Cruz Villalón’s ‚Gauweiler' Opinion: Lost in Platitudes

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On 14 January 2015, Advocate General Cruz Villalón delivered his Opinion in the *Gauweiler* case. The Opinion had been eagerly awaited, because it concerns the first reference ever for a preliminary ruling made by the German Constitutional Court (GCC), after decades of refusal to engage into direct dialogue with the ECJ. Nevertheless, it would be misguided to portray the GCC’s request for a preliminary ruling as a major turning point in its case law, heralding a new, gentler era in its relationship with the ECJ. For several reasons, which have been discussed extensively elsewhere, it seems that the preliminary reference procedure was not used for purposes of ‘judicial cooperation’ or ‘judicial dialogue’. One of those reasons is that the GCC claims for itself the last word on the legality of the impugned EU act. Even if the ECJ were to conclude that the Union had remained within the limits of its powers as laid down in the Treaties and, thus, that its action was valid, the GCC reserves to itself the right to review the action in light of Germany’s constitutional identity.

As was to be expected, the Advocate General disapproves of what he calls the GCC’s ‘reservation of identity’. His objection is twofold. First, he holds that the EU legal order would be placed in a subordinate position if domestic authorities could set aside any Union action that violates their constitutional identity. That is particularly the case, the Advocate General says, if that ‘constitutional identity’ is stated to be different from the ‘national identity’ referred to in Article 4(2) TEU. Second, the Advocate General reminds us that the constitutional traditions common to the Member States have been used by the ECJ to construct a system of values for the Union itself.

Few would disagree with the Advocate’s General observations. However, it may be doubted whether this kind of general truisms will convince the GCC not to engage in identity review of Union action, or even merely to give the ECJ a prior opportunity to rule on the compatibility of the action with the EU Treaty’s own identity clause. To achieve this aim, I think it would be necessary for the EU institutions to show more empathy for the GCC and the concern it has about the impact of EU law on German constitutional identity. A good starting point would be to try to understand the reasons behind the GCC’s refusal to extend its reference in *Gauweiler* to Article 4(2) TEU. In its order for reference, the GCC offered the following explanation: Article 4(2) TEU does not have the same scope and function as Article 79(3) of the German Basic Law, which protects the identity of the German constitution. First, German constitutional identity could not be equated with the concept of national identity in Article 4(2) TEU. Second, the GCC regards constitutional identity as a trump, which must always take precedence over competing interests. National identity as enshrined in Article 4(2) TEU, by contrast, merely serves as a legitimate interest that may be balanced against others.

Again, these propositions are correct. The GCC is right in highlighting that – strictly speaking – the identity clause enshrined in the EU Treaty does not protect constitutional identity, but national identity, that is, the identity of national groups. After all, the text of the clause only speaks of *national* identity. True, in order for it to come within the reach of the Treaty provision, national identity must be reflected in the State’s fundamental structures, constitutional or political. Yet it is not required that these fundamental structures be part of the *identity* of the domestic constitution. Furthermore, the GCC correctly holds that the obligation of respect for national identity laid down in the EU Treaty does not automatically override competing, integration-oriented interests, but needs to be reconciled with them. That a fair balance must be struck between European integration and respect for national identity does not only follow from the Treaties. In a multinational polity like the Union, it is also a matter of justice that integration and accommodation of national identities are reconciled.

Yet however true the GCC’s premises may be, they too are mere platitudes. They are not capable of justifying the conclusion, drawn by the GCC, that any preliminary reference questioning the compatibility of Union action with Article 4(2) TEU would be superfluous when German constitutional identity is at stake. For indeed there will be many cases in which the disputed constitutional norm not only belongs to the identity of its constitution, but is also connected to the State’s national identity. The reason is that the identity of a constitution and the identity of a national group may (and often do) influence each other, and interact. The constitutional principle at issue in *Gauweiler* illustrates this perfectly. At stake is the principle of democracy, which is considered to be part of

German constitutional identity (Art. 79(3) and 20 BL). Given Germany's past of dictatorship, it is plausible that this constitutional precept also mirrors German national identity, and therefore falls within the scope of the EU Treaty's identity clause. In a situation like this, where an EU act may be in conflict with a constitutional norm that is protected under the EU Treaty, the ECJ should first be allowed to review the compatibility of the impugned act with the identity clause. Hence the GCC would have done well to extend its reference for a preliminary ruling to Article 4(2) TEU.

Does this mean that the GCC as well as the Advocate General in *Gauweiler* are prisoners of their own truths, unwilling or unable to reach out to the other side? Perhaps it does. Yet there might be a way to present the GCC's order for reference in a better light. For it may be the case that the GCC's elaboration on the dissimilarities between Article 4(2) TEU and Article 79(3) of the German Basic Law masks, in fact, another motive, which is more intelligible. Indeed, I surmise that the real reason behind the GCC's profound reluctance to extend its order for reference to the EU Treaty's identity clause is simply a lack of confidence in the ECJ when it comes to identity review of Union action. Perhaps it is unfair that the GCC does not even give the ECJ the chance to prove itself in the *Gauweiler* case. On the other hand, the ECJ could have done more to win the national constitutional courts' trust in earlier cases in which secondary EU law generated concerns about national identity.

First, the ECJ's evaluation of Union action colliding with a Member State's national identity is hard to predict in situations where the EU legislature did not consider the specific issue of the proper balance between European integration and respect for national identity in the relevant area of law. Sometimes the Court is prepared to take national identity concerns into account (eg, *Groener*, *Michaniki*), sometimes it is not (eg, *Piageme*). Furthermore, even in situations in which attention is paid to national identity, it remains difficult to tell whether the particular national reading of the EU act will eventually be upheld·(compare *Groener* and *Michaniki*).

Second, in cases in which the EU legislature did have a clear view of the right relationship between European integration and respect for national identity, and decided to tip the scales in favour of integration and the uniform interpretation of EU law, the ECJ does not second-guess the legislature's judgement. In *Melloni*, for instance, the ECJ uncritically accepted the EU legislature's appraisal of what is the right relationship between the purpose of the EAW Framework Decision, on the one hand, and respect for diverging national identities regarding the protection of the right to a fair trial and the rights of the defence, on the other. The degree of harmonisation that the EU legislature envisioned in that particular area of law was not called into question by the ECJ. Consequently, the question may be raised whether Article 4(2) TEU truly serves as a ground for review of legality of Union action.

Moreover, disquiet as to whether the ECJ truly polices the limits laid down in the identity clause may be increased by the substance of the constitutional norm at issue. At stake in *Gauweiler* is not a constitutional right, but the principle of democratic rule. Even though Article 2 TEU lists the principle of democracy among the values on which the EU is founded, and Article 10 TEU proclaims that the functioning of the EU is based on representative democracy, the ECJ cannot demonstrate an impressive track record in enforcing that principle. In these circumstances, it should not surprise us that the GCC insists in these proceedings on reserving identity review power to itself.

Whether the ECJ should enforce the EU Treaty's identity clause against other Union institutions is, in my view, one of the primary issues raised by the *Gauweiler* case and a question of paramount importance. It is unfortunate that the Advocate General does not address it in his Opinion, taking instead a more superficial reading of the GCC's order for reference as the basis for his findings. Of course, it may still be hoped that the ECJ will pick up the gauntlet, so that the GCC's ruling in *Gauweiler* might, in future textbooks, be hailed as a new *Solange I* decision, which instigated the ECJ to take seriously not fundamental rights, but national identity and democracy. Yet such hope certainly has diminished after the Advocate's General Opinion.

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