

Goodbye, European Army? – Consequences of the German Constitutional Court's Ruling on the Lisbon Treaty

The German Constitutional Court has made a decision! The political tenor of the unanimous ruling will have long-term repercussions. Critics like Alfred Grosser consider the new ruling as a “black day” in the history of European integration. Having reached its national goals the Federal Republic would run the risk of becoming the brakesman of the process of European integration.¹ However, it remains to be seen whether this is really the end of the European integration process so dear to European federalists. It is safe to say though, that its effects on the future development of a common foreign and security policy and its defence related aspects are immense.

What does the ruling say? The judgement from Karlsruhe clarifies that, on the one hand, Germany is allowed to abide by the Lisbon Treaty and, on the other hand, Berlin will not, as a result, abdicate Germany's sovereign right to take political decisions. The principal of conferral guarantees the national sovereignty of Germany and the political legitimacy of the German parliament as long as the EU is an association of states. However, there is an unalienable core of tasks and duties that constitutes the state's sovereignty. Among them are questions of religion, budget, law and order, and peace and war. The Constitutional Court put it straight that the German Constitution, the “Grundgesetz”, does not empower the state organs “to abandon the right of self-determination of the German people in the form of the international sovereignty of Germany by joining a federal state”. This step is exclusively reserved “to the directly declared will of the German People”.²

Does it follow from this that the vision of the United States of Europe, has to be abandoned? The classic question of the final status or “finalité politique” of the EU goes this way: Shall the Union develop towards a federal state and hence also in the direction of an integrated European army or shall it remain an entity *sui generis* being de facto what has been called by the Constitutional Court in its Maastricht judgment an “association of states” (“Staatenverbindung”) - something between a confederation and a federation? The answer from Karlsruhe clearly favours the second model. However, the ruling does not entirely block the possibility of a merging of German statehood into a European federation. The ruling does, however, place insurmountable obstacles, even in less eurosceptic times, namely a new constitution in which Germany's renunciation of sovereignty is explicitly enshrined and is then approved by the German people, the real sovereign.

What are the consequences for the build-up of a European Army? Recently there has been much talk in German political parties about the necessity of a European Army. Chancellor Angela Merkel, for instance, commented in an interview in March 2007: “We have to come closer to a common European Army.”³ The Social Democrats (SPD) and the Liberals (FDP) also argued in favour of this goal in their respective manifestos for the election to the European Parliament in June 2009. However, in the election manifestos for the federal elections in September 2009 there is no talk about it anymore. The objective of the built-up of the United States of Europe has already been eliminated from the party programmes in the 1990s. All political parties, except for the party “Die Linke”, advocate a stronger security and

¹ Alfred Grosser, Deutschland auf dem Sonderweg, in: Süddeutsche Zeitung, 11./12. Juli 2009, S. 2.

² Urteil des Bundesverfassungsgerichts vom 30. Juni 2009, Absatz 228, unter: www.bundesverfassungsgericht.de/entscheidungen/es2009063. (Translation by the author).

³ See Merkel will Europa-Armee aufbauen, FSZnet, at <http://www.faz.net/s/RubA24ECD630CAE40E483841DB7D16F4211/Doc~EF37D4A048309443F9310A4A6594583A6~ATpl~Ecommon~Scont>

defence cooperation as well as more integrated European forces nonetheless. They sometimes talk of a European army but in doing so they do not mean an integrated army of a united Europe following the model of failed projects such as the European Political Community and the European Defence Community from the early 1950s. But they do advocate stronger practical security cooperation.

They link this approach to considerations stemming from German history and the challenges of a globalised world. War within the Union has to become definitely impossible. European integration was already a question of war and peace for former chancellors from Konrad Adenauer to Helmut Kohl. Preserving peace was, and still is, one of the main rationales for the “process of creating an ever closer Union among the peoples of Europe”, as the preamble to the Treaty of the European Union puts it. Today, as the idea of war between EU member states has become somewhat absurd, another rationale has come to the fore. Europe is to become more influential and engaged in world affairs. In the new global age, Europe should become capable of acting on the same footing as the old and new great powers in order to keep and to enhance peace. This goal is out of reach for any single member state. Hence, they have to pool their capabilities and pursue a common political approach, especially when facing global challenges and crisis.

If European politicians really want to achieve the goals of keeping peace and enhanced influence in world affairs, they have to do it within the framework of an association of states. There are enough construction sites still lying idle: the civilian and military capability gaps, the absent common armament market, the still-rudimentary export control regime, the deficient comprehensive approach or the lack of coordination of national defence planning, to mention only a few. In case of doubt, states decide in favour of their all-too-often parochially defined national interests. The Inspector General of the Bundeswehr Wolfgang Schneiderhan said against this background the other day, that he sees rather a tendency of renationalisation of defence than the Europeans on their way to an European Army.⁴

The Lisbon Treaty offers new opportunities, especially in the areas of foreign, security and defence policy. If it comes into force, there will be the new position of the High Representative for Foreign Affairs and Security Policy, who will be, at the same time, Vice President of the European Commission and Commissioner for External Affairs. In addition, there will be a European External Action Service consisting of foreign and security experts from the Commission, the Council and seconded personnel from the national capitals. Finally the EU Member States will pursue the forging of a common defence policy. This policy involves, for example, the assistance clause in case of aggression against a member state on its territory, the obligation to improve military capabilities, and the possibility of entering into a so-called “permanent structured cooperation, i.e. some member states will be allowed to go further in their defence cooperation than other ones. However, the accompanying law on broadening and enhancing the rights of the Bundestag to the ratification of the Lisbon Treaty states that the Bundestag has to adopt an appropriate law in case of the application of article 42,2 Lisbon Treaty (common defence) prior to such a decision by the Council. All steps that might lead to such a common such as the permanent structured cooperation do not require

⁴ Wolfgang Schneiderhan, Wie fähig ist die Europäische Union zum Krisenmanagement? Speech given at the Berliner Forum Zukunft on 24 April 2009, at http://www.bmvg.de/portal/a/bmvg/kcxml/04_Sj9SPykssy0xPLMn...

such a law (as at first requested by some MPs) but only oral or written information from the executive.⁵

After the ratification of the Lisbon Treaty the further development of European Security and Defence Policy will be possible without direct control of the European Parliament whose role is limited to asking questions and making recommendations. It is the Council – that is, the sovereign nation states - which decides unanimously. Because of this lamentable situation it is a positive thing from a democracy theoretical point of view that the prerogative of the Bundestag has been confirmed. If it comes to military interventions of the Bundeswehr the Constitutional Court ruled already in 1994 that the Bundestag has to decide on a respective mandate before. Since long the German armed forces are called “army of the parliament” (Parlamentsheer). The Constitutional Court has again confirmed this position by stating, that even if the EU would evolve into a regional system of collective security the “supranationalisation” of a decision to launch a concrete operation of German armed forces would be “inacceptable” due to the constitutions imperatives of peace and democracy. At the same time the ruling makes it clear that there are no “insurmountable barriers for a technical integration” of European force structures citing joint command and control structures and the built-up of joint force dispositives as examples.⁶ The EU has indeed created a set of planning and conduct capabilities for civilian and military crisis management. In addition, the EU has launched two dozen crisis management operations since 2003, six of them of a military nature. There are also multinational force structures assigned to the EU. However, Brussels does not dispose over its own forces. It is the member states which offer the civilian and military assets on a case-by-case basis.

In future, Brussels will still not be able to decide on whether or not to send German soldiers to a military mission, because the EU will not become a full-fledged federal state. The core competence regarding decisions on peace and war will remain with the Bundestag. Thus, it is up to the Bundestag to declare the state of defence according to article 115a of the Grundgesetz and to decide on a military mission of German armed forces. Germany has not entered a special way (Sonderweg). It has rather entered European normalcy, or as the architect of the German Ostpolitik and security adviser of the SPD Minister, ret. Egon Bahr put it in a letter to the author: “Now we are thrown back to a national role, like the others”.⁷ Nevertheless, a stronger foreign and security cooperation is still a necessity given the challenges of a globalised world. The vision of an Army of the United States of Europe is indeed fading away with the ruling of the Constitutional Court. The objective of stronger security cooperation can become reality though. Could this process lead to a European army, too? In principle yes, but only in the framework of intergovernmental arrangements.

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⁵ .See Entwurf eines Gesetzes über die Ausweitung und Stärkung der Rechte des Bundestages und des Bundesrates in Angelegenheiten der Europäischen Union, Deutscher Bundestag, 16. Wahlperiode, Drucksache 16/13923, 21 August 2009.

⁶ Urteil des Bundesverfassungsgerichts vom 30. Juni 2009, Absatz 255, unter: www.bundesverfassungsgericht.de/entscheidungen/es2009063...

⁷ Letter from Egon Bahr to the author from 21 July 2009.