Verfassungsblog
ON MATTERS CONSTITUTIONAL

Arbitrary and capricious

Maximilian Steinbeis

19.06.2020 doi: 10.17176/20200620-003715-0

The two Union supreme courts of the Western hemisphere, the European and the American, have handed down important rulings this week, on states dealing with the concerns of those who don't belong to them and the legal constraints they are under while doing so. As to the ECJ ruling on the harassment of foreign-funded NGOs in Hungary, we expect a thorough analysis very soon. I will focus on the US Supreme Court decision *Department of Homeland Security v. Regents of the University of California* which I find quite remarkable as well.

DACA and Dreamers

The ruling is about the efforts of the Trump administration to reverse the Obama administration's quasi-legalization of many undocumented immigrants – the so-called "dreamers" who arrived in the USA as children, mostly from Central America, went to school and to college, took jobs and had natural-born American children and became exemplary Americans in every respect except for one, namely that their stay in the USA was and is officially illegal and they had to spend their lives in fear of the immigration authorities. After a decade of failed attempts to change this through legislation, the Obama administration in 2012 set up the so-called DACA program: This gave more than 700,000 "dreamers" temporary security to continue their lives in the USA without fear of deportation, as well as access to the labour market and social security.

In 2016, Trump was elected, and a few months later the Department of Homeland Security rescinded the DACA program. This was taken to court, and now the Supreme Court, by a narrow 5:4 majority and with Chief Justice John Roberts as swing vote and author of the majority opinion, has ruled that the rescission was indeed unlawful. CJ Roberts' argument isn't primarily about constitutional or human rights but about administrative procedural law: If you do what the Trump administration did, don't do it this way.

Elaine Duke, the acting Minister of Homeland Security, had justified the rescission of DACA on the grounds that there were legal issues with it for which its successor program DAPA had previously been suspended by a federal court. Attorney General Jeff Sessions had expressed the opinion that the same concerns also existed against DACA. This, according to Chief Justice Roberts, was inadequate: the legal concerns related to access to the labour market and social system. But as the name ("*Deferred Action*...") suggests, the core of the DACA program was the temporary forbearance of the removal of its "illegal" recipients.

The revocation of this forbearance, Roberts writes, remained utterly without justification. This alone made the decision "*arbitrary and capricious*". Most of all, however, the ministry ignored the fact that the people concerned had relied on the government's decision: they had arranged their lives and affairs according to it, and so had their relatives, employers etc. It may be that the government is allowed to take all that away from them. But when it does, it must for the very least show that it has seen and recognized and weighed the concerns of the affected. What it must not do, however, is just walking over them as if they weren't even there.

What Roberts doesn't accept either is the argument that the government did provide reasons later. The state, according to the Chief Justice, must be held to the reasons it gives at the time of the decision. "Men must turn square corners when they deal with the government," Roberts quotes one of Oliver Wendell Holmes' less well-known *bon mots* and turns it around: "An agency must defend its actions based on the reasons it gave when it acted. This is not the case for cutting corners to allow DHS to rely upon reasons

absent from its original decision." A mere formality? By no means, says CJ Roberts. If the state later comes up with a valid justification for its initially arbitrary decision, well, then it must simply make a new one. Neither plaintiffs nor courts could be expected to chase after a "moving target" whose legitimacy depends on whether the government eventually does or does not come up with an idea how to justify it.

Advertisement

RECHTSSTAAT & DEMOKRATIE UNTER DRUCK

Call for Papers „Rechtsstaat und Demokratie unter Druck - Perspektiven in der sozialen und ökologischen Krise"

Die Zeitschrift juridikum, das Institut für Rechtsphilosophie der Uni Wien und die Arbeiterkammer Wien organisieren von 11. bis 13. März 2021 die Tagung „Rechtsstaat und Demokratie unter Druck".

Gegenwärtig erleben wir eine globale autoritäre Wende, in der demokratische Formen und der Rechtsstaat zwar nicht notwendigerweise aufgehoben werden, aber stark unter Druck geraten bzw. eingeschränkt werden. Die gegenwärtigen Tendenzen zu autoritären Handlungsmustern möchten wir im Kontext von sozialen und ökonomischen Verhältnissen analysieren. Der Call ist bis 15. August 2020 offen.

The main dissenting opinion was written by Justice Thomas, who is joined by Justices Alito and Gorsuch: In his view, the matter is quite simple. DACA was ultra vires and illegal to begin with, which is why its rescission cannot but be legal. The Obama administration's decision had turned illegal aliens into legal residents, for which "reclassification" there was no legal basis whatsoever – on the contrary, Congress had failed to create one repeatedly. In order to avoid a politically difficult outcome, Justice Thomas complains, the majority has created all the more legal difficulties: Now, with the argument that the reasoning leaves much to be desired, all sorts of government decisions will be challenged in court, to the detriment not least of the Supreme Court itself.

The right to justification

It's not a lot, one might think, that the verdict has to offer to the "dreamers": hardly more than the bare minimum of being a human being and not just a thing. Justice Sotomayor is the only of the nine who, in view of well-documented statements by President Trump calling irregular immigrants from Latin America "animals", does not consider it certain that proof of "discriminatory animus" at the hands of the government is completely out of the question.

Politically, the verdict could still make a difference: While there is nothing to stop the Trump administration from issuing a new and better reasoned rescission decree, it might take a while to prepare one which will be reliably withstand scrutiny in court, possibly more time than the government has left until the November elections – assuming Trump will lose.

But also legally, the difference between the majority and the minority opinions seems to me to be significant. Justice Thomas' opinion sees people solely according to their assigned legal status: Their stay in the US is either legal or illegal, and if the government tries to legalize their illegal stay in an illegal manner, then nothing happens at all, so to speak: They simply remain as illegal as before. Chief Justice Roberts' opinion, on the other hand, sees people, "illegal" or not, who are continuously suffering from the government's actions and omissions: They are told that they cannot stay, they are told that they can stay, they are told that they cannot stay after all – all the time, they get subjected to decisions which affect them in the most existential way. The least the government owes them is giving them some reasons.

Procedural rights. The difference between a *Rechtsstaat* and an authoritarian regime. Not a small thing.

And yet, if Trump wins this fall, little of this will matter, I guess.

This week on Verfassungsblog

... was a little quieter than the last, but still busy enough. LENNART KOKOTT summarizes what has been going on:

In the debate on **the concept of race** in the *Grundgesetz*, CENGIZ BARSKANMAZ and NAHED SAMOUR argue against its deletion: Referring to critical race theory, they demand a more objective debate and to take the legal concept of race seriously in its intersectional, interdisciplinary and international dimensions. CHRISTOPH BUBLITZ notes, referring to the findings of behavioural research, that large parts of the population may implicitly have racist attitudes. This must be taken into account in the discussion about latent racism in the police force, for example, and must also lead to self-questioning by the individual instead of being denied in what would be a ritualized defence against the undesirable.

Among other things, Article 116 (2) of the German Basic Law, which is intended to return citizenship to **persons persecuted by the Nazis** and their offspring, also refers to "racial reasons". TARIK TABBARA discusses a decision of the Federal Constitutional Court that teaches a constitutional lesson to German citizenship law and clarifies that the Basic Law aims to compensate for Nazi injustice to the greatest possible extent and accordingly must be interpreted and applied broadly. The shameful administrative practise to withhold citizenship to descendants of Nazi victims who weren't entitled to it under the discriminatory laws which were in force at the time of their birth, is therefore unconstitutional.

LUCY CHEBOUT looks at a decision of the FCC which outlines the **constitutional programme of duties of family courts**: According to the ruling, the regulations on pension equalisation are to be interpreted in a way that puts an end to decades of case law of the Federal Court of Justice and strengthens the rights of divorced wives in particular.

The *Bostock* ruling of the US Supreme Court, which declared discrimination in the workplace on the basis of sexual orientation and/or gender identity to be unlawful under the Civil Rights Act, is also essentially related to **the legal principle of equality**. MASUMA SHAHID presents the decision and places it in the development of the court's LGBTQ+ case law. The fact that President Trump, after two SC decisions he disliked, enragedly tweeted that the Court apparently did not like him and called the verdicts politically charged may be taken as further evidence of the President's disdain for rule of law institutions. In our Corona Constitutional podcast episode #35, MAXIMILIAN STEINBEIS spoke with DANIEL ZIBLATT about Trump's populist strategies and what to expect in the case of him losing the election in November.

EMILIO PELUSO NEDER MEYER and THOMAS BUSTAMANTE give an overview of the institutions and structures that oppose democratic backsliding in **Brazil** under President Bolsonaro. In addition to federalism, which has undergone a renaissance in the wake of the pandemic, they emphasize in particular the Supreme Court which has finally begun to provide the constitutional options for institutional responses to political crises.

On the basis of Tunisia's reaction to the pandemic and the constitutional state of emergency, AYMEN BRIKI examines the problems that can arise when **new democracies** adopt the instruments of other constitutions while their own constitutional culture is still developing.

The new Israeli government has announced an **annexation of the Jordan Valley**. TAMAR HOSTOVSKY BRANDES deals with a new ruling of the Israeli Supreme Court that invalidates the settlement law from 2017. The court's line of argumentation and in particular its emphasis on the role of international law are of great interest for the legal assessment of the annexation, she writes.

KAI AMBOS examines a judgment of the European Court of Human Rights on convictions for **boycott calls** against products imported from Israel which strengthens freedom of expression in political discourse. However, the Court, in accordance with its jurisdiction, does not make a general statement on the BDS movement.

ALESSANDRA ARCURI, FEDERICA VIOLI, SOPHIA PAULINI and STEPHANIE TRIEFUS argue that the

Covid-19 pandemic could be an opportunity for a fairer and more sustainable global economic order, with a particular focus on **investment protection agreements**. They argue that the pandemic has once again highlighted known problems and could therefore – as in other areas – instigate a reform process.

PÄIVI LEINO-SANDBERG analyses the EU Commission's and Council's plan to take on own debts for the Union before the backdrop of the Covid-19 crisis, in a U-turn of the previous interpretation of Art. 310 TFEU, and looks at the consequences of such a **budgetary policy** for national constitutional systems and the allocation of competences within the Union and the situation at the brink of a constitutional crisis in Finland in particular.

With a view to institutional proposals for **resolving ultra vires disputes** at the European level, such as the establishment of a mixed chamber at the European Court of Justice, WŁADYSŁAW JÓŹWICKI suggests that such a conciliation body could also deal with questions of the constitutional identity of the Member States within the framework of Article 4(2) TEU. NICOLAS STÖLTER also argues in favour of an institutional solution in the form of a Joint Council of the Supreme Courts of the European Union, which of course would have to be accepted as a court in the non-actual sense, but which could contribute to the necessary change of scale precisely because of its unorthodox structure.

In our **current online symposium** *Lieferkettengesetz Made in Germany*, SARAH HOESCH explains why environment-related due diligence obligations are necessary in supply chain laws, also from a human rights perspective. LENA WALKER presents weaknesses and strengths of the design of environmental due diligence obligations in the example of the European Timber Trade Regulation. CHRISTIAN SCHEPER shows that, in order to be effective, the German *Lieferkettengesetz* must also have an impact on the domestic promotion of foreign trade. CANNELLE LAVITE presents the French *Loi de Vigilance* as an exemplary case of legally binding due diligence requirements for companies. ANDREAS RÜHMKORF deals with the question of whether a German law could have a radiating effect on the European debate and states that Germany as an export nation in any case needs to catch up, an argument which calls for its own legal regulation. DAVID KREBS develops the concept of globalization impact law in a multi-level system as a jurisprudential analysis tool and shows how a supply chain law would fit into this.

So much for this week. In June, many of our Steady supporters are asked to renew their support for another year. Please do! Or if you haven't joined yet, now would be a particularly good time to do so. Just click here. Thanks!

All the best,
Max Steinbeis

ABOUT THE AUTHOR

Maximilian Steinbeis
Maximilian Steinbeis is a legal journalist and writer and the founder and director of Verfassungsblog.

SUGGESTED CITATION

Steinbeis, Maximilian: Arbitrary and capricious, Verfassungsblog, 19.06.2020, doi: 10.17176/20200620-003715-0.

Licensed under CC BY-SA 4.0.

Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20200620-003715-0.