

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

The Federal Constitutional Court's *Lisbon Case*: Germany's "Sonderweg" - An Outsider's Perspective

By Alfred Grosser*

A. Introduction

There is no cause for celebration: Instead, the judgement coming out of Karlsruhe must be seen as an expression of the Federal Constitutional Court Justices' fear of subjecting themselves to the European Court of Justice. Indeed, the judgment raises questions about Germany's commitment to Europe.

30 June 2009 will be remembered as a black day in the history of Europe. Not only because of the judgment of the German Federal Constitutional Court, but also because of the newspaper comments that reveal the degree of ignorance – and connected herewith, the degree of disregard for – the European Union that has taken hold in Germany.

The Court lives and decides in fear of subjecting itself to the European Court of Justice. The *Lisbon Case* is an expression of that very fear. It is for some time now, in any case, that the Court has lost a sense of self-restraint. In 1977 the Court dismissed the complaint brought by the wife of Hanns Martin Schleyer – who had been kidnapped by the *Rote Armee Fraktion* – holding that the decision to obey the kidnappers' demands was a political, not a legal issue.¹ And yet, today, the Karlsruhe Court has no reservation ruling that no airplane may be shot down even if it could be used as a weapon against a city or a nuclear reactor.² In addition, many judges author newspaper articles on topics that will come before them.

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¹ BVerfGE 46, 160. See Christoph J.M. Safferling, *Terror and Law: German Responses to 9/11*, 4 J. INTL CRIM. JUST. 1152 (2006).

² BVerfGE 115, 118. See also Wolf-Rüdiger Schenke, *Besprechung zu BVerfG Urt. v. 15.02.2006 1BvR 357/05*, 59 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 736 (2006); Torsten Hartleb, *Der neue § 14 III LuftSiG und das Grundrecht auf Leben*, 58 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 1397 (2005); Friedhelm Hase, *Das Luftsicherheitsgesetz: Abschuss von Flugzeugen als 'Hilfe bei einem Unglücksfall'?*, 59 DIE ÖFFENTLICHE VERWALTUNG (DÖV) 213 (2006); Karsten Baumann, *Das Urteil des BVerfG zum Luftsicherheitsgesetz der Streitkräfte*, 27 JURA 447 (2006); Burkhard Hirsch, *Zum Verbot des Rettungstotschlags*, 60 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 1188 (2007); Christian Pestalozza, *Inlandstötungen durch die Streitkräfte - Reformvorschläge aus ministeriellem Hause*, 60 NEUE

B. Legal Topic *sui generis*

By contrast, all high courts in France have been emphasizing that European Law always supersedes national law. There is also the possibility of our parliament to justify a complaint on the grounds that it assumes that a European regulation is in violation of the Subsidiarity Principle – according to which a lower level regulatory competence exists where appropriate. But such complaint must be brought before the European Court of Justice!

In this light, the basic assumptions of the FCC and the majority of the commentators, in particular those who are or were members of the bench in Karlsruhe, appear bizarre. The very debate over the EU being either a “federation of states” (*Staatenbund*) or a “federal state” (*Bundesstaat*) suggests an error with regard to the EU’s legal *sui generis* nature. The EU is not a federation of states – and yet it is more centralized than many federal states such as Switzerland or the United States. A federation of states would possess a common defence policy, something that the EU is still far from having – despite what former Federal Constitutional Court Justice Professor Paul Kirchhof has opined in that regard.

All the Lisbon Treaty says is that it envisions a “step-by-step establishment of a common defence policy” that might eventually “lead to a common defence.”³ In comparison, the

JURISTISCHE WOCHENSCHRIFT (NJW) 492 (2007); Wolfgang Hecker, *Die Entscheidung des Bundesverfassungsgerichts zum Luftsicherheitsgesetz*, 39 KRITISCHE JUSTIZ 179 (2006); Ulrich Palm, *Der wehrlose Staat? Der Einsatz der Streitkräfte im Innern nach der Entscheidung des Bundesverfassungsgerichts zum Luftsicherheitsgesetz*, 132 ARCHIV DES ÖFFENTLICHEN RECHTS (AÖR) 93 (2007); Dieter Wiefelspütz, *Änderung des Art. 35 GG, »Quasi-Verteidigungsfall« oder Neuordnung der Wehrverfassung*, 22 ZEITSCHRIFT FÜR GESETZGEBUNG (ZG) 97 (2007); Oliver Lepsius, *Human Dignity and the Downing of Aircraft: The German Federal Constitutional Court Strikes Down a Prominent Anti-terrorism Provision in the New Air-Transport Security Act*, 7 GERMAN LAW JOURNAL 761 (2006); Oliver Lepsius, *Das Luftsicherheitsgesetz und das Grundgesetz*, in Festschrift Burkhard Hirsch 47, 68-72 (F. Roggan ed., 2006).

³ See Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, December 13, 2007, 2007 O.J. (C 306)1 and arts. 23-46 TEU (Article numbering as amended by the consolidated version of the Treaties, May 9, 2008, 2008 O.J. (C 115)1). In particular see: Art. 24.1 TEU – “1. The Union’s competence in matters of common foreign and security policy shall cover all areas of foreign policy and all questions relating to the Union’s security, including the progressive framing of a common defence policy that might lead to a common defence.(...)”; and Art. 42.1-2 TEU – “1. The common security and defence policy shall be an integral part of the common foreign and security policy. It shall provide the Union with an operational capacity drawing on civilian and military assets. The Union may use them on missions outside the Union for peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter. The performance of these tasks shall be undertaken using capabilities provided by the Member States. 2. The common security and defence policy shall include the progressive framing of a common Union defence policy. This will lead to a common defence, when the European Council, acting unanimously, so decides. It shall in that case recommend to the Member States the adoption of such a decision in accordance with their respective constitutional requirements.(...)” See generally, Richard Whitman and Ana Juncos, *The Lisbon Treaty and the Foreign, Security and Defence Policy: Reforms, Implementation and the Consequences of (Non-)Ratification*, 14 EUROPEAN FOREIGN AFFAIRS REVIEW 25 (2009).

responsibilities growing out of NATO membership are higher! An example of the EU's centralized nature is its common currency, adopted by 16 of 27 member states. The German Mark became the Euro, and the German Federal Bank (*Bundesbank*) is positioned below the European Central Bank. Overall, both the Federal Constitutional Court and the media seem to like to ignore the character of the two prime regulatory instruments with which the EU governs life in the member states, regulations and directives. The former has universal validity, binding character, and is directly applicable in every member state. By contrast, a directive is binding with regard to its goal, but it leaves discretion to each member state with regard to the means of reaching this goal.

C. A Steady Increase of Participation

There may be concerns that many of these regulations and directives have resulted from undemocratic processes, given that they were created by the European Union Council, representing twenty-seven national governments and constituting a both executive and legislative institution. But the expansion of majority decision-making to altogether 40 policy fields⁴ must be seen as a further limitation on individual member states' veto power – and thus as a move towards more democracy. Furthermore, each EU reform has subsequently resulted in a power increase for the European Parliament, strengthening its co-decision-making powers in the legislative process.

And yet, it is the European Parliament's legitimacy that remains – wrongly, but to this day – broadly contested in Germany. First of all, this view is blind to the fact that the EU brings "peoples" together, not states, as clearly follows from the 1957 Treaty of Rome, which declares that the member states are "... determined to lay the foundations of an ever closer union among the *peoples* of Europe..."⁵ Second, EU citizenship complements national citizenship without substituting it. Finally, one ought to add that the legitimacy of the European Parliament would likely be higher in Germany if governments, political parties and media had not always treated it with such disregard, effectively neglecting the good work done by German members of the European Parliament.

⁴ See PAUL CRAIG AND GRÁINNE DE BÚRCA, *EU LAW: TEXT, CASES AND MATERIALS* 1-37 (4th ed. 2007); Stefaan van den Bogaert, *Qualified Majority Voting in the Council: First Reflections on the New Rules*, 15 MAASTRICHT JOURNAL OF EUROPEAN AND COMPARATIVE LAW 97 (2008); Michael Dougan, *The Treaty of Lisbon 2007: Winning Minds, Not Hearts*, 45 COMMON MARKET LAW REVIEW 627 (2008); Sara Hagemann & Julia de Clerck-Sachse, *Decision-Making in the Enlarged Council of Ministers: Evaluating the Facts*, 119 CENTRE FOR EUROPEAN POLICY STUDIES [CEPS] POLICY BRIEF 1-8 (2007), available at: <http://ssrn.com/abstract=1349087>; Achim Hurrelmann & Joan Debardeleben, *Democratic dilemmas in EU multilevel governance: untangling the Gordian knot*, 1 EUROPEAN POLITICAL SCIENCE REVIEW 229-247 (2009).

⁵ Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 3, Preamble (emphasis added).

D. Everyone (should be) Invited On Board

What is now being demanded in Germany is the strict limitation of the German government in the European Union Council. The Court concluded that the *Bundestag* (German Federal Parliament) and the *Bundesrat* (German Federal Council of States) have a say in the government's voting behavior. In a lead article published in the *Süddeutsche Zeitung*, the author notes in a sumptuous way: "You have to imagine it this way: There is a freight train starting in Brussels, it has a clear line, until it reaches Germany: here, it has to stop so that the parliament can board the train." The question is, however, what happens when the train passes through Greece, Romania or Latvia?

Because all member states are equal, all must be allowed to have their parliaments "board the train." This would mean that incessantly twenty-seven parliaments would be occupied. The trouble with transposing the Lisbon Treaty in the EU show one thing: with such invitations to board the train, the EU would be destroyed.

Can that be desired? Twice already Europe proved particularly fortunate for Germany. The Federal Constitutional Court, in its recent iteration, cites to the preamble of the German *Grundgesetz* (Basic Law or Constitution) where it says that Germany is obliged "... to promote world peace as an equal partner in a united Europe..." ("*als gleichberechtigtes Mitglied in einem vereinten Europa dem Frieden der Welt zu dienen.*") Europe, even as a supranational entity, was for Germany's first chancellor, Konrad Adenauer, an avenue towards Germany's emancipation; for a Germany that was at that point not sovereign – neither externally nor internally. But Adenauer believed in the value of a united Europe.

E. Germany as Brakeman?

Willy Brandt, a former SPD chancellor and the then-Seniority President of the German Bundestag, said on 20 December 1990, that German reunification would not have been so easy without the European Community. It is in this sense that Jean Monnet, father of the European Community, was also one of the fathers of the German reunification. Even as recently as Germany's turn with the Presidency of the European Council in 2007 – a presidency administered by German Chancellor Angela Merkel in a considerate, sober and altogether excellent way – one could believe that Germany was indeed the motor of European unification. Has Germany, now that some of its national goals have been reached, become the brakeman? How can one make Germany understand what the Karlsruhe judgement and the comments mean? One meaning is that all those living in Germany and promoting and supporting German-French cooperation for over 60 years must now answer critics that worry that the Germans have never been serious about Europe.