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Editorial

The 'Lisbon Urteil' and the Fast Food Culture

The outcome was not a surprise. 'Yes' to the Lisbon Treaty with some (arguably trivial) tinkering with internal German procedures. The naïve might have expected something else: after all, some of the statements of that same court in its highly problematic Maastricht decision could have been construed as pointing towards a different, negative, result. But in its internationally-related case law, the German Constitutional Court has a well-earned reputation of the Dog that Barks but does not Bite. There would be, as the more jaded court watchers among us confidently predicted, lengthy 'humming and hawing;' some high sounding and biting criticism of certain democratic deficiencies of the Union and its Institutions; heavy breathing about the German Court's constitutional responsibilities and important guardianship role. But in what we may now call the regular 'Karlsruhe Miracle', the pig would finally be pronounced Kosher – as indeed turned out to be the case. Despite its history of self-important 'so long as . . .' style rhetoric, of all the Member State courts and tribunals, it would not be the German Constitutional Court which would take it upon itself to derail the process of European integration in so important a case, no matter how inimical that process might be to its understanding (whether right or wrong) of democratic and civic propriety. (The dog might well bite in the pending *Mangold* case – and if it does the feeling of many is that it will be an injury the ECJ gratuitously brought upon itself and the Union.)

What of the content of the decision? Courts, especially supreme courts, do have institutional identities into which their transiently serving members mould themselves. But we should not overdo this form of reification. The quality of reasoning and the ostensible and implicit *Weltanschauung* of any given case are a reflection of the actual individuals who make up the chamber which hands down the decision. In this particular case, the composition of the deciding 'Senate' is as expected – some truly outstanding jurists, one or two about whose intellectual suitability for such high judicial office one might wonder, and the rest with more than adequate competence – as is the case with most of our European high courts. So no surprises here either: a mixed bag. A decision with lights and shadows, some conflicting tendencies, some painful displays of shallowness and lack of political imagination, and some veritable soaring passages and profound reflection.

What is striking in examining the first slew of hurried reactions was the degree to which political and ideological sensibilities determined the assessment of the judgment. The 'European federalists' (to use a convenient if misleading vulgarism) saw the outcome as a victory but there was no shortage of outrage at, say, the alleged disrespect of the German Court towards the European Parliament and more generally its failure to embrace a robust European outlook. What was missing from that corner

of the ring was any acknowledgement that the European institutional and decisional structure and process continue to suffer from very serious democratic deficiencies which Lisbon does not address and that at a minimum the German Court tried to identify these and grapple with them far more seriously than did most Parliaments who ratified Lisbon with Ceaulescian majorities. From those in the other corner who sang the praises of this bulwark of democracy, there was mostly a lamentable failure to appreciate the limited view of polity and politics put on display by the German Court, its failure to use Europe as a means for rethinking in a serious way some aspects of German identity, and the truly provincial, parochial and inward perspective underlying many aspects of the reasoning. But for the syntax, one could at times believe one was reading a decision of the Supreme Court of the United States. In America I call this the ‘World Series’ syndrome: the championship game of a sport (baseball) comprising teams coming exclusively from North America and yet being called the World Series. It is the spirit of the-way-we-do-it-is-the-only-way-we-know-and-hence-the-only-way-to-do-it. There was quite a bit of this in the German decision too.

All in all, one learnt from most of those comments more about the sensibilities of the commentator than about the decision of the German Constitutional Court itself. The real significance of the Lisbon *Urteil* will have to wait for much more careful analysis than that to which we have been treated so far.

If the outcome was no surprise and the ostensible quality of the reasoning ordinary, the hoopla surrounding the case was and still is altogether extraordinary. What explains it? In part it was the carefully calibrated and stage-managed timing of the decision. In part it flowed from the Positional Prestige of the Court, which is independent of the intrinsic quality of the decision: A ‘No’ issued by the Constitutional Court of a major Member State is, however poor the reasoning, more consequential than a ‘No’ coming from a minor one. It is, after all, easier to twist an Irish arm than a German arm. In part it is the Hallow Effect which attaches to certain hallowed institutions and which shapes our very perception of quality. (If it is, say, OUP, it has to be an important book – right?) And in large part, it was that stroke of PR genius – there is some genius associated with the decision after all – whereby an extensive translation into English was released together with the judgment. (We hope other high courts will set aside linguistic pride and emulate the German Constitutional Court at least on that issue.) But all of the above, necessary conditions perhaps, would not have quite produced that impact without the medium. Here was as veritable and poignant an example of the manner in which the medium – cyberspace – not only provides a remarkable conduit for communication but constitutes and shapes the nature and even content of discourse itself. The impact on the world of scholarship and on scholarship itself is huge, even transformative, with both negative and positive implications.

The writing was already on the wall with the advent of the personal computer and word processing. The mechanics of ‘producing’ an article were considerably eased and improved. Many of our readers will not even know of a world of typewriters and real scissors and glue with which one used to ‘cut and paste’. Or of the sinking heart of having to add a single footnote which would require retyping an entire manuscript. The ease of editing means that one can and normally does edit more extensively today

than in the past. From the vantage point of an Editor of *EJIL* throughout its 20 year life – *EJIL* began in the typewriter era! – I can attest to the increased technical polish of the submissions we receive, surely an advantage. But I can also attest to an increase in the volume of submissions *chez-nous* and everywhere else, which is only partially accounted for by the growing prestige of *EJIL*. It is also the result of a more efficient ‘production process’ of writing an article. I cannot say that there has been an increase in quality. This is not hearkening back to the Good Ol’ Days – far from it. It is simply a claim about a low correlation between quantity and quality.

The emergence of the internet and the maturing of cyberspace have accentuated to a huge degree the phenomenon begun by word processing. With what effect? I limit myself to the narrow vantage point of scholarly writing and publication seen from the desk of a Journal editor. Some of the effect is clearly positive – the traditional guardians of the gates to the shrines of Academia such as the Editors-in-Chief of distinguished law journals have lost a lot of that very gateway function and power. Digital access, though the blogosphere, Working Paper series and other forms of digital publishing, has become ubiquitous, less elitist and democratic. What receives prominence is more reader determined than Editor determined. And of course, even traditional publishing can reach many more readers at cheaper prices through on-line access.

Some of it is negative – the traditional guardians of the gates to the shrines of Academia such as the Editors-in-Chief of distinguished law journals have lost a lot of that function and power. Access is ubiquitous, less elitist and self-generated. (No, the repetition is intended).

And, paradoxically, that very ubiquity and ease of cyberspace publishing is restoring the traditional gateway function and power. The bounty that Google showers on us is at times so abundant one risks being swept away by the downpour – salvation lying in the safe haven of a familiar portal or journal the selection process of which we trust to serve up only that which merits attention and preserves our scarcest resource, time. Indeed, the very ease of self-publication coupled with the notorious indeterminacy of scholarly ‘quality’ in legal writing – much more akin to ‘art’ than to ‘science’ – valorizes even more publication legitimated by external referents of ‘quality’. As far as we can measure these things, both as regards the rate of submissions and the scope of readership, *EJIL* continues to grow both despite and because of cyberspace.

But it is not only in relation to ‘access’ to publishing space where the new media is reshaping our world. It is also the *immediacy* of access, the unlimited space (no numbers of pages and words and characters to negotiate with an Editor) and the broadness of the broadcasting range which is so different to the world of yesteryear. If it had not become so much the norm, it would be astonishing: within days (!) of the publication of the Lisbon *Urteil*, lengthy comments and analyses were available to anyone who cared to look. Within weeks they numbered in the dozens and more. There is in my view one huge virtue – the broadness of the conversation which is generated. Journal publishing is a Spectator Sport: someone writes, everyone else reads. There is more instant engagement on the internet, a lot more. It is like a conference with limitless participants and no time constraints for asking questions, raising objections, responding. But often one is left with a bad taste in one’s mouth and not only because

frequently one has the impression that everyone is so busy writing and self-publishing that no time is left for reading.

Let us stick with the culinary metaphor. I take cooking extremely seriously – my manuscript *Kosher, but really good!* is developing nicely and hopefully will be published before too long. Good cooking involves, apart from talent, creativity and good ingredients, also careful planning, meticulous preparation, and, more often than not, patient execution. A bit like serious writing. Likewise, that same well-cooked meal needs to be consumed slowly, with care, attention and patience if one is to detect all the flavours, sense all aromas, experience all textures and savour them all.

At times I feel that certain aspects of cyber publishing bring to scholarship the worst of the Fast Food culture. The preparation is hurried and often formulaic – getting out there first, getting out there fast being considered a virtue. The lack of discipline resulting from unlimited space and no external referents often produces cholesterol-laden, poorly written and poorly edited pieces. And the Fast Food culture also affects consumption. Hurriedly written pieces are hurriedly read, and hurriedly responded to. And that ‘broad conversation’ has its dark side too. ‘If you stuff yourself with a hamburger, you will have no appetite for the good meal waiting at home’ is a phrase that has its equivalent in most cultures. The cyberglut produces subject fatigue. Eventually there will appear some truly thoughtful pieces about this case. But who will actually turn to them after the initial glut or rather gluttony?

The lawyers working on the Lisbon case toiled for many months. The Court itself deliberated and drafted for many more. It is hard to explain at any serious level the rush to judgment, the rush to pronounce oneself in public, often categorically, on the Judgment, when it is so obvious that from so many of the pieces that have appeared, that even talented authors, ostensibly committed to *La Vita Contemplativa*, had little time to think and reflect. McDonalds rather than Steak Diane. The apt comment of the Wisest of all Men in Ecclesiastes 1:2 comes to mind (*Vanitas vanitatum omnia vanitas*).

In this issue

We continue to celebrate our Anniversary volume in this third issue with a significant article addressing the Responsibility-to-Protect norm by Anne Peters in ‘Humanity as the A and Ω of Sovereignty’. The political and normative difficulties implicit in any engagement with this norm coupled with the very real implications for human suffering associated with its demise render Peters’ pivotal argument an easy selection for this issue’s Special Anniversary Article. Lest one article on this exciting topic leaves you wanting, we have included four responses to Peters as well as her excellent rejoinder.

In addition to our Special Anniversary Article, this issue includes an interesting argument from Başak Çali at University College London concerning the commensurability of Dworkin’s interpretivism to the study of international law. This issue also introduces an occasional series, a Critical Review of International Governance, with a timely piece by Francis Maupain on the International Labour Organization and the 2008 Declaration on Social Justice for a Fair Globalization. This articles meshes well with our Anniversary Symposium on Globalization.

This Anniversary Symposium represents a critical grouping of some very thoughtful scholarship on international economic law. We decided to avoid the Globalization and its Discontents meta-approach and see the 'devil' through the details. The line-up of symposium authors ensures an interesting diversity of approaches and sensibilities. It includes Andrew Lang and Joanne Scott, Isabel Feichtner, Veerle Heyvaert, Sungjoon Cho, Francesco Francioni, Jürgen Kurtz and Valentina Vadi.

Two 'EJIL: Debates' in this issue. The first brings to a close our treatment of *Kadi*. Gráinne de Búrca, André Nollkaemper and Iris Canor reply to Pasquale De Sena and Maria Chiara Vitucci's article 'The European Courts and the Security Council: Between *Dédoublement Fonctionnel* and Balancing of Values', found in Issue 1 of this Volume, and the authors respond with a rejoinder. The second EJIL: Debate! produces some hard talk between Tony D'Amato and Jean d'Aspremont on the topic of Soft Law in International Law.

Last but not least. *Man doth not live by bread alone (Deut VIII:3)* – We invite you to turn to **The Last Page** where you will find a poem, *Delhi to Chandigarh*, by noted professor of International Law, Gregory Shaffer. Other poems by international lawyers or related to international law will be published in future issues on **The Last Page**.

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doi: 10.1093/ejil/chp072