

## **Lisbon's high-wire act moves to Germany**

**by Andrew Duff**

The Treaty of Lisbon continues on its high-wire act. On Wednesday, Germany's Bundestag, or parliament, held a first debate on emergency repairs to the country's long-winded attempt to ratify the European Union's reform treaty. The latest thrill stemmed from a provocative judgment of the German constitutional court, delivered on 30 June, calling for amendments to a law setting out parliamentary responsibilities under Lisbon.

The Federal Constitutional Court's job is to safeguard the Basic Law of the Federal Republic, drafted in 1948-49 to avoid the flaws of the constitution of the Weimar Republic (1919) which was subverted by the Nazis.

While approving Lisbon in principle, the court concluded that the powers of the German parliament in EU affairs were inadequate and had to be increased in order to maintain the Basic Law's central position in Germany's constitutional order.

The Basic Law empowers the Federal Republic to embrace European integration. Transferring German sovereignty to the EU is a legitimate and systematic constitutional process. The German legal order is open to EU law. No other EU member state has so readily entrenched European integration as part of its own national mission.

The Bundestag and Bundesrat are now taking hurried action to meet the court's objections before the general election on 27 September – and just in time before the second Irish referendum on the treaty due on 2 October.

Most of the objections raised against the Lisbon treaty were, in Germany as in other places, at best misinformed and at worst spurious. It is hardly surprising that the court comes down firmly in favour of German ratification of the Lisbon treaty, whose principal features it painstakingly describes.

So traditional German support for European unification is maintained, but it is not proffered unconditionally. The court sounds alarms for the future, warning against the prospect of 'excessive federalisation' without commensurate legitimisation. It wonders whether there is a 'deficit of European public authority'.

It warns that, while 'federal or supranational intertwining' allows a better balance of interests of regions and states and 'possibilities of action which otherwise would encounter practical or territorial limits', federalism makes it 'more difficult to create a will of the majority that can be asserted and that goes directly back to the people' (as required by German Basic Law).

Yet the judgment is not helpful in resolving these issues. It wavers between affirmation, on the one hand, that the Lisbon EU is not (or not yet) a federal state, and criticism, on the other hand, that the EU does not enjoy the democratic legitimacy of a federal state. The court supplies only a narrow national (and very German) critique of the EU's legislative processes, leaving the unfortunate impression that it can never be wholly satisfied with the concept of supranational democracy.

The court bemoans the absence of a European demos while not willing its discovery.

My own view, having looked high and low, is that a demos is best found in an island or city state where an exclusive community achieves political identity. A demos is an improbable and even rather frightening creature on a continental scale: we are better off with a looser and more catholic European citizenship.

The court grumbles that seats in the European Parliament are distributed according to the federalist principle of degressive proportionality, whereby a German MEP will represent twelve times as many people as a Maltese MEP. According to the court, it is the principle of electoral equality which allows for the emergence within the German Bundestag of clearly articulated government and opposition forces, and offers the public a decisive political choice at election time. (Quite how the current grand coalition in Berlin fits into that picture is not explained.)

The court complains that a simple majority in the European Parliament might not represent an actual majority of EU citizens, adding, rather acidly, that the EU is supposed to outlaw discrimination on the grounds of nationality.

The judges have a myopic view of the European Parliament. They might have shown more empathy with MEPs who always have to find a compromise between the international law principle of equality between states and the democratic principle of 'one man one vote'.

In any case, Parliament's own composition is only one part of the wider story of EU governance, in which the states are to retain strict equality of representation in the European Commission, European Court of Justice and European Council, and where, in the Council of Ministers, the normal qualified majority vote will be composed of 55 per cent of the states representing 65 per cent of the people.

The court views the Council of Ministers not as the second chamber of a bicameral legislature but as a diplomatic conference where state interests are horse-traded. The reduced possibility, under Lisbon, of the national veto in Council is therefore a serious matter.

The main preoccupation of the judges, however, is to ensure that the Bundestag will continue to have the ‘formative influence on the political development of Germany’. In particular, the sharing of competence within the EU in the fields of taxation policy, social welfare, culture, religion, and police, justice and military affairs – all of which is to be permitted by Lisbon – must be exercised with restraint.

The Bundestag must be involved in the development of EU policy in these sensitive areas and in decisions to deploy the passerelles, or bridging clauses, which allow for a shift away from unanimity in the Council. Likewise, the new softer methods of EU treaty revision must be subject to the positive assent of the German parliament.

What happens after parliament has its final say on the amendments in September is anyone’s guess. Clearly, the court intends to police the activities of the EU to see that they do not wander beyond the boundaries set under Lisbon. As far as the Bundestag is concerned, one may doubt that its members will be capable in practice of the close, constant scrutiny of EU affairs that the court has demanded. One can only imagine how Angela Merkel will take to being hobbled in the European Council by her judges and MPs back home.

Brussels, too, has to digest the German court judgment: the EU has constitutional authority, but it has it on probation; its supranational autonomy is real, but it is also reversible. No one in this Europe business is condemned to succeed. Not even federalists.

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