Verfassungsblog
ON MATTERS CONSTITUTIONAL

Confidence and Trust

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This was a rather quiet week from a constitutional point of view (with the unexceptional exception of Poland). That was actually quite nice for a change, with the birds and the flowers and sunshine and Easter holidays and all. Next week will be all the more exciting, I guess. Particularly at the European Court of Justice. There are a number of high-profile proceedings scheduled for next Tuesday in Luxembourg: the *Avis 1/17* on CETA, of course, or the AG opinion in the *Dorobantu* case on the immensely relevant question as to how abject the prison conditions in a member state must be before another member state can refuse the extradition of wanted crime suspects. What I also find rather exciting is another expected AG opinion, also on the subject of EU arrest warrants: It is about the German public prosecutor's office and its independence.

The case has been referred to the ECJ by Ireland's Supreme Court: It concerns a Lithuanian who lives in Ireland and is wanted in Germany on suspicion of murder. On the basis of a German arrest warrant, the Lübeck public prosecutor's office applied for his extradition. The suspect objected to this with the argument that the Lübeck public prosecutor's office is not a "judicial authority" at all and therefore not authorised under European law to issue an EU arrest warrant.

In fact, German public prosecutors are indeed not part of the independent judiciary, but part of the executive branch. They are expressly not allowed to assume judicial tasks. They are subject to the instructions of their superiors all the way up to the Attorney General's Office, and the Minister of Justice is formally the supervisor of all their actions and omissions (*Rechts- und Fachaufsicht*), including disciplinary authority. In Germany, the ultimate responsibility for whether and against whom and for how long and by what means criminal investigations are conducted and, if necessary, charges brought lies not in the hands of judges, but of politicians.

Independent enough?

Under these conditions, is a German public prosecutor sufficiently independent to pass as a judicial authority within the meaning of Article 6(1) of the Framework Decision? The Irish Supreme Court referred this question to the ECJ for a preliminary ruling, together with two other cases concerning the Lithuanian public prosecutor's office and the prosecutor of Zwickau in Germany, respectively. In all three cases, Advocate General Manuel Campos Sánchez-Bordona will submit his opinion on Tuesday.

The right of the executive branch to issue instructions to the public prosecutor's office has long been controversial in Germany. Judges' associations have been demanding its abolition for years – most recently in 2015 in the affair about criminal investigations against the platform *netzpolitik.org* and the dismissal of the Federal Prosecutor General by the then Federal Minister of Justice Heiko Maas. The reasons are obvious: with the right to issue directives, politicians could theoretically influence who is investigated and who is indicted – and, even more relevant, who is not. Since no criminal proceedings are possible without an indictment, the judge functionaries believe that the evil appearance of a distinction between friends and enemies of political rulers in criminal prosecutions impairs the reputation of the independent judiciary.

The counter-argument has also been known for a long time: The right to give instructions exists so that someone will bear the political responsibility if the state lets its law enforcement powers off the leash against individual people. If mistakes are made, it will have consequences. Which is precisely the reason why the whole debate remains most of the time theoretical: No politician of sound mind will deliberately risk her/his career by getting involved in a criminal investigation unless he/she absolutely has to. In practice, it

pays much better to let the prosecutors do their job independently and stay clear of any danger of getting your hands dirty. Which, on the other hand, implies that they will have to intervene when things really do get bad. But only then.

So what does that mean in the context of an EU arrest warrant? For a member state to enforce a foreign EAW on its own soil and with its own authorities requires a great deal of trust. Since 2016 at the latest, the European Court of Justice has recognised that this trust cannot simply be presupposed and enforced in the common area of freedom, security and justice in view of the often abysmal judicial reality in a growing number of EU member states.

In that same year, the European Court of Justice ruled that the Swedish police board doesn't pass as a "judicial authority" in the sense of EAW law. The term explicitly refers to the judiciary, which needs to "be distinguished, in accordance with the principle of the separation of powers which characterises the operation of the rule of law, from the executive". Only if the issuing of an EAW has undergone "judicial approval" that the legal conditions including proportionality are met could one expect the necessary trust from the judiciary of another member state. If on the other hand an executive authority issues an EAW, no matter how autonomous it may be, one can't.

I am not an expert of criminal procedural law and practice, so I'll be cautious. But that doesn't sound to me as if Luxembourg will be reassured by the fact that German public prosecutors are de facto independent of political influence in practice. Well, either way, we'll know more on Tuesday.

Visas for Aleppo

Another case we will definitely keep an eye on has been heard this week before the Grand Chamber of the European Court of Human Rights in Strasbourg: Is it compatible with the protection of human rights to deny Syrian refugees visas which would allow them to safely board a plane and seek asylum in Europe instead of having to risk their lives in the rubber dinghies of criminal traffickers for their safety? It is hard to fathom how much is at stake in these proceedings, as DANA SCHMALZ recently explained here. One of the things that make this case so explosive is the previous case law of the Luxembourg ECJ which, against the advice of its Advocate General Paolo Mengozzi, has declared itself against the possibility of embassy asylum (see here and here).

In **Bulgaria**, to return to the issue of judicial independence, the situation is extremely grim. RADOSVETA VASSILEVA reports from a lecture of the President of the Bulgarian Supreme Court of Cassation Lozan Panov about the desperate struggle of the Bulgarian judiciary and the indifference with which the European Union stands by and watches: "Panov painted a vivid, yet gruesome picture of Bulgaria's rule of law which is about to die like an oblivious frog in a pan of hot water reaching tipping point. Sadly, EU institutions have been turning a blind eye to the troublesome developments in Bulgaria for far too long."

In **India**, the highest representative of the judiciary is also causing a stir, albeit for completely different reasons: Chief Justice Ranjan Gogoi is at the centre of a sexual harassment scandal, as ADEEL HUSSAIN reports, and the way he defends himself threatens to damage the entire justice system of the Republic.

In the German state of **North Rhine-Westphalia**, the conservative-liberal parliamentary majority has amended the municipal electoral law and abolished the run-off round in the election of mayors and district administrators. SVEN JÜRGENSEN and JEROME SCHRÖDER criticise the constitutional problem of changing the electoral law for one's own political benefit.

Elsewhere

VIGJILENCA ABAZI analyses the new **EU** whistleblower protection directive.

LAURENS LAVRYSEN is disappointed by the ECtHR's first advisory opinion in a **French** case on surrogate motherhood.

SIMON DRUGDA explains a ruling of the **Slovak** Constitutional Court on the unconstitutionality of a constitutional amendment.

The *Rule of Law* blog documents the protest of the **Polish** judges' association Iustitia against Prime

Minister Morawiecki's comparison of Polish judges with Nazi collaborators.

KEITH WHITTINGTON explains why an impeached **US** President Trump, could hardly expect any help from the conservative majority in the Supreme Court.

GAUTAM BHATIA applauds the Supreme Court of **Namibia** for its defence of press freedom against security authorities.

That's it for this week. By the way, there will be a couple of layout and technical changes on Verfassungsblog next week, all to improve clarity and make it more reader-friendly, and if you don't even notice that something is different we'll have done everything right. Just so you're not surprised if you do. And since these things, like the upkeep of this project in general, unfortunately cost money, please let me ask you to support us if you don't already.

All the best, and take care,
Max Steinbeis

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