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The Ruling on the Lisbon Treaty (June 30, 2009)

Some members of the Bundestag doubted whether the Lisbon Treaty was compatible with the Basic Law. A Federal Constitutional Court ruling, described below, declared the treaty legal, but called for an expansion of the rights of the Bundestag and the Bundesrat in European affairs.

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### **Lisbon Decision: Wake-up Call from Karlsruhe**

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This marks the end of European integration as we know it. This far and no further, that is Karlsruhe's message to the political establishment. Germany can submit to the Treaty of Lisbon, which many of its proponents regard as harmless to member states – but only under strict conditions. In the view of the Federal Constitutional Court, the previous European Union [established] on the basis of treaties between sovereign states cannot be realized in a way that deprives member states of leeway in political decision-making. Essential decisions about war and peace, criminal law and policing, revenue and expenditures, education, media, and religion must continue to be made in Germany. Certain core tasks and structures remain an inalienable part of sovereignty.

Whoever wants more, that is, wants to establish a European federal state, must ask the German people directly. The extensive and unprecedented description of essential state tasks included in this Karlsruhe decision – definitive, as it were – is as new as the reference to a possible new constitution under which Germany would be merely one component of a European state. Such a renunciation of Germany's sovereign statehood could only be achieved through a direct decision by the German people. The Treaty of Lisbon does not – and that is precisely the point – establish a European federal state. Incidentally, there is probably hardly an EU state where a majority would favor such a move.

### **The Boundaries of Europe More Clearly Demarcated than Ever**

Whoever does not want this European federal state, however, must live with the hybrid that is the EU and the Karlsruhe boundaries that have now been drawn more clearly than ever. Those

boundaries are to be reinforced by parliament [i.e. the Bundestag and Bundesrat]. Its rights, too, are being strengthened in an unparalleled way. Of all things, the law “on the expansion and strengthening of the rights of the Bundestag and the Bundesrat” in EU matters (evidently undeserving of this name) was declared unconstitutional and must now be rectified before the ratification of the Lisbon Treaty. Moreover, the general parliamentarization of German foreign policy is proceeding apace.

The fact that the Bundeswehr was designated by the Constitutional Court as the parliamentary army bears consequences in this context as well. For [like the federal government] the EU also won't be allowed to exercise control over the German military without the approval of the Bundestag either now or in the future. And in Brussels the federal government will be henceforth more strongly bound by the Bundestag vote. Practical experience will have to show what that will look like in the reality of our government and parliament. One should not expect too much real oversight. On the other hand, a lack of participation can not only be made public but also subject to censure by the Constitutional Court.

### **“We're in Charge”**

And who else should be able to censure? With this unanimous verdict, Karlsruhe makes itself relevant again. To be sure, the judges already reserved the final word for themselves (especially in relation to the European Court of Justice) sixteen years ago in the Maastricht decision – but that remained theory. Now things are getting serious: the decision all but begs for implementation.

However, it is a Karlsruhe illusion to believe that final oversight by the Federal Constitutional Court will limit itself to a few marginal cases. The cases are already waiting or will certainly be brought before the court: data retention, age discrimination, abortion, assisted suicide, torture to procure life-saving information. Here, there will be a lot of talk about “obvious” overstepping of competencies by Brussels. And there are likely to be many complaints about violations of human dignity – something that is non-negotiable according to the German conception. No matter how often Karlsruhe might emphasize its own pro-Europe attitude – the message is: we're in charge.

### **Slept through Opportunities in European Policy**

The decision will not go unchallenged. Don't the constitutional judges have a conception of state and sovereignty that is too static, old-fashioned, and shaped by none other than Carl Schmitt<sup>1</sup>? One can also read something else into the Basic Law. But even the most ardent supporters of European integration cannot gloss over the fundamental conflict between the supra-national

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<sup>1</sup> Carl Schmitt was a conservative German legal theorist who was critical of parliamentary democracy and supportive of strong executive power. He was suspicious of liberal cosmopolitanism, emphasized the importance of distinguishing friend from enemy in politics, and stressed the necessity of sovereign authority. His legacy was tarnished by his support for National Socialism.

union of states and its members: a state-like entity with persistent democratic shortcomings is behaving like a state towards its members and subjects.

Now and then someone must speak out against this. It is anything but a coincidence that this dissent is coming from Karlsruhe: its legal decisions attract notice in the old democracies of the West and in the Eastern EU states that were subjugated until recently. And not least, the overwhelmed representatives of the German people are yearning for legal directives. It speaks for itself that this decision came about largely at the petition of a CSU Bundestag representative and the Left Party. The great Grand Coalition in the middle seems to have been asleep where European policy is concerned. That's why this wake-up call is so loud.

Source: Reinhard Müller, "Weckruf aus Karlsruhe" ["Wake-up Call from Karlsruhe"], FAZ.NET, June 30, 2009.

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