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By its judgment of 30 June 2009, the German Federal Constitutional Court cleared the way for the German ratification of the Lisbon Treaty. The reasoning of the Court, however, contains fundamental holdings on the current legal character of the European Union and on constitutional limitations concerning its possible development.

The ratification of an international treaty by Germany must be preceded by a parliamentary consent. In the case of the Lisbon treaty, this consent and a number of legislative acts relating to that treaty were challenged before the German Federal Constitutional Court (FCC). The basic argument of this challenge was that the Lisbon Treaty went too far in transferring sovereign rights to the European Union, thereby jeopardizing inalienable state sovereignty, the national identity of the German State as guaranteed by the Basic Law (the German constitution) and also the constitutional principle of democracy which required, it was said, a sufficient area of public policy being reserved to parliaments elected only by the German voter.

The Court, in the result, rejected the challenges as far as the treaty itself was concerned and upheld them only to a limited extent as to the surrounding legislation, this default being easy to heal before the summer recess and the federal elections to be held in September.

That positive stance, however, was surrounded by a number of reservations and limitations which are very important for the future behaviour of the State organs of Germany towards the EU, in particular their behaviour within the organs of the EU. Thus, the Court erects some constitutional barriers against possible future expansions of European integration and Germany's participation in them. In doing so, the Court continues to show a special kind of euroskeptical attitude which started already in the1970's and has been maintained in a number of judgments since. While the earlier decisions of this line were concerned with the protection of (German) fundamental rights in the European Economic Community (as it then was), the more recent ones (Maastricht Treaty, now Lisbon Treaty) deal with the expansion of the powers of the European Union to the detriment of the Member States, in particular their parliaments.

The point of departure of the Court's argument is that the European Union is a close association of sovereign States, but not a federal State. It is this type of association which the Basic Law allows and even requires Germany to join. A closer union could not be formed by relying on procedures provided by the Basic Law, even by constitutional amendment. It would require a different act of (European) constitution-making. The power of constitutional amendment is limited by certain principles (democracy, guarantee of human dignity, rule of law, certain elements of federalism).

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The central principle at stake in this context is democracy, which requires that a sufficient scope of decisions essential for the citizen must be reserved to a democratically elected parliament, the national parliament(s). This concept is, as the Court emphasizes, not only a limitation of European integration established by the German constitution, it is also a basic principle of the Treaty on European Union (TEU) which recognizes and guarantees the national identity of Member States (Art. 6 (3) TEU Nice/ Art. 4 (2) TEU Lisbon).

This basic concept has two practical consequences. There is, first, a substantive limitation of the growth of powers of the EU. Even where this limitation is respected, such growth requires the consent of the national parliament.

As to the first requirement, the Court analyses in great detail the scope of those policy fields which remain in the national realm. As the Lisbon Treaty does not add much to the powers of the European Union, this is not so relevant in relation to this particular step of European integration, but the analysis shed some light on the line the Court would draw. Elements which must be reserved to the State are fundamental rules of criminal law, the monopoly of the State to use force in the internal and external sphere, fundamental questions of the State financial system, the shape of the social security system, decisions of fundamental cultural relevance (family law, education, relation between State and religion).

As to the second consequence, the Court asks whether the EP could provide the necessary democratic legitimacy of EU decisions. The Court denies this *inter alia* because that parliament is not "democratically" elected – its composition is a violation of the principle of equal rights for all voters. As to the national parliament, its rights are respected because the powers of the EU are limited to those enumerated in the treaty which has been ratified with parliamentary consent. Thus, this principle of enumerated powers or principle of conferral (Art. 5 TEU Lisbon) is a cornerstone of the constitutional acceptability of the EU treaties (TEU and TFEU).

A further safeguard of the impact of national parliaments on EU decisions is the fact that certain areas are still subject to the unanimity requirement as the national parliament can enjoin the government to agree or not to agree to certain EU Council decisions. In this respect, all treaty clauses which allow switching from unanimity to majority decision are problematic. As a consequence, if the German member of the Council is to accept such switch, this requires, under German constitutional law, the consent of the German parliament. In other words, the Court postulates a veto power for the German parliament for any Council decision to be taken unanimously or to any deviation from this requirement. The legislation accompanying the ratification of the Lisbon Treaty was in part unconstitutional because it failed to sufficiently implement this principle by providing for the necessary procedures.

An essential element of the German democratic system is the concept that the German Armed Forces are under strict control of the parliament ("Parlamentsheer"). Thus, any use of the German Armed Forces abroad (except in urgent cases) requires the previous consent of the German Bundestag. This principle has to be maintained even in case of a

further military integration in Europe, and it may not be waived though a treaty amendment.

Thus, serious limitations for the future development of European integration are drawn by the Court, and the Court reserves a right of control over their respect. This means that it could and would declare inapplicable in Germany EU acts which violate them. In reserving this right, in an attempt of appeasement, the Court relies on the ECJ decision in the *Kadi* case where the latter court held that Security Council decisions, although technically binding the EC, were inapplicable because the fundamental rules of EC law prevailed in the internal sphere. Whether the two situations are really comparable is somewhat doubtful, however. This assertion of the last word of the national judiciary is bound to trigger objections. It is no surprise that there are first legal opinions on the market suggesting actual cases where the German Court should use this power.

The clear winner of the case is the German parliament. Its impact is increased beyond the enhanced recognition of the role of national parliaments which is contained in the Lisbon Treaty (Art. 12 TEU).

Is this type of parliamentary patriotism really a viable, realistic solution to the problem of ensuring the legitimacy of European integration, as it expands, and of decisions taken under this system? There is, however, some positive potential: The enhanced parliamentary powers also entail, the Court emphasizes, more responsibilities. Controversial as the euroskeptical reasoning of the Court may be, this result of increased parliamentary responsibility could be useful and necessary for Europe. If properly used, this responsibility might broaden the public debate about day to day issues of European policy and, thus, give the national voter a feeling that he or she matters in the field European policy. It may thus diminish the alienation between the European institutions and the European peoples which have already resulted in lost referenda.