

The Constitution says yes [but...] to the Lisbon Treaty

The Judgment of the Second Senate of the Federal Constitutional Court of the 30 June 2009

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The German Federal Constitutional Court was asked to decide upon the constitutional compatibility of the changes foreseen by the Treaty of Lisbon and its implementation via various acts of legislation by the German parliamentary organs.¹ Above all, the complainants (inter alia, a number of Members of the German *Bundestag* and the parliamentary group “DIE LINKE”) argued for constitutional breaches because, in their view, the federal government delegated powers to the EU that it was not competent to do and to such an extent as to undermine the authority of the Federal parliamentary organs (the *Bundestag* and the *Bundesrat*). The Constitutional Court held the competences assigned to the EU by the Treaty of Lisbon to be in line with the German Constitution (*Grundgesetz*), but that the foreseen legislation has failed to adequately provide for participation of the *Bundestag* and, where relevant, the *Bundesrat* in the legislative proceedings foreseen by the Treaty of Lisbon. On balance, the Federal Constitutional Court decided that the Act Approving the Treaty of Lisbon (*Zustimmungsgesetz zum Vertrag von Lissabon*) is compatible with the *Grundgesetz*. In contrast, the Act Extending and Strengthening the Rights of the *Bundestag* and the *Bundesrat* in European Union Matters (*Gesetz über die Ausweitung und Stärkung der Rechte des Bundestages und des Bundesrates in Angelegenheiten der Europäischen Union*) infringes Article 38 para. 1 in conjunction with Article 23 para. 1 of the *Grundgesetz* insofar as the *Bundestag* and the *Bundesrat* have not been accorded sufficient rights of participation in European lawmaking procedures and treaty amendment procedures.

I. The Complainants’ Arguments against the Lisbon Treaty

The major arguments heard against the Treaty of Lisbon, brought forward by a unique coalition of politicians of all political persuasions, included concerns that the ability of individual German citizens to participate in the selection and indeed to control state authority is to be diminished, that the principle of democracy is undermined by the loss of competences assigned to the *Bundestag*, and that there is inadequate democratic legitimisation of the EU itself (100).² Furthermore, the assignment of competences relating to military and criminal justice matters amounts to a “sellout of the state’s very own competences” (103). Whilst the Treaty of Lisbon was acknowledged to have enhanced the status of the European Parliament, this development was found to be inadequate in a number of ways because voters are not equal (smaller Member States having a disproportionately greater say) and the relationship between voter and legislature is far from adequate (103 et seq.). It was further argued that, by means of the Treaty of Lisbon, the European Union “becomes a subject of international law and can act like a state on the level of international law” with far-reaching powers to determine its own competences and to regulate internal security and prosecution unchecked by Member States’ constitutional courts.

II. The Court’s Decision: Conditions for European Unification

In a comprehensive decision, the Court held:

“European unification on the basis of a union of sovereign states under the Treaties may not be realised in such a way that the Member States do not retain sufficient room for the political formation of the economic, cultural and social circumstances of life. This applies in particular to areas 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 culture, history and language and which unfold in discourses in the space of a political public that is organised by party politics and Parliament” (249).

Chiefly, the Court emphasises the EU as a Union – the core of which is negotiated between sovereign, independent states to whom individual powers are conferred – whose role is to ensure that the powers conferred remain true to this context and to ensure “whether the inviolable core content of ... constitutional identity” – in this case Germany – remains intact after this transfer of powers. It stresses such supervision to be in line with the *Grundgesetz*’s fundamental openness to European Law (so-called *Europafreundlichkeit*) and, thus, in line with the principle of loyal cooperation established by European law (Article 4 para. 3 TEU post-Lisbon).

The Court identifies a number of facts clearly illustrating the Member States’ continuing sovereignty, not least each State’s right to leave the Union (150, see also 295 et seq.). It emphasises that the ability of organisations, such as the EU, to exercise supranational powers stems from its Member States: “they therefore permanently remain the masters of the Treaties” (231). The principle of singular conferred powers is thus of central and indeed constitutional importance in expressing the EU’s obligation to respect the identity of the Member States (as expressly stated by the Lisbon Treaty) [234]. Repeatedly, the need for national legislatures to agree to and implement decisions taken at the EU level is emphasised (see, e.g., 339, 344 et seq.).

The Court clearly states that the Treaty of Lisbon does not create a federation (263)³ but extends the current German state by a supranational, cooperative dimension (277), leaving the Bundestag “as the body of representation of the German people [and thus] the focal point of an interweaved democratic system” (278). Differences with regard to the failed Constitutional Treaty are laid out (331). The Court lays down that “to safeguard democratic principles, it may be necessary to clearly emphasise the principle of conferral in the Treaties and in their application and interpretation in order to maintain the equilibrium of the political forces of Europe between the Member States and the level of the Union as the precondition of the allocation of sovereign powers in the association” (265). Decisively - in line with the Court’s previous decision on the approval of the Treaty of Maastricht and keeping in mind its famous “*Solange*”-decisions - the Federal Constitutional Court continues that “as long as ... the principle of conferral in cooperatively shaped decision-making procedures exists, taking into account the states’ responsibility for integration, and as long as a well-balanced equilibrium of the competences of the Union and the competences of the states is retained, the democracy of the European Union cannot, and need not, be shaped in analogy to that of a state” (272). Thus, for example, the “one man, one vote” rule must not be observed analogously (278). Within the EU “the European Parliament stands between the principle under international law of the equality of states and the state principle of electoral equality” (284). The contradictions to be found in the equality of citizens of the Union that are often evident in the Treaty of Lisbon and the fact that the European Parliament is decisively linked to nationality can be explained only “by the character of the European Union as an association of sovereign [national] states [*Staatenverbund*]” (287).⁴ As a result, the international law principle of equality amongst States is offset somewhat by the idea of the majority of the population (291-293).

III. The Importance of the Principle of Conferral

In this judgment, the Federal Constitutional Court views the inalienable principle of democracy as centrally supported by the citizens’ right to vote freely and equally as well as the right “to free and equal participation in public authority” as “anchored in human dignity” (Article 1 para.1 of the *Grundgesetz* - 211). In particular, acts resulting in binding decisions for citizens “in particular as regards encroachments on fundamental rights must have a nexus with a freely reached majority will of the people” (212). Nevertheless, this principle is amenable to “integrating Germany into an international and European peaceful order” and the Court acknowledges that the resulting instances of governance cannot be unconditionally bound to the specifics of the principle of democracy as seen by any one Member State or constituting state (219). Membership in the EU or in systems such as the UN is not submission to a foreign force but “voluntary, mutual commitment” amongst equals (220), and the judgment emphasises that the Constitution is indeed desirous of European

integration and an order of international peace (225), as such empowering the legislature to confer sovereign powers, “under the condition that the sovereign statehood of a constitutional state is maintained on the basis of an integration programme according to the principle of conferral and respecting the Member States’ constitutional identity, and that at the same time the Member States do not lose their ability to politically and socially shape the living conditions on their own responsibility” (226). Any decision to depart from such independence, e.g., by joining a federation would require an explicit declaration by the German people (228).

The Court thus spells out that any transferral of powers must be fundamentally marked by the principle of conferral of singular powers because “the trust in the constructive force of the mechanism of integration cannot be unlimited” due to the Constitution (238). Thus, all legislation must reflect this and it is “constitutionally required not to agree dynamic treaty provisions with a blanket character” (239); competences to define further competences (*Kompetenz-Kompetenz*) cannot be assigned. All EU actions are subject to “*ultra-vires*” checks by the Federal Constitutional Court and, where the Union-level makes no provision for it, to examinations as to whether they are in line with the principle of subsidiarity. “This ensures that the primacy of application of Union law only applies by virtue of, and in the context of, the constitutional empowerment that continues in effect” (240).

The Court points out that membership in the EU provides Member States with options to influence policy areas which would otherwise be negated by practical or territorial limits (248) but adds that “European unification on the basis of a union of sovereign states under the Treaties may, however, not be realised in such a way that the Member States do not retain sufficient space for the political formation of the economic, cultural and social circumstances of life” (249). The policy areas over which national control is necessary to ensure this include citizenship, taxes, decisions concerning military and civil force, as well as intensive interference with fundamental rights, such as imprisonment in enforcing criminal law. The limit to powers being conferred is to be drawn “where the coordination of circumstances with a cross-border dimension is factually required” (251).

IV. Conferral in Criminal Justice Matters and its Limits

Several pages (352 et seq., see also 252) of the judgment are devoted to a discussion of criminal justice matters. The Court points out the significant loss of influence by national parliaments through the supranationalisation of police and judicial cooperation in criminal matters and the move away from unanimous decision requirements (293). It emphasises that conferral of any such competence must be particularly restrictive and well justified (358), stating “the core content of criminal law does not serve as a technical instrument for effectuating international cooperation but stands for the particularly sensitive democratic decision on the minimum standard according to legal ethics”. The Court adds that “the fight against particularly serious crime, which takes advantage of the territorial limitation of criminal prosecution by a state, or which, as in the case of corruption, threatens the viability of the rule of law and democracy in the European Union, can be a special justification for the transfer of sovereign powers also in this context” (359). A critical passage ends with the conclusion that “The Treaty of Lisbon ... provides sufficient indications for an interpretation in conformity with the constitution” (362) and the Court emphasising that EU actions must be kept to the absolute minimum necessary (363-366).

With its emphasis that criminal law, both substantive and procedural, is a culturally specific area of great sensitivity, the Court points out that German government representatives may only agree to decisions in this area being made in the Council that invoke the bridging procedure of Art. 48 para. 7 TEU – post-Lisbon, in order to allow them to be made by qualified majority rather than in unanimity, if both German houses of Parliament have previously passed legislation to this effect (para. 366).⁵ The Court also indicates that court and judicial structures are fundamentally the business of the Member States (368) and goes on to insist that the

EU cannot replace Germany's own membership and right to participate in international organisations (371 et seq.). It further emphasises that the Treaty of Lisbon in no way deprives the Member States of their influence upon and ability to make social policy. The Court points to the powers that Member States retain pertaining to social and criminal justice policy via the relevant emergency break provisions, again emphasising that action taken by a representative of the German government can be based solely upon instruction by the German *Bundestag* and, where relevant, the *Bundesrat* (400).

The Court views an occasional refusal to follow harmonising impulses as legitimate and not contradictory to a fundamentally international law friendly stance as required by the Constitution – it sees this principle confirmed by the *Kadi* decision of the European Court of Justice in September last year (340).⁶

V. Envisaged Parliamentary Participation Not Sufficient to Comply with German Constitution

The Court held that The Act Extending and Strengthening the Rights of the *Bundestag* and the *Bundesrat* in European Union Matters (hereinafter: Extending Act) failed to provide sufficiently for the participatory rights of the *Bundestag* and *Bundesrat* as regards subsidiarity checks and the right to reject the revision of the Treaty via the bridge provision of Article 48 para. 7 TEU – post-Lisbon (407). If the Treaty texts are changed significantly by the Member States themselves – in line with the principle of singular conferral or to a great extent by the organs of the EU, even where this is done by unanimous decisions in the Council – the national Parliamentary bodies have a particular responsibility to participate. In Germany, this must be done in accordance with Article 23 para. 1 of the *Grundgesetz*, and the national implementing legislation was found not to be doing so adequately.

The Court requires the two houses of Parliament to consider that they bear responsibility for integration⁷ in a number of cases of dynamic Treaty development: changes to primary European law via simplified proceedings require agreement in legislation (412). *Bundestag* and *Bundesrat* must actively agree to each and every use of bridging clauses to allow changes in EU legislative proceedings (e.g., from unanimous to qualified majority voting, etc. - 413). Where bridging procedures foresee a right to rejection by national parliaments, a government representative may only agree to the proposed Resolution if parliamentarily mandated to do so. In relation to a number of special bridging procedures, the Court again insists that active parliamentary agreement is necessary (416). Ultimately, the Court requires particular forms of legislation or mandate for the use of the flexibility clause in Art. 352 TFEU, the emergency breaks of Articles 48 para. 2, 82 para. 3 and 83 para. 3 TFEU as well as “extension clauses” relating to judicial cooperation in criminal matters (Articles 82 para. 2 subpara. 2 lit. d, 83 para. 1 subpara.)³, and 86 para. 4 and 325 para. 3 TFEU).

The following eucrim ID refers to a summary and the full text of the judgment (both in English and German).

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1. For the action, see also eucrim 3-4/2007, p. 74.↩

2. The numbers refer to the paragraphs as indicated in the judgment of the Federal Constitutional Court.↩

3. “The idea that the Member States’ own legal personality status in external relations gradually takes second place to a European Union which acts more and more clearly in analogy to a state [does not - sic] is not at all reflected in a predictable tendency, made irreversible by the Treaty of Lisbon, in the sense of a formation of a federal state that would factually be necessary at any rate. ... To the extent that the development of the European Union in analogy to a state would be continued on the basis of the Treaty of Lisbon, which is open to development in this context, this would be in contradiction to constitutional foundations. Such a step, however, has not been made by the Treaty of Lisbon.” (376).↩

4. Supplements inserted by the author in view of head note 1 of the decision.↩

5. This is also the case for military action (381 et seq.) as well as aspects of social policy (400). Decisions as to military deployment must remain in the hands of the German Parliament. No government representative can agree to anything which would allow this to be circumvented, nor is there any provision in the Lisbon Treaty which would allow such circumvention (388).↩

6. For the *Kadi* case, see *Wahl/Staats*, eucrim 1-2/2008, p. 33 and *F. Meyer*, eucrim 1-2/2008, pp. 81-88.↵

7. “to the extent that the Member States elaborate the law laid down in the Treaties in such a way that an amendment of the law laid down in the Treaties can be brought about without a ratification procedure solely or to a decisive extent by the institutions of the Union, albeit under the requirement of unanimity, a special responsibility is incumbent on the legislative bodies, apart from the Federal Government, as regards participation” (409).↵

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