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Should Europe listen to Justice Coney Barrett ?

A transatlantic reflection on constitutional law and its interpretation

Following her most recent publication 'Listening to the Law'², Justice Amy Coney Barrett has reached a wider public. Her writings have become of interest, even to those law practitioners in Europe who are unfamiliar with the U.S. Constitution and Supreme Court rulings, including the decision making process. This contribution by a prominent U.S. Supreme Court member coincides with increased tensions in the transatlantic relationship between the U.S. administration and European governments. The divisions on issues of international law are wide and varied, as claims for Greenland and Canada, the kidnapping of Venezuela's dictator and the volatile and unstrategic belligerence of the U.S. against the Islamic Republic of Iran illustrate.

At a time of transatlantic upheaval, when domestic U.S. law and international rules are routinely trumped, it is opportune that an outstanding practitioner and academic has given an very elegant and readable introduction to the U.S. constitutional system, its institutions and – last but not least – their spirit. Although several issues of Justice Coney Barrett's book concern personal matters and are therefore less significant to academic readers, the book remains a valuable introduction into the theory and practice of the U.S. constitution and the judiciary.

In the European Union, some members of the ruling elite including the judges in Luxembourg, believe in their (discretionary) defence of EU values and the monopolistic interpretation of the rule of law (Art. 2, 5, 7 TEU). The judgments of the ECJ in the Euro-Crisis, in addition to those in the arena of protecting migrants and „refugees,“ though unanimously decided by the courts have – mainly in Germany with her distinguished legal culture – provoked protest and challenge.³

Although EU law is not underpinned by a legal constitution, the ECJ claims its superiority to national legislation and the monopoly of its interpretation. Despite varied national legal systems and different degrees of judicial independence, the role of judge-made law by the ECJ has attracted common criticism. Only recently the ECJ

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² Reflections on the Court and Constitution, New York 2025

³ Degenhart/Horn/Kerber/Murswiek: Unabhängigkeit durch rechtliche Kontrolle, FAZ 6.6.2020 <https://www.faz.net/aktuell/wirtschaft/ezb-unabhaengigkeit-durch-rechtliche-kontrolle-16797228.html>

ruled that an Afghan asylum seeker though being validly rejected is entitled to receive substantial subsidies from the German state.⁴

Where the president of the ECJ continues to defend the superiority of EU law and the monopoly of its interpretation by the ECJ,⁵ judicial restraint might become an indispensable virtue.

In this context, Justice Coney Barrett's book might plausibly become a source of inspiration for the EU Justices. In the chapter on judicial power and restraint, she explains how the Supreme Court from its early rulings, strengthened its authority by well motivated, sound and nonpolitical reviews,⁶ resisting any temptation to take sides in the political debate. The quotation of Odysseus's self binding restriction by tying himself to resist the sirens' enchantment, illustrates⁷ the never ending temptation of Supreme Courts to wield power rather than to construe law. That temptation is common to all last instance courts and can only be overcome by the application of judges' ethics of judicial restraint, a virtue which has become rare. Justice Böckenförde, a legendary member of German Constitutional Court (from 1984-1996) as an anti-overreach 'inflationary dissenter', had undisputed authority as judge, although continuously intervening in political debate after his tenure.⁸

Of course, the exercise of judicial restraint involves conceptual tight rope walking for the judges because most last instance decisions are highly political in character. The temptation of executive power to appoint judges holding particular political orientations is permanent. If the reader of Coney Barrett's appraisal of the U.S. judicial system understands her correctly, the best remedy against the politicisation of last instance courts is self restraint on both sides. Otherwise there could be reciprocal incentive to save the constitution from justices and from executive power appointing them.⁹

In the U.S. the academic question of how to interpret and construe constitutional norms and to make them binding for executive power and lower courts focuses on the debate on Originalism and *Stare Decisis*. Coney Barrett has taken side in this debate¹⁰ which is cautiously mentioned in her book.

For every last instance court that question remains an unescapable challenge. The answers delivered by legal theory are inconsistent. *Kelsen* naively believed that law

⁴ Judgement as of June 4th 2026 case C 621/24 <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62024CJ0621>

⁵ See Verfassungsblog as of 08.10.2020 „No Member State is More Equal than Others“ <https://verfassungsblog.de/author/koen-lenaerts/>

⁶ Coney Barret op.cit. page 146 f. describing the Marbury v. Madison judgement praising Chief Justice Marshall's wisdom.

⁷ Coney Barret op.cit. p. 149

⁸ See the obituary for Böckenförde by the President of the Constitutional Court Andreas Voßkuhle, *Der Staat* 58 (2019), p. 451-456. In his 12 years of tenure Böckenförde wrote 11 dissenting opinions keeping however his commitment against abortion („Donum vitae“) outside the court.

⁹ Coney Barret quotes the example of F.D. Roosevelt who suspected the Supreme Court acting as a policy making body.op.cit. p.154 subseq. Lübke-Wolf by abstaining from a vote in the ESM case argued that the attempt to submit political power to constitutional rule, the judiciary should accept limits of its ambition. See her dissenting opinion <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/DE/2014/bvg14-009.html>

¹⁰ Originalism and *Stare Decisis*, 92 *Notre Dame Review* 1921 (2017)

would be self enforcing and judges could therefore not fail to apply the law "correctly" because law contains simple normative commands which the obedient judge would simply have to stick to.¹¹ Later, Kelsen admitted that the protection of the constitution could require a constitutional court,¹² but maintained his position that law does not need power but on the contrary would be a politically neutral way of ringfencing power.

His opponent *Carl Schmitt*, even in his earliest writings, denied the political neutrality of law and particularly challenged the „objectiveness“ of judge made law¹³. He also examined the utility of "collegiality". That principle and its advantage for the decision making process is impressively delineated by Coney Barrett when she qualifies the unavoidable disagreements of judges as "a source of strength".¹⁴ In that regard the U.S. Supreme Court and the German Constitutional Court seem to be on at least partially common ground: decisions are prepared by intense preceding discussions amongst the judges.¹⁵

To strengthen the authority of Supreme Court judgements, the culture of preparing decisions is of utmost importance. Coney-Barrett gives some intriguing insight on the decision making process, the division of labour between the judges and their clerks, the oral hearings, the bench statement and the Justices's conference to obtain a decisive vote. All this seems fairly different from the practice of continental European Courts with a Rapporteur in the German Constitutional Court and an Advocate General in the ECJ. But the procedure works even though the Justices express different opinions and assessments. Bench statements add to the public transparency of the court procedure.¹⁶

An important chapter deals with the law clerks. As Coney Barrett had been a long serving clerk to important Justices like Antonin Scalia, she has particular experience in that field. Although her description of her career as clerk sounds authentic; the reader gets to know little about the factual partition of responsibility and accountability between Justice and clerk. Last instance courts cannot do without clerks. At the Constitution Council in France the members (not Justices) do not even write one line.¹⁷ In the German Constitutional Court the number of clerks is growing.¹⁸ It is unclear how to ensure that only Justices finally take decisions and not factually clerks who are not appointed and thus not accountable.

Last instance Courts like the U.S. Supreme Court and the German Constitutional Court face the common problem of selecting the cases of most significance. In the U.S. Supreme Court, Coney Barrett reports a well established practice of selecting the "significant cases" (about 60 cases out of thousands of petitions per year). Not only in

¹¹ Hans Kelsen, *Reine Rechtslehre*, Studienausgabe 1960, Tübingen/Wien 2017 p. 596 ff.

¹² Kelsen, *Wer soll der Hüter der Verfassung sein*?, Berlin 1931

¹³ Carl Schmitt, *Gesetz und Urteil*, 2nd edition Munich 1969 of the original version of 1912 page 71 ff.

¹⁴ Op.cit. p.55. See for further insight on Schmitt's concept in his textbook „Constitutional theory“ first edited in 1928; translated by Jeffrey Seitzer, London 2008

¹⁵ See Lübke-Wolf, *Beratungskulturen*, Berlin 2022

<https://www.kas.de/documents/252038/16166715/Beratungskulturen.+Wie+Verfassungsgerichte+arbeiten%2C+und+wovon+es+abh%C3%A4ngt%2C+ob+sie+integrieren+oder+polarisieren.pdf/a68323eo-dd86-6b7b-202e-bd4130edb511?t=1658403065191>

¹⁶ Coney Barret op. cit. p. 98 subseq.

¹⁷ The rulings are de facto written be civil servants from the Conseil d'Etat.

¹⁸ They are called academic assistants and are assured of a promising career. Some critical observers in the light of their factual power speak of the „third Senate“ of the BVerfG.

that field of "granting cert" is the contribution of law clerks indispensable, but the whole process as Coney Barrett admits "carries mystery."¹⁹ So does the admittance procedure for individual complaints in the German Constitutional Court²⁰. Though the relevant norm gives clear criteria, the decision of non-admission (taken without public audience) cannot be challenged at any point²¹. That is clearly a lacuna in the German legal system despite the necessity of protecting the Court from collapse due to a flood of unfounded petitions.

In her chapter on U.S. federalism²² Coney Barrett deals with the special role of the Supreme Court in ringfencing federal government and defending the fields of legislative competence of the states. She praises the "accommodating force" of federalism²³ and shows that the common ground of all Americans does not lie in centralised legal uniformity but in the constitutional organisation of diversity. For a country whose population (apart from the First Nations of Indian tribes) consists of immigrants, the reconnaissance of the constitutional framework does not only generate pride but creates the common ground to be a nation.

The young Henry Kissinger, despite his European origins and the knowledge of his experienced father, proposed in 1965 that Europe should copy the U.S. federalism²⁴. Despite the respect of this author for Dr. Kissinger, that postulate is neither desirable nor realisable. Europe including the EU is composed of sovereign nations, each one with a different culture and legal traditions. The concept of a European Community of Nations called EU based on European Treaties (TEU, TFEU) is already at the outer reaches of what could be achieved: rule of law instead of war. European federalists in the European Commission and the European Law Courts, continuously strive for "more Europe" and consider the procedure of "amending" the Treaties as too onerous. They hope that instead, both Commission and the ECJ should autonomously develop "more" Europe from within. The example of discretionary ultra vires powers by EU institutions (mainly ECB) not ringfenced by the ECJ should awake the European public (which remains national). It should additionally allow an enlightened discussion on the benefits of originalism in European Law.

Justice Coney Barrett proudly reminds the reader, that the US has become a firm union under the rule of a Constitution which despite 26 amendments has remained a concise text full of vigour bearing a spirit of legal nobility.²⁵ The law is overwhelmingly considered in Western democracies to be legitimate *per se*. It therefore needs to be listened to.

¹⁹ Coney Barret op. cit. p. 137

²⁰ See § 93 a BVerfGG

²¹ See § 93 d BVerfGG

²² Coney Barret op. cit. p. 223

²³ Coney Barret op. cit. p. 231 f.

²⁴ Kissinger, A troubled partnership, A reappraisal of the Atlantic alliance, 1965 p. 32 f. His father Louis Kissinger had been a grammar School teacher at the Frankonian town Fürth.

²⁵ In her pride she is not alone. Admiration for the American constitution is widely shared by Hannah Arendt, On Revolution, New York 1965 (pocket version) chapter IV p. 141

Justice Coney Barrett's book offers a treasure of insightful observations. Hopefully it will be perused in Europe to inspire pragmatic reform²⁶ and remind all the transatlantic community that the rule of law is the pillar of peace and stability and the key asset of the free world.

²⁶ See Kerber at the Foundation of European reform march 2015 <https://www.europolis-online.org/allgemein/on-european-order-2>