

Developments

Interview with Professor Dr. Christoph Möllers, Humboldt University, Berlin, Faculty of Law: On the Occasion of the 60th Anniversary of the German Federal Constitutional Court (“Bundesverfassungsgericht”)

*By Katja Gelinsky**

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Do we still need the German federal constitutional court (BVerfG) at all? “Of course, we do,” argues Christoph Möllers, professor of German constitutional law and philosophy of law at the Humboldt-University in Berlin. However, he is eager to see the BVerfG be influenced more with external non-legal factors. As the BVerfG turns 60 and is being celebrated, Professor Christoph Möllers reviews the changing role of the BVerfG as part of a European legal and political community.

FAZ: The BVerfG is celebrating its 60th anniversary. Usually, with this kind of age, symptoms of wear become visible, strength and vitality are fading. Are any such signs apparent with respect to the BVerfG?

MÖLLERS: I cannot recognize symptoms of age. The Court is still extremely productive. But its context has changed. Germany is no more a young and fragile democracy. This may have altered, even diminished, the relevance of this court.

FAZ: Does the BVerfG have to “accept its increasing trivialization” and to “learn how to prepare for its retirement,” as postulated by your colleague, Professor Christoph Schönberger?

MÖLLERS: Well, I would not put it so drastically. But there is indeed, in some decisions, a somewhat awkward relation between the importance of the court and the way it represents itself. This is especially the case in judgments regarding the European

integration. The court becomes more self-complacent in its rhetoric, though it is losing influence.

FAZ: Would you agree with the statement that the BVerfG should have contained itself to a greater extent in its latest judgment on the European rescue package?¹

MÖLLERS: I read the decision on the European rescue package as a retreat from the court's formerly quite sweeping claim to control the whole process of the European integration. The court refused to review the question of if the rescue of Greece was *ultra vires* with regard to the European treaties, though the plaintiffs had a strong case.

FAZ: Do we still need the BVerfG at all?

MÖLLERS: Of course, we do. The court remains the final arbiter of conflicts within the German political system. In addition to that, the court will be needed to keep our understanding of Basic Rights in Germany up to date, maybe even with some effects beyond this country. The importance of the court became clear after 9/11. There was an open debate about new intrusions into individual rights for the sake of security. The court rejected any change of paradigm and struck down many statutes. Today the powers of the executive in Germany are considerably more limited than they are in the UK, France or the US.

FAZ: The ability of the BVerfG's compass for providing certainty in direction is limited by the increasing power of the European Court of Justice (now: Court of Justice of the European Union – CJEU) in Luxemburg and the European Court of Human Rights (ECtHR) in Strasbourg. Does the BVerfG still have a final say, as it always postulates claims?

MÖLLERS: Karlsruhe becomes a secondary institution. But this second row will remain a powerful place. Most rights cases will still have their origin in national law. And it might happen that the court is ready to fight for its interpretation of German basic rights against the European courts.

* Author is a permanent contributor to the *Frankfurter Allgemeine Zeitung* (FAZ), available at: www.faz.net (last accessed: 23 December 2011). The original version of the interview is available at: <http://www.faz.net/aktuell/feuilleton/sechzig-jahre-bundesverfassungsgericht-das-grundgesetz-ist-nicht-fuer-die-integration-da-11370751.html> (last accessed: 23 December 2011).

¹ The judgment of the German federal constitutional court (BVerfG) on the European rescue package: BVerfG, Case No. 2 BvR 987/10, Sept. 7, 2011. The judgment in German is available at: http://www.bundesverfassungsgericht.de/entscheidungen/rs20110907_2bvr098710.html (last accessed: 23 December 2011). A press release provided by the German federal constitutional court on that judgment is available in English at: <http://www.bundesverfassungsgericht.de/en/press/bvg11-055en.html> (last accessed: 23 December 2011).

FAZ: Could you elaborate the outlined scenario?

MÖLLERS: There seems to emerge a void in the European protection of human rights. The ECJ/CJEU does not seem to be ready to apply rights against acts of the EU. The ECtHR is not always quite sensitive towards national, democratically legitimate peculiarities.

FAZ: Could the BVerfG truly risk a conflict with the Court in Strasbourg, for example, by refusing to implement a judgment? The argument is made that such a rejecting stance of the BVerfG might lead to a weakening of European human rights protection, by encouraging other member states like Russia or Turkey to adopt a rejecting position regarding subsequent judgments requiring specific standards with respect to human rights protection.

MÖLLERS: To be sure, neither the German court, nor the European courts have any interest in an open conflict. But especially the ECtHR seems quite vulnerable at the moment. There is critique not only from Russia, but also from Western countries like Germany and the UK. In such a political context, a self-conscious constitutional court might prevail against an international institution.

FAZ: Thus, should the BVerfG have ignored the ruling of the Strasbourg Court, which declared parts of Germany's legal approach to preventive custody of potentially dangerous criminal offenders as a violation of human rights?

MÖLLERS: No, in this case, it was wise for the German court to avoid any conflict. The court knew that there was a problem, and it had not made use of all procedural opportunities to correct a careless legislator. Therefore, the decision of the ECtHR opened a new chance for the German court to correct the political process, and its own jurisprudence.

FAZ: One of the core responsibilities of the BVerfG is the provision of strong democratic structures in Germany. Can the BVerfG similarly be the guard keeper of the democratic structures regarding the European integration process?

MÖLLERS: Different from the protection of human rights, it seems to me that the court is not able to cope with the role of a guardian of a European democracy to come. To my mind, the court underestimated in its jurisprudence the variety of democracies within Europe, and the openness of the concept of democracy itself. It is not possible to distill an ideal democracy out of the German (!) constitution and to present it as a normative blueprint for the European integration. And it is no accident that the court never dared to strike down one piece of European law.

FAZ: However, the BVerfG has empathically proclaimed its authority for drawing the limits of transferring sovereignty to the European Union. Is such a declaration merely a rhetorical or symbolic saber rattling on parts of the BVerfG?

MÖLLERS: I have that impression. For the big cases, Maastricht,² Lisbon,³ it was virtually impossible for the court to stop the treaty amendment procedure. This would have endangered its own position within the German constitutional system.

FAZ: Would you encourage the BVerfG to restrain itself?

MÖLLERS: I think the court should be more explicit about its role and its limits. There are political constellations in which the court is simply not able to bear the political burden of a certain decision. The court is not able to stop the process of European integration. If the court were ready to articulate its own limits more open, this could also strengthen the persuasiveness of its legal reasoning.

FAZ: Are you suggesting a need for more political arguments influencing the decisions of the BVerfG?

MÖLLERS: The court should not politicize. This would obviously undermine its legitimacy. But it could, indeed, be more sensitive towards the peculiarities of the political process. This court applies a stricter scrutiny to the political process than all other constitutional courts I would know of. It requires rational arguments and a standard of systematic coherence from the political process. In other words, It applies administrative law doctrines to the democratic legislator. Of course, it sounds great to expect a “rational” and coherent legislator. But, on closer view, this it is an unfortunate idealization of the political process that always depends on compromise and openness to moods within the society. Democratic decision-making cannot be, in that sense, be “rational.” We count votes because we don’t know or do not agree upon what is rational.

FAZ: Consequently, would you prefer political candidates for the office of constitutional judges?

MÖLLERS: Yes, I think so. There is no doubt that the professional judges and the many professors on the court make it an intellectually brilliant institution. But still, more politicians on the court knowing the other side of the story could be helpful.

² Judgment of the BVerfG, Case No. 2 BvR 2134/92, Oct. 12, 1993.

³ Judgment of the BVerfG, Case No. 2 BvE 2/08. Jun. 6, 2009. The German Law Journal published a special issue on the Lisbon judgment of the BVerfG. The full issue special issue (Vol. 10, No. 8) is available at: http://www.germanlawjournal.com/pdfs/FullIssues/Vol_10_No_08.pdf (last accessed: 23 December 2011).

FAZ: This view is subject to controversial discussions. Particularly, members of the political class approached a potential nomination of the former state minister of Saarland, Mr. Peter Müller, rather skeptically.

MÖLLERS: This kind of critique stems from a certain self-hatred within the political class. And, politicians talk badly about politicians because they think this is popular. But it is not part of the logic of a constitutional court that politicians have to stay out. A specialized constitutional court is not just a normal high court, it is explicitly an actor within the political system.

FAZ: The German constitutional judiciary has been seen as a role model for the composition of constitutional courts in several other jurisdictions. Will this international importance be gradually weakened by the growing importance of European courts?

MÖLLERS: More important than the European courts is the relevance of the US Supreme Court for other national courts. If the Americanization of the world is slowing down, the German court may become a more important model for other courts.

FAZ: Do we have to fear a loss of confidence in the BVerfG, established through a long history of constitutional cases, as a result of European integration and globalization?

MÖLLERS: I do not see the threat of a loss. The idea of “constitutional patriotism” developed by Dolf Sternberger and Jürgen Habermas was an intellectual project. The court is quite popular, but there is still no constitutional folklore in Germany. Germans do not pilgrim to Herrenchiemsee and Bonn,⁴ as Americans do to Philadelphia. And almost nobody knows the names of our framers.⁵

FAZ: German basic law and the decisions of the BVerfG are said to be a catalyst (motor) initiating moral identity and integration. Is that an unjustified claim?

MÖLLERS: The idea that constitutions “integrate” societies seems strange to me. Integration is the dissolution of differences. But modern constitutions protect differences. One might rather call the task of the *Grundgesetz* a benevolent disintegration, especially for the German society that tends to overrate consensus and homogeneity.

⁴ In 1948 the Herrenchiemsee conference was assembled in order to discuss and draft a first version of a constitution for occupied Germany. The results of this conference were later used by the parliamentary council in Bonn to particularize the constitution. On May 8, 1949 the parliamentary council voted on and passed the German constitution (*Grundgesetz*), which was proclaimed on May 23, 1949.

⁵ The following representatives of the German *Länder* were the leading members of the Herrenchiemsee conference: Anton Pfeiffer (Chair), Paul Zürcher, Josef Schwalber, Theodor Spitta, Wilhelm Drexelius, Hermann Louis Brill, Justus Danckwerts, Theodor Kordt, Adolf Süsterhenn, Fritz Baade, Josef Beyerle, Carlo Schmid and Otto Suhr. Additionally, the listed members were supported by advising staff and legal experts.

FAZ: How and in which legal areas has the BVerfG still authority to render significant decisions in order to prevent itself from becoming a mere audience to its own judgments?

MÖLLERS: A new challenge for the court could be to develop more openness and flexibility with regard to its own legal reasoning. Sometimes, the judgments seem quite self-referential. The court tends to cling to its own jurisprudence. It could be more sensitive toward the external factors of a given case, more irritated by its own old solutions, to evolve the case law. But this is obviously something easier to recommend from outside than to be done from within the court.