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WHO IS THE MASTER OF THE TREATIES? THE COMPACT THEORY IN KARLSRUHE

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1.The European Treaties: a "Compact"?

We are still trying to understand the implications of the shocking decision by the German Constitutional Court (BVG) on the Public Sector Purchase Programme (PSPP) and its impact on the future of the EU integration process. This post will not analyse the content of the decision. Rather, it will argue that this judgment and other recent critical events understand the integration process in light of something resembling the "Compact Theory" approach, which is very similar to that devised by Calhoun and other scholars in the American pre-Civil War scenario. Indeed, the conclusion reached by the German Court and the application of the *ultra vires* doctrine, with the nullification effects, reminds us of what Boom wrote about Germany as the Virginia of Europe in 1995.

Does it mean that the Compact Theory is back? Can we use it to understand the current state of affairs in the European integration process? The European Union is suffering from a complex crisis, especially after Brexit. Indeed, scholars have already compared secession and withdrawal, while others have tried to distinguish between secession and withdrawal because of the unilateral nature of the latter. However, this distinction does not take into account that both the Canadian Supreme Court in its landmarking 1998 Reference Re Secession of Quebec and

Calhoun, one of the champions of the Compact Theory in the US, defined secession as a form of withdrawal.
In Calhoun's view the American Constitution was a compact between the sovereign States. He found confirmation of this reading in Art. VII of the Constitution according to which: "The ratification of the conventions of nine states, shall be sufficient for the establishment of this Constitution between the states so ratifying the same". "Between" gives the idea of a compact: In Calhoun's words:

«They established it as a compact between them, and not as a constitution over them; and that, as a compact, they are parties to it, in the same character. I have thus established, conclusively, that these States, in ratifying the constitution, did not lose the confederated character which they possessed when they ratified it, as well as in all the preceding stages of their existence; but, on the contrary, still retained it to the full».

Against this background States were the real sovereign. In order to explain his view he made a distinction between government and sovereignty:

«*In order to have a full and clear conception of our institutions, it will be proper to remark that there is, in our system, a striking distinction between Government and Sovereignty. The separate governments of the several States are vested in their Legislative, Executive, and judicial Departments; while the sovereignty resides in the people of the States respectively. The powers of the General Government are also vested in its Legislative, Executive, and judicial Departments, while the sovereignty resides in the people of the several States who created it*».

This meant that States were the masters of the compact, and the Union was a mere agent. The shift from the Confederation to the Federation had not changed the substance of the compact in his view.
States had rights and according to the Compact Theory there were three main rights: interposition, nullification and secession. Interposition and nullification were the terms used in the so-called "Principles of '98" and refer to the Kentucky and Virginia Resolutions in response to the Alien and Sedition Acts. "Interpose" was the term employed in the Virginia

Resolution – whose mastermind was Madison – in case of *ultra vires* acts of the federal government. "Nullification", instead, was the word employed in the Kentucky Resolution of 1799, inspired by Jefferson.
While nullification seemed to refer to a unilateral right of the State, interposition would be a right that States can exercise only collectively.
Nullification in particular is used when the State level perceives as illegitimate an act of the federal level, because it violates the core constitutional principles and the identity of the State.
It is more than an expression of disagreement – which is indeed a constitutive part of any multi-tier legal system; nullification here is understood as the ultimate reaction – before secession – against an illegitimate exercise of power, impinging on the State sovereignty. After being considered a historical device of the State resistance *vis a vis* the development of the federal power, nullification has started to be regarded as a still functioning tool, even though in new forms – like disobedience – that can be labelled "neo-nullification".

2.Neo-Nullification and the European integration process

Why is neo-nullification relevant to understanding the current state of affairs in the European integration process? Indeed, the EU is experiencing several crises, which are typically "federal" in their essence.
After the case of Brexit – which put at stake one of the core State's rights according to the Compact Theory, the right of secession – now the decision of the BVerfG on the PSPP offers us a new interesting case, through the use of nullification, to test the Compact Theory in the EU.
The German Court exercises the nullification option since the CJEU in Weiss "affords the ECB the competence to pursue its own economic policy agenda" and "refrains from subjecting the ECB's action to an effective review as to conformity with the order of competences on the basis of the principle of proportionality" (para.163). In not taking seriously the assessment of the ECB programme the CJEU, in the eyes of Karlsruhe, exceeded its judicial mandate and the Weiss ruling is not a binding force in Germany.
From a broader diachronic perspective, the nullification exercised by the BVerfG in the PSPP case is the outcome of a jurisprudence in which the

Court has built a kind of "German Compact Theory", starting from the Maastricht Urteil, where the BVerfG clearly emphasised the nature of the compact of the EU, which is "an association of sovereign states with a view to achieving an increasingly close union between the peoples of Europe – which are organized as sovereign nation states". The EU is thus considered an association with limited powers, conferred by the sovereign States. This conception posed the grounds for the nullification power of the BVerfG: "if European bodies or organs were to implement or add to the Union Treaty beyond the scope of the treaty instrument on which the act of approval was based, the resulting legal acts would not be binding within the German sphere of sovereignty". The Courts themselves claim such a power: "the Federal Constitutional Court reviews whether acts of European bodies and organs remain within the limits of the sovereign powers transferred to them or whether they exceed such limits".
So the seeds of the current *ultra vires* declaration were already planted in the Maastricht Urteil construction, further developed in the Lissabon Urteil, where the BVerfG identified the core areas of State sovereignty in which intervention of the EU would have been considered *ultra vires*.
The PSSP decision does not depart from the idea that the Member States remain the Master of the Treaties and that the EU is a "union based on the multilevel cooperation of sovereign states" which retain the right to declare void an act of the EU institutions if the latter exceed their conferred competences. Differently from the previous jurisprudence, in the PSPP case, the nullification option which seemed to be – to use a metaphor of the US debate – a zombie constitutional concept, has been exercised, with heavy consequences on the EU legal order.

3.Judicial Neo-nullification?

In order to better understand what this decision represents for the EU, it must be read not only retrospectively but is has to be put in the present moment of the EU integration: a context characterised by a growing narrative challenging the EU authority, as an illegitimate constraint over the expression of national sovereignty and identity. These tensions, which to a certain extent can be considered inherent in the nature of the multitier system, need to be analysed in a broader trend of a

reemergence of constitutional dissent and conflict between local, national and global actors. As Hirschl argues "when understood against the backdrop of formidable centripetal forces of political, cultural, and economic globalization, the rise of a new trans-national constitutional order and judicial class and the corresponding decrease in the autonomy of 'Westphalian' constitutionalism, as well as an ever-increasing deficit of democratic legitimacy, counter pressures for preserving a given sub-national unit's, region's, or community's unique constitutional legacy, cultural-linguistic heritage, and political voice seem destined to intensify, not decline".

In this context the BVerfG decision may be a counter-reaction to the marginalisation of the national and local dimension in the name of the centripetal forces of a supranational authority.

The constitutional concept of nullification, rather than a relic of the past, is emerging now as a powerful – though dangerous – instrument to give voice to new claims and new resistances, in a federal and supranational context. However, we are facing a new type of nullification: while nullification in the US theory is meant to be exercised by States' legislatures, today the agents of nullification are mainly apex courts. Indeed, as we saw earlier, the Kentucky resolution was given before Marbury v. Madison and even later Calhoun mainly looked at political bodies as the actors in charge of this.

This is not surprising, however, given the rise of the judiciary in the new-constitutional paradigm.

On this basis, even before this decision, scholars had already warned about the "bad example" offered by the German judges, especially after which, in 2012, the Czech Constitutional Court (Pl. ÚS 5/12) declared the CJEU's judgment in C-399/09 Landtová "ultra vires". The Czech case represented the first example of the application of the *ultra vires* doctrine.

After that, the Danish Supreme Court in Ajos also took the chance to delimit the competences of the EU. However, now it is different because of the prestige and charisma of the BVerfG and indeed the risk of a *domino* effect is now very high.

Conflicts like these have also been occurring in proper federal systems.

The EU is dealing – more than other multilevel legal experiences – with this ultimate and deep tension. However, differently from other contexts the EU legal system may find a way out of this conflict on the last word. Now that the nullification option of the BVerfG has become a reality, this will pave the way for a broader reflection on the several current resistances that the EU is facing, urging us to look beyond the earthquake surface effects, in order to identify its epicentre and its deeper causes.