Verfassungsblog
ON MATTERS CONSTITUTIONAL

Brother's Keeper

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L'Europe se fera dans les crises, Jean Monnet once famously said. That *bon mot* has been quoted rather once too often than once too little over the past decade, especially since it seems to have been quite a while ago that it last actually made any sense: In this day and age, *L'Europe se ne fait* obviously not at all *dans les crises*, quite the opposite is true. The idea that in the hour of need the states of Europe would pull themselves together and overcome their petty national egotism in the sense of common responsibility has been mercilessly refuted by experience, not just once but twice, thrice over: in the euro crisis, in the refugee crisis, and in the current rule of law crisis. Instead of tackling these by means of structural reforms and powerful leaps of integration, they were at best tempered down to a halfway endurable degree and thereby made permanent. No κρίσις whatsoever, instead half-hearted muddling through and no end in sight.

And yet… perhaps dear old Monnet, if one keeps a bit of distance to the heroic redemption and liberation connotations of his quote, was not entirely wrong after all. Even the euro crisis, as terrible as it was in so many respects, had changed one thing for the better: It had triggered a political conversation about austerity and budgetary discipline, not just between nation states but cutting right across them and depriving another of those tired old European truisms of much of its corroboration: that there was no such thing as a European public sphere.

Taking care of each other

Even the big crisis of the present days, the one about the rule of law in Poland, Hungary and other EU member states, might have some subcutaneous *faisant-l'-Europe* effect of that sort. This is what I thought when I read a recent decision by the Karlsruhe Higher Regional Court (Ausl 301 AR 95/18), which Klaus Gärditz had pointed out to me and which has not yet received the attention it deserves.

A former version of this post had included a false link to the decision, apologies!

The case is about a man from Latvia who was wanted in Poland and arrested in Germany. The man claimed that his extradition to Poland would breach his right to a fair trial because of the lack of independence of the Polish judiciary. This, according to the seminal *Celmer* judgment of the CJEU of last July, is a valid point: Before extraditing someone to Poland, a court must ensure that the independence of the judiciary is indeed not compromised to a degree that constitutes a "real risk" to the right to a fair trial. If it finds it is, and if there are substantial reasons to fear that the extradited person would actually be exposed to this "real risk" – then the general principle of mutual trust between the judicial systems of the individual EU member states must step aside: no extradition!

For many, the CJEU ruling was a disappointment: that's an *if* of rather ample proportions the court has set up there. How is a judge in a courthouse somewhere in Europe supposed to assess the "real danger" a person would find herself in before a Polish court? The way the Karlsruhe Court handled that task, however, seems to indicate that something rather fascinating is beginning to develop in the European court landscape – a practice of transnational judicial taking care of each other.

As for the first prong of the *Celmer* test, the question if there is a "real risk" for the right to a fair trial in Poland in general is answered very clearly by the Karlsruhe court: Yes, there is. It is "obvious that it is precisely the retirement of judges in the higher courts and their replacement with 'line-toeing judges' that the lower courts can be influenced by." The Polish unfair-trial bomb is made live by the new legal remedy

of an "extraordinary appeal" introduced in 2016, which enables numerous state bodies to bring a case before the Supreme Court under rather vague conditions, even if the parties themselves have not lodged an appeal at all – the Supreme Court being the aim of the relentless attacks at the hands of PiS in order to turn it into a political tool through forced retirements and newly established special chambers. On top of that, the government has the possibility to get insubordinate judges in line by means of disciplinary proceedings (which is apparently already being used extensively).

If!

With respect to the second prong of the *Celmer* test, the concrete risk for the extradited person, the Karlsruhe judges sent their colleagues at the Polish district court a list of 12 questions, some of them very detailed. The answers appeared to the Karlsruhe court to be "reliable and credible enough" and sufficiently convincing to green-light the extradition in the end. The decisive factor for the Karlsruhe court is the degree of likelihood that an "extraordinary complaint" to the Supreme Court or disciplinary proceedings should actually occur – which it considers rather low in this particular case. The man in question is wanted for VAT fraud, i.e. ordinary crime, and there is no indication for a possible referral to the European Court of Justice (which the Polish court might be prevented to decide upon for fear of disciplinary action), nor for the assumption that the defendant's status as a foreigner could be detrimental to him.

One of the questions to the Polish District Court was if it would give a binding promise under international law that no disciplinary proceedings would be initiated against any of the deciding judges. Of course, the district court couldn't give such a promise. Fine, said the Karlsruhe court, we accept that, but we make the extradition dependent on the German embassy being allowed to take part in the trial and visit the defendant in custody. "On the basis of this (...) restriction which is by no means unusual in the context of extradition to non-member states, the Senate excludes the possibility that political or otherwise inappropriate influence might be exerted on the present proceedings and that the person being persecuted might thus be subjected to an unfair trial."

To me, this approach seems rather elegant. It signals to the PiS that they are under observation and will have to suffer consequences if they insist in subjugating their judiciary. It also signals to the oppressed Polish judiciary that this is not a matter of holding them liable for the sins of their oppressors. This is about strengthening the Polish judiciary, not weakening it. Such a comparatively low-key practice of judiciaries mutually looking out for each other is much harder to instrumentalize politically than more spectacular and high-profile interventions by the EU institutions. The Karlsruhe Higher Regional Court isn't encroaching on Poland's competences. It isn't even minding Poland's business. It just tells Poland: Hey, you want something from us, namely to extradite this alleged VAT fraudster to you. Sure, we'll hand him over to you, no problem. If you give him a fair trial. If! That *If* is articulated not by some demonizable neighboring state or overbearing Brussels authority, but ideally by all sorts of simple, ordinary courts from Ireland, from Germany, from all over Europe, in a polite but determined manner, just doing their job and, while doing it, making sure that their Polish colleagues remain safe from becoming their government's tools.

Such a network of mutually observant judiciaries makes the rule of law in Europe tremendously strong – stronger than even the best-crafted constitution could ever do on its own. *L'Europe de la loi – peut-être se fait-elle dans la crise!*

Meanwhile in the UK

The one crisis in Europe without a silver lining by any stretch of imagination seems to be Brexit, which is even more a crisis of the **United Kingdom** than one of the EU. The whole horror of it is summed up by HOLGER HESTERMEYER who points out that it is a bundle of (at least) three British constitutional crises at once. *Le Royaume Uni se détruira dans la crise...* Anyone present who places his hopes in an extension of the Article 50 TEU deadline? FRANZ MAYER has sobering news for you: The only way for the EU to

allow that to happen without doing serious damage to its own constitutional order would require the UK to take part in the European elections in May. And how likely is that?

The British Parliament is often praised as a model of a lively parliamentary debate culture. In **Germany**, the Bundestag is currently attempting to improve its own wretched customs in this respect by reforming the questions-to-the-government procedure in Parliament. FLORIAN MEINEL, who by the way has just written a remarkable book on the crisis of parliamentarianism, is rather unconvinced that this endeavour will be a resounding success, though.

Speaking of Parliament: three years after the peak of the refugee crisis, the **German** public is still left in the dark about which legal basis exactly the Federal Government had decided at the time that the border should remain open for asylum seekers. HENNING TABBERT pleads for the introduction of a procedure for abstract legality control for parliamentary groups before the Federal Constitutional Court.

In **Slovakia**, a large portion of the Constitutional Court seats is up for re-election, and one of the applicants for the job is the controversial former prime minister Robert Fico. MAX STEUER reports on the public broadcast of the hearing of the candidates and five lessons he recommends learning from this experiment. MAREK DOMIN explains the background to the Slovak Constitutional Court's decision to declare the 2014 constitutional reform of the judiciary unconstitutional – if I'm not mistaken, that is the first time that a Constitutional Court has applied something like a basic-structure doctrine in Europe, isn't it?

In **Germany**, the Brandenburg law about gender parity in parliament – subject of my last editorial – continues to raise the temper of constitutionalists across the board. SVEN JÜRGENSEN dismisses the accusation that the Brandenburg parity law is unconstitutional as unfounded, whereas MONIKA POLZIN, on the other hand, considers it not only justified, but holds even a constitutional amendment to be unconstitutional as a violation of the eternity clause of Article 79 III *Grundgesetz*. UWE VOLKMANN, in his turn, sees good reasons to be sceptical about such a law in terms of constitutional policy, but that shouldn't mean that constitutional lawyers must once again have the last word on what is possible and what isn't.

The Advocate General at the European Court of Justice has dealt a blow to **Austria's** confidence in being able to bring down the German car toll as discriminatory under European law. However, whether the AG's arguments are convincing or the Court should follow them is quite another question which ODEY HARDAN answers in the negative.

The **German** Federal Constitutional Court has enriched its case law on automatic number plate control with two further fundamental decisions, which BENJAMIN RUSTEBERG has subjected to a detailed analysis.

Colombia, in its peace treaty with the FARC guerrillas, was the first country to introduce a special body of transitional justice which is now coming under massive pressure following the conservative victory at the presidential elections. CARLA DIETMAIR has interviewed GABRIEL ROJAS, coordinator at the Colombian International Center for Transitional Justice.

Elsewhere

LUC VON DANWITZ examines the possibilities and limits of **European** party financing.

OLIVIA TAMBOU discusses on the occasion of the CJEU hearing in the *Dorobantu* case the perspectives of further developing the *Aranyosi* jurisprudence on EU arrest warrants and inhuman detention conditions in **Romania**.

ROSELINE LETTERON analyses the decision of the **French** Constitutional Council to find the criminal prosecution of clients of prostitutes constitutionally irreproachable.

JEAN-PHILIPPE DEROSIER is worried about the **French** President's idea of presenting a referendum with several questions to the people in the course of his "Grand Débat".

NICOLÁS ZAMBRANA-TÉVAR discusses the decision of the **Spanish** Constitutional Court on universal jurisdiction of Spanish criminal justice for human rights violations.

ALEXANDRA SINCLAIR and JOE TOMLINSON are concerned about the "deletion" of former EU administrative competences in the course of Brexit in the **UK**.

MICHAEL DORF appreciates the fact that Chief Justice John Roberts of the **US** Supreme Court voted alongside the liberal judges in the case of a Louisiana anti-abortion law.

So much for this week. The most consequential event of next week will probably take place in **Spain**: the trial against the detained operators of the Catalan "independence referendum" of 1 October 2017 – an event on which enormously much depends for the stability of the Spanish state and Spanish democracy. When I was in Madrid the week before last, I was somewhat horrified to see how many balconies are adorned with the national flag there, too, now – not much different from Barcelona anymore in that respect. Some in the Spanish capital have even hung out the Franco-era version of the *Rojigualda*with an evil-looking black eagle in the coat of arms. I still consider the Catalan nationalist equation of contemporary and Franquist Spain a baseless perfidy. But it is obvious that Catalan and Spanish nationalism are ratcheting one another up in the most ominous manner, and with the trial that mechanism of mutual escalation could gyrate completely out of control. JOAQUÍN URÍAS has agreed to write a blogpost for us on this exceedingly alarming matter, so stay tuned.

In the meantime, all the best to you, and take care

Max Steinbeis

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