Verfassungsblog
ON MATTERS CONSTITUTIONAL

2020: Turning Point

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Die deutsche Version dieses Editorial finden Sie hier.

For this year, this is the last editorial before the winter break. And what a year it's been....

January

The most read post in January was my editorial "Have you noticed that burnt smell?" (21,899 views): In **Poland**, the government had just strapped its "muzzle law" on the judiciary, forbidding still independent Polish judges, under the threat of disciplinary sanction, to question the independence of already dependent Polish judges. This set the first major general topic of this year: How will the EU react? My prediction at the time:

> *There is no way of whitewashing this or of taking a perspective from which it appears in any way sufferable. That applies to the Commission, it applies to the Member States, it applies to the German Government and to Angela Merkel. Provided, of course, that one does not want the EU to cease to be a community based on the rule of law. Anyone who thinks such a development would be conceivable or even desirable (like Orbán and Kaczyński) should by all means continue to sympathize and appease. That's just consequential.*

Little did I know...

My interview with FRANZ MAYER on the question of what the ECJ can still do with regard to Poland was also in great demand (6.742).

Other topics were HELMUT AUST's analysis of the killing of Iranian General **Qassem Suleimani** under international law (9,775) and DANA SCHMALZ's forceful appeal to the deans of German law faculties to remedy the shameful situation that so many **doctoral students** have to wait months or even years for their dissertations to be corrected (7,783).

February

Just before all the real madness of this year started, a report by JOANA MENDES and HARM SCHEPEL stood out in February (6,900). The two former editors of the once venerable **European Law Journal** describe the reasons why the entire editorial and advisory board of this journal resigned at the end of January in protest against the way the publishing giant Wiley was executing its ownership rights to the journal.

Speaking of open access: That describes pretty well what we're doing here on Verfassungsblog. Expect more on that soon on these pages.

Other topics: TIM WIHL takes the farcical formation of the short-lived **Thuringian** government under an FDP prime minister elected with the votes of CDU and the far-right AfD, which only survived for a few hours, as proof for his observation that the German party public is saying goodbye to the "great false state-political certainty" of the old Federal Republic, namely the idea that right and left are somehow equally dangerous (5.506). And CHRISTOPH MÖLLERS wonders why anyone would find the idea that the Chancellor owes a "duty of neutrality" to her political opponents, which supposedly forbids her to publicly criticize the Thuringian gallimaufry, even remotely plausible (4.555). MAX PICHL and DANA SCHMALZ analyze the ECtHR ruling **N.D./N.T.** and its shocking consequences for the protection of migrants at the border and the credibility of the Strasbourg Court (4.918).

March

Spring came, the snow of Ischgl was melting, and so was the certainty in the Federal Republic of Germany that **Coronavirus** was happening only in Wuhan and Bergamo and other far-away places: Quickly the pandemic crossed the Alps and arrived with several

truckloads of constitutional issues and problems in tow, which we are still working through today and will probably continue to do so for a long time to come.

Where were you when your particular Corona penny dropped? I won't forget the moment, any more than I will forget Chernobyl, 9/11, and a few other events in my lifetime, when I caught on to the "flatten the curve" thing. The moment I realized what I and everyone around were supposed to do: to fall in line, along with everyone else, in a collective effort to fend off a collective danger, without being in any way particularly dangerous or endangered myself. I had lived through half a century, middle-aged privileged Central European that I am, without ever experiencing anything like that. That alone gives me pause.

Ausnahmezustand! The state of emergency and exception, when the constitutional order gives way to pure, unbridled power! For so many years and decades that old spectre had been conjured up time and again with almost eschatological zeal, not least by a certain part of German constitutional law scholars, after 9/11, and more recently in the refugee crisis. We at Verfassungsblog have always tried to keep a cool head and not let ourselves be carried away by the fever of apocalyptic anticipation, and I am not entirely unproud of the fact that this time as well, with roles so differently distributed, we have by-and-large remained true to ours.

When a **curfew** was first imposed in the Upper Palatinate town of Mitterteich, ANDREA EDENHARTER stood up and said: This is disproportionate (45,518). UWE VOLKMANN provided enlightenment in the best sense of the term on the concept of ***Ausnahmezustand*** (24,245). THORSTEN KINGREEN's appeal to defend the rule of law against a sanitary "**whatever it takes**" approach was read 15,584 times, ALEXANDER THIELE's analysis of the legal issues surrounding the ban on **second homes** in some northern German states 15,465 times, MATTHIAS CORNILS's early handout regarding the **compensation** law consequences of lockdown measures 13,882 times. WEYMA LÜBBE's piece on the ethical dilemma of the **triage** situation, if I'm not mistaken one of the first texts that has appeared on this topic after the outbreak of the pandemic at all, also had an tremendous response (12,339).

With the pandemic on everyone's mind, the perpetual, bottomless, infernal outrage that takes place every single day at the south and southeast external border of the EU seems to have completely sunk into oblivion. At the beginning of March, more people could be bothered still, so MATTHIAS LEHNERT's analysis of the alleged (there it is again) state of emergency at the **Turkish-Greek border** was clicked no less than 7,789 times.

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BAdW BAYERISCHE AKADEMIE DER WISSENSCHAFTEN

An der **Bayerischen Akademie der Wissenschaften** werden für das interdisziplinäre Projekt **„Kulturen politischer Entscheidung in der modernen Demokratie",** das Anfang 2021 unter der Leitung von Prof. Dr. Andreas Wirsching (Institut für Zeitgeschichte, München) und Prof. Dr. Christian Walter (Lehrstuhl für Völkerrecht und Öffentliches Recht der LMU München) startet, zum nächstmöglichen Zeitpunkt **aus dem Bereich der Rechtswissenschaften**

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gesucht. Nähere Hinweise finden Sie hier.

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April

At the beginning of April, OLIVER LEPSIUS's diagnosis of the German "decline of **fundamental rights** categories of thought in the Corona pandemic" came down on us like the police on curfew-oblivious strollers in springtime Upper Bavaria (stunning 38,918). Many of the most popular articles from March scored once again big-time in April, most of all Thiele's (12,375) or Edenharter's (7,941). In addition, there was the sober analysis by JAN FÄHRMANN, CLEMENS ARZT and

HARTMUT ADEN on the Berlin obligation to carry an **ID card** at all times (9,782) – a prime example of the constant temptation of the security apparatus to use the crisis for things they have always found rather practical anyway – and the recommendations by ANDREAS GUTMANN and NILS KORNMEIER on how to limit **freedom of assembly** in the pandemic in a fundamental-rights-respecting way (7,142).

CHRISTOPHE HILLION caused quite a stir with his interpretation of the conflict between the EU and **Poland and Hungary**: He considered an interpretation conceivable according to which the two countries, with their disregard for the fundamental values of the Union, have implicitly already declared their withdrawal under Article 50 EU (14.640). DAVID DYZENHAUS's essay on Harvard professor Adrian Vermeule and his ideas of claiming **constitutional legalism** for the conservative cause also had great resonance (5,990).

May

The German Federal Constitutional Court's *Weiss* decision was the defining topic of May: for the first time, the Karlsruhe Court actually pressed the **ultra vires** button and declared an ECJ ruling irrelevant in Germany on constitutional grounds. MIGUEL POIARES MADURO, former Advocate General at the European Court of Justice, immediately warned how well the Karlsruhe line of reasoning would be received by the autocratic tools formerly known as "constitutional courts" in Poland, Hungary (10.809). ALEXANDER THIELE saw the "ultra-vires Pandora's box" opened (10.535) and FRANZ MAYER the *Verfassungsgerichtsverbund* in Europe "on the way to a judicial law of the fist" (9.599).

The fist? Mayer's and Maduro's articles are two of four Verfassungsblog posts cited by ECJ Advocate General Tanchev in his Opinion in the Polish National Judicial Council case published this week. The AG uses Maduro's post as evidence for his thesis that, as far as the "substance of the legal questions" is concerned, the BVerfG's reasoning "is not watertight, to put it mildly."

I wonder if the Advocate General – who, after all, was once president of a constitutional court himself – is aware of how close this choice of words comes, in the German version at least, to claiming that the Karlsruhe Court "*ist nicht ganz dicht*", i.e. has lost his marbles? I am generally not particularly fond of the imperious attitude with which Luxembourg insists on unrestricted submission of the member states' constitutional courts, and as upset as I am about the ultra vires reasoning in the *Weiss* case myself, along with the accompanying judicial public relations efforts, it alarms me if this is the style which Luxembourg considers appropriate now for fighting back. As if we can still afford that kind of intra-judicial tussle, with so much at stake right now.

June

In early summer, the curve indeed flattened out, even for us: fewer super-cluster events, overall numbers going down, remaining at an alarmingly high level nevertheless.

In the month June of this **Black Lives Matter** year, the most-read article was THOMAS FELTES's post on whether there is reason to speak of the police as "persecuted fundamental rights holders." Pushing the human being wielding the nightstick to the fore is a communication strategy that police advocates have also learned applying in Germany, and Feltes says what needs to be said about it from a constitutional perspective (4.146).

Also: DIMITRY KOCHENOV defends himself against the scandalization of his person and work as an accessory to "**passport trade**" in the EU (3.853). Yours truly looks at a referral to the ECJ from Erfurt on the question of whether the German judiciary can be trusted to pass unbiased judgment on the **diesel scandal** (3,586). And AMADOU KORBINIAN SOW calls on "**white legal scholarship**" to take note that its perspective is less "normal" than it would like to believe (3.488).

July and August

During the summer months, a contribution to our massive online symposium "COVID-19 and States of

Emergency", organized by the incomparable JOELLE GROGAN and kindly supported by Democracy Reporting International and the Mercator Foundation, stood out. The report on **South Africa** by MELODIE LABUSCHAIGNE and CIARA STAUNTON had already been published in April and was read by thousands over the months, 8,009 in the two summer months alone.

At the end of July, KILIAN WEGNER landed a veritable scoop with his story on the de facto amnesty that German tax lawmakers have quietly granted to the beneficiaries of the **Cum-Ex** scandal (6,662).

September

A topic that does not often attract public attention is the inclusion of **children with disabilities** in the school curriculum. The success of VOLKER IGSTADT's article on an emergency decision by the Federal Constitutional Court in the case of a mother who had been deprived of custody because she insisted on the inclusion of her child, shows that many people do care, after all (4,563).

After the burning of the **Moria refugee camp**, DANA SCHMALZ concludes that the law no longer has any force in the EU. Not enough, anyway, to prevail against the political interest in minimizing the arrival of protection seekers in Europe (3.562).

Meanwhile, the new president of the European Court of Human Rights, Robert Spanó, took a trip to Turkey and had his picture taken with representatives of the AKP government. DILEK KURBAN calls for his resignation (3.549).

October

Against the background of the debate on the *Weiss* ruling and the conflict with Poland and Hungary, ARMIN VON BOGDANDY puts up for debate in an **online symposium** whether there is such a thing as "German legal hegemony" in Europe. The result is quite controversial (3,923).

The German Federal Ministry of Justice writes a draft law in insolvency law in the **generic feminine** instead of the masculine for a change, and what happens? Home Secretary Horst Seehofer says it is unconstitutional. KATHARINA MANGOLD makes delicious fun of this (3.423).

The topic of compulsory **masks at school** causes a controversy on Verfassungsblog, and JOHANNA WOLFF's skeptical position is read 3,045 times.

November

Will our compliance to the Covid-19 measures be enforced even in our private homes? SEBASTIAN KLUCKERT sheds light on the fundamental right to **inviolability of the home** in the Covid-19 pandemic (14,096).

ANDREA KIESSLING examines whether the second round of infection control legislation in Germany was more successful than the first in involving **Parliament** in a manner consistent with democracy and the constitution (5,337).

On the morning of the first Wednesday in November, the U.S. presidential election was by no means as settled as one was accustomed to from earlier times. KIM LANE SCHEPPELE described what legal cards the loser **Donald Trump** was prepared to and later indeed did play to turn the political gamble to his favour, thankfully without any success (4,879).

December

We are still in the middle of last month of this year, which therefore is not quite comparable. Sebastian Kluckert's text on the inviolability of the home is still getting a crazy amount of views (10,425), which probably shows how much fear the tentacles of the security state elicit among many, I guess, if they suddenly aren't among the supposedly "normal" people any more who have nothing to fear.

With that, enough of the year in review and on to....

... this week on Verfassungsblog.

We have started a small but note-worthy online symposium on **constituent power** today. This is the subject of a new book by Lucia Rubinelli which PETER NIESEN puts up for debate, with further contributions by CARLOS PEREZ CRESPO, MARKUS PATBERG and

ESTHER LEA NEUHANN to appear on Verfassungsblog in the next few days.

The European Parliament this week emphasized by a large majority that the **Rule of Law Mechanism** will indeed apply from January 1, 2021, the day it enters into force. This may sound like a matter of course, but isn't: As is well known, the European Council, in collusion with the supposed "guardian of the treaties", the Commission, had agreed upon the opposite with the main parties concerned, Hungary and Poland. The public, weary of the issue, found the compromise negotiated by the German Council Presidency largely okay: the main thing was that the much-needed Covid-19 aid could finally flow. We were and are of a decidedly different opinion. KIM LANE SCHEPPELE, LAURENT PECH and SÉBASTIEN PLATON examine in detail the extent to which the Council's "interpretative declaration" and, in particular, the role it assigns to the Commission, trample on the very rule of law it purports to protect.

A European Union that prefers to make murky compromises with Hungary and Poland instead of protecting its own fundamental values does not remain the same. It changes. It is becoming more and more similar to what Hungary and Poland imagine as an EU that suits their interests, observes RENÁTA UITZ.

Turning back to the **Coronavirus**: Once the pandemic is behind us, we will have to talk about the political responsibility of the key players. In order for this to be transparent and fair, some important preconditions must be observed. JOSEF FRANZ LINDNER explains what these are.

Assembly bans can only be the exception in a democracy, even during a pandemic. However, in the case of a reasonable assumption that the mask requirement will be disregarded, a preventive ban is appropriate, finds WOLFGANG HECKER.

Back in the spring, when **curfews** were first imposed to curb the spread of coronavirus, courts at least partially overturned those regulations. Now there are again such restrictions in some federal states, and this time, too, they are highly questionable from a constitutional law point of view, says FELIX SCHMITT.

On Dec. 21, 2020, the European Medicines Agency will decide on the approval of Biontech and Pfizer's Covid **vaccine**. But it may take until 2022 before everyone is vaccinated. Over the next year, the question will be how we will deal with the fact that part of the population is already vaccinated and part is not yet. ANDREA KIESSLING and DIRK MÜLLMANN answer the question to what extent a differentiation may be made between these two groups.

Are the competencies for health and infection control properly distributed between the federal and state governments? In the pandemic, there have been doubts about this. HELMUT PHILIPP AUST has a suggestion on how to strengthen the role of the federal government without damaging **federalism**.

The Federal Constitutional Court has issued a ruling on the **Antiterrorism Act II**. HANNAH RUSCHEMEIER explains how the combination of 'data mining' and the use of a composite file by police and intelligence services can rightly be considered disproportionate. It would be desirable if the protection of fundamental rights, as is so often the case with security legislation, was not first guaranteed by the Federal Constitutional Court, but was included in parliamentary and executive decisions.

The Munich Higher Regional Court has ruled that Facebook may oblige its users to use their **plain names**. ERIK TUCHTFELD discusses with JOHANNES CASPAR in episode #53 of our Crisis Podcast why the advancing restriction of anonymous use of the Internet is a problem for freedom of expression.

A new proposal to introduce independent criminal liability for **dark net** marketplace operators has been tabled. It reflects much of the criticism which has been raised against the previous two proposals, but the new one still remains doubtful in terms of necessity, conformity with European law and constitutionality, finds CHRISTIAN RÜCKERT.

Delivery robots rolling along sidewalks are still an unfamiliar sight in most parts. What does their arrival mean for public space? SAMIRA AKBARIAN on idealizations, non-places and the community-building dimension of fundamental rights.

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All best,

the Verfassungsblog team

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Last year, the ECJ ruled that German **prosecutors** are not independent enough to issue a European arrest warrant. Therefore, the Federal Minister of Justice now plans to make the public prosecutor's office more independent. GÜL PINAR does not think much of the proposal.

At the European Court of Human Rights, the position of the Polish judge has to be filled. The **Polish nomination process** of three candidates for the judgeship was so obviously unfair, non-transparent, and non-inclusive that the seat is at risk of being left vacant. DOMINIKA BYCHAWSKA-SINIARSKA and KRZYSZTOF JARZMUS followed the nomination process and explain what has been going on.

The internal workings of the **monetary union** do not always receive the attention they perhaps deserve. Now the ECJ has ruled in the case of *Commission v. Slovenia* on the question of whether a member state violates its obligations under European law if it unilaterally seizes documents from its national central bank, as happened in Slovenia's case. Answer: it does. GRAHAM BUTLER analyzes the decision.

This was just one of a whole number of high-profile cases which the ECJ apparently wanted to conclude before the holiday season. Another was a decision about the ban on **ritual slaughter** in Flanders. CLAUS DIETER CLAASSEN analyzes how the Luxembourg court is trying to balance animal welfare and religious freedom.

On Tuesday, the European Commission has published its proposal for the **Digital Services Act**. QUIRIN WEINZIERL describes how it codifies parallel governance while state courts, prosecutors, law enforcement and state law as such take the back seat.

Ok, then. That's it for this year, I guess. I'm going to take a break now, and I do hope that you will enjoy a few restful days, too. In the meantime, I wish you all the best and expect to see you all again in the New Year, healthy and in good spirits!

Max Steinbeis

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