Sue and Let Sue

Maximilian Steinbeis

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Before I start: Could I ask you for a favour? We are trying to find out a bit more about the preferences of our readers. Please take two minutes and answer some VERY BRIEF QUESTIONS. Much obliged!

The EU Commission didn't always have the very best press among friends of the rule of law and constitutionalism lately, myself included. In the last week, however, it has made great efforts to correct the impression that it finds other things more important than democracy, the rule of law and human rights. It has announced that it will seek to strengthen the Charter of Fundamental Rights and defend democracy against fake news and election rigging, both profoundly noble endeavours, of course. We have postponed the latest and penultimate episode of our **rule-of-law podcast** for two days in order to be able to talk to the Commissioner for Justice, DIDIER REYNDERS, about the very latest developments. The other two guests – KATARINA BARLEY, Vice-President of the European Parliament, and the one and only LAURENT PECH – have given him quite a run for his money, but the brave Commissioner's explanations for the laggard way in which his authority keeps using its procedural possibilities before the European Court of Justice against what is happening in Poland and Hungary still remained somewhat unsatisfactory, from what I can tell. Reynders himself is not the problem, I dare say, nor is Vice President Vera Jourová. Both, it seems to me, are doing what they can. The problem is located further up. And it bears a German name.

At first glance, phonetically, one might even think it's Dutch, but that would not only be ignorant, but downright unfair: the Dutch parliament has adopted a resolution at the beginning of the week, with 124 of 149 votes, that Mark Rutte's government should no longer wait for the Commission but take matters into its own hands and take Poland to court itself. A member state can do this under Art. 259 TFEU, but that almost never happens. For good reason, as the Member States, relying on diplomatic cooperation amongst each other, have installed an independent Commission in Brussels to do this job for them. If the Commission is unwilling or unable to do it, however, there is still another perfectly legal way to go, and that is Art. 259 TFEU.

The Netherlands, more precisely the University of Groningen, is the place where Dimitry Kochenov teaches, who spelled out a few years ago in a much recommended paper how useful Art. 259 TFEU could be in protecting the Union's fundamental values enshrined in Art. 2 TEU, if one so wished. Now someone does. It will be exciting to watch what will become of this. (As opposed to the humbug the Polish Minister of Justice Zbigniew Ziobro is now putting up in reaction to the Dutch resolution.)

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Online Conference I 9 December 2020 I 10.00 a.m. to 5.30 p.m.

70 Years of the European Convention on Human Rights

Safeguarding Human Rights in Germany and Europe

How can the rule of law and the safeguarding of human rights in Germany and Europe be secured and strengthened in the face of current challenges? This will be discussed on 9 December by panellists including Federal Minister of Justice **Christine Lambrecht** and Federal Foreign Minister **Heiko Maas** as well as **Stephan Harbarth**, President of the Federal Constitutional Court, **Marija Pejčinović Burić**, Secretary

General of the Council of Europe, and **Beate Rudolf**, Director of the German Institute for Human Rights.

Conference languages: German and English (with simultaneous interpreting)

Information on the programme and other panellists can be found at https://70-years-echr.de

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The Commission has a very broad discretion as to whether or not take a member state to the ECJ. It's own democratic legitimacy is seen as somewhat wobbly by some, which leaves it vulnerable to attempts at the hands of the accused state to stir up anger against "Brussels bureaucrats" attacking democratically elected governments. All this is avoided in a procedure under Art. 259. The Commission isn't even necessarily sidelined: If a member state sues another for treaty infringement, it "shall bring the matter before the Commission", which then can decide to get involved or not. Either way, the conflict would be negotiated for what it is, namely a legal disagreement not between EU institutions and member states but *within* the Union *among* member states about what exactly the Union constitution requires of the members it binds in terms of organizing their justice systems.

Article 7

There are new developments in the other legal channel provided by the treaties to keep member states from turning authoritarian, as well. This week, Michal Bobek, Advocate General at the ECJ, presented his opinion in the case of *Hungary v. European Parliament*. The Hungarian government had requested that the initiation of Article 7 proceedings against Hungary by the Parliament in 2018 be annulled. Unlike in the case of Poland, the Commission had been disinclined to pull article 7 against Hungary for years, until in 2018 the Parliament stepped in and the necessary majority was reached. Which is what Hungary contests: A two-thirds majority of votes cast is required (art. 354 TFEU), and, according to Hungary (with Poland as intervener), the vote failed that threshold – as long as one counts abstentions as votes cast. But does one? The proposition doesn't make much sense to the Advocate General at all: In abstaining, you indicate that you don't want to cast a vote and don't want your vote to be counted. Therefore: complaint unfounded. ("Voting fraud" was the vocabulary Orbán's then Foreign Minister found appropriate for this matter, isn't that a funny coincidence?)

Even more interesting from a legal point of view is the preceding question: Is this action even admissible? Did the decision of the Parliament "produce legal effects vis-à-vis third parties" (art. 263 TFEU), as opposed to being merely a kind of preparatory act for the final determination by the Council that there is a clear risk of a serious breach of the Article 2 principles by the Member State (which in turn has only limited justiciability, art. 269 TFEU). In other words: Was the initiation of Article 7 by Parliament just an internal procedure with no external relevance but for the (evidently disinterested) Council, or did it in fact alter the legal situation in some way?

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Federal Ministry of Justice and Consumer Protection

Virtual fireside chat on Tuesday, 8 December 2020 from 6-8 p.m.

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Three women committed to human rights in high-profile positions share their personal stories and discuss the position of **women in human rights law**: A virtual fireside chat by the Federal Ministry of Justice with the Council of Europe Commissioner for Human Rights **Dunja Mijatoviæ**, the former Vice-President of the European Court of Human Rights **Angelika Nußberger** and the human rights lawyer **Nani Jansen Reventlow**.

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Ironically, in order to get its lawsuit admitted, Hungary and Poland had to argue in the latter sense. Their arguments seem to have convinced the Advocate General in that respect, at least: The decision of the Parliament may nominally just be a "proposal" to the Council to state the danger emanating from Hungary in the way described in art. 7 (1) TEU. Nevertheless, it cannot be compared to a mere legislative proposal:

> *A reasoned proposal pursuant to Article 7(1) TEU is a very different animal. It is not an invitation to negotiate, to collectively deliberate over the text and its individual provisions, which epitomises the typical back and forth process of a legislative procedure. A reasoned proposal under Article 7(1) TEU reflects the final position of its author: the metaphorical baton in the multistage procedure under Article 7 TEU is passed from one institution to another. It is the final (and therefore irrevocable) position of one of the actors in the relay race. The procedure is triggered (and not just provisionally).*

But that is not all: the decision has two more very tangible legal effects: Firstly, with the initiation of the art. 7 procedure, Hungary loses its status as a safe country of origin in the asylum procedure. Whoever is politically persecuted in Hungary can be entitled to protection in Germany under EU law, Hungary's EU membership notwithstanding. As an effect of the art. 7 vote in Parliament, the legal fiction that an EU member state can never be a persecuting state no longer applies.

Secondly:

> *The existence of a reasoned proposal may indeed have an impact on mutual trust and mutual recognition within the area of freedom, security and justice, in particular, in the context of the execution of European arrest warrants, but such an impact is certainly not limited to that area of law.*

The decision whether to arrest and extradite someone in Germany who is wanted by a Polish court hinges to a great extent on the art. 7 reasoned proposal. The ECJ has based its *LM* ruling largely on the respective proposal of the Commission on Poland. This, according to the Advocate General, should definitely count as legal effect:

> *Indeed, in pragmatic terms, the importance of such authoritative statements coming from a European level can hardly be underestimated. It is unlikely that a criminal jurisdiction in a Member State, typically a first-instance criminal court competent to deal with surrender requests, would either have the capacity or feel competent to carry out a full spectrum review of the quality of the rule of law in another Member State. Thus, if such actors are expressly invited to rely on a statement made by the European institutions, then when it comes to upholding such pronouncements and accepting the necessary consequences thereof at EU level, which includes allowing for reasonable access to a court, (…) the once exercised power which started to have legal effects cannot suddenly disappear in a 'denial-of-any-knowledge-mist', reminding one of 'The X-Files' tagline.*

The week on Verfassungsblog

When the planned rule-of-law mechanism finally arrives, the Union will have another powerful instrument at its disposal, which is precisely why Poland and Hungary try to block it so stubbornly. There is so much more at stake in **Poland** than just the proper handling of EU funds. ADAM BODNAR and PAWEŁ FILIPEK remind the European institutions of this fact, not least the European Court of Human Rights which has not yet found the time to deal with the problems in the Polish courts, never mind their urgency.

The **Strasbourg Court** did deliver an important judgment on Poland this week, albeit indirectly and mediated via a distant island in the North Atlantic: In its judgment *Guðmundur Andri Ástráðsson v. Iceland*, the ECtHR has defined what constitutes a "tribunal established by law" under art. 6 of the Human Rights Convention, and the result, according to HANS PETTER GRAVER, is likely to cause serious issues for Poland and Hungary.

The disciplinary regime against independent judges in Poland was again discussed before the **ECJ** this week. JOHN MORIJN was present at the hearing and reports how five member states backed the case and increase the pressure on the Commission to finally become more active in defending the rule of law in Poland.

Could the 25 other member states circumvent the Polish and Hungarian veto against the "**Next Generation Europe**" recovery program? After his analysis of

the possibility of "enhanced cooperation" last week (answer: negative), MARTIN NETTESHEIM has now taken a closer look at the possibility of a secondary legal solution. Conclusion: might work legally, but the constitutional costs would be immense.

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Call for an International Human Rights Law Instructor for the OLIve Program, Spring Semester 2021

The Open Learning Initiative (OLIve) at **Bard College Berlin** (BCB) is seeking to recruit an instructor for the Spring Semester 2021 to design and deliver a 4 US credits course on International Human Rights Law. Applications are reviewed on a rolling basis until **Friday, 11 December 2020**. For more information, please visit https://berlin.bard.edu/about-us/employment/.

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In **Slovakia**, the legislature plans to strip the Constitutional Court of its authority to review constitutional amendments. ŠIMON DRUGDA explains this case, which is as interesting in terms of constitutional theory as it is relevant in terms of constitutional practice, and what lies behind it.

In **France**, the government's current security legislation has driven people to protest *en masse*, especially the ban on filming the police. KAMEL AJJI examines what this is all about and why this ban (which even the government has now backed away from) will not pass constitutional scrutiny.

In Germany, until the beginning of 2016 almost all Syrians were granted subsidiary protection by the Federal Office for Migration and **Refugees**. Since then, the proportion has fallen dramatically and many complaints for supplementary protection, often by Syrian men who have escaped military service by fleeing, have not been successful. A new ECJ ruling on protection for Syrian men who have escaped military service also runs the risk of having little effect in decision-making practice, reports VALENTIN FENEBERG.

Meanwhile in **Thailand**, young demonstrators are protesting against the 2017 constitution, while the current government of former junta leader Prayuth Chan-ocha refuses to offer any concessions. KHEMTHONG TONSAKULRUNGRUANG fears that this blockade could escalate the protests and bring down the entire government.

In mid-November the conflict between Morocco and **Western Sahara** escalated after thirty years of ceasefire. ALINA FUNK finds the role that the EU has taken on in the region in recent years shows that economic interests count most, and perpetuates the state of affairs in Western Sahara that is contrary to international law.

In the presidential elections of the Republic of **Moldova** in mid-November, the pro-European opposition politician Maia Sandu won a clear victory. She has awakened great hopes among citizens that she can tackle the many problems in the country. The difficulty is that as president of a parliamentary democratic system she lacks the competence to do so. Early parliamentary elections to achieve a political majority are also unlikely, says MIHAI-RAZVAN CORMAN.

The significant increase in the number of **Covid-19 infections** has led to a so-called "partial lockdown" in Germany. However, the federal states have decided not to close educational institutions temporarily. MICHAEL WRASE considers this decision to be correct and legally justifiable: The right to education should not just be a rhetorical figure.

With the Covid-19 crisis we are – quite literally – at a turning point. So the question is: Which direction will we take? GERD WINTER offers six observations and possible lessons to be learnt from the pandemic and applied to **environmental policy**.

Austria had forgotten most of its coronavirus worries in the summer, and its citizens had swarmed out to southern and southeastern Europe to enjoy their vacations. Then, after their return, the number of

cases spiked, and the government reacted abruptly and chaotically. This all culminated in a second, hard lockdown. SUSANNE GSTÖTTNER and KONRAD LACHMAYER trace the developments and the – also legal – omissions of the last months, which do not shed a good light on the government's crisis management.

In the *Glawischnig* case, Austria's Supreme Court has now confirmed that **Facebook** must delete the insulting comments against a former Green politician. But does this really make Austria the "censor of the world"? Hardly, say MATTHIAS KETTEMANN, GEORG KRAML, FELICITAS RACHINGER and CLARA RAUCHEGGER and clear up some misunderstandings.

Social media make it more and more difficult for scientists to access data and thus to conduct independent research. In doing so, platforms perform window-dressing and refer to their users' right to data protection and the unclear legal situation in order to block transparency. AMÉLIE HELDT, MATTHIAS KETTEMANN and PADDY LEERSSEN explain the status quo and show where regulation could be effective.

Since its foundation in 2013, the far-right **AfD** party has proven to be a significant disruptive factor in the German political system. Most recently, members of the AfD had helped conspiracy theorists gaining access to the *Reichstag*, which once again brought the party into the focus of a debate on party bans. It is important to make sure that there is more behind the desire to ban the AfD than just an anti-pluralist affect, says SVEN JÜRGENSEN.

Once again a comedian in Germany is said to have fallen victim to "**cancel culture**". Once again there is great indignation, many see artistic freedom in danger and even warn of the collapse of democracy. KARSTEN SCHUBERT disagrees with most of this.

After the threat of an 11-year-old to behead his primary school teacher, there are again discussions about how teachers should deal with suspicions of "radicalization". It is neither clear what is meant by this term, nor are there any legal guidelines on how the rights and duties of pupils and teachers are to be reconciled. KAJA DELLER and KONSTANTIN WELKER discuss how regulations could eliminate the existing uncertainty.

That's all for this week. Please don't forget to support us on Steady, by Paypal (paypal@verfassungsblog.de) or bank transfer (IBAN DE41 1001 0010 0923 7441 03, BIC PBNKDEFF). Many thanks and all the best to you,

Max Steinbeis

ABOUT THE AUTHOR

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

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