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1. Judges don't do politics, it is said; the judges do not decide according to the times of politics, it can be added; right or wrong, a judge's decision must be respected, it can be concluded. Perhaps it will be true for ordinary judges. Some doubts about these three assumptions cannot fail to arise when the decision is made by a constitutional judge whose task is precisely that of judging politics, of course according to a regulatory canon whose normativity, however, leaves ample room for discretion. And, in the upside-down world in which we now live, the three assumptions struggle to persist when the decision of one judge intends to judge the decision of another judge, belonging to another judicial system, of which it postulates, thanks to agreed pact clauses, the exclusive competence and, consequently, the supremacy.

This instead is what happened with the decision of this last May 5 of the German Constitutional Tribunal, which, arrogantly and presumptuously as the first of the class and arbitrarily interpreting the Treaties: a. said that the European Central Bank (ECB) of Draghi's time has operated beyond its competences, confusing "monetary policy" (which is part of the Union's exclusive competences) with "economic policy" (of which the Union, at most, ensures coordination by dictating the broad guidelines); b. considered incompetent the Court of Justice of the European Union (which, badly using the criterion of proportionality, would write unintelligible sentences, which therefore should not be respected, being *ultra vires*, that is, beyond the competences attributed to the Court by the Treaties); c. ordered the Federal Government and the German Parliament to oppose the European system of public bond purchases; d. ordered the *Bundesbank* to exit the European system of central banks; e. unless, within three months, the ECB gives sufficient justifications (id est, shareable by the German court) of its work.

It is true, this judgment comes at the end of a theoretical path started by the *Bundesverfassungsgericht* at least thirty years ago, which has its roots in some traditional theoretical settings of constitutional doctrine (German, but which has significant connections also in Italy and other countries of Western democracy) that not even the most recent and modern theoretical orientations (for example, those that leverage the

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idea of reading the European system with the glasses of the *federalizing process* theory) have managed to affect.

2. There are two assumptions at the root of the German position: a. the indissolubility of the relationship between Constitution, State, democracy and homogeneity of the people; b. the permanent lack of democracy of the European institutional mechanisms, which would essentially derive from the non-existence of the European people.

Both assumptions can be criticized, as an expression of ideological prejudices, which do not take into account the historical, factual and especially legal reality as it is now acquired, in the Treaties and in the constitutional practice of the European institutions.

If there is a people that is not homogeneous, it is precisely the German one. It is demonstrated by history, geography, etymology. Probably, Germany is the only country in the world, whose name changes depending on where you are located: the Italians, together with the English speakers or those who have suffered English-speaking influence, use the term Germany, which derives from Latin and Greek and originally refers to the populations on the borders of the Rhine. Other Latin countries (France, Spain, Portugal), but also Arabic speakers, use the term Alemagna. The Germans use Deutschland, from ancient German word *diutisch* (the term has also penetrated some Asian languages). The Slavic peoples use a formula based on the suffix Niem-, Nem-, Nim-, which probable original meaning is that of foreigner, enemy. In some Baltic languages, they use terms based on the suffix Sak-, with clear reference to Saxons and Saxony. It is evident that every language, which also changed during its history, has chosen to indicate that land in the middle of Europe by referring to the different tribes that had inhabited it from time to time (or in part of it). From a geographical point of view, Germany has always dangerously fluctuated, moving its borders between East and West, North and South. From the historical and institutional point of view, it is needless to remember that the unification of the German State took place quite late as that of the Italian one, as there were many states, statelets and principalities that survived under the formal cover of the Holy Roman German Empire (Gramsci's lesson is always valid, identifying in the lack of a unitary State the weakness of the German and Italian bourgeoisies that he placed at the basis of the Fascist and Nazi authoritarian regimes). From a linguistic and ethnic point of view, German speakers are present in numerous European states, without this giving rise to unhealthy ideas of Greater Germany anymore, which were the basis of Nazi expansionism; and, at the same time, Germany has the largest Turkish community in Europe.

The homogeneity of the German people is a theoretical abstraction (*Dem Deutschen Volke*, it is written at the entrance of the old *Reichtstag*, today the seat of the *Bundestag*), an illusion, even more than an aspiration,

whose attempt of concretization was at the basis of the most dramatic experience that Europe has suffered, that of Nazism. It should be the task of the democratic constitutional culture to remember which poisons are hiding behind this idea and what tragedies it has led to.

It is not true that the triad of "people - state - constitution" is the only way to establish democratic structures. This route has been used, however, according to profoundly different itineraries, by many (but not all!) European States (certainly except Switzerland, *Willensnation*, a nation by voluntary choice, and not as a consequence of the hypostatization of a people in the State-building process), but it is not valid for the large federal states that came out of European colonialism (from the United States, passing through Brazil, Argentina, Mexico, Canada, Australia, to India, Nigeria, Ethiopia), and it is even less valid as regards the dramatic post-colonial failure of the state -building in Africa, where the aping of the European experience of the nation-state has been a source of continuous geo-political instability.

However, the dogmatically austere German constitutional judge or, at least, his translation office, has now fallen prey to theoretical confusion. And, in fact, in the English text released by the same Tribunal, all the difficulty of defining the case of the European Union with the theoretical models of an old-fashioned constitutionalism is revealed. In the German text the European Union is defined as "an association of states, constitutions, administrations, jurisprudences" ("*eine Staaten-, Verfassungs-, Verwaltungs-, Rechtsprechungsverbund*") (Rn. 111 of the decision, recalling BverfG 140, 317-338, 44). It is about a definition played on the theoretical difference (and not only theoretically significant) between the *Bundesstaat* (federal state), *Staatenbund* (confederation), *Staatenverbund* (association of states), made ambiguous by the fact that the EU would be not only an association of states, but also of constitutions, administrations, jurisprudences. But the German constitutional judge himself realizes that this concept is unsustainable in English and then says that the European Union "*is based on the multilevel cooperation of sovereign states, constitutions, administration and courts*", still putting the German words between parentheses also in the English version (always Rn. 111 of the decision).

3. Erroneous is, then, the continuous underestimation of the democratic nature of the European structure, in which, at least starting from the Lisbon Treaty (but in truth already before it), elements that can be assimilated to the experience of modern state democracies are finally and clearly identifiable, at least as regards a legislative process (the output of which is significantly defined as "legislative act", which is ontologically different from the "regulatory" act) that is basically equal between the two Chambers, the political one (the European Parliament) and the territorial one (the Council of the European Union), the submission of the Commission to the creation of a relationship of trust with Parliament, the introduction of a catalogue, having the same legal value as the treaties, of fundamental principles and rights. They are

qualifying elements of the European experience which now add to the discipline of the decision-making processes, to the supremacy of the European law over national ones, to the verifiability by an independent judge of the conformity of European secondary legislation with primary European law. The primary European law is given by the rules jointly established by the Member States in the Treaties, of which the Member States remain the "lords", but which now live their own life in the institutional practice and jurisprudence of the Court of Justice and from which, democratically, it is moreover allowed to withdraw (art. 50 TEU). The European legislative path is, in truth, highly democratic, at least when this adjective is intended (also) to identify the contribution that the representatives of the European people, united in the European Parliament and of the national peoples, supported by the representatives of national governments united in the Council (but also through the contribution of national parliaments which contribute to the formation of the European norms more intensely than imagined).

But the German Constitutional Tribunal continues to give lessons of democracy to the European Union and to all European peoples, holding onto the extremely weak criticism of the criterion of degressive proportionality on which base the European Parliament is composed, so that German citizens would count less than Maltese or Luxembourgish ones in the composition of the representative body (a German deputy represents over 800,000 German citizens, while a Maltese deputy represents little more than 80,000 and a Luxembourgish one little more than 100,000), or onto the unsustainable idea (also from the historical point of view, given the way in which the German Constitution has been written) of the superiority of the German institutional structure or of the catalogue of rights over the institutional structure and of European rights. Of course, Germany - which owes so much to Europe, not least to the fact that it was widely helped in the reunification process (see Article 107, paragraph 2, letter c, TFEU) - hasn't done much for the benefit of Europe). Maybe we need to go back to history lessons together ..., maybe reading of the first fifty pages of *Postwar* written by Tony Judt, which describes the destruction of Europe at the end of the Second World War, should be imposed on all European citizens ...

4. The German constitutional judge has thus decided to go through his old jurisprudential line. It is the so-called Solange doctrine, repeatedly affirmed by the German jurisprudence and which basically recalls the fact that it is the Constitutional Tribunal that acts as a guardian of the border that defines the powers transferred to Europe from those that remained under national jurisdiction.

But the Lords of the Treaties, that are the national States, have very little to exult. In fact, they do not exult, indeed Angela Merkel is the first to appear quite worried, and with good reason. This judgment, in fact, also contains *in nuce* the possible destruction of the Lordship of the Treaties: if the EU blows up there will no longer be any lordship to claim, if not a sovereignty exercised only on themselves.

Could it be done differently? Yes, of course. The Solange doctrine could not have been taken to the extreme consequences and it could have been sought a "dialogue" with the Court of Justice, as the Italian Constitutional Court did in its time in the now famous Taricco affair.

That affair could, in fact, concretely lead to assert for the first time the counter-limits in respect of the direct effect of certain provisions of EU law in our legal system. The Court of Cassation and the Court of Appeal of Milan, in fact, have sentenced that the rules set out in the first Taricco judgment were in contrast with some supreme principles of the Italian constitutional order, in particular with the articles 3, 11, 24, 25 (second paragraph), 27 (third paragraph) and 101 (second paragraph) of the Constitution and, remitting to the Constitutional Court the documents of two processes they were dealing with, have raised questions of constitutional legitimacy of the article 2 of the law n. 130 of 2 August 2008 on the ratification and execution of the Lisbon Treaty in the part in which, imposing the application of the article 325 TFEU, as interpreted by the Taricco judgment, it was meant that in certain cases the third paragraph of the article 160 and the second paragraph of the article 161 of the Criminal Code were disapplied in respect of crimes related to value added tax (VAT) that constitute fraud affecting the financial interests of the Union.

The Constitutional Court, wisely, with the ordinance n. 24 of 2017, instead of deciding the questions that had been remitted to it, ordered a reference for a preliminary ruling to the Court of Justice for the interpretation relating to the meaning to be attributed to Article 325 TFEU and to the Taricco judgment. The Court itself explained the meaning of that referral in the press release of 31 May 2018: in its judgment, in fact, the possible application of the "Taricco rule" in our system would have violated the articles 25 (second paragraph) and 101 (second paragraph) of the Constitution and, again in its judgment, it would not have been possible to apply the Taricco judgment in conflict with the constitutional identity of the Member State, implying a violation of the constitutional principle of legality in criminal matters. In this case the Constitutional Court asked the Court of Justice to confirm this, in the belief that the latter would have difficulty in reiterating such a position.

In short, as soon as it has been concretely feared the possibility that the "counterlimits" (also present for a long time in our constitutional armamentarium) towards EU law could be asserted for the first time, the Italian Court has taken the path of research and dialogical elaboration with the Court of Justice, in the conviction - it can always be read in the press release of the 31st of May - that, although it is up only to the Court of Justice to interpret EU law uniformly, and to specify whether it has direct effect, "it is also out of discussion that an interpretative outcome that does not comply with the principle of determinacy in criminal matters cannot have citizenship in our legal system".

The balance between the primacy of the EU law and the respect for common constitutional traditions allows the integration process to continue on its path, despite a thousand difficulties.

The national courts have a great responsibility for this process, since their ability of constitutional interpreting often intercepts the very strategic junctions of the integration process. It is sufficient to remember another emblematic issue in this sense, the Catalan one. Even in that case, the Spanish Constitutional Court wasn't able to expertly use its potential of juridification - and therefore mitigation - of the political conflict, risking to provoke, after Brexit, another earthquake in the difficult and delicate European territorial balances.

In the specific case, in fact, instead of adopting a radical declaration of unconstitutionality of the Catalan law on the referendum and the subsequent proclamation of independence, the Spanish Court could have pursued the path of a partial unconstitutionality, which would have led to the same consultation, on another ground, more dialogical and less confrontational. This would probably have stemmed the devastating results we have witnessed: arrests, violence and the climate of a civil war in Spain and, moreover, would not have laid the foundations for possible similar secessionist processes within the Union.

In a context that could dangerously get similar to the Spanish one, only a few years earlier, in 2015, the Italian Constitutional Court had defused a potential secessionist conflict in relation to the Veneto Region with a completely different attitude than that of the Spanish Constitutional Court. With the judgment n. 118 of 2015, in fact, while declaring largely unconstitutional the provisions of the two laws under which Veneto held a referendum on "independence", had nevertheless paved the way for the re-establishment of that institution within the constitutionally permitted limits. With a "constitutionally oriented" interpretation the Court had precisely indicated the limits in order the referendum issue did not prelude to "developments in autonomy exceeding the constitutionally established limits".

Of course, in any case operations of this kind made by the national Constitutional Courts lend themselves to criticism regarding their role and their "place" in the constitutional system and more and more frequently push the commentators to charge them with political protagonism. But precisely to avoid this, it would be good if they use their interpretative potential without causing conflicts but, in accordance with their role, trying to avoid or bring them back into the constitutionally allowed field, both at national and Union level.

5. Let's go back to the German constitutional judge. Among five assumptions of the BverfG, the first and the fifth - beyond the unacceptable claim to set up as a judge of the acts of European law through the artifice of the control on the use of the criterion of proportionality - are those that fall in the area of

a possible discussion and in any case are less politically and institutionally dangerous. And, indeed, it is quite possible that the "Lords of the Treaties" have wanted to reserve the area of the economic policy for themselves, leaving the European institutions with a "monetary policy" anchored to the objectives predefined by the TFEU. Boundaries can be discussed from a theoretical and a political point of view: and this is what has happened so far in Europe, on the base of more or less restrictive interpretations, proposals to amend, expansive or restrictive readings by the CJEU, opposing also in the European Court the originalists or theorists of the petrification of competences and the supporters of evolutionary or historical-finalistic interpretations. In general, it is quite evident - and the BverfG captures this point well - that the question is that of the *Kompetenz-Kompetenz* (whose transfer is prohibited according to the German Basic Law, see paragraph 102 of the judgment), which in the orders involved in a federal process can only be tempered by the implied powers clause: judge of all this while remaining judge the expression of the association of states, in the words of the German national judge. As regards the fifth point, the ECB will be able, if it wishes so, to find a way to explicit its own arguments in support of securities purchase initiatives referring to the European Council and the Commission or, if the matter will become more serious, even to the European Council. Some optimists hope for an impulse that will bring back to discuss the institutional position of "economic policy".

But all this risks diverting the crucial point of the deciding on the constitutionality. After all, what is the use of recalling the proportionality criterion for the purposes of the decision, if not to distract attention from what really matters to the BVerfG? Let's see in what sense.

The main consequence of the decision of the BVerfG is, above all, and especially in perspective, that of putting into question the process of European integration *in the most difficult phase of its recent history*. Let's reflect on a specific point. The Covid-19 emergency has pushed Europe, *among others,* in search of new tools, precisely in the effort to find a common policy, with the dual objective (it doesn't mean that this is fully correct but this is not the point): on the one hand, to overcome the bottlenecks of an integration *without* or, at all, *with a reduced inter-state solidarity*; and, on the other hand, to reduce the sovereignism of many member states, made even more concrete right in this latest political crisis. The perspective of national control over the ECB's monetary (and economic) policies and the imposition of a scrutiny of proportionality among means and ends towards the European institutions, disintegrates *with the weapons of law* that already very difficult political horizon of European solidarity and that crucial political attempt to contain national populism.

The constitutional judge, with his limited and blunt tools, achieved a tactical *ruinous* result, making us believe that he had acted correctly, putting the objectivity of the technique before the subjectivism of politics (considered, acting in concrete *ultra vires*). It is really cloying, however, to read in the words of the

judges of Karlsruhe the language of an instrumental mind used at the service of anti-politics. What else does it mean, in fact, recalling the principle of proportionality if not to wanting to reduce a political question to a mere matter of legal technique? It is the usual problem of justice in general, and of constitutional justice in particular. The question posed to the judges by the applicants is political in its nature, and not technical. The judge's answer can only be (must be) technical. However, it has, and cannot fail to have, a political content. Does proportionality, in its structure of judgment on means in relation to ends, really replace the legal method with the politics of law? Let's look at the substance of the phenomenon.

In the BVerfG decision, more than one result is obtained, which in its formal capacity translates evident material contents. The problems of European integration are trivialized, especially, as mentioned, in the crisis that Europe as a constitutional order is going through (compared to which the Covid-19 emergency represents only the last piece). At the same time, transforming what is a political question into a matter of measure, or into a question of proportionality between means and ends, the judicial decision of the authority necessary to dismantle any political-constitutional reason is enshrouded. What is technically measurable is evident and, like any evidence, is also objective, and does not allow discretionary or political assessments (*ex ante* and *ex post*). Indeed, recalling or using proportionality, as always regards constitutional judgments, is simply a way of *doing politics by other means*. Means which are cleverly enshrouded in objectivity, which therefore makes them not questionable; means that have the value of an *ukase*, which should therefore oblige those who have political responsibilities (Commission, Council, but also the ECB, which is not simply a technical authority, especially when pursuing the objective of saving states) to necessarily consequent behaviours, *without ifs and buts*, as if *no ifs and buts* has so far been, and still will be, the European political challenge.

Recalling and imposing the proportionality criterion, indeed, conceals a precise constitutional policy of the Court of Karlsruhe: it is another manifestation of a "judicial suprematism" which, affirming its institutional pre-eminence over the democratic bodies (national and, what is more, European) as the custodian of an undisputed and indisputable legal rationality, wants to affirm fundamental and political decisions which, however, deny European integration exactly in the most relevant forms of a unification process and reaffirm the primacy of a *particular* state interest which, in this case, coincides with that of the country that wants to continue dictating the contents of the european *ordo ordinans* and *ordo ordinatus*.

Proportionality is an ambiguous and dangerous instrument, especially if there are no principles or values that can guide its development. In these cases, who decides on proportionality? Who has the right to say the last word? What value does the word of the constitutional judge have in comparison with that of the democratically elected political bodies, starting right from those of the Country of which that same

constitutional court is the body, subject only to the Constitution? How could this BVerfG decision commensurate with the political mediations that support what remains of Europe's shaky construction? Obviously, we find ourselves on clearly uneven and, therefore, immeasurable levels. Reducing Europe's salvation to a question of proportionality between means and ends is tantamount to debasing politics and constitutional law, reducing them to a practical problem that can worry only the most perverted leguleians. Indeed, as we well know, behind every pettifogger there is always a superior political intelligence. In this case, the constitutional reasons to which we were accustomed by reading the European jurisprudence of Karlsruhe are now long gone and faded memories. Where are the talks about democracy, *demos*, representation and difficult mediations that politics, and not a judge, is called to make in order to reconcile the rationes of its constitution with the limitations on state sovereignty made in the name of a higher political purpose? Today, after this decision, remains only proportionality, the instrumental reason of the law, nominally reduced by Karlsruhe to a means at the service of European anti-politics and nationalist revanchism.

6. Disruptive, for various reasons, may instead be the consequences of the assumptions referred to in points b., c., d. of the judgment of the German Court.

It is certainly paradoxical that the Court, after recognizing that *ultra vires* control must be conducted prudently and in a manner favorable to Europe (*europafreundlich*), then launches into a fierce criticism of the Court of Justice, up to accusing it of having operated *ultra vires* and ordering Germany's substantial non-application of its decisions, by ordering the Government, Parliament and Bundesbank to oppose the decisions of the EU body, which the Community judge considered to be in compliance with the Treaties. The program of interventions and aid that the Union is discussing, although not under the judgment formally, will suffer repercussions, which will result in delays, if not real blockings; and then nationalistic instincts will awaken in all other countries, and other national courts will feel itself legitimized to put in difficulty the European Court, if not to mock it (just think how the Polish and Hungarian governments will use this judgment of the German Court in order not to apply recent decisions!) and national judges and administrations will question the primacy of European law. The castle, starting right from its judicial custodian, could be shattered.

The reactions of the European institutions were not long in coming.

Meanwhile, the ECB, through the words of its President Lagarde, has made it known that it does not feel troubled by the German constitutional judge's decision on the securities purchase program launched in 2015. The ECB has identified its referents in the European Parliament, to which it is called to report, and in the EU Court of Justice, under whose judicial control the acts adopted by it are placed. It seems to

want to anticipate that it will not accept the invitation-order of the German constitutional judge to justify its action in the light of "proportionality", a value which, among other things, the ECB as an institution of the Union must respect not by precept of the German constitutional order, but due to the constraint deriving from the primary law of the Union and, in particular, from the article 5, paragraph 4, of the TEU. Since it concerns a value inscribed in the Treaty, that value will be interpreted, first of all, by the Court of Justice, without the possibility of unilateral interpretation by each supreme national judge.

With a truly unusual attitude, the European Commission has announced, through a *statement* from its (German ...) Presidency, its intention to evaluate whether the judgment of the German Constitutional Court could integrate the case of an "infringement" of the values of EU law to the point of justifying the initiation of an infringement proceeding in accordance with the article 258 of the TFEU. Although this statement may sound glaring, it cannot be said, at first glance, that it is unfounded: EU law, and its primacy over national rights, must be respected by state legislators and governments, but also by every single national judge, whose "deviant" decision becomes a legally relevant infringement for the "guardian of the treaties", called to supervise its respect. Nor would it be the first time that the responsibility of a Member State before the Union is "engaged" by the behavior of its own supreme judge: "[...] the failure of a Member State to fulfill its obligations, in principle, can be declared in accordance with the article 258 of the TFEU regardless of the body of that State whose action or inertia gave rise to the transgression, even if it is about a constitutionally independent institution" (judgment of the EU Court of Justice, 4 October 2018, C-416/17, Commission v. France, point 107). In the mentioned case, the riotous attitude of the Conseil d'Etat had cost France a decision to ascertain the infringement in accordance with the article 258 of the TFEU. Of course, launching an infringement procedure requires (also) a political evaluation, but the Commission itself has established the rule through a Communication of 2017, according to which the infringements should be basically restricted to systemic violations or those of fundamental principles of the integration process, without committing the energies for failures that are "bagatelles". Equally, unusual is the press release of the Court of Justice of the European Union of the last May 8th. The Court, claiming to be the recipient of many requests for explanations after the German judgment, recalls, in general, that its preliminary rulings are binding on the national courts (clear is the reference to the *Weiss* judgment, from which the German constitutional judge, instead, takes a distance), that EU law has the primacy over national rights and that only the judge of the Union can review the validity of the acts of the institutions of the Union, otherwise the uniformity of the system will be fragmented, and then conclude that it will refrain from any other communication in this regard. Now, even though the message of the judge of the Union is atypical, it seems interesting to the extent that it

ends up welding with the announcement of the President of the Commission: an infringement will be judged, in the result, by the Court of Justice whose meager statement seems to be very clear.

7. An answer will be needed, in order to prevent that institutional crisis could affect the European Union at a time of serious economic difficulty, in which, however, we began to see some signs of rethinking as regards a market economy that is too unbalanced towards a competition at the expense of sociality. The EU institutions seem to march in unison, defending their very existence. Will we get a clear and coherent response also from the European political institutions, in particular from the Parliament and the European Council? Also putting the issue of competences in the sphere of "economic policy" at the center of the Convention on the future of Europe?