

# High Court Insists on National Sovereignty

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Klaus Mellenthin

*Claudio Celani and Rainer Apel interviewed him on July 1, on the details and significance of the high court ruling. The interview was translated from German.*

**Celani:** The ruling by the Karlsruhe court was immediately received in many media, but also by the government in Berlin and by the EU Commission in Brussels, as a triumph for the Lisbon Treaty. Do you also see it that way?

**Murswiek:** No, this assessment is totally false, for two reasons. The Treaty could only be approved by the Constitutional Court under specified conditions. First, the German accompanying law has been declared contrary to the Basic Law,<sup>1</sup> and the Constitutional Court

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1. The *Grundgesetz*, or Basic Law, is Germany's constitution. When it was drafted and approved in 1949, the word *Verfassung* (constitution) was not used, since it was in effect only for West Germany (Soviet-occupied East Germany would soon have its own constitution); was subject to approval by the Western occupying powers; and was regarded as provisional, subject to change and ratification in a future reunified Germany. After reunification in 1990, the Basic Law remained in force, with slight changes. Major modifications were made in 1994, 2002, and 2006. The "accompanying law" to which Murswiek refers is the German law that would have adapted the nation's legal system to the Treaty—ed.

has made it a requirement for the German legislature to reconstruct this law from top to bottom. The decision by the Constitutional Court indicates many points which the legislature must work into the accompanying law. It's for that reason that the further development of the European Treaty in the "simplified procedure of change," and on the basis of the so-called bridge clauses, should not be undertaken without the express, lawful agreement of the Bundestag [the lower house of parliament]. Thus, a strengthening of the democratic rights of the national parliament. That is the first point.

The other thing is, that the Constitutional Court has in no way approved the Lisbon Treaty as it exists on paper, but has said: The Treaty is only compatible with the Basic Law *under the interpretation which has been given by the Constitutional Court in its ruling*. That means: The Constitutional Court said in a multitude of points, that precise prescriptions of the Treaty must be very narrowly interpreted; that is, the competencies which the Treaty gives to the European institutions, especially to the European Parliament, should not be interpreted broadly, but only in a very narrow sense. That is binding with respect to the application of the Treaty in Germany, according to the opinion of the Constitutional Court. And thus the Treaty takes on a very precise meaning, and provides the sovereignty of the member states with greater protection, than it would have had without the decision of the Constitutional Court.

**Celani:** If I have read the Lisbon Treaty correctly, its powers are very broadly laid out; is this now a limitation of the Treaty?

**Murswiek:** It is a limitation of the Treaty. Basically, the Constitutional Court gives the Treaty, in part, a different content. The concepts that a Treaty applies are subject to interpretation; there are often imprecise ideas which can be interpreted in one way or another. And if there are various possible interpretations, then the Constitutional Court has said: Only one interpretation, namely that which gives the least authority to the European institutions, and leaves more authority on the national level—only this narrow interpretation is the right one, and only this can be accepted by Germany.

## The Next Moves

**Celani:** Practically speaking, what has to happen now?

**Murswiek:** First of all, the Bundestag must enact a new law, which sets the parliamentary provisions prescribed by the Constitutional Court. That's one thing. The other is the fact that the Constitutional Court stresses, that it itself has to be the controlling competence, in order to ensure that the European institutions do not overstep the authority that the Treaty delegates to them.

That means the Treaty as such can go into effect; it has not been changed; but if one day the European institutions construe and apply it differently than the Constitutional Court has now formulated its powers, then there will be a conflict. The situation could arise in which the Constitutional Court says that a specific law which the European institutions have decided on, exceeds its authority, and therefore is not applicable in Germany. The European Court of Justice could have a different opinion, and then we would have a conflict situation. It remains to be seen whether the Constitutional Court would assert itself; whether it is ready to engage in such a conflict with the European Court of Justice.

**Celani:** The Bundestag must now adopt a new accompanying law; that means the Bundestag can, if it wants to, win back German sovereignty?

**Murswiek:** The Bundestag cannot change the Treaty. The court decision only applies to the accompanying law, to require parliamentary approval for specific decisions which, according to the Treaty, can be made *without* parliamentary participation.

**Celani:** Such as the clauses in the Treaty which are being characterized as an "Enabling Act"?<sup>2</sup>

**Murswiek:** Precisely, the so-called flexibility clause, according to which the European Union, by a decision of the European Council, retains for itself the competence to make laws on matters for which it actually has *no* legal competence. This flexibility clause has been drastically expanded by the Lisbon Treaty. The previously existing clause was only applied to matters concerning the Common Market, and this limitation was abolished by the Lisbon Treaty. It is now applicable in all areas, with the exception of foreign policy, and there was the danger that a so-called "competence on competencies" would emerge for the European Union,

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2. A reference to the March 1933 *Ermächtigungsgesetz* which made Hitler the *Führer* (dictator) of Germany—ed.

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*The ruling of the Constitutional Court says that the German Federal Republic must remain a sovereign state. And if the European Union should itself develop into a federal state in which the member states are no longer sovereign, then Germany could not participate in it.*

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i.e., the competence to assert new competencies for itself.

And the Constitutional Court put the kibosh on this, when it said: The Council cannot make a decision on the basis of the flexibility clause, if the national parliament (the Bundestag and the Bundesrat) does not ratify it in the form of a law. Therefore, at least one procedural hurdle has been erected, which looks precisely like a hurdle which demands a change of the Treaty, according to the procedures for changing treaties under international law.

**Celani:** It's been said that the judges have not declared the EU Treaty incompatible with the Constitution, but only the accompanying law. Do you have a comment on why this ruling does *not* declare the EU Treaty unconstitutional?

**Murawiek:** The Treaty, as the Constitutional Court has interpreted it, in this restrictive sense, is no longer as worrisome as it would have been without this restrictive interpretation. In this narrow interpretation it could be completely acceptable; at least that is the judgment of my client, Dr. Gauweiler.

Sure, it is a problem that the Constitutional Court has failed to require the Federal government to insist upon a caveat, under international law, which would say that for Germany, the Treaty is only in force according to this restrictive interpretation by the Constitutional Court. This could result in problems in implementation.

**Celani:** Is that what you originally wanted?

**Murawiek:** Yes. We were working toward such caveats being established, and that unfortunately did not happen.

### **The Broader European Picture**

**Celani:** What about the accompanying laws in other countries? Do you know about them?

**Murawiek:** Not exactly. There are certainly similar rules in other countries, but I don't know exactly how they are set up.

**Apel:** Professor, do you have any insight into how the situation is developing in Prague? I have naturally heard the news dispatches from the Czech Republic, saying that a "closure proceeding" is before the Supreme Court, and that numerous restrictive points have been brought before the court by Czech senators. Therefore, it could perhaps turn out that they would follow the example of our Federal Constitutional Court, and enact a string of restrictions which in reality amend the Treaty and make it acceptable for the Czechs.

**Murawiek:** It is quite conceivable that the Czech Constitutional Court could orient toward the example of the Federal Constitutional Court. But that is only speculation: I don't have any inside information.

### **The Issue Is Sovereignty**

**Celani:** Professor, which clause of the EU Treaty, as it stands now, will reduce or override the rights of the Bundestag?

**Murawiek:** I don't want to mention any concrete provisions, since there are a good number of them which amount to a simplified process for changing the constitution; or the aforementioned flexibility clause, and here the Constitutional Court's decision has created a corrective.

**Celani:** There is a new argument in the ruling, I believe, which is that the judges infer from the preamble of the Basic Law, that the Basic Law is Europe-friendly.<sup>3</sup> But, if the Basic Law is Europe-friendly, that does not

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3. I.e., positive toward the idea of German participation in some kind of alliance of European nations. In May 1949, when the Basic Law was approved, the ideas now enshrined in the Lisbon Treaty were, of course, not on the agenda—ed.

mean that an alliance of sovereign states is Europe-unfriendly.

**Murawiek:** No, no. On the contrary, the Constitutional Court emphasized, on the one side, the Europe-friendliness of the Basic Law, but on the other side—and this is new, it has never been said before in this way—it says that the Basic Law also contains the principle of sovereign statehood, and that means, that along with European integration, the German Federal Republic must remain a sovereign state. And if the European Union should itself develop into a federal state in which the member states are no longer sovereign, then Germany could not participate in it.

**Celani:** Those are significant words.

**Murawiek:** That has been articulated totally explicitly. Thus the Basic Law would have to be changed beforehand, through a constitutionally valid decision of the people. Since the Basic Law does not allow such a thing [as the elimination of national sovereignty], it would have to be submitted to a popular referendum.

**Celani:** What the Constitutional judges have articulated sounds very clear.

What do you see as the reason for the fact that the federal parliamentarians have not been aware of the contradiction between the accompanying law that they passed, and the Basic Law?

**Murawiek:** I assume that the federal parliamentarians didn't give it much thought; they simply agreed, without great reflection, to what the federal government laid before them.

**Celani:** So they have frivolously—

**Murawiek:** It was very frivolous, and I believe that it is a total disgrace for the majority of the Bundestag, that the Constitutional Court has now pointed out to them that the parliamentarians have unconstitutionally given up their own rights.

**Apel:** Professor, if the Bundestag now corrects the accompanying law—I myself am very skeptical, in view of what has already occurred, that anything would come out of this, after the court ruling, that would be positive; but setting that aside: Who will verify that what the parliamentarians produce in August or September, is in accord with the court ruling?

**Murawiek:** Mr. Gauweiler and I will verify it with

great precision, and if the accompanying law does not accord with the requirements, on each particular detail which the Constitutional Court has laid out, then we will sue again.

**Celani:** Very good. We are keeping our fingers crossed.

**Murawiek:** Thank you very much.

**Celani:** When then, in your opinion, will the President, if all goes well—

**Murawiek:** The Bundestag must first ratify that the amended accompanying law has been passed.

**Celani:** Is that expected to be before or after the federal elections?

**Murawiek:** That I can still not judge. I have read in the press that the Bundestag and the government would like it to be taken care of in September.

**Celani:** Maybe the new Bundestag will do it.

**Murawiek:** Yes. Actually that would be more sensible, because you need time to analyze the ruling with precision, and to draft a totally precise law. If you act too hastily, there is a greater danger that there will be more mistakes.

**Celani:** Would you like to add anything, Professor?

**Murawiek:** Yes, one more consideration is probably important to mention. The Constitutional Court has emphatically established that the legitimacy of the EU in the current system is not in accord with the requirements of the democratic principle. Several European parliamentarians said something different on television yesterday, but they were wrong. It is stated in the ruling: The EU has not been adequately authorized democratically. The Constitutional Court has therefore only judged that the Treaty is compatible with the Basic Law, despite its structural deficit with respect to democracy, but that since the [European] Parliament does not possess the competences of the national Parliaments, it is not required to be fully legitimized democratically.

**Celani:** That is very important, and we will make sure that this statement is widely circulated in other countries. Thank you.