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Lisbon Treaty – Karlsruhe Rules

The German Constitutional Court's decision on the Lisbon Treaty was a resounding "yes, but …". Germany can ratify but only if the Law governing the role of the *Bundestag* and *Bundesrat* in EU affairs is modified. This has stirred up exaggerated hopes and fears about limits being placed on the development of the EU, which obscure the important points actually raised.

On one level, the Court is not rejecting, but simply demanding consistency with, the principles of integration stated in the Lisbon Treaty as compared to the Constitutional Treaty. The difference is indeed fundamental regarding the formal bases of democratic legitimacy for the pooling of sovereignty. Compare the two versions of Article 1. "Reflecting the will of the citizens and States of Europe to build a common future, this Constitution establishes the European Union, on which the Member States confer competences to attain objectives they have in common." Lisbon puts citizens firmly back in their national place: "By this Treaty, the High Contracting Parties establish among themselves a European Union, hereinafter called "the Union" on which the Member States confer competences to attain objectives they have in common."

The Lisbon Treaty may state that the European Parliament (EP) is made up of "representatives of the Union's citizens" (as compared to today's "representatives of the peoples of the States brought together in the Community"). However, says the Court, there is "no independent people's sovereignty of the citizens of the Union in their entirety". The EP is not elected on the basis of citizens' equal political right to vote, as is said to be natural since it is "a representative body of the peoples in a supranational community, which as such is characterized by a limited willingness to unite".

There can thus be no relaxation of the principle of conferral of competences by the Member States as "masters of the Treaties", nor of the need to ensure explicit involvement by national parliaments, since these remain the only bodies which enjoy full democratic legitimacy as a channel for citizens' votes. The Law must therefore provide for prior authorisation by parliament of German positions in any decision which affects the EU's competences. Ratification is required in the "ordinary "and "simplified" treaty revision procedures. In addition, a general "bridging clause" (or "passerelle") allows the European Council to decide by unanimity to apply qualified-majority voting (QMV) in the Council where unanimity is now foreseen, or the "ordinary legislative procedure" (i.e. codecision) instead of a "special" procedure. In these cases, national parliaments have six months to make known their opposition. Any national parliament can prevent adoption. There are also specific "bridging clauses". In only one case (family law) is there explicit provision for national parliaments to oppose. The Court insists that the Parliament must also give its authorisation in all the other cases which change the EU's competences or procedures, where there is no explicit mention of ratification or opposition by national parliaments. This means explicitly providing for the eight other specific bridging clauses permitting QMV or the ordinary legislative procedure, as in the UK European Union (Amendment) Act. Beyond this, the German Parliament must give its authorisation in three cases in which substantive changes could be made by the Council or European Council, as well as the "flexibility clause" under which the Council may take actions to attain Treaty objectives where the Treaties "have not provided the necessary powers", which has been broadened from the "common market" to cover all policies except the Common Foreign and Security Policy (CFSP).

This is much more than just the latest episode in 20 years of efforts to reconcile QMV in the Council with the expectations of national parliaments. When it comes to competences, argues the Court, even unanimity may not be sufficient to guarantee democratic le-

gitimacy. On the one hand, while some uncertainty and delegation is inevitable, there can be no "blanket" authorisations even by unanimity. National parliaments can legitimately renounce future control only if the integration programme is "sufficiently precise" for them to justify their decision to the citizens who elected them.

On the other hand, there are some policy areas over which national parliaments should inherently not renounce control. The Court suggests that an elected parliament may renounce control over an issue area only to the extent that the democratic legitimacy of the higher-level arrangements for controlling it is commensurate with the sensitivity of the area. Member States must retain "sufficient space for the political formation of the economic, cultural and social circumstances of life." Some areas – such as criminal law, fundamental fiscal decisions, basic social-policy choices, family law or education – are so much at the heart of "the ability of a constitutional state to democratically shape itself", and are so shaped by cultural specificities, that they cannot be supranationalised without exceptional reason and explicit authorisation.

In these areas, the Court is indeed saying that Lisbon is as far as one can legitimately go in terms of limiting national sovereignty. Yet there is no longer any assumption of a constant increase in competences in the Treaties. While "ever closer union" still figures in the Preamble, the Lisbon provisions on treaty revision explicitly state that "These proposals may, *inter alia*, serve either to increase or to reduce the competences conferred on the Union in the Treaties", a point which was reiterated in two Declarations annexed to the Final Act. There will still be cases in which tension can be predicted between a problem-solving argument for doing a bit more, and a legitimacy-based argument against doing so. Some cases (such as addressing new kinds of crime) are foreseen in the Lisbon Treaty and provide for an "emergency brake" if there is not consensus. In these cases, says the Court, national parliaments must give their explicit position in order to justify to their electorates why this is appropriate. The German Court will be competent to decide if things go too far, and Germany could even "refuse to participate". The last word may be said by Karlsruhe, not Luxembourg.

There is a peculiarly German dimension to this. It is often forgotten that the German Basic Law commits Germany to "establishing a united Europe". That European Union, however, must be "committed to democratic, social, and federal principles, to the rule of law, and to the principle of subsidiarity" as well as guaranteeing fundamental rights. As discussed in the ruling, German participation in the EU cannot sacrifice the principle of the "social state" to unrestrained market competition. And the "federal" principle involved is the model of cooperative federalism as practiced in Germany. The "participation of Germany […] is not the transfer of a model of a federal state to the European level but the extension of the federal model under constitutional law by a dimension of supranational cooperation […] the *Bundestag* as the body of representation of the German people is the focal point of an interweaved democratic system". Helmut Kohl's reiterated assertions that German unity and European unification were "two sides of the same coin" were intended to reassure others that greater German power would be harnessed to the greater European good. Yet this can all too easily seem to mean that European unification can only take place to the extent, and in the way, that Germany wants.

The Court is only applying the combination of the German Basic Law and the Lisbon Treaty. The points raised may usefully fuel political debates about the future of Europe. Yet integration is a sensitive political project which requires careful diplomatic treatment as well as rigorous legal examination.

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