

Becker, Peter; Maurer, Andreas

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German Brakes on Integration

Consequences and Dangers of the Federal Constitutional Court Judgment for Germany and the EU

Peter Becker / Andreas Maurer

In its judgment of 30 June 2009, the German Federal Constitutional Court (*Bundesverfassungsgericht*), based in Karlsruhe, coupled its endorsement of the Treaty of Lisbon with the demand that the rights of the *Bundestag* and *Bundesrat* to participate in the further development of the European integration process be strengthened. According to the Court, any simplified procedure for amending or adapting the Lisbon Treaty requires a statutory provision governing the rights of participation. The Court used its judgment to fundamentally redefine the existing political and legal boundaries of the European integration process in Germany, by specifying the areas in which the national legislature has inviolable sovereignty of action. In so doing, the Court limits the responsibility of the *Bundestag* and *Bundesrat* on European integration policy to monitoring the European policy decisions of the executive and places the focus of parliamentary involvement in European policy on taking qualitative steps of integration.

The Karlsruhe judges' assessment of the dynamics of primary and secondary EU law is based exclusively on the standards and requirements of the German Basic Law. The more closely integrated Europe becomes, the more heavily the Basic Law weighs in Federal Constitutional Court decisions. In its Lisbon judgment, the Court does not question the openness of the Basic Law to integration; however, it does restrict the boundaries afforded to integration by the fundamental rights and principles of democracy enshrined in the Basic Law. In this respect, the Court's decision is a seamless continuation of the 1993 Maastricht Treaty judgment and continues to class the

EU as an "association of states" (*Staatenverbund*), whose legal order derives from those states.

Basic Finding: An Undemocratic EU

Central to the Lisbon Treaty judgment is the principle of democracy. In particular, the Court sees the transfer of arguably too many or inadequately defined competences to the EU *Staatenverbund* as potentially weakening the democratic principle. In their earlier judgment on the Maastricht Treaty, the Court's judges declined to call the EU a democratic form of government, on the grounds that it lacked the "essential

prerequisites” for this status. Now in the Lisbon judgment, the Court goes a step further. It recognises the extensive reforms that have taken place since 1993 towards a formal, institutional democratisation of the Union as evidence of a clear delimitation of the EU’s development. The democratic deficits of the European Union, it claims, have led to a considerable degree of excessive federalisation, which cannot be compensated even by the new forms of participative democracy introduced by the Lisbon Treaty.

In the Court’s view, the European Parliament (EP), despite being strengthened, will not be democratically legitimised unless it is elected on the basis of democratic equality. The EP does, it says, convey independent, albeit only “additional”, democratic legitimisation, which complements and carries “the legitimisation provided by national parliaments and governments”. However, because the EP is not elected on the basis of “equal contribution towards success”, the principle of democracy is not fulfilled. The EP, it claims, is “not a body of representation of a sovereign European people”, which is made clear by the fact “that it, as the representation of the peoples in their respectively assigned national contingents of Members, is not laid out as a body of representation of the citizens of the Union as an undistinguished unity according to the principle of electoral equality”. Therefore, even after the entry into force of the Lisbon Treaty, the Union will lack “a political decision-making body which has come into being by equal election of all citizens of the Union and which is able to uniformly represent the will of the people.”

Heedless of the fact that the Lisbon Treaty at no point attempts to constitute a unified European people, this line of argument forms the core of the judgment and shapes the rest of the Court’s statements. For example, the Karlsruhe judges do not consider the additional forms of legitimisation introduced by the Treaty of Lisbon – the double-qualified majority in Council votes, the elements of associative and direct

democracy (European Citizens’ Initiative) or the involvement of national parliaments in the European legislative process – as suitable compensation for “the majority rule which is established by an election”.

Short-term Consequences

The court makes it clear that the principle of conferral of enumerative empowerments continues to apply and that the EU only enjoys competences transferred to it by the Member States, which remain sovereign. However, although it seems positive at first glance, this overall judgment only relates to the framework of competences that the Lisbon Treaty codifies at the time of its entry into force. It explicitly does not cover any competences outside this framework which are developed through application of various amendment clauses provided in the Treaty.

In this connection, the Court announces that in future it will always review whether the boundary at which the nation-state sovereignty or the threshold to the federal statehood of the European Union is undermined is being transgressed. In so doing, the judges do not in principle rule out the step of Germany entering a European federal state. However, they make it conditional upon the German people voting in favour of such a break and the democratic requirements of the Basic Law and the protection of fundamental rights being guaranteed. The Karlsruhe judges see the boundary of nation-state sovereignty being reached at any point when, as the result of implementation of an amendment to the Treaty, “the Member States do not retain sufficient space for the political formation of the economic, cultural and social circumstances of life”. This applies particularly to fields of policy “which shape the citizens’ circumstances of life, in particular the private space of their own responsibility and of political and social security, which is protected by the fundamental rights, and to political decisions that particularly depend on previous understanding as regards cul-

ture, history and language and which unfold in discourses in the space of a political public that is organised by party politics and Parliament”.

Brakes on Integration and Comprehensive Scrutiny Reservation

This line of argument freezes indefinitely the framework of competences and action contained in the Lisbon Treaty. In practical terms, it means that every time the EU decides to further extend the integration process the Federal Constitutional Court will need to clarify whether the boundary of national-state sovereignty has been breached. Every political response formulated by consensus between all Member States with the aim of keeping the EU viable in future runs the risk of being challenged as an inadmissible “transgression of the boundary”. In this way, the Court is extending the core line of argument it has been formulating since 1974 beyond the protection of fundamental rights, and is henceforth reserving the power to review itself all of the provisions codified in the Lisbon Treaty which involve supplementing or simplified revision of the Treaty foundations. It also specifies the preserves of state sovereignty and democratic autonomy for which it wishes to perform a supervisory function: citizenship issues, military and police monopoly on the use of force, substantive and formal criminal law, fundamental fiscal decisions on revenue and public expenditure (including external financing and in particular with respect to public expenditure motivated by social-policy considerations), decisions on the shaping of circumstances of life in a social state and issues relating to family law, the school and education system and dealings with religious communities. In these areas, the Court says, there must be preliminary factual restrictions on not only the legal transfer but also the actual exercise of sovereign powers. In this, the Court is going beyond the comprehensive scrutiny reservation on transfers of competences that it has

demanded. What it is claiming for itself here is the role of a potential ‘brake on integration’, one that is legally actionable at any time.

In terms of European policy practice, the Federal Constitutional Court’s listing of protected core areas of nation-state competence throws up some weighty questions. The Court is hampering practical implementation of the European “integration programme”, even in those policy fields that have been communitised under the Lisbon Treaty. Large-scale integration projects, such as the development of a European criminal code or the ideas – long-discussed in political circles – of establishing a European army, creating a European social insurance system or introducing separate European tax-levying powers, will be put on hold.

In the Court’s view, the integration of all these areas represents such a fundamental decision that it must be preceded by an expression of the will of the German people. In practice, this requirement of a referendum covers more than those future reforms of the Treaty that are classed, following review by the Constitutional Court, as qualitative steps towards integration. It would even apply to a new Treaty compromise that was much less radical than what a German Federal Government, during negotiations, had told its EU partners would require a referendum. This uncertainty will undoubtedly hamper ratification of any Treaty amendments right across Europe. Above all, however, it questions the autonomy of the *Bundestag*, *Bundesrat* and the Federal Government in exercising their responsibility for integration.

Moreover, the statement by the Karlsruhe judges that public external financing is one of the elementary domains of democratic sovereignty for EU Member States raises the question of whether or not the Maastricht convergence criterion relating to annual net government borrowing was already an encroachment into one of the protected areas of sovereign state competence. The statements of the Karlsruhe judges are unclear on this point. The parliamentary

debate on the budget, “-including the extent of public debt -” is, they say, a general debate on policy in the *Bundestag* and is vouched for by the fact that the right to adopt the budget and control its execution is a cornerstone of the principle of democracy. However, not every European or international obligation that has an effect on the budget necessarily endangers the viability of the *Bundestag* as the legislature that is responsible for approving the budget. That being said, it cannot be disputed that the Maastricht criteria place tight fiscal limitations on the policy-making scope of Member States in the Eurozone: after all, that is the whole point and purpose of the convergence criteria. With high-court approval from Karlsruhe, a failure to comply with the borrowing limit can be legitimised on the grounds of protecting national budget sovereignty. This situation could become a political problem at European level, if compliance with or greater flexibility for the European Stability and Growth Pact is put back up for discussion. A bomb has been placed under monetary stability; all we can hope is that other Member States will not detonate it.

Barriers to Simplified Adaptation of the Treaty

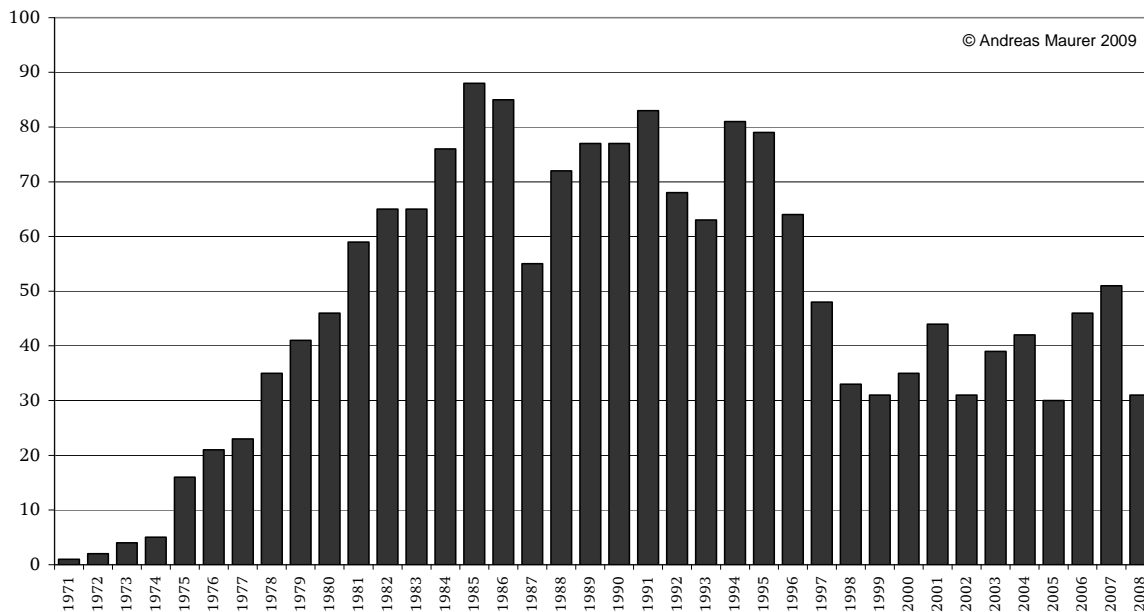
The Karlsruhe judges understand the transfer of sovereign powers to mean “any amendment of the texts that form the basis of European primary law”. Consequently, in future any adaptation – however small – of the European instruments will require the approval of the German parliament. In addition to the standard Treaty revision procedure, the new mechanisms of the simplified revision procedures, bridging clauses and Treaty ‘rounding-off’ procedures would also require approval by the German parliament in future. These simplified revision procedures were introduced to avoid having to go through the lengthy procedure of an Intergovernmental Conference for every adaptation to a Treaty in a Union of 27 and more Member States. Never-

theless, these procedures provide hurdles in the form of unanimous agreement by the EU Member States as well as, in most cases, the approval of the EP.

- a) The graded procedure for simplified revision of the Treaties laid down in Article 48(6) of the Treaty on European Union (TEU), as amended by the Treaty of Lisbon, enables simplified revision of Part Three of the Treaty on the Functioning of the European Union (TFEU), i.e. the provisions relating to “internal policies” such as the internal market, fundamental freedoms, agriculture, justice and home affairs or employment and social policy. The Treaty stipulates that this shall not increase the competences conferred on the EU.
- b) The general bridging clause in Article 48(7) TEU and a special bridging clause for family-law measures in Article 81(3) TFEU enable a simplified procedure for switching from unanimous decision-making to qualified-majority decision-making in the Council as well as from the special to the ordinary legislative (*codecision*) procedure.
- c) In addition, the Lisbon Treaty confirms the existing flexibility (*implied powers*) clause, which is used around 30 times a year: if the Treaty does not provide the necessary powers to achieve a certain objective but “action by the Union should prove necessary, within the framework of the policies defined in the Treaties”, then the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, can adopt the appropriate measures. This so-called *Vertragsabrundungsklausel* (Treaty rounding-off clause) allows for a fine-tuning of the Union’s powers on a strictly case-by-case basis. It explicitly rules out measures aimed at the harmonisation of Member States’ laws and regulations. So far, the clause has been used – often in combination with other legal bases that are clearly defined in terms of competences – to equip the EU with instruments that it

Graph

Use of the Flexibility Clause 1971–2008



Source: Own calculation based on EUR-LEX, 7 July 2009;
Search criterion: legal basis (=235/=308) + period (=year) + author (=Council)

needs in order to exercise the competences and tasks already transferred to it. These include, for example, the creation of agencies, the agreement of action programmes and measures in relation to agreements with third countries.

The Federal Constitutional Court has expressly demanded that the prepared “Extending Act” (BT-Drs. 16/8489) be adapted, in order that the Treaty of Lisbon can be definitively ratified in Germany. In so doing, the Court has thwarted the attempt of the EU to create an appropriate balance between the need for adaptation of primary law and the wish for equal participation by all members, in so far as it has rejected the procedure enacted by the *Bundestag* and *Bundesrat* to satisfy the requirement for national ratification. Consequently, the differentiated revision procedures are simplified only at European level; national implementation will not follow this differentiation, since the Court demands that *Bundestag* and *Bundesrat* exercise their

responsibility for integration in the form of an explicit approval on a legal basis established by law. Under this system, every abstention counts as a rejection. The already prepared agreement between the *Bundestag* and Federal Government is not sufficient to satisfy the Court.

Accordingly, the requirement for parliamentary participation and assent applies not only to transfers of competences but also to changes to the EU decision-making procedure. The immediate effects of the judgment are limited. However, over the longer term the judges’ line of argument in particular could have consequences for Germany’s European policy and its role in the EU.

Long-term Effects on European Policy

The Constitutional Court calls for a redistribution of weight between the executive and legislature in Germany’s European policy, going beyond implementation of its

judgment. The requirement for *Bundestag* and *Bundesrat* to give their consent strengthens their participation and co-decision rights. Members of parliament will be required to continually monitor the process of European integration and analyse European decisions in depth.

With its discernible desire to take the German Basic Law as its exclusive yardstick for assessing the further dynamic of the integration process, the Court has (wittingly or unwittingly) made itself a political player in the European policy cycle. In future, whenever there is a textual amendment to the European instruments or even a disputed legislative procedure, both *Bundestag* and *Bundesrat* will be tempted to influence the way the Federal Government negotiates in Brussels, by appealing to the Constitutional Court or threatening to do so. With every EU directive, the Constitutional Court can be asked whether it transgresses the threshold to the federal state and to the waiver of national sovereignty and violates the inviolable core content of the “constitutional identity”. This increases the danger that European policy projects will become a weapon in internal political disputes and that European issues will be exploited in tactical power struggles and internal political horse-trading. The key question in the long run, therefore, will be: how strong is the fundamental cross-party consensus on European policy in Germany?

Nonetheless, through its judgment the Constitutional Court has narrowed the scope of the Federal Government to actively shape European policy in Brussels, while increasing the push towards a reactive policy that puts the brakes on European integration. The Court’s message on integration policy will have ramifications for the basic assumptions underpinning Germany’s European policy and Germany’s position in Brussels. In inter-ministerial votes, the reference to Germany’s traditional role as a driving force behind integration and a broker of European compromises will no longer be enough to persuade individual ministries to put aside their specific reser-

vations and misgivings and forge European solutions. However, participation in the process of European integration remains a constitutional mandate of German politics and is not left to the “political discretion” of the German constitutional bodies. This obligation therefore also applies to the Federal Constitutional Court, which must continue in future to align its case-law with the openness to integration of the Basic Law.

Full entitlement to review on the part of the Constitutional Court could also open up new areas of conflict. To start with, there would be the ongoing conflict, which has only been superficially resolved by this judgment, between the Constitutional Court and the European Court of Justice (ECJ) regarding decisions of last instance on the legality of European legislation. This conflict will really come to a head if the two courts hand down contradictory judgments on the legality of a European directive in a specific case; if that happens, the Federal Government, *Bundestag* and *Bundesrat* will be faced with the choice of having to follow either the ECJ or the Federal Constitutional Court.

As the Karlsruhe judges see it, the yardstick for compatibility of the Lisbon Treaty with the Basic Law remains the chain of legitimacy provided by the nation states. In the Court’s view, legitimacy via the directly elected European Parliament must take a back seat, due to the lack of electoral equality in the European elections. This line of argument corresponds to the state-centred notion of democracy under 19th and 20th century German constitutional law, a notion that seems anachronistic when set against the multi-level and multi-actor system of today’s EU.

However, the clear marginalisation, in the Karlsruhe judgment, of the European Parliament’s role with respect to smaller Member States should arouse suspicion. If the constitutional body of a big Member State focuses in this one-sided way on the chain of legitimacy of nation states and the principle of “the majority rule which is established by an election”, this will have

the effect of strengthening trends towards 'renationalisation'. Smaller Member States may ask themselves why, in an archetypal intergovernmental EU body like the Council of Ministers, the principle under international law of the equality of states has to be breached at all. For according to the Karlsruhe judgment, the double majority principle for votes in the Council of Ministers, to be introduced by the Treaty of Lisbon, whereby a majority of the population will need to be taken into account when reaching decisions, cannot compensate for an absence of the precept of electoral equality in the European Parliament. The end result of this will be a possible questioning of the double majority procedure agreed upon by Germany in the Constitutional Convention, the Constitutional Treaty and ultimately – in tough negotiations with Poland – in the Lisbon Treaty.

In the long term, the judgment gives rise to four (hypothetical) options with respect to Germany's European policy identity:

1. Qualitative leap towards a European federal state

The Court does not rule out the creation of a European federal state. However, it ties this step in with the preconditions formulated by the Basic Law, namely the approval of the German people and the guarantee of democratic structures and fundamental rights. Consequently, such an enterprise would require a nationwide referendum as well as a reform of the EU institutions guaranteeing democratic electoral equality. A reform of the respective voting weights of the EP and Council geared strictly towards the Karlsruhe judges' interpretation of the principle of democracy would have to aim at achieving a much more proportional distribution of EP seats than is currently the case. However, as a counterbalance to this, voting weights in the Council of Ministers would have to be based more on the principle of equality of states. The double majority principle would then be eliminated and replaced by a system of weighted

votes, which would significantly enhance the smaller states' 'contribution towards success' at the expense of Germany, France and the UK.

Constitutional Court judgment notwithstanding, in a European Union whose Member States are drifting increasingly apart, such a scenario seems scarcely realistic at present.

2. Germany's European policy acting as a brake

Given the Constitutional Court's mistrust of the EU's "considerable degree of excessive federalisation", the judgment could be used to slam the breaks on German European policy initiatives. The primary interest of Germany's European policy would then consist of countering further steps of integration capable of strengthening the EU's ability to act independently or even engage in autonomous decision-making. This would signal a paradigm shift in Germany's European policy identity. Germany would lose its role as a driving force behind European integration and a mediator at the heart of a unified continent and instead become a giant force of obstruction. Given the European policy consensus that still exists in Germany, the expectations of Germany's European partners as to its role in the EU, as well as Germany's rational national interest in the continuation of the EU, such a fundamental political change is inconceivable for the time being.

3. Re-engage with core sovereignty

In its judgment, the Constitutional Court spelled out policy areas that constitute the core of nation-state sovereignty. In this connection, it did not rule out further steps of integration but rather claimed the right to review and assess these steps itself. If the Court wishes to become more of a political player, then the other constitutional bodies should take it at its word in exercising their responsibility for integration. Over the coming years, the need for European policy

action could arise in precisely those areas that the Constitutional Court makes subject to its scrutiny reservation. However, the risk of initiatives falling at the Karlsruhe hurdle would inevitably accompany such a policy.

4. Look for new ways forward

The Court's line of argument, according to which European integration is to be understood primarily as a process of intergovernmental agreements, could foster an even more executive-heavy approach to European policy. Whenever cross-border action is required in future, looking for solutions outside European Union instruments could be a way of escaping the straitjacket of the EU's criticised democratic deficit. Although the foundations of the EU under the Treaties are much more in keeping with the democratic principles of the Basic Law, the Karlsruhe judgment could lead to even greater reliance on purely intergovernmental arrangements. Specifically, the danger posed by the Constitutional Court's judgment is that European nation states will feel encouraged to test out new forms of intergovernmental cooperation (with or without Germany), outside the framework of the EU.

The key question, which the decision of the Federal Constitutional Court still does not resolve, remains that of the relationship between the European Union, a construct "in analogy to a state", and Europe's national constitutional states. An attempt to address this question using traditional German constitutional law will fail to do justice to the Basic Law's normative openness towards Europe, the current level of EU integration, citizens' expectations of the possibilities and effectiveness of modern and increasingly integrated welfare states, or the international challenges of a globalising world. These political benchmarks must take precedence over a purely legal assessment of the dynamics of the integration process.

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SWP
Stiftung Wissenschaft und Politik
German Institute for International and Security Affairs

Ludwigkirchplatz 3-4
10719 Berlin
Telephone +49 30 880 07-0
Fax +49 30 880 07-100
www.swp-berlin.org
swp@swp-berlin.org

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