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The judgment of the Court of Karlsruhe

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Abstract

This note provides a brief comment on the *Lisbon Urteil* of the German Constitutional Court. The author points out the ambiguities of the judgment and its possible impact on the European integration process.

Key-words:

Lisbon Treaty, German Constitutional Court, European integration



I.

The judgment of 30 June 2009 issued by the German Constitutional Court on the constitutional profiles of the Treaty of Lisbon and on its ratification in Germany can be summed up in three propositions: 1. the Treaty of Lisbon is compatible with the principles of the German Constitution and can consequently be ratified; 2. the amendments made to the Constitution by the German Parliament in view of ratification of the Treaty are correct; 3. the Act extending the powers of the Bundestag and Bundesrat in view of ratification does not meet the necessary requirements and must therefore be reformulated and approved again before ratification (§ 273 of the judgment).

The judgment is extremely complex and articulate, comprising no fewer than 420 paragraphs. If we were to make a comparison, without this similitude implicating any positive evaluation, the judgment reminds the architecture of a gothic cathedral, with central naves and side chapels, main columns and capital, arches and buttresses, bell towers and watchtowers, using textual subjects and opinions, some expressed and other implied and hidden, with learned juridical arguments and politically tending general judgements. An adequate analysis of this important document would require much more space than is possible in these brief notes.

II.

It comes as no surprise that the main issue, to which most of the space in the argumentations of the Court is devoted (in §§ 274-400), is the first of the three listed above. If we were to sum up the essence in just one sentence, we could state that, for the Court, the fundamental reason for declaring the new Treaty as constitutionally correct lies in the fact that the Treaty does not transform the European Union (EU) into a real federal state: according to the Court, even with the new Treaty, the EU will retain its identity as a complex of institutions which has received and maintains its powers by mandate. The numerous duties and procedures assigned to the EU by the Treaty of Lisbon do not, in the Court's opinion, alter this organisation as a Staatenverbund, which is characteristic of the EU and distinguished by the fact that it juridically differs from the



Staatsverband (§ 233). To use different, more common terminology, we could say that the former has the character of a confederation of states, while the latter corresponds to a federal state.

The second point of the judgment requires no particular comment. As regards the third point summed up above, it concerns the rules of the Treaty of Lisbon which envisage two procedures for the reform of treaties for which no ratification of the EU member states is required: the simplified procedure for the reform of part III on EU policies (art. 48.6 TEU Lisbon), as long as the decision is reached by the unanimous vote of the Council, and the so-called bridging-clause (art. 48.7 TEU Lisbon), which allows the passage (once again only with the unanimous vote of the Governments) from unanimous decisions to majority decisions, including the co-decision of the European Parliament, and therefore the passage to ordinary legislative procedure. For both these procedures, the Court has established that “blank” authorisation is not sufficient, it being necessary for the Bundestag and Bundesrat to vote case by case, should the EU Council decide to activate them. The two branches of the German Parliament will have to reach a decision on the matter before ratification of the Treaty of Lisbon.

The claim which states that the Treaty of Lisbon has not transformed the Treaties into a true, formal European constitution is definitely well founded: not because the text no longer speaks of a constitution – although the words and symbols do play an undoubtedly important role – but because future reforms of the treaties will still require the unanimous consent of the national governments and parliaments of the member states, which will continue to be the “lords of the treaties”. However, I think that the judgment strongly underestimates certain aspects which already characterise (and have done for some time) the institutional rules of the EU, as well as certain new elements of the Treaty of Lisbon, which will convey profiles closer to those of a federation to the EU. Let me list a few of them.

The inclusion of the Charter of Fundamental Rights, albeit in a protocol annexed to the Treaty, has a very pregnant constitutional meaning which cannot be missed, if we consider that the Charter becomes in fact enforceable.

The upholding (included in the Treaty) of the principle of democracy as a fundamental character of the EU presents considerable potential, as it implicates a consistent implementation of the principle of popular sovereignty at Union level.



The introduction of the procedure for reform of the Treaties via the proposals of the European Parliament and via the standardisation of the Convention method (art. 48 TEU Lisbon) deeply transforms the lever of future reforms of the EU, including those at institutional level, as they will be promoted by bodies – the European Parliament and the Convention – which constitute the expression of the will of the people at both European and national level. This is of great relevance, even though the restriction of art. 48, which requires the unanimous vote of governments and parliaments for future reforms, remains in place.

The most critical point of the judgment of the German Court, however, regards the role of the European Parliament (EP). The claim according to which it can not consider itself a representative of the people's sovereignty at European level is astonishing. It is simply incomprehensible. The fact that the representation of the various member states is not strictly proportional within the EP does not present an obstacle if we consider that, at national level too, numerous member states have implemented constitutions which envisage corrections to the strict criteria of proportionality on the election of representatives of the people, in order to better protect minorities. Nor is it true that, in federal states, proportionality is a necessary requisite (§ 271), an example being the composition of the United States Senate.

We can (and must) state that the representational nature of the EP still contains several imperfections and that it is necessary to present a uniform electoral law (as envisaged by the Treaties), but we definitely cannot say that the EP elected by universal suffrage – while until 1979 the Assembly of the European Communities had a completely different legal nature – does not represent the will of the people. This claim by the Court is unacceptable and must be rejected.

The EU respects the fundamental principle of democracy which the Court rightly considers to be unamendable for the German constitution. European democracy is in fact strongly lacking only in those fields where the EP has no powers of co-decision. For all the numerous and important matters for which the Treaties, including that of Lisbon, demand the unanimous decision of the Council and the simple opinion of the EP, the Union is not democratic, because the will of the people, expressed with the election of the EP, carries no weight; and because refusal by just one national government can block the will of the great majority of governments of the member states, for matters which even the



Treaties reserve to the competences of the Union. This is the real deficit of democracy from which the Union has not broken free so far. Here it would be justifiable to object that the simplified review clauses of the Treaties envisaged by Lisbon have failed to assign a co-decisional role to the European Parliament. This makes it logical to ask, transitorily and until the deficit is eliminated, for the vote of the national parliaments.

To demanding that unanimity be maintained for issues of common interest and for the matters which the Treaties signed by each member state assign to EU is, in my opinion, wholly contradictory. It is an error that must be corrected sooner or later. For issues of common interest, during the last twenty-five centuries, human experience has found no criterion – apart from the drawing lots – other than that of counting votes. The Church began using this system for the papal election in 1179, believing that the qualified majority vote was the expression of none other than the Holy Ghost. Without going that far, how long will it be before the EU abolishes the power of veto too? And how long will it take to acknowledge that in EU legislative provisions – including the reform of the Treaties, as has been envisaged by the United States Constitution since 1787 – the EP must always share a co-decisional power with the Council?

III.

The judgment of the German Constitutional Court has given the go ahead to the Treaty of Lisbon. And this is positive for those who believe the Treaty to contain significant new elements for the EU. However, the main body of the Court's argumentations seems decidedly focused on posing a series of caveats with regard to the future reforms of the Union (this is why I mentioned watchtowers). In particular, the principle by which the will of the people will have to keep on mattering through the vote of the national parliament for any future extensions of European integration, which Karlsruhe Court also acknowledges as constitutionally compulsory according to German law, is highlighted in numerous passages of the motivation. This is said by arguing that otherwise the principle of democracy would be violated, while at the same time the Court admits that European integration is a constitutional obligation for Germany. In fact the Court wishes, through its expressed argumentations and those that are implied, to affirm the hierarchical superiority of the German Constitution, of which Karlsruhe Court is considered to be the undisputed interpreter, over the European Treaties.



At least three objections can be raised.. Firstly, there are important sectors and extensive matters – those under the exclusive jurisdiction of the EU: currency, competition, international commerce, but also all the decisions which the Treaties allow to be made by a qualified majority, including those on budget deficits, which were once the jealously-guarded prerogative of the states – in which national sovereignty has already been superseded. In these fields, it cannot be denied that the EU is already substantially a federation of states. Secondly, the principle of democracy at European level is guaranteed by the universal suffrage election of the European Parliament, for all matters in which it holds co-decisional power, including the appointment of the president of the Commission and of the commissioners. Thirdly, the Karlsruhe judgment implicitly challenges the role of the Luxembourg Court of Justice as the sole Court allowed to give the correct legal and judicial interpretation of the European treaties .

We can say that the European Union is a developing organisation: partly Staatenverbund and partly Staatsverband, to use the terminology of German constitutional doctrine. There is almost the temptation to adopt one of the cardinal principles of modern physics for the EU, according to which light simultaneously observes the laws of a wave and those of a corpuscle, actually being both one and the other at the same time. But as instability cannot last forever in human matters, sooner or later the EU will have to give precedence to one of the two solutions. One leads to the re-nationalisation of policies and to the decline of Europe. The other leads Europe (with its nations and its historical regions, which will not disappear) to be a major actor for the creation of tomorrow's world.

Which of the two routes Germany intends to take in the future is of vital importance for Germany itself, for Europe and for the world. Unfortunately, the German government has recently shown clear signs of weakness in dealing, at European level the economic and financial crisis which could have been (and still could be) a historical opportunity to boost the integration process. Karlsruhe Court has raised more barriers, as questionable with regard to their legal foundation as they are dangerous in terms of politics and from a historical viewpoint. The judgment reveals an attitude of reserve in relation to the future of Europe as a federal union – which would definitely not cancel national individualities – despite the fact that European public opinion, also in Germany,



continues to see the integration process as highly positive, with a majority of over 60 percent of voters.

Should we move forward or retreat along the route taken by the Union half a century ago? For those who have believed in a genuine European vocation by Germany, and still do, the answer that emerges from the judgment of Karlsruhe Court has now become less reassuring.