Interpreters of the Constitution

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To be honest, I can understand to a certain extent why some politicians in the German governing coalition have begun to react somewhat peevishly to the word "unconstitutional". For months now, they have been getting slapped in the face with the *Grundgesetz* for nearly everything they do or don't in discharge of their office or mandate, mostly by people whose passion and self-confidence in dealing with fundamental rights concepts is in inverse proportion to their constitutional legal judgment. That kind of thing gets to you after a while, I suppose. And then, inevitably, along comes Hans-Jürgen Papier, the former President of the Federal Constitutional Court and now universally deployable federal unconstitutional-declarer, to do once more what is expected of him, this time in an interview with the *Berliner Morgenpost*.

Jurisprudentially informed opinions of law professors often get misinterpreted as an authoritative source of knowledge of exactly what action or inaction is required by (constitutional) law, not exclusively, but definitely in Germany. This week, this could be seen once again in the daily paper DIE WELT ($), which accused the governing coalition of still not having remedied all constitutional concerns of experts in the hearing of the health committee of the *Bundestag*. There are, of course, many valid constitutional reasons to criticize the legislature's (in-)actions in the pandemic, and that is exactly what the said experts have been busy doing. But the sheer fact that the legislature sometimes decides against their advice is not one of them. The Basic Law, like any law, is a text open to interpretation, and the *Bundestag* may or even must take the same risks in interpreting it as any other constitutional interpreter. The experts it consults can make sure it doesn't miss any important argument. But they cannot relieve it of the responsibility for what it finds right.

Heribert Hirte, the acting chairman of the *Bundestag's* Legal Affairs Committee, was so annoyed by the WELT article that he immediately posted a tweet in which he remarkably took aim not so much at WELT as at two critical scholars from the expert hearing, both authors of Verfassungsblog, quoted by WELT. Thorsten Kingreen and Andrea Kießling, writes the CDU politician (originally a civil law professor himself), "serve, across the board, always as quotation givers" (*"dienen durch die Bank immer als Zitatgeber"*) to the Covid-denying lunatic-fringe scene known as "*Querdenker*" in Germany.

STEPHAN RIXEN, also in his capacity as spokesman for the DFG "Ombudsman for Science" committee, has already said what needs to be said from the perspective of legal science. In addition, Hirte's phrase seems remarkable to me because it absolutizes legal scholarship with a reversed sign, so to speak: Instead of stamping law professors as donors of authoritative knowledge, they get stamped as "quotation givers" of crazy right-wing people whom they "serve", and "across the board, always". The effect is the same: What disappears from view is the fact that their input is an opinion which in principle can be contested by anyone who has the arguments to do it.

One could confidently dismiss the whole matter as an unpleasant, but altogether rather unimportant event in a highly nervous and tense situation of perpetuated crisis, were it not for the fact that it resonates with a previous affair which occurred during the last major crisis of this sort. In the refugee crisis of 2015-2018, as is well known, the Federal Minister of the Interior (in office to this day), seconded by a whole squad of high-profile constitutional law scholars, had proclaimed the "rule of lawlessness" (*Herrschaft des Unrechts*) that had allegedly broken out as a result of the alleged "opening of the borders" for refugees. Fortunately, there were enough EU law scholars in

possession of arguments sound enough to contest this opinion, and today the thesis of the "rule of lawlessness" can be considered by-and-large discredited (I wrote a whole book on this together with Stephan Detjen). But remember: it was only less than three years ago that the entire republic almost took a turn toward authoritarian populism just because of that thing, which was brought about with the active help of many a well-renowned law professor. I suppose many of us are still frightened to our bones, and rightly so.

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There are, however, a few glaring and evident differences between the constitutional law scholars' diagnoses then and now. First, the constellation in terms of fundamental rights was quite different: Back then, fundamental rights and their bearers hardly played any role in the constitutional criticism, or if they did, then ex negativo in terms of cutting back the scope of protection. The alleged constitutional norms against which the "opening of the borders" was measured came instead mostly from the lofty heights of state theory. Today, by contrast, it is the shrunken space of individual freedom that underpins the demand for a stronger legal basis for the Covid-19 measures.

Above all, however, the situation today differs from the situation then in that this time there is no actual lawlessness which is to be made invisible by the clamour about a supposed "rule of lawlessness" elsewhere. As is well known, the crisis of 2015 had begun with the member states at the EU's external border, first and foremost Hungary, abandoning their obligations under EU asylum law. What rules to this very day at the external borders, I suppose, can be labelled as lawlessness quite correctly. To bring about exactly these conditions at the German-Austrian internal EU border was exactly what the protagonists of the "rule of lawlessness" discourse back then were up to.

I don't see any equivalent to this in the current discussion. The toxic mixture of state-theory mumbo-jumbo and ethnic-cultural purity and exclusion fantasies that characterized the debate back then is – alhamdulillah! – back in the bottle. The vast majority of constitutional law scholars who criticize Covid-19 measures these days, on the other hand, are simply doing their jobs. Whether I agree with all their diagnoses is secondary; the main thing is that, if I don't, I can contest them if I have the arguments to do so. This is what I would recommend to Heribert Hirte and all others who have started to take against those insufferable know-it-all constitutional lawyers.

This week on Verfassungsblog

Several German *Länder* plan to forcibly detain persistent **quarantine breakers**. CHRISTOPH GUSY wonders: is this still infection control law or already police law?

Since the beginning of the week, it has been mandatory in Bavaria to wear an **FFP2 mask** on public transport and in shops. Nationwide, simple cloth masks will soon no longer suffice either. For those on welfare that is a substantial burden. But can they demand that the costs be covered? MARJE MÜLDER thinks they likely can.

Donald Trump is no longer President of the United States, but he will stand trial in Congress to be removed from office in retrospect. KIM LANE SCHEPPELE explains why **impeachment**, while risky for Democrats, makes sense, and in the end, private law consequences could be the means to hold Trump liable for the consequences of his actions.

In investigating the crimes surrounding the **storming of the U.S. Capitol**, American authorities are using controversial facial recognition technologies. CHRISTIAN RÜCKERT explains why their use is illegal under German law and what would have to be taken

into account when introducing an according legal basis.

Joe Biden is the President of the United States, and MICHAELA HAILBRONNER and JAMES FOWKES, on the occasion of the inauguration, muse about just how lucky the USA has been after all, so far.

On December 11, 2020, the Austrian Constitutional Court overturned the ban on **assisted suicide** as unconstitutional. Only a few months earlier, the Federal Constitutional Court had declared the ban on the promotion of suicide void. The decisions represent significant liberalization steps for both states. Now it's up to lawmakers to come up with solutions, find ALEXANDER BRADE and ROMAN FRIEDRICH.

Five years ago, in January 2016, the EU Commission first activated the Rule of Law Framework for **Poland**. The Polish government's ongoing attacks on the rule of law since then threaten the entire European legal order. In Part II of their series, LAURENT PECH, PATRYK WACHOWIEC and DARIUSZ MAZUR review the key rulings from 2020 and reiterate their call for the EU institutions to act.

The German *Bundestag* and *Bundesrat* have passed an amendment to the anti-trust law, which is intended to give the Federal Anti-Trust Office more scope for action vis-à-vis '**big tech**'. It remains to be seen whether the adjustments are actually suitable for effectively addressing the market power of the large platform companies and their behavior in competition. At the very least, JÜRGEN KÜHLING finds, the amendment can inform the Digital Markets Act at the EU level.

On Dec. 15, Spain's Constitutional Court rejected the appeal of a union member convicted of **desecrating the Spanish flag** during a workers' protest. Now the reasons for the ruling have been published: With their decision, the judges denied constitutional protection to statements directed against the flag, even if they occur in the context of political activism. The ruling shows that freedom of expression is increasingly under threat in Spain, warns JOAQUÍN URÍAS.

GRIETJE BAARS reports on an English High Court ruling that **puberty blockers** should no longer be available to trans youth under 16. The court based its decision on the fact that puberty blockers can have irreversible effects and that adolescents under 16 cannot assess those consequences. Better, then, according to the court's logic, to let them experience the irreversible effects of puberty – which only makes later conversion more invasive.

The **parliamentary groups** in the German *Bundestag* are fully funded by state resources, and their use of funds is subject to strict rules. If they violate these, however, there are no consequences. HEIKE MERTEN explains the report of the Federal Court of Auditors, which clearly identifies the structural deficits of parliamentary group financing.

Since **Ukraine's Constitutional Court** overturned anti-corruption legislation at the end of October last year, the country has found itself in a veritable constitutional crisis. President Zelensky is now playing anti-corruption and the rule of law against each other. Most recently, he suspended the president of the court from office. ALINA CHERVIATSOVA explains why this move was unconstitutional.

Tesla is currently building a "gigafactory" in the Brandenburg hamlet of Grünheide near Berlin. Since the plans became known at the end of 2019, citizens and environmental groups have been regularly complaining and protesting against the project. In terms of procedural law, the politicians do not seem to have to be reproached here. However, the approval procedure is also not suitable for creating acceptance among the population for such large-scale projects, says BIRGIT PETERS.

The EU likes to see itself as a force for good when it comes to human rights, but the latest agreement with China speaks a different language. SURYA DEVA teaches in Hong Kong and knows how things have been going there since the enactment of the National Security Act, and in his view, the sincerity of the EU's commitment to human rights in China very much remains to be seen.

So much for this week.

As always, you can make your contribution to the upkeep of Verfassungsblog here (permanently) and here (one-off), which I kindly ask you to do.

Thank you for that and for your attention, and see you next week!

Max Steinbeis

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