Verfassungsblog
ON MATTERS CONSTITUTIONAL

The Bursting of a Constitutional Bubble

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Ursula von der Leyen and not one of the *spitzenkandidaten* promoted by the parties in the EP election campaign will be the EU Council's nominee for Commission President. Throughout the week, wails of dismay could be heard in the halls of the European Parliament, of the German Social Democrat and Green headquarters, and among parts of the German and European public, lamenting the mistreatment that the Council is alleged to inflict on the EP and democracy in general. I must confess: That leaves me rather cold. I am bothered more by something else.

The whole *spitzenkandidaten* idea – personalising the European elections following the German example – has its constitutional basis in Art. 17 (7) para 1 TEU: While the Council nominates the candidate under consideration of the election result, this norm authorises the majority of MEPs to decide whether the candidate actually gets the nod or not. If you have the majority of MEPs behind you, the Council will have to nominate you. The majority of MEPs behind you gives you the constitutional power to impose your nomination on the Council.

Five years ago, Jean-Claude Juncker possessed this power: his EPP Group and the competing Social Democrats had agreed in advance to accept only their relative electoral success as a criterion to determine who among the *spitzenkandidaten* would get the job, excluding at any rate all candidates from outside. That worked because the EPP and S&D together held a majority. And thereby the constitutional power to enforce their will.

That power is gone, though: Manfred Weber doesn't have it, neither does Frans Timmermans, and certainly none of the other *spitzenkandidaten*. Together, EPP and S&D hold only 336 of 751 seats in parliament. There is no majority of MEPs that stands united behind a victorious *spitzenkandidat* for Commission President.

This makes the entire constitutional basis for *spitzenkandidaten* construct collapse. Weber's claim to be nominated as a matter of democratic legitimacy is an assertion without any constitutional justification. He claims to be entitled to the job because his EPP group has a couple more members than the others? What, exactly, is the legal basis for this claim? Where is the majority of MEPs who support him? Sorry, but no. This is all just a stunt, a reckless attempt to see how much he can get away with, a bluff, a confidence trick of the sort we've come to expect from the CSU lately.

Destructive Turn

Of course, the European Parliament remains entitled to not elect Ursula von der Leyen if it does not want to. If the majority of Members decided that this is the right way to communicate to the Council that they feel treated badly, they arguably possess the right to do so. It would be rather unwise, though. The EP would turn its hard-won constructive role in the Commission President election into a veto-player position. It would give its whole beautiful *spitzenkandidaten* process a destructive spin, a turn of events unlikely to increase voter satisfaction in these crisis-ridden times.

Then there is the assertion that the Council was somehow democratically obliged to nominate at least one of the *spitzenkandidaten* and nobody else. I can't see any basis for that, either. Since when does the mere *candidacy* bestow a particular legitimacy on a person, above others and regardless of his or her electoral success? I must have missed that part in democracy 1.1.

Personally, I wouldn't mind Timmermans as Commission President, for precisely the same reasons Orbán and Kaczyński abhor the idea. But for him, too, the rule is: you need a majority of MEPs. To use the election as an opportunity for obstruction in order to

extort from the Commission a power that doesn't belong to you is, at any rate, not the right way to democratize the EU. Voters aren't stupid. They see through that. And they resent the attempt to fool them.

As far as voters are concerned, I find the assertion that the *spitzenkandidaten* reveal the will of the European voters highly doubtful, too. It's true that, unlike in the past, this time there a remarkable degree of polarisation was palpable in the European election campaign, the feeling that a fundamental collective decision for Europe is at stake and not just, as it used to be, just some sort of domestic political opinion poll. But was that decision "Weber or Timmermans"?

The big topics of this election were climate and democracy, and the tension poles were not Weber and Timmermans, but Orbán/Salvini and Macron. And this became a massive problem for Weber, who had embraced his fellow EPP partner Orbán with a passion almost painful to behold for so many years and then, after he realized how the tension field was aligned, had to stake his campaign on a break-neck pivoting manoeuvre at the 11th hour to escape that fateful alliance with the autocrat of Budapest.

But alas, that was just another bluff and confidence trick. Since March, the Fidesz Party's EPP membership has allegedly been "suspended", but that did not prevent the EPP Group from proposing the Fidesz politician Lívia Járóka as vice president of Parliament which swiftly elected the lady with quite a few votes from RE and S&D. Meanwhile, Weber has the nerve to blame an "axis between Macron and Orbán" for his failure to be nominated as Commission President.

All that happened while in Budapest Orbán's government is dismembering the Hungarian Academy of Sciences. The Fidesz government in Frankenstate Hungary claims that it is only copying the successful German model with its large non-university research institutions. In an open letter to Orbán, the heads of the ten most important science organisations of Germany explain that this claim is factually false and that they expect, as a result of the Fidesz policy, academic science in Hungary to lose not just its independence but its quality and relevance.

La Capitana

Back to the *spitzenkandidaten*: That has been clearly the dominating topic on Verfassungsblog this week. ROMAN LEHNER appeals to protect the *spitzenkandidaten* concept from its most eager supporters. KENNETH ARMSTRONG goes even further and questions that there'd much to mourn for in the case of the *spitzenkandidaten* concept's demise. And KLAUS BACHMANN notes how this concepts looks like from a Center and Eastern European perspective and why it is seen with such scepticism there.

Even more excitement than the EU personnel decisions caused the arrest of Carola Rackete, the SeaWatch *capitana* and fearless rescuer of refugees and taker of docking risks, indicted in **Italy** but then, to Salvini's teeth-gnashing anger, set free by an independent judiciary. DANA SCHMALZ warns not to jeopardize the acceptance and authority of law by punishing what humanity dictates. CHRISTOPHER HEIN explains why Italian criminal and constitutional law probably won't do that.

In the **USA**, the Supreme Court had issued its "gerrymandering" decision the week before, declaring the partisan manipulation of electoral district maps to be outside the bounds of judicial control – the topic of my last editorial. THEODOR SHULMAN explains what the ruling entails for the court itself and its position in the US judicial system. ROMAN KAISER and FABIAN MICHL investigate whether gerrymandering can also become a problem in the German system of personalized proportional representation, and they present several examples where it already has.

The fact that the **US** Supreme Court with its right-wing majority could at some point reverse the liberalization of abortion law in the USA is now an acute concern. DAVIDE PARIS looks at how this could happen.

Just in time for the Women's Football World Cup finals, we have launched an online symposium on FIFA and human rights together with the T.M.C. Asser Institute in The Hague. Following the introduction of

ANTOINE DUVAL and DANIELA HEERDT, ELEANOR DRYWOOD is addressing the issue of children's rights in the context of international football. BODO P. BÜTZLE and LISA SCHÖDDERT deal with the "eigen-constitutionalization" of FIFA, and RAQUEL REGUEIRO DUBRA with human rights violations in the preparation of the Men's Football World Cup 2022 in Qatar.

Elsewhere

LIZE R. GLAS tells how **Russia** defeated the Council of Europe.

LAURENT PECH and SÉBASTIEN PLATON draw the lesson from the ECJ ruling on "judicial reform" in **Poland** that any "dialogue" with governments like that should be accompanied by as many infringement proceedings as possible.

OLIVIER BEAUD observes a coup de grace for the constitutional principle of the independence of the universities in **France**.

ROBERT HAZELL and MEG RUSSELL investigate the constitutional issues raised by the election of the new Tory chairman and thus Prime Minister in **Great Britain**.

SIMON DRUGDA hopes for relief in the worsening crisis of the **Slovak** Constitutional Court, which now consists of only seven judges due to a blockade in parliament.

PRIYA PILLAI sees good reasons to accuse the **EU** of complicity in crimes of war and humanity against refugees in Libya.

That's it for this week. All the best, and take care,
Max Steinbeis

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