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To look for a continuation of harmony between a number of independent unconnected sovereignties situated in the same neighbourhood, would be to disregard the uniform course of human events and to set at defiance the accumulated experience of ages.

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Editor: Giulia Rossolillo

www.thefederalist.eu - publius@thefederalist.eu

The German Constitutional Court and the Future of European Unification

In order for any political battle to succeed, there first has to be a full and clear understanding, without mystifications, of the situation that the battle itself is setting out to change. Only in this way is it possible to establish, clearly, the instruments that need to be used and the steps that must be taken in order to reach the final objective. In this sense it is, for anyone committed to the founding of a European federal state, very useful to reflect upon the considerations advanced by the German Constitutional Court in its recent ruling (June 30th, 2009) on Germany's ratification of the Lisbon Treaty. The Court, indeed, examines the foundations on which the European Union is built and provides a lucid analysis of the weaknesses shown by the EU institutional machinery whenever the unification process runs into difficulties, and of the contradictions that emerge, within this framework, whenever the objective of creating a European federal state is raised. Thus, even though many commentators have interpreted it as an attempt to obstruct the process of European unification and strengthen the role of the national institutions, the ruling actually provides an excellent starting point for a federalist analysis of this issue, as it helps to debunk many of the myths that have precluded, and still do preclude, a real understanding of the process of European integration and the turn it could take in the future.

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The question put to the Court concerned the possibility that the attribution of new competences to the European institutions under the Lisbon Treaty (and thus the transfer of these competences away from the states) would leave the democratic principles on which the German legal order is founded devoid of substance, and the citizens powerless to influence the decisions affecting their own future. Because, according to the complainants, these decisions would, ultimately, be taken not by national institutions answerable to the citizens, but rather by non-democratically legitimised European institutions.

This is not the first time that the *Bundesverfassungsgericht* has grappled with this question. In the 1990s, it was called upon to decide on the constitutional legitimacy of the law ratifying the Maastricht Treaty, and in fact decreed that the law was compatible with the German Constitution.

On that occasion, the Court emphasised the European Union's essentially internationalist character, highlighting the fact that it was not founded on a single European people, but that the source of its legitimacy was, instead, the member states and their peoples. In other words, the states, according to the Court, were still the «masters of the Treaties», which could be modified only by unanimity, and from which the states retained the power to withdraw (in other words, the states retained the power to take back competences attributed to the EU institutions).

These principles were confirmed by the ruling of June 30th, 2009, this time in view of the imminent entry into force of the Lisbon Treaty. The ruling indeed states that the new elements introduced by the Treaty do not substantially alter either the existing revision procedure, or the current nature of the Union's competences. The new Treaty revision procedure, which involves the convening of a Convention composed not only of government representatives, but also of representatives of the national parliaments and EU institutions, is essentially still based on intergovernmental mechanisms, given that, under it, any amendments proposed will come into force only if they are approved by a conference of representatives of the governments of the member states and ratified by all the member states in accordance with their respective constitutional requirements.

As far as the competences of the European Union are concerned, on the other hand, the Lisbon Treaty continues to be based on the principle of attribution, i.e. the principle according to which the EU acts within the limits of the powers that have been conferred on it. The right to determine the competences held at European level (*Kompetenz-Kompetenz*) thus remains firmly in the hands of the member states.

Hence, as the Court underlines, the European Union, even post-Lisbon, retains its confederal character, being an organisation founded on *cooperation* (or harmony) among *sovereign* states.

The first myth that the Court helps to debunk is thus the notion that the European Union is a *sui generis* organisation, distinct both from confederations of states and from federal states, being more evolved and more complex than the former, and standing apart from the latter on account of its division of sovereignty between central and state level, if not for its overcoming of the classic concept of sovereignty.

In actual fact, these latter ideas confuse the concept of sovereignty with that of autonomy. Whereas an entity may be defined as autonomous when its authority to exercise given powers independently is a derived authority (i.e., conferred on it by other bodies that can, at any time, withdraw it), a sovereign entity is one whose existence is absolutely independent of the will of others. Once created, a sovereign entity no longer depends on its creators or its members; indeed, upon its creation, it acquires the power of self-determination. This means that the members of a federal state, once they have brought it into being, lose all power to condition its existence; confederal-type unions, on the other hand, once they have come into existence, continue to be conditioned by the will of the states that created them.

Therefore, however much the European Union has evolved compared with other existing international organisations, it is still to the concept of autonomy – not sovereignty – that we must refer when describing its nature. The existence and workings of the European Union depend on the will of the states that created it and are its members. Thus, the process of European unification is not *irreversible* because the member states retain the freedom, regardless of the will of the European institutions, to take back the powers they previously conferred on the Union. What is more, the idea that they might actually do this (a possibility inherent in the very nature of community building) is referred to explicitly in the Lisbon Treaty, which establishes that the Treaty revision procedure need not necessarily result in an increase of the Union's competences, but could also lead to a reduction of them (and thus to their being transferred back to the states). In the same way, the Lisbon Treaty contains a provision that would allow member states to withdraw from the Union.

All of this remains true in spite of the fact that the European Union possesses some traits considered typical of a federal state. Indeed, one need only scratch the

surface to see that the EU institutions, whose smooth running depends on consensus among the member states, are in fact nothing like those of a federal state.

The *Bundesverfassungsgericht*, in references to the role of the European Parliament and to the principle of the primacy of EC law over domestic law, provides two clear illustrations of this point.

First of all, the European Parliament, in the Court's view, does not give the Union the democratic legitimacy that, in a democratic state, is guaranteed by the representative body of the citizens. In the first place, it is an institution in which the European citizens are not represented on an equal footing: the seats in the European Parliament are not distributed according to a strict rule of proportionality to the size of the population; instead, in order to ensure an equal balance among the states, a criterion is adopted whereby euro-MPs from more highly populated countries each represent a greater number of inhabitants – a system that results in underrepresentation of the citizens from these states. As pointed out by the German Constitutional Court, «in federal states, such marked imbalances are, as a general rule, only tolerated for the second chamber existing beside Parliament», whereas in the lower chamber, the principle of equality of citizens must always be upheld. As things stand, the European Parliament does not represent the European people as a whole; rather it represents the Europeans as citizens of their respective states.

Moreover, the close involvement of the states in the workings of the Union explains why the role of the European Parliament is so very different from that of a national parliament. Democracy within a state is realised by giving the citizens not only the right to elect a parliament (as in the European Union), but also the possibility, through their parliamentary representatives, to choose a government that will be answerable to the citizens for its actions. The European Parliament, however, does not fulfil this function, given that the decisions crucial to the life of the Union are taken by the European Council and by the Council of the European Union (which thus become, substantially, the Union's government), in other words, by two organs that, by definition, guarantee equal representation of the states (not of the citizens) and are subject to no democratic controls at supranational level. Thus, although we may talk of democratic legitimisation of the EU through the European Parliament, what we are referring to is clearly a flawed form of legitimisation.

With regard to the primacy of EC law over domestic legislation, a principle enshrined in the case-law of the Court of Justice of the European Communities (ECJ) ever since the 1960s and seen by many as a sign of the Union's federal nature, the *Bundesverfassungsgericht* makes the point that the ECJ, unlike supreme federal courts, does not have the power to override domestic legislation that is incompatible with EC law. Indeed, the application of EC law, the abrogation of incompatible domestic legislation, and the enforcement of ECJ rulings are all operations that, ultimately, call for cooperation on the part of the member states, whose behaviour the European institutions have very little capacity to force. Hence, the principle of the primacy of EC over domestic law, too, is applicable only as long as the member states and their judicial authorities are willing to apply it, and it is understood that should the action of the European institutions jeopardise the sovereignty of the member states as a whole, the constitutional courts (the German one in this instance) will be free to intervene in order to avert this risk.

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In truth, affirmations like this last one, which have shocked many of those who have analysed the ruling, should be seen less as an attempt to slow down the unification process and more as an indication of the limits that the functionalist method, which has guided the evolution of the process of European integration thus far, is unable to overcome. Indeed, the *Bundesverfassungsgericht* does not rule out the possibility that the European Union might become a federal state. What it does rule out is the possibility that this transformation might come about through a gradual transferring of competences from national to European level, and in the absence of a conscious decision on the part of the governments, supported by the explicit consensus of the citizens.

In other words, this ruling (unlike the one the German Court issued in relation to the Maastricht Treaty) explicitly raises the issue of constituent power, and thus of the transfer of sovereignty.

It is, indeed, unthinkable that the European Union should be attributed the competences that are central to a state's sovereignty without first changing its own nature in order to become a state, i.e., an entity equipped with a democratic government that is answerable to the citizens. According to the *Bundesverfassungsgericht*, only a break with the existing rules will allow such a transformation to take place. In other words, the decision to create a new sovereign entity is not one that can be reached by the representatives of the member states *within* the EU institutions, or by the states acting under the ordinary Treaty revision procedure; it is, instead, one that will have to be adopted by the citizens outside the framework of the mechanisms provided for by current national and Community law. Indeed, the will to create an entirely new European political system will have to emerge – a will that cannot be considered implicit in the erosions of national sovereignty that the European citizens have accepted through their national parliaments' ratifications of the various Treaties during the course of the European unification process. The founding of a new power, which is what is called for now, will instead require that the citizens take back their constituent power, in order to exercise it in a new framework.

This, in the Court's view, is the only solution capable of avoiding a «suspension» of the democratic rules and thus of guaranteeing, throughout the process, the citizens' right to share in the decisions that really affect their future. Because to persist with the rationale of simply increasing the powers of the current European Union would be to go on transferring competences away from national level, a level at which democratic legitimisation exists, yet without this entailing a transition towards a new state and thus towards a new form of democratic legitimacy.

The question of a common defence policy provides a clear illustration of this problem. Currently, responsibility for defence matters is still in the hands of the states, but Article 42 of the Treaty on European Union (as modified by the Lisbon Treaty) makes provision for the European Council, acting unanimously, to decide to introduce a common European defence, whose establishment the member states would nevertheless have to approve formally, in accordance with their respective constitutional requirements.

Some people, retaining a functionalist perspective, think that a true European defence policy can be achieved using the current mechanisms and propose that the Treaty should be modified to make it possible for the European Council, acting by a

majority, to decide to adopt a common European defence, and subsequently to take majority decisions on all aspects of EU defence policy. This would amount to a moving away from a purely intergovernmental approach and result in a further extension (to the defence sphere) of the community method. However, as the *Bundesverfassungsgericht* points out, such a course would conflict deeply with the democratic principles on which the constitutions of the EU member states are founded. Whereas application of the principle of unanimity in the area of common foreign and security policy (provided for by the current text of the Treaties and also by the Lisbon Treaty) provides a guarantee that no member state can be obliged to take part in a military operation against its will, the proposed extension of qualified majority voting would make it possible for a body that has no democratic legitimacy (the European Council) to impose its defence decisions on a state. The *Bundesverfassungsgericht* makes it clear that Germany would be constitutionally prohibited from taking part in any Treaty amendment allowing this.

The Court's observations in relation to the majority rule raise, once again, the problem (particularly glaring in defence matters) of the relationship between the central authority and the member states, even though the ruling does not make any specific reference to it. As long as the decisions taken at Community level continue to be directed at them, the states will retain their capacity to influence the action and the very existence of the supranational level, and the survival of the European Union will continue to depend on their will to cooperate. Accordingly, even should the European Council or the Council, acting by a majority, reach a decision on a defence matter, any member state opposed to that decision could refuse to act on it. Ultimately, the only means of forcing a state to adopt a certain behaviour is to use military force against it, but this would obviously lead to disintegration of the Union. The United States experienced just such a situation during the period in which the *Articles of Confederation* were in force: even though the federal authorities had the power to take majority decisions on matters relating to defence and the funding of the confederation, the member states refused to implement them, thereby causing the confederal machine to seize up. It was, indeed, the enormous crisis provoked by the confederal institutions' inability to impose any decision on the member states that led to the collapse of the rules established by the *Articles of Confederation* and the creation of history's first federal state.

The central authority, if it is to be truly independent of the member states, must have the capacity to impose its decisions directly on the citizens. With regard to defence, therefore, the power to recruit a European army would have to reside at federal level, and the effective formation of this army would have to be independent of the individual member states' willingness to contribute the necessary men and means.

However, as we have already pointed out, it is quite inconceivable that this kind of power might be transferred to a supranational level without the creation, first, of a proper government that is answerable to the citizens, in other words, without the creation of a European federal state. And it is also inconceivable that this state might be created without the citizens, first, being called upon to take part in a decision that, radically altering Europe's political configuration and transferring sovereignty from the nation-states to a new federal-type entity, would profoundly affect their future.

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Given the current situation – the process of European integration is struggling badly and the EU institutions are proving incapable of rising to the challenges that Europe faces –, the German Constitutional Court's ruling not only comes as a timely reminder of the risks generated by the current drift of the process of integration and by the generally held belief that it is irreversible, but also serves, usefully, to highlight the roles played by the different parties involved.

On the one hand, never has the *voluntary* nature of the forms of cooperation introduced by the member states through the creation of the European Community and the European Union been as strikingly apparent as it is today. In the past (up until the end of 1980s), the partial successes recorded by the Community to an extent masked the real role played by the states; conversely, in today's highly unstable world, and in a European Union in which the spirit of Europe's founding fathers has been largely extinguished by successive enlargements, the power of the states to condition the process of integration and even to block the European institutional machine is clear for all to see.

Paradoxically, on the other hand, the EU institutions themselves emerge more as an obstacle to the building of a federal state than as a driving force towards this end. Indeed, not only do they necessarily support the need to preserve the current system, failing to conceive of anything beyond gradual reforms designed to allow themselves to go on working, they are also the arena in which efforts are made to reconcile the different demands of the states (some of which are openly opposed to any federal-type evolution of the process), and are therefore, by definition, bound to go on accepting compromise solutions.

In short, the German Constitutional Court has highlighted a stark choice that, now more than ever, there is no escaping: either to preserve the current confederal structure based on the existing Treaties or to decide to found, through a breakaway action, a federal state. There are two reasons for this: first, the decision to transfer sovereignty to a European federal state – a decision crucial to the future of the citizens, destined to give rise to a new form of political organisation – cannot be dressed up as a technical decision and adopted using mechanisms that fly in the face of the most basic rules of democracy; moreover, it is a decision that would have to be taken by the people as the ultimate holders of sovereign power. Second, in today's Union with its 27 members, some of which make no secret of their opposition to further forms of political integration, it is futile to imagine that Europe can evolve gradually in a federal direction; instead, thinking must, inevitably, turn to the prospect of a few states deciding to break with the existing Treaties in order to form the initial core of a federal state, presenting the citizens with a clear project to this end.

The *Bundesverfassungsgericht* has clearly woken up to this fact; it is high time the governments and political forces in favour of the creation of a European federal state did so too.

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