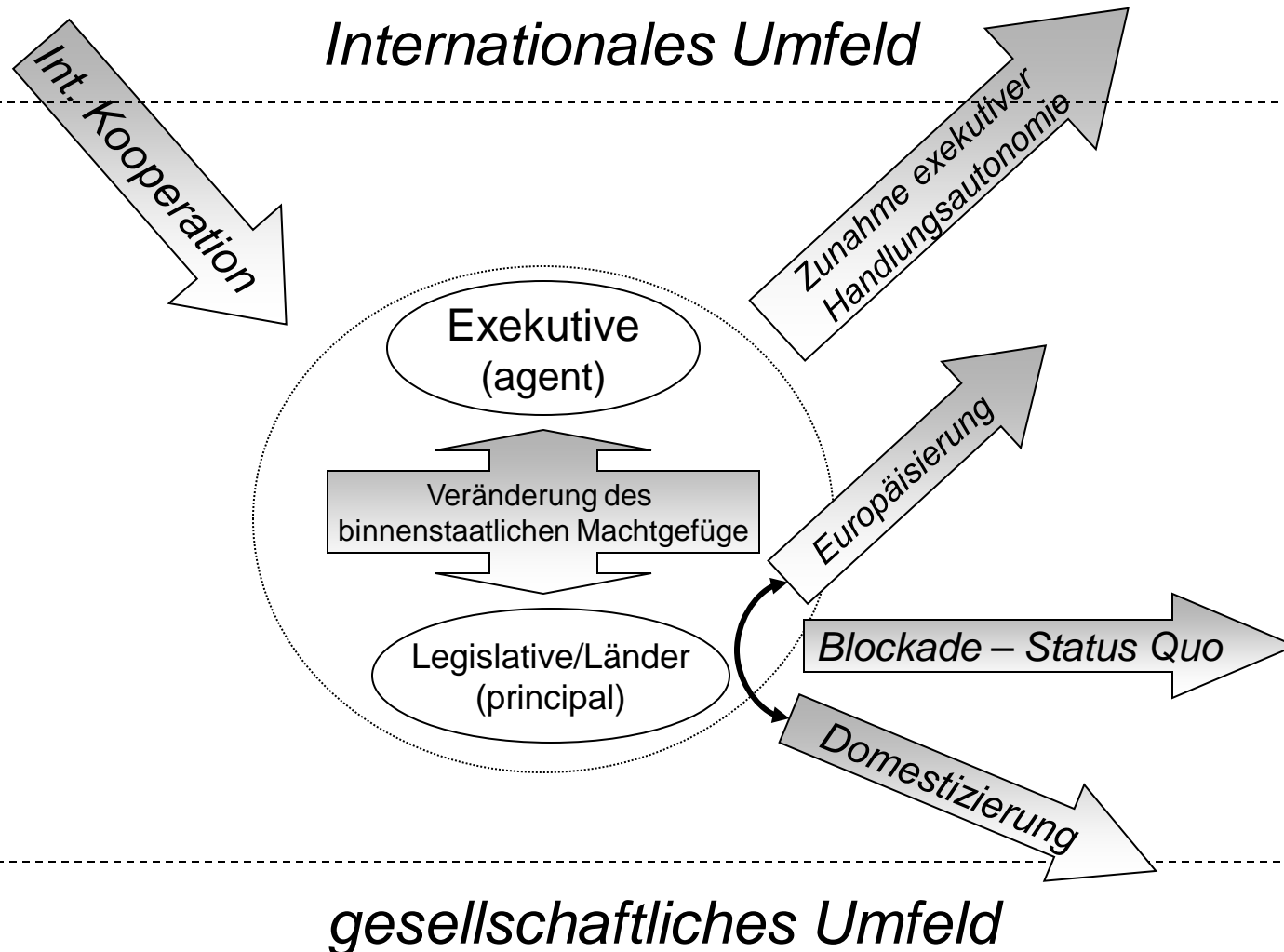
2. Institutionenanalyse

3. Verhaltensanalyse

Die Struktursicherungsklauseln von Art. 23 und das Ähnlichkeitserfordernis für die Europäische Union



Internationalisierung von Politikprozessen: Handlungsoptionen für binnenstaatliche Akteure



Germany's Constitutionalisation Policy for the EU: Initiatives und Policy outcomes

