

Special Section: The Federal Constitutional Court's *Lisbon Case*

The Ruling of the German Constitutional Court on the Treaty of Lisbon

By *Christian Tomuschat**

Generations of politicians and lawyers will have to read and re-read the recent ruling of the German Constitutional Court of 30 June 2009 regarding the Treaty of Lisbon ("Lisbon Case") on almost a daily basis for many years to come.¹ The Court, master of its own proceedings and not feeling bound by any doctrine of judicial self-restraint, has expounded in this decision at great length about its own philosophy of the European integration process. Based on its self-established theory, in which every German citizen is holder of a democratic right to a legislature that is endowed with substantial powers to determine the destiny of the German people, the Court examined the Treaty in each and every detail. The claimants, alleging through a constitutional complaint that this democratic right had been breached, could not point to any specific injury that they had suffered. In real terms, their constitutional complaints amounted to an 'abstract' review of the Treaty, a remedy which the Basic Law reserves for the federal government, any government of a Land, or for a third of the members of the *Bundestag*. But the Court saw the constitutional complaints, which had been filed by the extreme right and the extreme left of the political spectrum, as a welcome opportunity to define the constitutional limits of the European integration process. Far from reflecting the views of the framers, the ruling reads like a political manifesto from the judges.

The positive aspects of the ruling should not be denied. The Court rejected every objection that had challenged the compatibility of the Treaty of Lisbon with the Basic Law. It acknowledged openness towards Europe as one of the cornerstones of the German constitutional system. The Court's only criticism was directed at the national law of implementation (which defines the participatory powers of the German legislative bodies), and found that these powers had not been sufficiently strengthened. According to the Court, any significant step toward the extension of the European Union's competences, for example the change from unanimity to qualified voting in the Council, or resorting to the

* Professor of Public Law and European Law, Humboldt University, Berlin, Germany. E-mail: chris.tomuschat@gmx.de. This essay first appeared in the *AICGS Advisor*, which published on July 10, 2009. Available at: <http://www.aicgs.org/analysis/c/tomuschat071009.aspx>.

¹ Lisbon Case, BVerfG, 2BvE 2/08 from 30 June 2009, available at: http://www.bverfg.de/entscheidungen/es20090630_2bve000208.html.

general legislative clause of Article 352 (currently, Article 308), must be approved by a parliamentary statute, since sole governmental consent does not meet the requirements of democratic legitimacy. The Court also re-affirmed that the European Union is not a “state,” and in any event, federal statehood for the Union cannot be pursued based on the current integration clauses of the Basic Law.

Fervent advocates of a united Europe, however, will not be the only ones disappointed by the ruling. The general tone of the ruling in the Lisbon Case resonates with skepticism towards the integration process. The Court constructs a line of defense against any possible infringements of German sovereignty, stating that certain fields – the administration of criminal law; the civil and military monopoly on the use of force; fundamental fiscal decisions on revenue and expenditures; provisions governing the media; dealings with religious communities; and the shaping of citizens' lives via social policy and important decisions on cultural issues, e.g. the education system – must forever remain under German control. The Court does not openly say that the Treaty of Lisbon traces the extreme outward frontiers of any conferral of powers to the Union, but the whole context of its findings suggests that indeed the Court begins with this assumption. In agreement with its defensive approach, the Court stresses that in the future it will intensify its control vis-à-vis the Union by carefully scrutinizing whether the Union has complied not only with common European human rights standards, but also whether it has respected the substantive scope of the powers that have been delegated to it. In this connection, the Court suggests that a special procedure should be created that will remove any challenge on its competence to rule on such disputes.

Political wisdom has been absent throughout much of the creation of the European institutions. The clauses of the Treaty of Lisbon are drafted fairly generously, specifically with regard to criminal law, and the notion that efficiency cannot be the overriding motto of the integration process, may have been overlooked during the general frenzy of building the foundations of a European legal order. On the other hand, in a process that started with the European Coal and Steel Community in 1952, European integration has fostered a wealth of great achievements. Only reluctantly does the Court's ruling acknowledge the positive aspects of the balance sheet.

This becomes visible particularly in the Court's treatment of a crucial issue, democratic legitimacy of the European Union. The Court develops a narrow dogmatic thesis holding that: in a true democracy the weight of each voter must be the same, which is to be reflected in equal participation in the respective representative parliamentary body. From this viewpoint, the Court argues that the European Parliament cannot be recognized as a truly legitimate parliamentary body since the citizens of the smaller member states are granted greater representation than the citizens of the larger nations, e.g. France or Germany. This is a truly erroneous argument that misunderstands the particular logic of a federal entity. In the view of the Court, the U.S. Senate would lack true democratic legitimacy. Observing that the U.S. Senate is “only” a second chamber clearly misses the

point. Essentially, the Court presents domination of the more populous members of the European Union as a constitutional requirement, even though it accepts the composition as shaped by the Treaty of Lisbon since the European Union remains an institution below the level of a state.

In any event, for the Court, the European Parliament remains a marginal institution. Therefore, the main democratic roots of the European Union lie in the democratic processes of the twenty-seven member countries. With its ruling, the Court has expressed its wish to prevent the European Union from developing its own democratic legitimacy as a second pillar of a European compound system, where governmental decisions are made at two levels in two different institutional contexts. In our age of globalization, it seems fairly odd to contend that genuine democracy can exist only within the framework of the nation-state.

