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The German Constitution in the future of the European Union after the judgment of the Federal Constitutional Court on the Lisbon Treaty*

by Thomas Jansen

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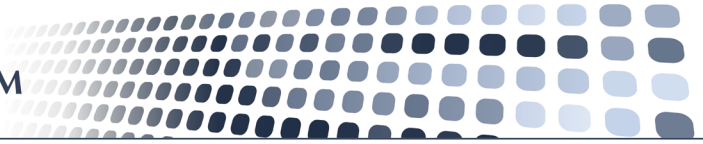


Abstract

This note analyses the legal reasoning and the motivations of the recent judgment of the German Constitutional Court on the Lisbon Treaty and considers the possible impact of this ruling on the future of the European integration.

Key-words:

Lisbon Treaty, German Constitutional Court, European integration



Following the judgment on the treaty of Lisbon passed by the Federal Constitutional Court (Bundesverfassungsgericht) on June 2009 it would appear that – at least as far as the German Constitution (Grundgesetz) is concerned – there is not much more to add to the topic of our session. The German Constitution continues to be the benchmark, also for the future of the European Union, for development, so much so that we ought to ask ourselves: what future does the German Constitution allow the European Union?

It allows the entry into force of the Treaty of Lisbon, as long as the Bundestag and the Bundesrat implement a concomitant law on the extension and reinforcement of their rights to intervene in the affairs of the European Union, to the extent indicated by the Constitutional Court. However, it also raises barriers to further progress in the unification of Europe.

The assent of the Federal Republic of Germany to the entry into force of the Treaty of Lisbon, which changes many aspects of the character of the European Union in the sense of a community similar to a State, is nevertheless possible – according to the Federal Constitutional Court - because, while undergoing all the changes envisaged, the character of the EU as an “association of States” (Staatenverbund), the existence and development of which depend on the provisions made by the Member States, remains unchanged. Furthermore, the rule limiting single authorisations with regard to the transferral of competencies to the European Union continues to be valid. The threshold of the construction of a European Federal State cannot however be bypassed in such a way as to arrange jurisdiction of the jurisdiction, which would mean the foregoing of national sovereignty by the Federal Republic. Germany remains a sovereign state and retains responsibility for its fundamental national duties.

The message states: This far and no further! It is a political message with which, within the debate on Germany’s political future in Europe, the Federal Constitutional Court takes the side of the “Eurosceptics”.



It is believed that: “the German Constitution does not allow bodies that act on behalf of Germany to transfer – via entry into a federal state – the German people’s right to auto-determination into the form of Germany’s right to popular sovereignty. Due to the irreversible transferral of sovereignty to a new legitimising subject, this step is reserved to the direct will of the German people.”

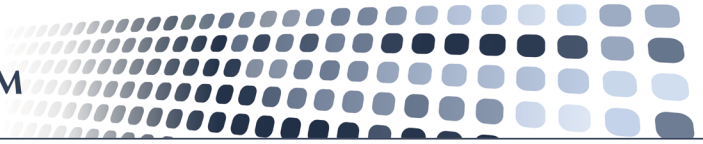
The logical question is then “What else?” Should “the will of the German people ” be implemented against “the bodies that act on behalf of Germany”? Who, if not the bodies that act on behalf of Germany, should interpret the will of the German people?

This aside, where does it state that the entry of the FRG into a European federal State following a consequent transferral of sovereignty is forbidden by the German Constitution? No such reference is made in the Constitution. No ban can be derived from the fact that Art. 23 does not explicitly contemplate a similar development, so this theory must be founded in complicated, problematic assumptions based on the democratic precept. Nor is the development “of a European Union conceived as an association of states” contemplated, - contrarily to what the Court would have us believe. Indeed – according to the German Constitution – the question of the finality of the integration process is still open.

Accordingly, from the start up to the present day, all the federal governments – with the approval of the Bundestag, the Bundesrat and the people, who have confirmed this policy via election on several occasions – have ensured that it remains open, also with a view to possible development in the sense of a federal state.

Article 23 the German Constitution requires, as pre-condition to every possible development that the European Union “be faithful to the democratic, social and federative principles, to the rule of law and to the principle of subsidiarity, and that it ensure, in the essence, defence of fundamental rights like that guaranteed by this Constitution.” All of this seems more compliant with a Federal State than an Association of States.

The indications of the Constitutional Court deriving from a ban of the German Constitution, meaning that the European Union cannot be allowed to cross the threshold of the Federal State, explains the satisfaction of the opponents of a more advanced unification policy, who also include those detractors of the Treaty of Lisbon contradicted by the judgment issued by the Court. Indeed, the tone of the verdict allows the assumption



that the threshold will, in the end, be established by the Court, in agreement with their expectations.

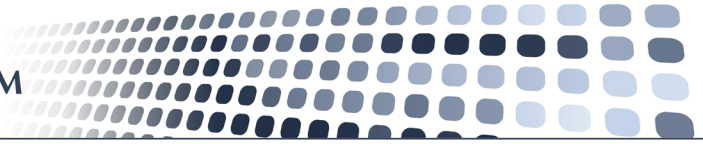
The Court's argumentation, presented with immense juridical elegance but not as much transparency, is not however – within the framework of the premise chosen – lacking in logic. The premise states that, with the interpretation served on 30 June 2009 by the Federal Constitutional Court on the German Constitution, Germany has reached the end of the line.

It derives that in the extensive explanations, deductions and motivations relating to the judgment, there is no room for the historical dimension of the European integration process. The representation of the development of the European treaties can be read as though the last 60 years of European history have taken place within a jurisprudence seminar. The respective historical contexts of the single levels of development are not taken into consideration.

For example, no mention is made of the fact that the Treaty of Maastricht was the necessary consequence of 40 years of experience of integration and that the subsequent reviews of the Treaty, from Amsterdam via Nice as far as Lisbon, were nothing other than responses to the historical events that took place in 1989/90. Nor are there any references to and clarifications of the circumstances, which has meant that the elaboration of the Treaties has only been possible on the basis of the consent which could be reached between the bodies which acted on behalf of the Member States regarding the needs of the moment and the guidelines of the unification process.

In drawing up the motivations of its judgment, the Constitutional Court failed to consider this dimension, it obviously cannot even imagine that future developments – like those which await us as a consequence of globalisation – could require answers that – in the interests of European citizens, including the people of Germany – would contemplate further cessions of sovereignty by the Member States, which as a further consequence could lead the European Union to cross the fateful threshold of a federal state organisation. Or could it be that perhaps the Federal Constitutional Court, as far as it has considered this possibility, feels that it needs to protect Germany from Europe?

We cannot even see why – as felt by the Court on the other hand - in a federalist evolution of the European Union, Germany should lose its “nature as a sovereign constitutional state”, its own “constitutional identity” and its “capacity for independent



political and social organisation of the quality of life”. Those are fears based in ideology. From the analysis of the situation and the state of the German Länder, we can see that the member states of a federation can retain such attributes, both in terms of principle and in practice. This is the charm of the federal order: the fact that every level of sovereignty and responsibility has its own dignity and organisational freedom.

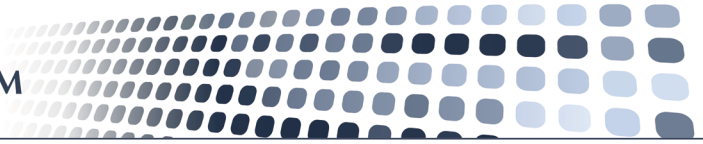
In other words: also in the future of the EU (and of the European Federal State itself should it ever become a reality) the German Constitution will not lose its value or its social and political role.

The Federal Constitutional Court sees sovereignty as: “freedom regulated and restricted by international law”. But if we look closely, not only is this freedom regulated and restricted by international law, in different ways it is also regimented and limited; the freedom of action of the States is shared with the bodies of the various levels that exercise it together or in competition with one another; with the municipalities, regions and the European Union, but also with international organisations and other players who participate in global governance.

In fact, in our historical situation, the definition of sovereignty as freedom means, above all, that the State, its bodies and its people, both internally and externally, must be assured the possibility to rely upon the partners implicated in the political process. Integration, subsidiarity and interdependence are today’s units of measure for the freedom of action of informed sovereign states at the political level for which they are responsible, as well as at international, supra national or transnational levels, within which they hold joint responsibility.

Moreover, it is necessary to note that, significantly, the concept of sovereignty, which is central to the argumentation of the Federal Constitutional Court, makes no appearance whatsoever in the German Constitution. The German Constitution does not require Germany to be a national sovereign state, but “a member holding equal rights in a united Europe” (Preamble).

Der unvollendete Bundesstaat (The Unfinished Federal State) was the title of a book by Walter Hallstein published in 1969, in which the political and institutional system of the European Community was carefully described in the spirit of the title. The Italian edition, with a foreword by Giuseppe Petrilli, was entitled “Europa: federazione incompiuta” (Europe: unfinished federation). The German edition, which was printed in

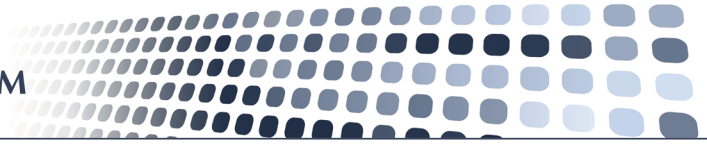


several subsequent extended and updated reruns, was published from 1973 under the title of: “Die Europäische Gemeinschaft” (The European Community). Hallstein had obviously come to the conclusion that the title initially chosen could be misleading, inasmuch as a description and denomination of the growing supranational community for which a federative order had to be forged, the concepts of the doctrine of the classic state were no longer valid and were therefore capable of generating more confusion than clarity. Only the precise analysis of the situation and its development could lead to the understanding of this new political system and its procedural character and finally allow the exact formulation that would clarify the reference categories. At the time, the concept of “Community”, according to Hallstein’s point of view, struck the essence of the problem in question.

The reality of the European Union and its development, within the scope suggested by Hallstein, have brought us to the threshold of the political union described in the Treaty of Lisbon. The reality of the EU is, in truth, much richer than stated in the Treaties. The dynamics of the political process, the permanent interaction of the bodies and players, the practical and progressive connection of the systems of power at various levels, the role and influx of the European political parties and their supra national groups, the growing power of control and decisional power of the European Parliament, the trans-nationalisation of civil society, the constant Europeanisation of public opinion and, last but not least, the success of the Monetary Union with its federal structures – all this forges the character of the European Union well beyond what the decisional system formalised in the treaties allows us to see. This reality was not perceived by those who drew up the judgment on 30 June.

The German Constitution will not interfere with the unification and integration movement, as is visible from the statements made above and which goes beyond Europe – as can be deduced from the intensification of the global governance structures. In 60 years of history, the German Constitution has always proven to be valid, also in terms of its opening to the needs of European unification.

It would be ridiculous if this movement, which founds and guarantees the peace, freedom and wellbeing of European citizens, were to be stopped in future due to the judgments of the Federal Constitutional Court with reference to the German Constitution.



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