Jürgen Neyer on Normative Realism

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On Monday 2 November, Professor Jürgen Neyer delivered an Architecture Lecture at the University of Amsterdam’s law faculty carrying the simple but evocative title “What is wrong with EU decision-making?”. According to Neyer, it is the lack of contestation that eventually becomes unsustainable for the European Union: “Discourse and conflict are two sides of the same coin – they are both necessary.”

The state of the EU’s political system

Neyer, a political scientist at the European University Viadrina, was the second political scientist in a short time to speak about contestation at the UvA law faculty. A week earlier, prof. Antje Wiener had emphasised the central role of contestation, based on her recent book A Theory of Contestation. Neyer’s monograph on the subject, The Justification of Europe: A Political Theory of Supranational Integration however preceded the former by two years, and Neyer had a somewhat narrower understanding of the concept of contestation than Wiener. He presented a cyclical model of decision-making, in which business as usual consists of the negotiation and validation of policies, and subsequent deliberation within the parameters of the agreement (in the vernacular of Elster, which expressly served as a source of inspiration, the terms would be bargaining, voting, and arguing). Neyer’s understanding of validated agreements was rather broad, he took this to encompass whatever policy output European decision-makers produced.

It is only beyond the ‘business as usual’ model of policy making that contestation comes into the picture. When parties to the agreement no longer consider it justified, normally, the path to renegotiation would be paved through contestation: the voicing of disagreement outside of the established parameters. It may occur when actors were excluded or marginalised in the negotiating process, when new actors emerge (such as new member states, or EU bodies, MH), or when the agreement produces effects that are in the long run considered perverse or uncontrollable. It is according to Neyer the validation and the contestation phases that the EU is particularly bad at: the validation process is generally highly entrenched, requiring unanimity or supermajority for an agreement to emerge, while the consensual nature of debates in the EU means that contestation hardly ever happens. It is for this reason, Neyer argues, that in many EU member states, political parties at the left and right fringes are becoming more popular. They do not contest elements of the EU, or individual agreements, but the EU as a whole.
Does this account fly or not?

Neyer’s analysis of European policy-making and its discontents was met by an engaging audience. Discussant Ingo Venzke felt that the typology had clear “purchase” in the sense that it identified well some of the EU’s weaknesses. However, he also felt that agreements, upon validation, likely left more space for contingent (and therefore contesting) interpretations than the scheme suggested. He also questioned the modesty of the model’s normative premises. In spite of Neyer’s call for ‘normative realism’, defined as ‘the normative function that one may realistically expect of the EU’, Venzke argued that the TEU’s articles 9-12, containing the provisions on democratic principles may offer guidance in this regard. Neyer however presented himself as a political realist with regard to the question of the EU’s democratic ambitions, arguing that, if we were to take all normative declarations at their face value, “China and the Soviet Union would also be democracies”. When pressed on the matter, he declared himself relatively pessimistic of the possibility of a European-level democracy, which would in his opinion require the formation of a deliberating demos, which he does not currently see materialising. At the same time, he also did not share the ambition of European democratisation, arguing that it is a big word to bandy about in a precarious context. Instead, a ‘demoi-cracy’ of member states, engaged in continuous dialogue based on process-values such as responsiveness, inclusion, participation, openness and fairness would lend the EU sufficient legitimising force.

An argument that could be brought against Neyer’s policy-making typology relates to the role of the Court of Justice of the European Union. As was put forward, a frequent argument is that court litigation has the potential of developing European laws into directions that could not have been expected at the point of the validation of the agreement, and that occasionally offers the court the opportunity of presenting itself as a judicial activist. Neyer however was not convinced that this account posed a strong challenge to his analysis of the consensus-based closed-circuit nature of EU decision-making. After all, he argued, the court is mandated to function within the parameters of the treaties, and generally produces outcomes that are congruent with it. Occasionally landmark judgments, as well as the court’s invention of general principles, only serve to demonstrate the strong entrenchment, and therefore problematic validation structure of EU policy-making.

A question posed by the author of this blog concerned Neyer’s identification of the validation and contestation phase as the most problematic stages of the EU’s policy cycle. According to an apt aphorism of Joseph Weiler, the EU’s balance of power is premised on Germany pretending not be too powerful, and France pretending not to notice. If it were accepted that the constellation of inputs into any negotiating process is already inherently unequal, this would account for many of the flaws observed in terms of validation and contestation: after all, a constitutional order that reflects the preferences of the most powerful actors is best locked away in a complex validation process, whereas a realisation among actors of intrinsic inequalities renders overt contestation either futile or unproductive. Neyer’s response to this scenario was an insistence on the creation of better avenues of contestation, for example through the parliamentarisation of the European Council, to counter and politicise the inherent tendencies of the European constitutional order.
An important point of criticism concerned the high level of abstraction of Neyer’s model, in the face of widely divergent practices. Given the generalised postulates of his model, it would be difficult to see it fit to all the various contexts of EU decision-making, ranging from constitution-like treaty negotiations with a horizontal impact to various vertical, sectoral legislative procedures and coordinating measures. In this regard, Neyer conceded that the model was under development and required further elaboration. However, pending the further work, he held that there were no clear signs defying the model’s applicability to EU decision-making architecture writ large.

The norm and the exception in decision-making

Many of Neyer’s postulates concerning the functioning and design faults of EU policy-making concern the interpretive question of what the constitutes a ‘norm’ in the functioning of the EU’s decision-making architecture. What is normal, business as usual, and what is rather exceptional, anomalous? Examples of the centrality of this problem abound, as was evident in the discussion. Is court activism a neo-functionalist and inalienable feature of the European constitutional order, or rather limited, and interpretable within the design of the original treaties? Is the Commission’s recent decision to abandon its advocacy of closed-door arbitration in the TTIP (in favour of a court-based system of dispute settlement) evidence of the responsiveness of the political system, or rather evidence of its extra-ordinary imbalance and politicisation? When can we speak of a sufficient degree of dialogue between European citizens from different member states, and is the insistence on a demos to constitute a democracy actually an empirical position? These questions, while essential to our assessment of the European architecture, remain open. What we did take home however was an original and stimulating new thinking tool by way of Neyer’s four-step typology.

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