

# *THE TREATY OF LISBON UNDER REVIEW: THE GERMAN CONSTITUTIONAL COURT AND THE FUTURE OF EUROPE*

## OUTLINE

Ingolf Pernice, Berlin \*

### **I. Introduction**

#### ***1. The German Federal Constitutional Court and the European Union***

- History of Maastricht: Setting conditions for further integration: Increase of competences going hand in hand with more democracy
- The case of Lisbon: hearing at the German Constitutional Court of February 10 and 11, 2009

#### ***2. Admissibility of the applications***

- Interinstitutional argument (Organklage)
- Constitutional complaint (Verfassungsbeschwerde)
- Admissibility as a question of balance of powers

#### ***3. Legal and Political Impact of the Courts' Judgments in Germany***

- Recall the Maastricht-Judgment 1993 – The network of Courts
- The Silberhorn-story: What is democratic responsibility?
- Karlsruhe and the Future of the European Union

### **II. Public Misunderstandings: Notes on a Google-blog**

#### ***1. Competences left to the Member States***

Di Fabio: "One has to ask soberly: What competences are left with the Bundestag (the German parliament) in the end?" He also bluntly asked "whether it would not be more honest to just proclaim a European federal state".

##### *a. Matters salient for the citizen*

- Distributional issues: Economic policies, taxation, social security, public health

---

\* Professor Dr. jur., Chair for public, international and European Law of the Humboldt-University of Berlin, managing director of the Walter Hallstein Institute for European Constitutional Law (WHI) of the Humboldt-University of Berlin ([www.whi-berlin.de](http://www.whi-berlin.de)).

- Security: Law and order, police, home affairs, foreign and security policies, defense
- Education and culture: Schools, universities, broadcasting, promotion of artist production and performance, treasures of architectural value

*b. The Principle of Conferred Competences*

- Compare to the 14<sup>th</sup> amendment:  
The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.
- New provisions under the Treaty of Lisbon: Articles 4 and 5 TEU\*
- Questions on Articles 48 (6) and (7) TEU\*, 83, 311 and 352 TFEU

*c. Categories of Competencies under the New TFEU*

- Definition in Article 2 TFEU
- Catalogues of Articles 3 (exclusive), 4 (shared), 5 (coordination), 6 (support)
- Special Chapter: CFSP (Articles 21-41, in particular Article 24) and CSDP (Articles 42-46 TEU\*)

*d. The Rationale behind EU competences: Principle of Subsidiarity*

- Subsidiarity and the architecture of the EU: In areas of shared competences the EU only acts where Member States cannot or not effectively act – where is the loss of powers?
- New mechanisms of subsidiarity: The early warning system – the national parliaments get a recognized active status within the EU-legislative process. They can make proactive use of this status

**2. Federal State or Supranational Union?**

- There is no authority of the EU to set aside national law or to enforce European law by measures of physical coercion upon states or individuals; the Member States maintain the monopoly for this.
- The principle of voluntariness of membership: Member States will have the right to withdraw
- No rule of supremacy: EU law does not trump national law: no hierarchy.
- Lech Kaczynski (2007 in Berlin): public expenses controlled by EU just about 1% of BNP (federal states: 40 %)

### ***3. National Sovereignty and a threat to freedom***

Di Fabio questioned whether the transferral of powers to the EU really means more freedom for EU citizens, asking "Is the idea of going ever more in this direction not a threat to freedom?"

- New concepts of sovereignty – the right to participate. The EU is a vehicle to act where Member States alone cannot reach
- In defence of individual rights and freedoms: Values of Article 2 TEU\* and the Charter of Fundamental Rights

### ***4. Criminal Law and Criminal Sanctions in EU Competence***

Herbert Landau said new EU powers in criminal justice affected "core issues" of German legislative authority and Judge Rudolf Mellinghoff asked whether the Treaty wasn't already "in an extensive way" being applied when it comes to the area of criminal sanctions in environment issues, as the European Commission already has the mandate to sanction companies for pollution.

- The area of freedom, security and justice: Consequences of the opening of borders between the Member States
- Limits of powers conferred to the EU under Articles 82 and 83 TFEU
- Opening for specific legislative powers to be extended to other areas of serious transborder crimes, by unanimous decision of the Council

### ***5. Questions of Transparency and Clarity***

Reportedly, all judges agreed that the Treaty was very hard to read. EUobserver notes that "less-than-clear passages from the treaty were read out aloud, guaranteeing a laugh".

- There was no reading out in Karlsruhe but the advocate of the applicant reported from such performance in a Freiburg Theater
- What is a Treaty amending other Treaties? Who needs to understand and of whom can be expected to understand ?
- Reading the Treaty of Lisbon makes very clear what are the changes, more than it was possible by reading the Constitutional Treaty.

### ***6. How Does the Court Decide?***

Five of the eight judges must approve the ratification Bill for Lisbon in order for it to come into force. Incidentally, five of the judges pursued a line of critical questioning yesterday, suggesting that they are not convinced by the German government's assurances that the Treaty is harmless.

- § 15 (4) BVerfGG: The Court takes a decision with the majority of its judges.

- In case of 4:4 votes, there can be no finding of a violation of the Constitution.

### ***7. Referendum on the Treaty of Lisbon ?***

Sueddeutsche Zeitung notes that the Court may ask for a referendum if it finds that the Treaty detrimentally affects the German Constitution. The paper notes that “if the judges intervene...it will be because important transfer of powers to the EU is not followed by a corresponding increase in democracy. Europe suffers from lack of democracy”. This is very striking since the Federal Republic of Germany has never held a referendum, not even in the process of its unification in 1990.

- The Grundgesetz itself was not adopted by referendum and does not provide for a referendum in cases of amending the Constitution
- There is no referendum provided for establishing or amending the EU-Treaties, but the Grundgesetz herefore requires the same majorities and conditions as for constitutional amendments.
- Thus, the Court would not be well advised to require a referendum in the present case.

### ***8. Article 146 of the Constitution***

Article 146 of Germany's Constitution provides that a referendum may be called if the German constitutional order is to be changed. Gesine Schwan, who was the Social Democrats' nomination for the German Presidency, has said she would support a referendum on the Lisbon Treaty.

- This provision regards the substitution of the provisional Basic Law by a new constitution to be decided freely by the entire German people.
- Changes of the Constitution follow the procedure laid down in Article 79 of the Basic Law: Two thirds majority in both chambers.
- Such a previous change would be necessary if a referendum on the Treaty of Lisbon was to be held.

## **III. Other Relevant Issues**

### ***1. Democracy in the European Union – Model of Democracy ?***

#### ***1. The Talk of the „Democratic Deficit“ – Problems of Translation***

- Why do citizens not care about European politics (Moravcsik) – participation in European elections
- Can equal voting rights be a requirement for European democracy ? The weight of one vote from Cyprus or Malta is 10 times the weight of a vote from Germany

- The absence of an opposition in the EP – absence of a government to be held accountable by the Parliament
- The Swiss model: Congruential democracy in a federated system – contradictions and tensions

### *2. Three Straints of EU Democratic Legitimacy*

- The Treaties and amendments thereof: Article 48 TEU old and new – the Convention method, the national “integration-clauses” and ratification-processes
- Legitimacy and control of governments acting in the Council: Public sessions of the Council acting in legislative capacity, provisions in national constitutions regarding supervision of ministers
- Direct democratic legitimacy provided by the European Parliament as a co-legislator, in budget procedure and by the election and political control of the Commission

### *3. Understanding the Political Process in the EU*

- The citizen of the Union: multiple identities and multiple responsibility
- The citizen’s initiative as a new instrument for active participation
- Formation of political parties as a result of new powers of the EP?

### *2. National Constitutions and European Law*

- Declaration no 17 on Primacy : Legal implications? The Declaration states that there is no change in the situation as determined by the ECJ
- The role of national constitutional courts: No powers to scrap European legislation or decisions, but co-responsibility in securing the respect of the common values and basic fundamental rights
- Supremacy and primacy: Towards a non-hierarchical relationship between complementary legal orders composing one system
- A pluralistic approach of cooperation between justices at equal level: the role of the Article 234-procedure on preliminary rulings of the ECJ

## **IV. Perspectives**

### *1. What could Karlsruhe reasonably decide*

### *2. The Brussels Compromise and the second Irish Referendum*