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Use or Abuse of National Constitutional Requirements in the Dynamic Development of EU Treaties?

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The Lisbon Treaty is the result of a process of at least ten years, which aimed to clarify in which fields the member states wish the EU to have competence and to improve its capacity to exercise that competence. Following the entry into force of the Lisbon Treaty this process may finally be said to have come to an end. Considering the efforts made to negotiate the Treaty, and the difficulty to complete ratification in all member states, it is not likely that another full-scale reform will be ventured upon within a foreseeable future. And quite probably, the time is forever gone when disparate, even competing, demands for improvements of the constitutional framework of the EU could be melted together in all-amending 'fudge' treaties.

But it is a lot less difficult to imagine that the simplified revision procedures set out by the Lisbon Treaty will be operated in order to enhance the capacity of the EU to exercise that competence which has already been conferred upon it. Most notable among these is, first, a procedure which enables limited amendments to be made to existing treaty provisions on internal policies and action, and, second, a general bridging clause or *passerelle* which enables shifts in decision-making procedures from unanimity to qualified majority voting and increased participation of the European Parliament.

Another type of treaty changes which must be expected is that which will accompany future enlargements and admission of new member states. Even if such changes are supposed to be confined to the "adjustments of the treaties… which such admission entails" it is likely that attempts will be made, successfully, to give this a very broad meaning. Indeed, it would seem that the political reasons to use future Acts of Accession as vehicles for other treaty changes than those strictly needed for admission of new member states (i.e. redistribution of votes in the Council and the European Parliament) are growing with the awareness how difficult it is to conclude an ordinary procedure for treaty revision.

Support for that conclusion can be found in the promises made to the Irish people and the Czech President during the run up to Lisbon Treaty ratification. In both these cases the concessions granted will only acquire their legal status after being introduced in the form of "Protocols to the Treaties" and as such "form an integral part" of the Treaties and thus, the primary law of the EU. But this in turn requires that the procedures which may be used for adopting or amending protocols must be the same as the procedures which may be used for adopting or amending treaties. This leaves not only the ordinary and simplified revision procedures provided for by the Lisbon Treaty, but also the procedure for making adjustments in the context of enlargement. It is important therefore to note that the commitment to transform the promises made by heads of state or government into protocols "at the time of the conclusion of the next Accession Treaty" is the centrepiece of the solution to the Irish and Czech demands.

But even if political agreement has already been reached between the heads of state or government, the fact remains that a future accession treaty – and every protocol attached to it – will require fresh support from all member states and subsequent ratification "in accordance with their respective constitutional requirements". This in turn means that there is an obvious risk, first, that member states represented by new governments will find an opportunity to invoke new demands and, second, that national parliaments will want a return to concerns that were held back during the ratification of the Lisbon Treaty.

So, for example, there was considerable support in the Swedish *Riksdag* for making a demand that the Lisbon Treaty ought to be supplemented by a 'social progress protocol' which could correct the effects of the European Court of Justice's ruling in the notorious *Laval* case. But despite knowing that postponing its approval of the Lisbon Treaty could be strategically useful, the *Riksdag* did what was expected of it, sticking loyally to the government's tight schedule for ratification of the Lisbon Treaty. Perhaps a responsibility was also felt not to create a situation which could handicap the upcoming Swedish Presidency of the EU. But, importantly, none of this meant that the perceived need for a social progress protocol disappeared from the political agenda. Therefore, the next round of ratification of another (accession) treaty may be seen as a new opportunity for strategic considerations. This is particularly relevant if such ratification is not limited to questions of new accession(s) but cover also questions of former concessions. Obviously, the logic holds not only for the Swedish *Riksdag* but for everyone in all member states who is granted a decisive say in accordance with national constitutional requirements.

In the light of the above it would appear that the remaining step in delivering the concessions made to the Irish and the Czech cannot be taken for granted. Furthermore, the risk must be acknowledged that the required approval will have to be paid for by new concessions to others. Presumably, if member states' negotiation or ratification of the next accession treaty – and protocols attached to it – turn out to be problematic, the principal responsibility for securing resolution will fall upon the European Council. Therefore that treaty is also likely to offer a first major test for its new President.

This text emphasises the significance of the national constitutional requirements which must be complied with before amendments can be made to existing primary law of the EU, whether in the form of treaties or protocols. From the perspective of the EU, the cumulative content of such requirements is a crucial factor to consider before attempts are made to obtain amendments or adjustments. From the perspective of each member state, the content of its own national requirements is a factor which may complicate its relationship with the EU: representing an obstacle to integration but also a protection. In the light of the experience of the ratification of the Lisbon Treaty there are more compelling reasons than ever before to assess the national constitutional requirements – in both existing and incoming member states – but also how they can be changed and how much they can be allowed to change. The contrasting images which immediately come to mind are the honest concerns of the Irish people and the one-man charade which the Czech President was allowed to play. But it is submitted that nothing deserves more serious attention than the ruling of the German Constitutional Court.

The dynamic development of the treaties after Lisbon: a lesson from Germany?

The official reactions to the *Bundesverfassungsgericht's* ruling on the Lisbon Treaty of 30 June 2009 were surprisingly positive. Not only the German Chancellor Angela Merkel but also Commission President José Manuel Barroso and Council President Fredrik Reinfeldt immediately embraced the ruling as an eagerly awaited 'yes' to the Lisbon Treaty. But for a less uncritical reader it is clear that the answer of the German Court rather amounted to 'no,' and that 'yes' was not possible until a new law, fulfiling specific criteria, had been adopted by the *Bundestag* and *Bundesrat*. It was only after the demand stated by the court had been complied with – when a more modest law first intended to accompany the Lisbon Treaty had been replaced by a stricter one – that Germany could finally complete its part of the process for ratification.

In its ruling the *Bundesverfassungsgericht* confirms that the EU, after the Lisbon Treaty, will continue to rest on a principle of conferral of competence to act in limited fields. But, importantly, emphasis is placed on the difficulty in deciding exactly which those fields are, or, in other words, what the EU has been authorised to do. The existing ambiguity is added to by the Lisbon Treaty, which introduces new provisions that give rise to such questions. According to the German Court the situation is still acceptable as long as the institutions of the EU behave responsibly: not evidently transgressing the limits of the competence entrusted to them or the conditions underlying its conferral. But this requires sufficient mechanisms for national control of what these institutions do and how they do it.

Against the background of that reasoning, what the *Bundessverfassungsgericht* found most objectionable were a number of situations where it would become possible, after the Lisbon Treaty, to bring about Treaty amendments "without a ratification procedure solely or to a decisive extent by the institutions of the Union, albeit under the requirement of unanimity".

With respect to those situations, the Court said, a special responsibility is incumbent on the German parliament – rather than the government – as regards participation. Therefore, in order not to have to judge the Lisbon Treaty incompatible with the German Constitution, the *Bundessverfassungsgericht* concluded that a new law had to be adopted which would fill the gaps of the Lisbon Treaty, thus enabling the *Bundestag* and the *Bundesrat* to "exercise their responsibility for integration in numerous cases of dynamic development of the Treaties".

The new law resulting from the ruling of the *Bundesverfassungsgericht,* the Act Extending and Strengthening the Rights of the *Bundestag* and of the *Bundesrat* in Matters Concerning the European Union, was adopted on 22nd September 2009 and three days later the German procedure for ratification was concluded by President Horst Koehler. Apparently, what that law did was to enable German ratification of the Lisbon Treaty – a ratification which for a while was not possible – by introducing national constitutional requirements that could compensate for the lack of corresponding requirements in that treaty.

In the light of the German experience and after the Lisbon Treaty, it is said to be clearer than before that national parliaments may have different roles and different strengths within the EU depending on the design of national constitutional requirements. So, for example, the new constitutional requirements resulting from the ruling of the *Bundesverfassungsgericht* – the pronouncements of the Court and the resulting legislation – mean that the German Parliament is in a position which is formally stronger than that of the Swedish Parliament. Similarly, because of the corresponding constitutional requirements in the UK, introduced prior to ratification of the Lisbon Treaty (at the insistence of the House of Lords), the UK parliament is in a position which is formally stronger than that of the Swedish Parliament but weaker than that of the German one.

In the case of both Germany and the United Kingdom, the new constitutional requirements that have accompanied ratification of the Lisbon Treaty focus on those situations where simplified procedures may be used to make amendments to Treaties and other EU instruments of primary law. Because of the concerns of *Bundesvarfassungsgericht* about the "numerous cases of dynamic development of the Treaties," the situations covered by Germany include also the future application of the so-called flexibility clause as a legal basis for adoption of secondary law (and also cases where member states can halt a deepening of European integration subject to so called 'emergency brakes'). Essentially, in the case of both Germany and the United Kingdom, constitutional requirements have been introduced which serve to secure a decision-making role for the national parliament in some of those situations where the Lisbon Treaty only stipulates such a role for the national government. Overall, these requirements are constructed so that where any draft decision under the relevant procedures comes before the European Council or the Council, the national government may not agree to the adoption of the decision unless the national parliament has first given its approval.

In comparison with the way in which Germany and the United Kingdom have made use of the possibility to unilaterally supplement the Lisbon Treaty with constitutional requirements

that give the national parliament a formally stronger role, the solution opted for in Sweden (and probably most other member states) is somewhat more minimal. Here focus has been placed on the wish to establish in national constitutional law the procedures needed for the tasks which the Lisbon Treaty explicitly expects national parliaments to perform, in particular subsidiarity control. But in sharp contrast to Germany and the United Kingdom, there has been little interest so far in the tasks which the Lisbon Treaty implicitly expects. In Sweden this may perhaps be explained by the fact that there is no Constitutional Court or, indeed, any House of Lords. But once the Lisbon Treaty has entered into force and there has been some time to reflect over reactions, Sweden and its *Riksdag* may find it difficult to reconcile an increasing awareness that the EU has become an integral part of modern democracy with an understanding that this democracy is being built on an asymmetric constitutional construction where national parliaments are not equal.

The most practical conclusion which may be drawn from this is that no national parliament has to satisfy itself with a weaker role than any other and that every national parliament holds the power to do something about this. But at the same time it is important not to forget that the existing possibility – to unilaterally supplement the constitutional framework of the EU with national provisions that give one's own parliament a stronger role – must be balanced against the need for a common system which is able to act. In every situation where the requirement is made that one national parliament or, indeed, 27 must give approval prior to the adoption of a common decision, the likeliness increases that there will never be any decision. The dilemma finds no better illustration than the new requirement, with which we all have to live, that the flexibility clause may not be acted upon unless support for this is first manifested in a law carried by two thirds of the members of the *Bundestag* and two thirds of the votes of the *Bundesrat*. Undoubtedly, this will deprive that provision of much of its usefulness.

Conclusion

The experience of the ratification of the Lisbon Treaty, and in particular the result of the ruling of the German Constitutional Court, suggests that the particular design of national constitutional requirements may have far-reaching effects on the overall system. It remains to be seen whether a process of constitutional protectionism has been set in motion, where more member states unilaterally introduce new requirements in order to restore balance. However, there are more compelling reasons than ever for the European Council and its new President to undertake a thorough assessment of these requirements, and of how they can be changed and how much they can be allowed to change. But every government in charge of the rotating Presidency is well advised to pay attention. Following the entry into force of the Lisbon Treaty, the successful operation of the EU will become more vulnerable than ever before to national constitutional requirements. And the importance of the matter reaches far beyond the practical or strategic considerations that will need to precede the next attempt to secure treaty changes.