

*The People's Movement campaigns against any measures that further develop the EU into a federal state and to defend and enhance popular sovereignty, democracy and social justice in Ireland.*

## **German Constitutional Court rejects primacy of EU law**

On the 30th of June last, Germany's highest court ruled that the Lisbon Treaty can be ratified only if the national parliament's role is first strengthened. This judgement rejects the principle of the primacy of European law over German law. Member-states are said to be the "masters of the Treaties." In the court's view, the EU institutions have no powers of their own but can only administer delegated competence in prescribed areas. European law is stated to be ultimately based on and limited by the accession law of each member-state.

The president of the European Commission, José Manuel Barroso, expressed concern at the court's judgement, fearing it could undermine the "European project." He said that the judgement raises "very important and sensitive issues in terms of the competence of the European Union and other competences, namely on the understanding of the principle of subsidiarity." He added that the judgement was "extremely important" for the way member-states "understand respect for community law."

The ruling has also raised strong debate in Germany. Some politicians, particularly from the Christian Social Union (sister party of the governing Christian Democratic Union), now want Germany's parliament, the Bundestag, to have the right to approve the country's position before it negotiates EU decisions in Brussels.

German negotiators will be required to have prior sanction from both houses of parliament before a European decision on a large range of subjects can be made. A possible approval or disapproval after a European decision is made is considered insufficient and is not a substitute for the democratic process.

Importantly, the Constitutional Court put clear limits to the EU common foreign and security policy. It ruled that all of the CFSP is not supranational.<sup>1</sup> The result is that the CFSP does not have primacy over national constitutions, nor over the Charter of the United Nations,<sup>2</sup> so it is governed by the prohibition of aggressive war.<sup>3</sup> This is decisive for the preservation of peace, because the Lisbon Treaty would allow military interventions into literally all the countries of the world, based on such legally unclear terms as "crisis,"<sup>4</sup> "failed states,"<sup>5</sup> and "terrorism."

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1. Page 137.

2. Charter of the United Nations, article 103.

3. Charter of the United Nations, article 2, paragraph 4.

4. Treaty on European Union (Treaty of Maastricht), article 43.

5. Treaty on European Union, article 42.

The treaty would also explicitly allow the European Council of Ministers to establish its self-defined basic strategic interests,<sup>6</sup> in connection with the common foreign and security policy,<sup>7</sup> which would have greater power even than the UN Security Council, because the latter is clearly bound by the UN Charter.

The Constitutional Court has clarified, therefore, that the German Parliament solely must decide on the deployment of the German army. The parliament's involvement in military operations, as foreseen in the Lisbon Treaty and in accompanying laws, is therefore unconstitutional according to the judgement of the Federal Constitutional Court.

This relates, for instance, to protocol 10 of the Lisbon Treaty, "On permanent structured cooperation established by Article 42 of the Treaty on European Union," which allows for military deployment within five to thirty days. According to the judgement of the German Constitutional Court, only the Bundestag can decide, not the European Council on its own.

However, the ruling of the Constitutional Court is legally binding only in Germany. Whereas the German Basic Law (constitution) gives the EU treaties the same legal standing as the greater part of the Basic Law itself,<sup>8</sup> there are no prescriptions in, for example, the Polish or Czech constitutions that would be comparable with this article.

In contrast, the Constitution of Ireland puts all EU law above the Constitution (article 29, paragraph 4, sub-paragraph 10); and, regrettably, the German court decision will not help the Irish people to limit the effects of the Lisbon Treaty should it come into force in Ireland. On the contrary, Ireland could quickly become the legislative experimental laboratory of the European Union.

A clear enunciation of the primacy of EU law over Irish law is also provided in the Twenty-Eighth Amendment of the Constitution Bill (2009), which is what we will actually vote on in the referendum.<sup>9</sup>

## Some of the main elements of the judgement

- There is a rejection of article 344 of the Treaty on the Functioning of the European Union, which provides that member-states undertake not to submit a dispute concerning the interpretation or application of the treaties to any method of settlement other than the European Court of Justice.
- The Constitutional Court also insists that important areas of law-making and decision-taking must be left to



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6. Treaty on European Union, article 21, paragraph 2; article 22, paragraph 1.

7. Treaty on European Union, article 21.

8. Basic Law, article 23, paragraph 1.

9. Twenty-Eighth Amendment of the Constitution Bill (2009), subsection 6°. "No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State, before, on or after the entry into force of the Treaty of Lisbon, that are necessitated by the obligations of membership of the European Union referred to in subsection 5° of this section or of the European Atomic Energy Community, or prevents laws enacted, acts done or measures adopted by—

- i the said European Union or the European Atomic Energy Community, or institutions thereof,
- ii the European Communities or European Union existing immediately before the entry into force of the Treaty of Lisbon, or institutions thereof, or
- iii bodies competent under the treaties referred to in this section,

from having the force of law in the State.

the EU member-states, with national parliamentary participation in all areas where member-states would lose their veto.

- The court does not accept that the European Parliament is a body that can give adequate democratic legitimacy to EU law and sets limits to the importance of the new “additional” EU citizenship, stating that this can only be supplementary to national citizenship.

- The court insists on prior approval by the German parliament—and implicitly by other national parliaments—for the use of the so-called “bridge articles,” whereby government ministers in the Council of Ministers or the European Council can alter EU law-making from unanimity to qualified majority voting.

- The judges also require the full participation of national parliaments in the use of the flexibility clause in article 352 of the Treaty on the Functioning of the European Union, which permits the European Union to take action and adopt measures to attain one of its objectives even if the treaties have not provided the necessary powers. In addition, the judges ruled that Germany’s highest court should have the final say on the interpretation of EU law, allowing it to overturn judgements by the bloc’s highest court, the European Court of Justice.

- The German court implicitly invites any citizen, political party or firm to take cases before the Constitutional Court if they find that a piece of proposed EU law is outside those delegated competences. It is then the German court that would decide—not the EU Court of Justice.<sup>10</sup>

Jens Peter Bonde has said that *“the most striking element in the judgement is that the Court implies the need for the involvement of National Parliaments in all aspects of EU law-making. They refer to democracy as being a principle common to all the EU Member States. The involvement of National Parliaments in EU law-making is therefore a necessity. If not, the principle of democracy will have been fundamentally breached.”*

If Germany’s ratification of the Lisbon Treaty is found to be illegal and in contravention of basic democratic principles in the absence of such parliamentary controls, should not the same principle apply in all other member-states, including Ireland, that claim to be democracies?

## **Excerpts from the German judgement**

(English version published by the Constitutional Court, 30 June 2009)

“European unification on the basis of a union of sovereign states under the Treaties may not be realised in such a way that the Member States do not retain sufficient room for the political formation of the economic, cultural and social circumstances of life.” (Paragraph 3)

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10. Declaration 17 of the Lisbon Treaty, concerning primacy. “The Conference recalls that, in accordance with well settled case law of the EU Court of Justice, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law. The Conference has also decided to attach as an Annex to this Final Act the Opinion of the Council Legal Service on the primacy of EC law as set out in 11197/07 (JUR 260):

“Opinion of the Council Legal Service of 22 June 2007

“It results from the case-law of the Court of Justice that primacy of EC law is a cornerstone principle of Community law. According to the Court, this principle is inherent to the specific nature of the European Community. At the time of the first judgment of this established case law (Costa/ENEL, 15 July 1964, Case 6/6411) there was no mention of primacy in the treaty. It is still the case today. The fact that the principle of primacy will not be included in the future treaty shall not in any way change the existence of the principle and the existing case-law of the Court of Justice.”

“It is therefore constitutionally required not to agree treaty provisions with a blanket character or if they can still be interpreted in a manner that respects national responsibility for integration, to establish, at any rate, suitable national safeguards for the effective exercise of such responsibility.” (Paragraph 239)

“. . . retain sufficient space for the political formation of the economic, cultural and social circumstances of life. This applies in particular to areas which shape the citizens’ circumstances of life, in particular the private space of their own responsibility and of political and social security, which is protected by the fundamental rights, and to political decisions that particularly depend on previous understanding as regards culture, history and language and which unfold in discourses in the space of a political public that is organised by party politics and Parliament.” (Paragraph 249)

“. . . the European Parliament is not a body of representation of a sovereign European people.” (Paragraph 280)

“The deficit of European public authority that exists when measured against requirements on democracy in states cannot be compensated by other provisions of the Treaty of Lisbon and to that extent, it cannot be justified.” (Paragraph 289)

“As regards the legal situation according to the Treaty of Lisbon, this consideration confirms that without democratically originating in the Member States, the action of the European Union lacks a sufficient basis of legitimisation.” (Paragraph 297)

“Finally, the Treaty of Lisbon does not vest the European Union with provisions that provide the European union of integration (*Integrationsverband*) with the competence to decide its own competence (*Kompetenz-Kompetenz*).” (Paragraph 322)

“With Declaration No. 17, Concerning Primacy, annexed to the Treaty of Lisbon, the Federal Republic of Germany does not recognise an absolute primacy of application of Union law, which would be constitutionally objectionable, but merely confirms the legal situation as it has been interpreted by the Federal Constitutional Court . . .” (Paragraph 331)

“After the realisation of the principle of the sovereignty of the people in Europe, only the peoples of the Member States can dispose of their respective constituent powers and of the sovereignty of the state. Without the expressly declared will of the peoples, the elected bodies are not competent to create a new subject of legitimisation, or to delegitimise the existing ones, in the constitutional areas of their states.” (Paragraph 347)