

.....

Germany as Europe: How the Constitutional Court unwittingly embraced EU demoi-cracy

A Comment on Franz Mayer

Kalypso Nicolaidis*

5
10
Who is afraid of the German Constitutional Court? Here is a Court which tells us in June 2009 that the Lisbon Treaty is kosher, that all we need is one last German parliamentary moment and that the prize is there for the Europhiles' taking. And yet, the same Europhiles in Germany and beyond have had precious little praise for the Court's edict. Some saw it as the ultimate reassertion on the constitutional front of German "normality" as a European nation-state; others as "a deeply cynical and corrupting decision" whereby the Court should have struck Lisbon down if it had been consistent with its rash assessment.

15
20
25
Franz Mayer brilliantly dispels for us the temptation for a rough and ready opinion on the Court's opinion by laying out its many different facets. He uses to great effect the device of characters in a play who all stake out a piece of the beast like the proverbial elephant. Overall, Franz expresses some doubt on the collective wisdom of the judges: they have managed to produce a messy, contradictory, circular and often uninformed judgment. Nevertheless, he ends up expressing guarded support for the judgment's "identity shift." His exegesis is impeccable but can lead to a different conclusion or at least emphasis: that, in reflecting the various streams of German and non-German opinions about the EU, the Court demonstrates that Germany is more European than ever; and that EU pundits and politicians would do well to embrace the kind of narrative diversity which this judgment and the debate it has spurred expose. This is the spirit of European demoi-cracy, a vision that the Court ignores at its peril.

Franz Mayer is not a postmodern writer who believes in the death of the author. But as a "narrator" he espouses the bird's eye view, while as playwright, he puts a bit of himself in every character. His critical support for the judgment therefore is informed not by a single reading of it as most would have it, but by a deep engagement with

* Email: kalypso.nicolaidis@politics.ox.ac.uk.

30 the radical pluralism of the EU itself. And indeed, I find some truth in each character about the pitfalls and qualities of the Treaty and the attitude to European integration which it reflects.

Let us enter the conversation:

- 35 - *Justus Lipsius*, many around Europe share your concern about the normalization of Germany and its renewed reification of sovereignty. You infer from such concern a threat to the EU. But in the end, there is nothing wrong with the kind of asymmetric federalism reflected in the judgment. Treaties and Unions can and should mitigate power asymmetries, not negate them. If Europeans want to sustain a European
- 40 Germany who continues to pay the bills of profligate Greeks, let Germans have their German moment!
- Thanks *Optimistica* for highlighting in the judgment the kind of functional defense of European integration which we dearly need. Indeed, isn't the spirit of Constitutional pluralism as much in horizontal guidelines for unilateral state behavior as
- 45 it is about vertical arrangements for collective behavior? The Court's affirmation of the "principle of European law friendliness" and German "responsibility for European integration," or beyond, "constitutional obligation to participate in European integration" spell out a spirit of deep loyalty that even the Treaty drafters did not dream to assert so pointedly.
- 50 - Still, *Brutus* it is good to have you around (and not only in Britain) to keep us on our toes as you defend the primacy of the local. We are all or should all be euro-skeptic, if skepticism is the mark of our enlightenment inheritance. Thankfully, you are prone to wishful thinking—the treaty did not die. And I ask you: have the *Länder* really lost so much power since entry into force? If so, do continue to be vigilant.
- 55 - Indeed *Brutalius Machiavelus* you will be vigilant too (albeit driven by power rather than Brutus' ideological considerations). Why should we reject you to the fringes because you applaud this new "competence check"—the fact that the judgment creates a new bargaining dynamic in the EU, through a credible threat of a national veto based on an "identity review" for *ultra vires* control. Friends of the EU
- 60 should support this state of affairs as a second best. Since the Lisbon negotiations failed to police "creeping competences" and to squarely endorse the repatriation of competences (the proper expression of "cycles of federalism"), national Courts do need to rein in the "dynamic integration provision" which allows collective unanimous EU action even without prior competence. Sorry *Julius Lipsius*, but why
- 65 not let constitutional courts constitute themselves as an association of ultimate umpires (an old idea of Joseph Weiler)—as long as the move is "exceptional," not frivolous.
- Now *Democraticus*, you put a different gloss on the same critical take, all in the name, that is, of your traditional idea of democracy: since the European Parliament is a lousy representative of the European peoples (a sad state of affairs in your view), let national democracy assert itself through an empowerment of the *Bundestag*. You may be right that the Court takes the Lisbon Treaty to its ultimate (democratic) logic
- 70 (ah, the cunning of law) but aren't you a bit inconsistent? Consider the counterfactual:

if national democracy is so important, then why should the EU be dispensed with the European parliament ever came to conform to your wishes?

- Thankfully, we have you *Paulus*, guardian of the fate embodied in the Maastricht judgment, to remind us that this parliamentary obsession is misguided even in the name of national assertion. In the end, the Court's most important insight consists in reconciling the prior emphasis of the Maastricht judgement on the State with a new angle: The *Volk*. That is the indeed the beauty of the Treaty's new exit clause for member states who may wish to withdraw. As Joseph Weiler brilliantly explained in *The Federal Vision*, the EU stands out for its voluntary nature, *un plebiscite de tous les jours*.¹ Your *Verbund* (connoting compound and contract) or what I have described elsewhere as a "federal union not a federal state" is indeed the essence of Weiler's "constitutional tolerance."² But *Paulus*, in the end, you give us no ground to disagree with the Lisbon statement that the EU is a union of states and citizens.
- Good to have you *Nationalus* to bring us down from the theoretical stratospheres to the here and now of integration, as the guardian of subsidiarity. You are right: for all the fuss made on competences, Lisbon did not go far enough in setting up constraints. Was this not what all the Nos around Europe were about? In the real world of proportionality and incremental action, we cannot rely routinely on *Machiavelus*' precious national constitutional veto. What matters is how European law is made and implemented. Any good liberal should share you concern about the European arrest warrant *Nationalus*! That is the problem when the crucial and precious principle of mutual recognition migrates from liberalizing market-building realm to the judicial state-coercion realm. In the latter case it can lend itself to very illiberal use indeed.
- Last but not least *Publius* of illustrious ancestry, you seek to seize the Court's edict to reassert that the "federal" contract matters at all levels. Well, other Europeans may not all have the equivalent of *Länder*, e.g. a proper federal structure, but all European states have moved towards devolution in the last two decades. Ultimately, the championing of *Länder* can serve as a proxy for the fundamental concern for "control" among European publics, a sense that public life must continue to start close to home. Indeed, the question of *qui bono* in the end, the *Bundesrat* or the *Bundestag*, is itself a matter for subsidiarity, and an outcome that is bound to evolve over time.

The beauty of such a varied cast of characters is that all of us—legal theorists, political scientists, politicians, citizens—can chose to engage with the characters we want and use them as foils for our own biases, obsession and questions. Here are three from me:

¹ Joseph Weiler, *Federalism without a Constitution: The Principle of Constitutional Tolerance*, in *THE FEDERAL VISION: LEGITIMACY AND LEVELS OF GOVERNANCE IN THE US AND THE EU* (Kalypso Nicolaïdis & Robert Howse eds., 2001).

² See, inter alia, Kalypso Nicolaïdis, *We, the Peoples of Europe . . .*, *FOREIGN AFFAIRS*, 97–110 (November/December 2004).

1) *Yes, national democracy is paramount. But is it alright if the German Court draws what can be seen as the right conclusions for the wrong reasons?*

With *Optimistica* and *Democraticus*, I applaud the stress on subsidiarity, democracy and the limitations of the European Parliament’s representativeness—thus the championing of national parliaments. As does the Lisbon Treaty, in theory. But the reasoning behind this conclusion is flawed. The argument that small states are over-represented reflects a majoritarian bias that will not serve the EU nor even its most populous member states. The EU rests on an anti-hegemonic bargain based on degressive proportionality across its institutions (composition and staffing of the Commission and the Court of Justice; rotation in the Council; weighted voting and indeed representation in the European Parliament). Sure, it is easy to make it sound “anti-democratic” that a Luxembourg citizen is 10 times more represented than a German one. But that is only if we consider this state of affairs in isolation. The Court implicitly acknowledges this by referring to the EU as made of “representation of the peoples linked to each other by Treaties.” But its reasoning is of the kind: if only the European Parliament had been different, EU democracy would obtain. And indeed, the German Constitutional Court stresses that in its view, the equality of individuals trumps equality of states (para 185 et seq).³

Instead, the Court and the German public need to view the composition of the European Parliament as embedded in an EU institutional order where Germany indeed holds a dominant place. They need to hold the EP to account on its capacity to deliver the kind of compromises and sensitivity of European publics that often elude the Council and the Commission. And paradoxically, support for enhancing the role of the *Bundestag* in European affair should not be by default in view of a defective European Parliament—as if national parliamentary power was a second best that could and should be abandoned the day the European level became truly “proportional”! In this sense, traditional democrats risk appearing as less committed to national democratic input into European affairs than the structural reforms of the Lisbon treaty suggest. As Franz Mayer argues, they should focus instead on enhancing the horizontal cooperation among parliaments rather than solely the vertical control of the council by national parliament.

2) *Is it right to replace questions of democracy in Europe with the kind of identity frame suggested by the Court?*

Mayer seems ambivalent. He bemoans this shift as a shift from seeking more proactive pro-participation in EU affairs to a defensive pro-control attitude, but in the end sees its dynamic promise. I am more concerned with the shift altogether. In “identity review” I prefer the review side to the identity side. First because grounding the primacy of the national contract (a good thing) on identity will always risk an exclusivist bias, the rigid delineation between insiders and outsiders leading to discriminations

³ *Bundesverfassungsgericht*, Case 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09, Decision of June 30, 2009 (Treaty of Lisbon), available in German, English and French at <<http://www.bverfg.de>>. The decision is also published in the official reports of the German Constitutional Court *Entscheidungen des Bundesverfassungsgerichts* (BVerfGE) vol. 123, p. 267.

150 of all sorts. Second because even if invoked at the national level, such identity talk is bound to spillover to the European level. And talk of “European identity” is not conducive to greater EU legitimacy at home or abroad.

155 Coming back to the original assumption, abandoning democratic ambitions for the EU is predicated on favoring one specific aspect of democracy—the right to vote. But the Court is wrong to see the lack of a European people as an explanation as to why European democracy is not only limited today but unlikely to develop in the future. The reply to this mode of reasoning lies not only with the softening of the exclusiveness of citizenship (eg dual citizenship) as Mayer rightly stresses. But, I would add, in highlighting the Court’s failure to consider that it is possible and even plausible to imagine or perceive (Mayer stresses the importance of perceptions in the democratic deficit question) the EU as a demoi-cracy, a space where states and citizens are inventing a form of democracy beyond the state which does not rest on the existence—potential or actual—of a single people.⁴ A demoi-cracy is not about individuals belonging to multiple demoi (European and national) but about a polity (the EU) being composed of multiple demoi (e.g., German and Polish). This means inter alia that
160 a plurality of majorities of peoples is necessary to pass decisions as discussed earlier. Moreover, democratic legitimacy cannot be separated from identification if not identity. Europe is a continent of intimate rivalries or symbiotic antagonisms as coined by Ayse Kadioglu.⁵ A demoi-cracy frame makes it easier for EU citizens to identify with the EU even while feeling separate from it.

170 Mayer points out that the idea of national constitutional identity as a break on European integration is not new. Indeed, democracies are based on the assumption that people accept to be part of a minority one day and see their opinions overridden under two conditions. First, the expectation of belonging to the majority another day (my scoundrels are better than yours!). And second, the existence of safeguards if and when this is not the case. As the Lisbon treaty generalizes QMV, the question becomes
175 whether reassurance should be put on the first condition—by in effect transferring the national veto from governments to national courts; or on the second, by strengthening safeguards even while a given country is in a minority. But this of course raises crucial questions: what are the democratic implications of Courts second guessing their own national governments when these have been part of a majority decision taken at the EU level, or better still when they have been part of a unanimous decision? Given the functional need for QMV in the first place (which the Treaty reflects), does greater allowance for national constitutional review risk endangering EU effectiveness? Would a subsidiarity defense rather than a sovereign
180 autonomy defense not be more in keeping with the spirit of both German federalism and EU governance?

⁴ *Supra* note 2.

⁵ SYMBIOTIC ANTAGONISMS: COMPETING NATIONALISMS IN TURKEY (Ayse Kadioglu & Fuat Keyman eds., 2010).

3) *Does the root of our unease lie with the schizophrenia between the ethos and the telos underlying this judgment?*

As echoed by Mayer's *Optimistica*, the Court still applauds the ultimate goal of an EU federal state—while acknowledging its improbability. But it also applauds the non-hierarchy of the current system. The latter is the right *ethos* from a democracy view point: the EU should be about empowerment, horizontal integration and mutual recognition more than about power centralization, vertical integration and harmonization. An ambitious “indispensable minimum” does not mean succumbing to the cult of oneness. In the long run too, we should hope not to cross the rubicon between a federal union and a federal state. Such a *telos* would certainly alleviate the concerns of *nationalus*—a good proxy for more than half of EU citizens. The “binary way of thinking” denounced by *Julius Lipsius* continues to make an ambitious EU a state in the making, and to associate democracy with one state and one people—the national for sovereignists or the supranational for “federalists”). If democracy could be both an ethos and a telos for the EU, there would be no need to reason as if in the here and now we were waiting for a Euro-Godot and in the meanwhile exploring second bests. Instead, sovereignists should not oppose the enhancement of participatory democracy at the EU level of the empowering kind. And Europhiles should keep their cool when guardians of national temples invoke sovereignty. We need to remind *Julius Lipsius* that there is nothing wrong with “talking sovereignty” in the name of Europe—after all how could you pool something you did not have? What truly matters in the EU is that the Member states and their agents have learnt to define their sovereign interests in ways that are compatible with each other and prone either to compromises or civilized agreements to disagree. Intergovernmentalism comes in many forms and should not be seen as antithetical to integration, either by Courts or by citizens.

*

In the end, only those wedded to the dreaded imperative of “oneness” in the EU—one state, one people, one story and indeed one voice—should feel uneasy about the many different voices being brought together in this judgment. The rest of us can accept that the EU should continue to be a mosaic of stories. We can embrace the prevailing narrative diversity about the EU both within and across European countries. If the EU can be described *a la* Rawls as an overlapping consensus of overlapping consensus, then traditional EU integrationists will exclude dissenting voices at their peril. This is certainly the ethos which we advocate in a recent book, *European Stories*—solace cannot be found in the sacred cow of narrative hegemony.⁶ Indeed, the EU rests on practices of interpretation and negotiation reflecting strong—yet reasonable—disagreements between its many component parts on the norms and goals that underpin the

⁶ EUROPEAN STORIES: INTELLECTUAL DEBATES ON EUROPE IN NATIONAL CONTEXTS (Justine Lacroix & Kalypso Nicolaïdis eds., 2010).

225 process of integration.⁷ Actually, the EU gives rise to many more variants than the
Court can possibly reflect, as an object of scorn or desire—attracting numerous labels
ranging from “artificial construct,” or even “identity threat,” “ethical hazard” or “giant
supermarket” to “community of values” or “community of law,” “humanist polity,”
“cosmopolitan order,” or “democratic anchor.” Taken together, all these stories are
230 part of a bigger multi-faceted whole, part of a logic we can only wish for, a logic of
reflexive appropriation, decentering and mutual learning. If we can amplify the echoes
between them and hear them together in a new kind of political polyphony intended
to take the competing visions of Europe seriously, we may start to turn ‘unity in
diversity’ into more than a pretty slogan.

⁷ Kalypso Nicolaïdis & Janie Pelabay, *One Union, One Story? In Praise of Europe’s Narrative Diversity*, in REFLECTIONS ON EUROPEAN INTEGRATION 175-193 (D. Phinnemore & A. Warleigh-Lack eds., 2009). See also Janie Pelabay & Kalypso Nicolaïdis, *Comment raconter l’Europe tout en prenant la diversité narrative au sérieux?*, 7 RAISON PUBLIQUE, 63-83 (2007).