Verfassungsblog
ON MATTERS CONSTITUTIONAL

A Hard Year

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As always at this time of year, this last editorial of 2021 is not only a weekly review, but also a kind of annual review. As of today, we have published 936 articles in 2021, so by New Year's Eve we might end up in walking distance of the 1000 mark. With this, we have reached a total of almost 1.2 million readers.

I have pored over the analytics and crunched the numbers, and the picture that emerges – mostly COVID, mostly German perspectives – does not quite match my own perception of what we did here on Verfassungsblog, to be honest. This was the year of the storming of the Capitol in Washington and the realisation that in the world's oldest and largest democratic constitutional state, the majority can no longer rely on the minority's readiness to accept being outvoted. This was the year of the end of democracy in Hong Kong, of the brutal implementation of the "muzzle" law in Poland and the showdown with the EU, of the conflict on the Polish-Belarusian border, the ultimate normalisation of pushbacks at the EU's external borders and the human rights hellhole left behind by the so-called West in Afghanistan. To name just a few of the big non-COVID issues that are not reflected in this list, but which we have of course also dealt with intensively.

So, which texts had the most resonance, i.e. more than 4,000 views?

January

Around the turn of the year, the big question in Germany is whether vaccinated people should be "**privileged**" or whether they owe the unvaccinated people "solidarity" in accepting restrictions on their freedom. This was back in the sunken times when vaccines were scarce and coveted and only a minority vaccinated. LAMIA AMHAOUACH and STEFAN HUSTER criticise the "radical egalitarianism" of the mainstream opinion at the time (4,796 views).

FELIX SCHMITT's text on **statewide exit bans** actually dates back to December 2020, but still counts 5,217 hits in January.

There is increasing irritation in the *Bundestag* towards **constitutional law professors** and their constant worries about the constitutionality of the acts of the legislator. STEPHAN RIXEN counters the accusation from conservative MPs that these expert opinions are serving as cues to militant COVID deniers (6,380).

Meanwhile, a **general election** has to be prepared under pandemic conditions, parties have to determine their candidates, congresses have to be held. The *Bundestag* authorises the Federal Ministry of the Interior to adjust the conditions for this by legal decree, and FABIAN MICHL doesn't think it's all done very well (4.228).

February

In February, our project "*Offener Zugang zu Öffentlichem Recht*" (**OZOR**, open access to public law) is launched. With this project, funded by the Federal Ministry of Research, we will seek to find out how a scholarly legal publication medium like us can sustainably exist without paywalls, APCs and other obligatory payments for those who use it, and thereby perhaps play a kind of door-opening role in the notoriously OA-sceptical German legal academia.

As in the year before, JOELLE GROGAN has organized another monster blog symposium, supported by Democracy Reporting International, about on "**Power and the COVID-19 Pandemic**" with a total of 84 country reports from around the world.

A text by HINNERK WISSMANN, who worries that **pandemic prevention** no longer seems to care about constitutional standards, has been read by astonishing 26,663 people.

ANDREA KIESSLING, THORSTEN KINGREEN and ANNA LEISNER-EGENSPERGER predict that the **prioritisation** within the COVID-19 vaccination regime has little chance to stand before the administrative courts (4.012).

A scandalous commentary full of racist stereotypes appears in a labour law journal published by the dominant legal publishing house which struggles for a long time to find an appropriate way of dealing with it. An open letter against **racism in legal scholarship** finds 15,381 readers.

The Federal Office for the Protection of the Constitution places parts of the far-right AfD party under observation. JOSEF FRANZ LINDNER (5,227) comments on the debate about **AfD members in the civil service** from a constitutional law perspective.

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Call for Papers – UoP-EUI Conference 2022

On June 9-10, 2022, Gábor Halmai (EUI) and Elif Mendos Kuskonmaz (University of Portsmouth) convene a conference on **surveillance systems**. New technologies for automated 'predictive' surveillance have augmented the questions of transparency, accountability, oversight, and the protection of democratic freedoms. We welcome papers that fit broadly within the theme of the conference.

The deadline for submission of abstracts is 28 February 2022. For more information click here.

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March

What is this **growing irritation** between politicians and legal scholars about the COVID-19 regime all about? Together with MICHAELA HAILBRONNER and ALEXANDER THIELE and supported by *Stiftung Wissenschaft und Demokratie*, we put the role of constitutional law expertise in the public sphere up for debate in a widely remarked blog symposium.

In March, the German legislator makes the **pandemic regime**, actually designed to fight COVID-19 specifically, permanent, and ANNA-LENA HOLLO finds the law has been cobbled together rather imperfectly (4.705). MAURIZIO BACH considers alternatives to "governing by fear" in the third wave of the pandemic (13.555). DIETRICH MURSWIEK is certainly not a regular author of Verfassungsblog, and the decision to post his position on "deficits and misbalances in the lockdown case law" was not an easy one for us, but: it has been read no less than 4,697 times.

BENEDIKT RIEDL explains why the BVerfG has temporarily halted the execution of the German ratification act for the EU post-pandemic **recovery fund** (5,124), while in the following month the way for ratification has been cleared by Karlsruhe.

Private entities **blocking access** "structurally copyright-infringing websites" without a court order is a rule of law problem according to FELIX REDA and JOSCHKA SELINGER (4.238).

April

In April, the Federal Constitutional Court hands down its decision on the constitutional obligation of the government to fight **climate change** effectively. Our ad-hoc blog symposium on the topic is in great demand, especially the contributions by ANDREAS BUSER (4,632), HELMUT AUST (4,483) and KATJA RATH and MARTIN BENNER (4,183).

An tremendous number of readers are interested in the article by HOLGER GEFRATH on the formal constitutional problems of the legislation on the **federal emergency brake** (32,791).

The Federal Constitutional Court overturns the Berlin **rent cap**. TIM WIHL does not agree at all with the ruling (8.316). SELMA GATHER and FLORIAN RÖDL's criticism of the decision is viewed 4,224 times.

My editorial on Ferdinand von Schirach's booklet "**Every Man**" is read 5,192 times.

May

YANIV ROZNAI's analysis of the **Kenyan High Court's** epoch-making ruling on the "basic structure doctrine" receives a lot of attention, especially but not only in Kenya (9,190 views altogether, 6,888 of them from Kenya). The text on the same topic by AMBREENA

MANJI is hardly less successful (5,486 views, 3,814 from Kenya).

SASCHA WOLF's text on the **culture war of the right** and artistic freedom is read 4,921 times.

June

As part of our OZOR project, we launch a blog symposium on "**access in lockdown**". How is the pandemic changing German legal academia? What happens in academic publishing, teaching and everyday academic life when universities and libraries are closed? Legal scholars report on their diverse experiences.

July

STEPHAN RIXEN is one of the first to address the issue of **compulsory vaccination**; in the specific situation at the time he considers it disproportionate (29,100). PATRICK ZIMMERMANN finds it questionable that even those who have been fully vaccinated have to undergo quarantine after returning from so-called "**virus variant areas**" (4,355).

In Berlin, a woman is asked by the police to cover her **breasts** in a park, which ANJA SCHMIDT denounces as a sexualisation of the female body that is contrary to law and equality (4.310).

August

Together with HEIKO RICHTER and the Max Planck Institute for Innovation and Competition, we launch a blog symposium on the EU's **DSA/DMA** package and the question of whether the power of platform operators is better dealt with by breaking them up or by regulating them.

JOACHIM WIELAND counters Paul Kirchhof's thesis that **negative interest rates** interfere with the fundamental right to property (8.740).

WERNER SCHIFFAUER locates the origin of the local forces debacle in **Afghanistan** in the Federal Ministry of the Interior (7.639)

September

Germany elects a new *Bundestag*, and Berlin a new House of Representatives. CHRISTIAN WALDHOFF reports as a first-hand witness on the appalling conditions in **Berlin's polling stations** on election day. His report is widely quoted in the regional and national press and seems to even have played a role in forcing the state election commissioner to resign (23,508).

JOACHIM WIELAND considers the **search** by public prosecutors office in Olaf Scholz's finance ministry in the middle of the hot phase of the Bundestag election campaign to be legally problematic (11,580), while others disagree.

At the same time as the elections, Berliners are voting on the referendum about collectivizing residential real estate held by huge corporations ("**Expropriate Deutsche Wohnen & Co.**"), and support that proposal by a considerable margin. In the run-up to the vote, we have produced a three-part podcast series on the fascinating constitutional questions raised by this proposal: Part I has had 6,457 listeners so far, Part II 3,802 and Part III 4,011.

JOSEF FRANZ LINDNER analyses the problems of holding a federal **election under pandemic conditions** (5,142). JOHANNES GALLON complains that the *Bundestag* is taking itself out of the game in managing the fight against the epidemic (4.262). Restrictions for unvaccinated people are being tried out in **Hamburg**, and how this affects fundamental rights is examined by CHRISTIAN ERNST (4,937).

9/11 was 20 years ago this year, and to mark the occasion, with the support of the Federal Agency for Civic Education, we have launched a series of blog symposia on the impact of this event in various fields – so far, the international legal order, migration and citizenship, and surveillance in the public sphere. Further blog symposia will follow until May 2022.

October

The **Polish "Constitutional Tribunal"** announces that the ECJ case law on the independence of the judiciary in Poland, along with the norms of EU primary law on which the ECJ relies in this regard, are incompatible with the Polish Constitution. ALEXANDER THIELE defends the German Federal Constitutional Court from the accusation of having provided the template for this with its own *Weiss* decision (6,944 in the English, 4,874 in the German version).

The outgoing Federal Minister of Health allows the "**epidemic situation of national significance**" to expire, defended by THORSTEN KINGREEN (4,374).

November

The emerging "traffic light" coalition in Germany agrees on **cannabis legalisation**, and ROBIN HOFMANN explains the legal hurdles to be overcome in Germany and Europe (6,096).

The new coalition is warming to the concept of **compulsory vaccination**, and the discussion quickly revolves around the question of how and within what limits the unequal treatment of vaccinated and unvaccinated people can be justified. UTE SACKSOFSKY's contribution to this debate was read by 6,006 readers.

The end of the **pandemic emergency** causes a hot controversy in November: FRANZ MAYER sharply criticises the new governing coalition for this decision (4,380). THORSTEN KINGREEN responds to Franz Mayer's criticism (5,349). UWE VOLKMANN's statement on the same topic is read 5,010 times.

December

Together with the journal *World Comparative Law* we organise a blog symposium on **corruption and democracy**.

STEPHAN RIXEN and ADAM SAGAN's detailed and actually quite technical analysis of the constitutional and labour law implications of **compulsory vaccination** for employees of specific institutions sets an annual record of stunning 64,435 views.

So much for the year 2021. Not listed, by the way, are a remarkably large number of posts that date from 2020 or even earlier, but nevertheless had many thousands of views this year as well, many of them, but not all on COVID.

That brings us to the…

Week on Verfassungsblog

Our blog symposium on how the united opposition in **Hungary** should deal with the Orbán constitution if it wins the elections, enters its second week with some very commendable contributions by CSABA GYŐRY, RENÁTA UITZ, GÁBOR HALMAI, MARK TUSHNET and ANDRÁS JAKAB. Meanwhile, the ruling Fidesz party is taking steps to prevent this from happening in the first place, passing a new law that legalises voter tourism. ANNA UNGER sees this as a legal but unfair and undemocratic attempt to improve Fidesz's chances of winning the most hotly contested parliamentary districts.

The **Hungarian Constitutional Court** could have followed the Polish example and gone into full confrontation with the ECJ, declaring its ruling on the infamous asylum transit zones a violation of Hungary's constitutional identity. But to the great surprise of NÓRA CHRONOWSKI and ATTILA VINCZE, it chose not to.

Speaking of Poland: the third episode of our five-parts **podcast series on the EU v Poland conflict** is online and ready to be listened to. It is about the escalation of the conflict since 2019 and the increasingly blatant repressive measures of the PiS government.

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Das Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht sucht zum nächstmöglichen Zeitpunkt eine

Teamleitung IT (m/w/d)

in Vollzeit. Der Tätigkeitsbereich umfasst neben der Leitung des IT-Teams mit derzeit vier Mitarbeitenden u.a. die Sicherstellung des IT-Betriebs und Weiterentwicklung einer forschungsorientierten und zukunftsfähigen IT. Nähere Infos finden sich hier.

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WEYMA LÜBBE finishes her series on the ethical issues of COVID **triage**, arguing that the vaccination status must not be a factor in the decision about who gets treatment even in the case of necessity. TATJANA HÖRNLE takes the opposite position. The above-mentioned analysis by STEPHAN RIXEN and ADAM SAGAN on **compulsory vaccination** examines the law recently passed by the *Bundestag* and its consequences for labour law. On the question of **school closures**, ANDREA KIESSLING argues for amending the Infection Protection Act again and keeping distance learn-

ing possible under narrow conditions, instead of simply extending the school holidays, as some states are considering.

Among the opponents of the COVID policy, some are radicalising at a disquieting pace, now even harassing politicians in front of their private homes. These **demonstrations**, however, are not aimed at participation in the process of democratic opinion-forming, but at intimidation in the private sphere of retreat. Under current assembly law, they could have been banned, says EVA MARIA BREDLER.

In a recent ruling, the ECJ addresses the situation of **rainbow families**, which are not legally recognised in some member states. Although the EU has no competence for family law, the Court is reducing discrimination at least in the area of freedom of movement. FABIAN MICHL doubts, however, that this will be implemented by member states that are putting this up as a matter of their "national identity". Same-sex couples and their children "thus become pawns in the great European sovereignty game."

Last week, 200 EU citizens gathered in Florence to discuss controversial issues such as the protection of democracy, the rule of law, European values and identity at the **Conference on the Future of Europe**. EVANGELOS VENIZELOS thinks this is not a suitable way to solve the structural problems of the EU.

Citizens' councils have actually been met with great fascination for some years. The new German coalition agreement also declares the will to implement them in Germany. CHRISTINE LANDFRIED thinks that citizens' councils elected by lot are a good idea to strengthen the rationality of political action in representative democracy, as long as certain conditions are observed.

The European **General Data Protection Regulation** (GDPR) has been in force for less than four years, but already there are calls for more European centralisation. SEBASTIAN BRETTHAUER examines the question of whether the system of competences should be reformed.

AISLINN KELLY-LYTH and JEREMIAS ADAMS-PRASSL find the European Commission's draft directive on working conditions in the **platform ("gig") economy** quite positive.

Can the ECJ review decisions determining the seats of EU agencies? No, says the Advocate General in a pending case that will soon be decided. EZIO PERILLO, former judge at the General Court of Justice, recognises a pattern he finds very disturbing: "The Court has the duty to assure the effective judicial protection also in relation to **intergovernmental decisions** when they do not respect the institutional balance as in the present case."

And another round in our blog symposium series on 9/11 has started, on **surveillance in the public sphere** and with contributions by SOFIA RANCHORDAS, JOÃO VICTOR ARCHEGAS and CHRISTIAN PERRONE, MARKUS NAARTTIJÄRVI, MONIKA ZALNIERIUTE, ALBERT FOX CAHN and EVAN ENZER.

With that, I'll take my leave for the Christmas break. This year, to state the obvious, has been exhausting in more than one respect, and I am sure I am not alone with this sentiment. These are trying times, which is why I wish you and myself all the more a happy and restful holiday season and a good start to the new year! See you again in January.

Max Steinbeis

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