

Possibly War

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Constitutional law won't return to its normal status as a special interest of nerds with weird legal proclivities any time soon, as one might wish. This much is certain at the beginning of this new year/decade. Which means for us that we must not rest in our efforts for an enlightened transnational constitutional public. We won't. Watch this space.

Two things before I start: First, please let me introduce our new Associate Editors. Anuscheh Farahat, Jannika Jahn, Sven Jürgensen and Alexander Thiele have joined our team, familiar names to many of you of course, and will support us with their time, their expertise and their advice, which will give us a real boost and makes me very happy.

Second: revenues. We need to raise them. It's important, you know. We have substantial fixed costs, and to make ends meet we need you. Here is what you can do: a) [Steady](#), b) a donation of a sum you consider appropriate (paypal@verfassungsblog.de, IBAN DE41 1001 0010 0923 7441 03, BIC PBNKDEFF), or c) thinking of us if you have an event or a book release or a job offer to advertise and a budget to pay a rather modest fee for it, and get your administration to consider us for their advertisements. Do [get in touch](#) if you have an ad you want us to publish. Thanks a million!

USA, Iran, Germany

I was as horrified by the prospect of war between the USA and Iran as any of you this week, I suppose. A US drone had launched a missile at the Iranian General Qassem Soleimani and his convoy, and even though signs seem to point towards de-escalation right now, the notion has become frighteningly real for a moment that our current world constitution actually empowers one orange-haired freak with severe impulse control issues to start an armed conflict of incalculable dimensions on behalf of the world's greatest military power, without a plan, without the consent of Congress and without more than the thinnest appearance of compliance with international law. And we are all part of it in one way or another. This is not something between Americans and Iranians. This affects us all.

As far as international law is concerned, [HELMUT AUST](#) has little trouble with his diagnosis: On the basis of what is known, killing Soleimani was not an act of self-defence on the part of the US. All the more it gives reason to be concerned about the development of international law if Trump gets away with this or even gains the approval of allies. The attack, Aust writes, "appears in many ways, at any rate, to be a final footnote to the blurring of the boundaries between war and peace,

military counter-terrorism and security policy that the world has experienced since the attacks of 11 September 2001".

What Trump may and may not do is, in practice, principally a question of US constitutional law. Or is it? There seems to be hardly anything in matters of "national security" anymore which a US President can't get away with nowadays, and the erosion of these constitutional boundaries has been going on long before Trump. In Germany, the situation is quite different: the Basic Law still requires parliamentary approval before any *Bundeswehr* mission abroad, according to the Federal Constitutional Court which keeps patrolling these boundaries vigilantly. As far as material conditions for the lawfulness of military deployments are concerned, however, the *Grundgesetz* and the Federal Constitutional Court have been largely silent. This could change, however, if a current draft bill of the Greens eventually enters into force, which aims to create a new type of procedure at the Federal Constitutional Court to scrutinize foreign deployments. [HEIKO SAUER](#) does indeed see a control gap in that respect, but has doubts whether it would be wise from a constitutional policy point of view to make Karlsruhe a source of constitutional and international legal knowledge in that respect to an even greater extent than it has been so far.

It is not only the deployment of its own *Bundeswehr* that poses a legal problem for the German government, however, but also that of US drones in the Middle East. These are controlled from the US military base in Ramstein in Rhineland-Palatinate. Qassem Soleimani was probably killed from German territory. [YOLANDA SCHEYTT](#) examines the legal situation and concludes that Germany urgently needs to clarify its co-responsibility for violations of international law from Ramstein.

Poland

Meanwhile, in Poland, the beauty of *Staatsorganisationsrecht* is shining brightly: just before Christmas, the PiS government has introduced its "Judicial Disciplinary Act" into parliament. If this draft law – unconstitutional, as [PAWE# MARCISZ](#) shows – enters into force, Polish judges will face severe sanctions if they dare resist the government's interference in the independence of the judiciary. Before, the European Court of Justice and the Polish Supreme Court had declared the new disciplinary chamber at the Supreme Court not independent enough to adjudicate in accordance with European law, because its members have been appointed by the PiS-subservient National Council of Justice. The same applies to all other judges appointed by that body since it fell under the control of PiS. Questioning judgements of these judges is exactly what the new law is trying to sanction: It forces the Polish judiciary to act against their EU law obligations, so to speak.

But the draft law is not yet in force. In the last elections, the PiS had lost its control over the second chamber of parliament, the Senate. There the opposition has a majority. Under the Constitution, the Senate does not have the power to block laws adopted by the PiS majority in the Sejm. But it can delay them. So far, the PiS has been able to push its laws through parliament within hours and without giving as much as a shrug about public deliberation, opposition rights, and an orderly

parliamentary procedure. That is no longer possible. The Senate is now taking its due time to examine and discuss the so-called "muzzle act" in full detail, for the Polish citizens to see, and not only that, but also what Parliament is actually all about, as opposed to what they were offered in the last legislative period and also in this one over in the PiS-controlled Sejm. Polish citizens see what constitutional institutions and procedures are actually good for. They see what an open political space, allowing different interests and preferences to coexist and be brought to a collectively binding decision in a legally ordered procedure, is actually a good thing. In contrast to the oppressive travesty that the PiS Senate has been performing since 2015 in order to pretend that from the outset there is always only the one, single will of the "true Poles", embodied by a few neckless middle-aged men of catholic nationalist persuasion.

Poland is Europe. The judges' associations have called for a silent march from the Supreme Court to the Sejm on Saturday, and judges from several European countries will take part. A delegation from the Venice Commission of the Council of Europe is currently in Poland to prepare an expert opinion at the invitation of the Senate Marshal. The PiS can and will disparage all the experts and critics from Europe as hostile, godless liberals and agents of foreign countries, and many in Poland will surely believe it. But, on the other hand, many won't. PiS cannot control that. Not yet. PiS cannot yet completely reproduce the conditions of its own power. Poland is not yet lost.

Did I mention already that Poland is Europe? Before the end of last year, TOMASZ KONCEWICZ, in a [two-part blog post](#), looked back on 2019 and the truly incisive things that have happened in it in terms of the rule of law and its guarantee in the European Union: "After all, Poland's refusal to obey the Court's judgments and its readiness to do everything possible to circumvent it strike at the very heart of the EU rule of law. The challenge is to use what is legally available rather than keep finding excuses for not using the mechanisms already in place." Will the new EU Commission have the strength and will to take up this challenge? It doesn't look like it at the moment.

Europe

The Council of Europe is most directly in charge of human rights and the rule of law in Europe, but it is itself going through a historical period of weakness. That a member state could simply stop observing its duties without too much being done about it at all is no longer just a threat, it's a practice, as the example of Russia has painfully demonstrated to all concerned. [SILVIA STEININGER](#) outlines current plans to strengthen the Council of Europe and is concerned about the role that the European Court of Human Rights is expected to play in this.

A member state with a track record hardly less poor than Russia is Turkey. In December the ECtHR declared the way in which the Turkish judiciary deals with the criminal offence of membership of a terrorist organisation to be in violation of human rights. Since the attempted coup in 2016, you could be regarded a "member" of the Gülen organisation by, for example, having an account at a Gülen bank or a

certain messaging app used by Gülen networks on your mobile phone. [ALI YILDIZ](#) and [LEIGHANN SPENCER](#) analyse the EGMR ruling.

The rule of law is also at stake in the border dispute between the EU member states Croatia and Slovenia. The EU had made the resolution of that dispute by means of arbitration a condition of Croatia's accession. However, Croatia did not recognise the outcome of the proceedings, and Slovenia turned to the ECJ. Now the Advocate-General has presented his opinion and finds that the ECJ has no authority to interpret international law. [JAKOB GAŠPERIN](#) considers this to be misguided – this is not about international law but EU law – and bad news for smaller EU Member States which, for lack of political leverage, are particularly dependent on the rule of law.

Just before Christmas, the ECJ ruled that the immunity of elected members of the European Parliament extends to the Catalan separatists whom Spain has so far refused to allow to take their seats in Strasbourg. The ruling has fundamental significance for representative democracy in the EU, as [PETER VAN ELSUWEGE](#) shows.

On the same day, the opinion of the ECJ Advocate-General in the *Schrems II* case was delivered – a case in which the stakes are truly tremendous as well. The question is whether the strict European data protection regime will allow the status quo in transatlantic data traffic to continue at all. [JONAS BOTTA](#) analyses what can be read from the GA opinion.

World

The climate. It's getting hotter. Whole continents burst in flames. Where to complain? Where to appeal? Is the judiciary the appropriate institution to enforce as a legal requirement what politics is too weak and too lame to make their minds up about? Is it in the Netherlands, or so it seems: At the end of December, the High Council in The Hague obliged the Dutch government to reduce the Netherlands' greenhouse gas emissions by 25 percent by the end of 2020. Would this also work in the German legal context where similar lawsuits exist? [BERNHARD WEGENER](#) does not believe so.

The German governing coalition has agreed on a climate package which, however, is hardly satisfying anyone. In essence, Germany is following the trend towards nudging and other instruments of soft regulation, largely relying on incentives, instead of banning outright what is recognised and accepted as harmful. Why though? [JOHANNA WOLFF](#) points out that it is not necessarily particularly liberal to forgo legal bans and to rely on the shaming of wrongdoers, as if this was about mending their amoral ways instead of preventing specific behaviour in relation to a specific problem.

Austria

Black and green are the colours of the new governing coalition in the Republic of Austria. That is false, of course, Sebastian Kurz is not black at all, apologies: The guy is turquoise. That is the colour the formerly clergy-black Austrian People's Party has adopted for itself under the Kurz's youthful leadership: a little greener than blue, and a little bluer than green, and sufficiently pretty to look attractive from both sides. Anyway, Kurz remains chancellor, and the Constitutional Court is in the meantime sweeping up the legacies of his previous coalition with the disgraced far-right FPÖ (colour: blue).

One part of that turquoise-blue legacy was the "security package" which had included a whole raft of invasive surveillance measures and, according to the Constitutional Court, violated the principle of proportionality and the right to privacy. [FLORIAN LEHNE-GONZALEZ](#) notes that the Court had thereby created "a relatively close-meshed net around the private sphere of the individual" which even a democratically legitimated legislator will hardly find a way to pierce, and certainly not with such blunt surveillance powers as those contained in the "security package". He finds the new turquoise-green coalition agreement all the more remarkable as it seems to indicate that the government nevertheless wants to give it another try – the Green coalition partner possibly trusting that the Constitutional Court will have broom and dustpan ready once again.

Another major turquoise-blue project was the nationwide standardization of social welfare payments at the expense of immigrants. The Constitutional Court declared this law unconstitutional as well, as [FRANZ MERLI](#) explains. The new turquoise-green coalition on the federal level will stay clear of this matter now, so that the states will remain responsible for regulating social assistance according to their own ideas.

Chile

In the transition from dictatorship to democracy, the constitution often has the function of reducing the risk for the outgoing party: Solid constitutional rights are suddenly highly attractive for an ex-dictator with ample reasons to fear the revenge on his democratic successors in power. In the case of Chile, the 1980 constitution contains a whole bundle of provisions which serve to shield all sorts of "achievements" from the Pinochet era from the grasp of the democratic majority. For [FRANCISCA MOYA and MARCO GOLDONI](#), this is part of the explanation for the fact that the social protests in Chile have turned against the constitution. Too much constitutional law can be as damaging to a democracy as too little.

India

The Hindu nationalist government in the world's largest democracy wants to make access to citizenship easier for immigrants – unless they are Muslims. The project fits into the grand plan to turn the secular constitutional state of India into a Hindu

nation in which Muslims have no place and even face statelessness. [ANMOL JAIN](#) shows why the law is unconstitutional.

The law has stirred massive protests in India, and the Hindu nationalists are arming themselves for a counter-attack. At the beginning of January, masked thugs stormed the campus of the venerable Jawaharlal Nehru University in New Delhi and beat up students and faculty members – by far not the only case in which the state, security organs and university administrations have drastically failed in their duty to protect university members against right-wing extremist violence. A call for solidarity from European academics and students can be found [here](#).

Today, the Indian Supreme Court has delivered its [fundamental verdict](#) on the Internet shutdown imposed on the region of Kashmir by the Modi Government. Although the court has not ordered the complete lifting of the shutdown, it has at least denied the government the desired *carte blanche* in the alleged fight against terrorism in Kashmir and recognised the access to the Internet as a fundamental right. A first assessment of this ruling, which will certainly be much talked about, is [here](#).

UK, Scotland

Boris Johnson has no opposition in Parliament against "getting Brexit done" to fear any more after his election victory in December, to the contrary: His Tory majority, drunk with victory, even kills off the Erasmus programme with the EU, showing the elitist Remainer youth who is master now in the realm of Great Britain. One of the big unanswered questions is, though, what will now happen to the Scottish part, which, as we know, never wanted to leave the EU and whose SNP government now believes it has a good case for a new independence referendum. However, as [ALAN PAGE](#) explains, the Scottish Parliament is unlikely to be able to do much on its own: The lever of the independence process remains firmly in the hands of the Westminster Parliament.

Germany, MeckPomm, NRW

In the northern German state of Mecklenburg-Western Pomerania, the use of the N-word is, depending on the context, permitted by constitution. That, at least, is what the State Constitutional Court claims. An AfD-politician had repeatedly used this expression in the state parliament and had been called to order by the speaker. He went to court and partly prevailed: According to the state constitutional judges, the speaker should have differentiated whether the word had been used with a derogatory intention or not. [KATHARINA MANGOLD](#) and [SINTHIU BUSZEWSKI](#) will not let this kind of constitutional interpretation stand: "When a whole group of people learns from a debate in the Landtag that a member of parliament denotes them with a racist term, it becomes clear at the same time that the basic democratic idea of equality of all citizens is being called into question." The *Grundgesetz* makes very clear that racist slurs are forbidden to *all* state powers, including those of Mecklenburg-Western Pomerania.

In the western German state of North Rhine-Westphalia, for its part, the state constitutional court has declared the abolition of the run-off vote in municipal elections to be unconstitutional. This is particularly damaging to the CDU, whose candidates in that region tend to win by relative rather than absolute majority, and lo and behold: judges close to the CDU dissented from the majority. [STEFAN LENZ](#) analyses the consequences of the judgement.

According to the Federal Minister of Justice, specific children's rights should be added to the Federal Constitution, which [PHILIPP DONATH](#) considers absolutely necessary in principle, although he strongly dislikes the concrete implementation of this project.

Oh, well: this editorial is almost twice as long as it should be. A lot has piled up during those three weeks since my last editorial. The holiday break has effectively been cancelled in this eventful year, I guess. I'll skip the usual "elsewhere" review of what has been going on on other blogs this time, please forgive me. See you next week, all the best to you, and take care,

Max Steinbeis

