

Is Art. L of the Maastricht Treaty workable?

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I must begin by conveying to Hans-Joachim Glaesner the warm good wishes of all his friends at the Court of Justice, although I have to say that none of us really believes that he is 70 years old. As we can see, he looks a great deal younger than that, and he still has a wide reputation as a down-to-earth, practical thinker. I know from my days as a specialist adviser to the House of Lords Select Committee on the European Communities how much that rather daunting assembly relied on him as a witness.

The topic assigned to me today is: "Is Article L of the Maastricht Treaty workable?". That is a topic on which opinions are legion but there is only one authoritative source from which to draw them: the text of the Maastricht treaty itself.

Much of what I have to say is therefore conjectural.

The purpose of Article L was, I think, partly political and partly legal. As to its political purpose, Professor Everling has said:

"L'exclusion de la compétence de la Cour, prévue à l'article L du traité sur l'Union, pour le contrôle des activités de l'Union en dehors des domaines des Communautés, est l'expression d'un déclin de confiance du public envers la jurisprudence de la Cour. Quelques formulations pour le moins étonnantes du récent arrêt de la Cour constitutionnelle allemande concernant le traité de Maastricht confirment cette impression."¹

It is almost certainly true that some of those in the governments of the Member States distrust the Court and its motives. But Article L is not wholly new. Article 31 of the Single European Act already excluded the jurisdiction of the Court in relation to Title III of that treaty – the Title on Political Cooperation in the sphere of foreign policy. And it is perhaps natural to think that courts have little role to play in the field of foreign policy. Whether the same is true of cooperation in the fields of justice and home affairs is another matter.

From a legal point of view, Article L can be seen as defining the line of demarcation between the aspects of Maastricht that are "supra-state" and legally binding, on the one hand, and those that are "intergovernmental" and purely diplomatic, on the other. To put the same point in different terms, Article L constitutes the rule of recognition of the *Community* legal order. The German Constitutional Court seems to share this view².

1 U. Everling, *L'avenir de l'organisation juridictionnelle de l'Union européenne*, in *La Réforme du Système Juridictionnel Communautaire*, Brussels, 1994, p.19.

2 See para. B.2.c of the judgment on the Maastricht treaty (cases 2 BvR 2134/92 & 2159/92).

The question whether Article L is *workable* as a line of demarcation or rule of recognition is not to be confused with the question whether Article L is *desirable*. As to whether it is desirable to exclude the Court of Justice from large areas of the activity of the Union, of which it is an institution (Articles C and E), I would only observe that, during the nineteenth century, it was the British who made judges the interpreters of the federal constitutions they drafted for their Dominions. Continental constitutions tended to leave constitutional interpretation to the elected parliament. The workability of Article L depends, to some extent at least, on whether the line of demarcation it lays down is watertight. Every lawyer knows that legal problems do not come with labels attached. In the field of Community law, as experience shows, it is often difficult at the outset to know whether a case involves a point of Community law – and, if so, what point – or whether it is purely a question of national law. The best-defined line of demarcation has to assume that the true nature of the legal problem at issue can be identified in advance, so as to see on which side of the line it falls.

As to whether Article L is watertight, two general points can be made. First, all issues involving the demarcation of competences between the Union and the Member States, and between the institutions of the Union, are “constitutional”. The constitution must be interpreted in order to solve them. Someone must provide the interpretation and the assumption, in most Member States at least, is that this is properly the work of a court. Second, *implementation* by national authorities of obligations undertaken in the context of the Union may give rise to a problem of Community law. So legal problems falling within the competence of the Court of Justice are not wholly avoided by “diplomatic” or “intergovernmental” solutions.

Next, looking at the text of the parts of the Maastricht treaty excluded by Article L from the Court’s competence, we find that Title I appears to lay down legally binding constitutional norms. Article C speaks of a “single institutional framework” and Article E provides that the institutions of the Union “shall exercise their powers” as provided by the treaties, including the Union treaty. Further, a legal obligation on the part of the Union itself to comply with external norms is envisaged by the use on three occasions of the words “shall respect” (Article B, last paragraph, on subsidiarity; Article F.1 on national identities and systems of government; and Article F.2 on fundamental rights). Who is to interpret these provisions in case of conflict or doubt?

Title V on Political Cooperation, like Title III of the Single European Act, may appear to offer few problems of constitutionality. But the new arrangements for Political Cooperation involve greater depth of cooperation and recent reports in the newspapers suggest that it has not been found easy, in practice, to define who is responsible for doing what. More obvious legal questions are raised by Article J.11, which refers to the powers of the institutions as defined in the EC treaty and the charging of administrative expenditure to the Community budget. Here Title V

impinges directly on matters that fall, for other reasons, within the Court's jurisdiction under Article L.

Unlike Title V, Title VI on cooperation in the fields of justice and home affairs clearly raises legal issues. Its potential impact on human or fundamental rights has already been widely noticed. Anything agreed under Title VI which may affect free movement within the Community, or may affect the rights of third country nationals who form part of a "Community family", could cut across established norms of Community law. So may the action taken by national authorities to implement the obligations undertaken by the Member States under Title VI. And Article K.8 raises the same problems as Article J.11 (above).

The text of Maastricht therefore offers, even on superficial examination, grounds for believing that significant problems of legal interpretation are likely to arise under Titles I, V and VI.

Who will decide if a legal problem arises under these Titles, excluded from the Court's jurisdiction under Article L? That is not clear, and perhaps was not intended to be. But it is as well to note that the interpretation of Article L itself *does* fall within the Court's jurisdiction. The Court of Justice is therefore the ultimate arbiter of where the line of demarcation lies.

So, is Article L workable? In the short term, to judge by experience of the Single Act, probably Yes – in the sense that serious legal problems will probably not arise in the short term. In the longer term, one need say no more than Article L will not necessarily produce the results that opponents of the Court intended.