

Pushing Borders

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Maximilian Steinbeis Sa 10 Jun 2017

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Dear Friends of Verfassungsblog,

In the UK, the electorate refuses to take the responsibility for the Brexit decision off the Tories' shoulders. In the US, Donald Trump gyrates towards impeachment, the outcome uncertain. In Spain, the Catalan referendum on October 1st will push the country to the brink of a constitutional crisis. In Poland, the legislature officially decides to subjugate the judiciary. These are trying times, and there is certainly no lack of highly topical Matters Constitutional. For today, however, I want to start with a topic supposedly of the past but nevertheless both legally and politically as present as can be: the refugee crisis in late summer, autumn and winter 2015/16.

Attorney General at the CJEU Eleanor Sharpston has published an [opinion](#) this week on two cases which go to the core of this unprecedented crisis. Appellants are a Syrian and an Afghan family who had applied for asylum in Austria and Slovenia. There, the authorities referred them to Croatia as the place where they had crossed the EU's external border and therefore had to seek protection (Article 13 (1) of the Dublin III Regulation). They had not, however, because Croatia just "waved them through" along with the vast majority of refugees, westwards.

Should the states of Central and Northern Europe 2015/16 have insisted on leaving the responsibility for the protection of refugees to the states at the external frontier? That is the question raised by this case, and AG Sharpston's reply is: No.

What happened in the West Balkans in 2015/16 was, according to the Attorney General, "the greatest mass movement of persons across Europe since World War II." This was not what the rules of responsibility distribution in the EU were made for. The EU asylum system is built for protection-seeking dissidents stepping out of planes, not hundreds of thousands of visa-less desperates in dinghies. The fact that Article 13 of the Dublin III Regulation imposes the responsibility for the asylum procedure on the countries where the EU external border was illegally crossed for the first time makes sense as long as it can be said that they should have protected their border properly. But not in the face of a humanitarian mega-disaster.

This could be dismissed as water under the bridge if it weren't for the commonplace of the "blatant lawlessness" shown by the German government and others in 2015/16 – a topos persistently shared not just among right-wing populists but countless middle-of-the-road Germans eagerly spooning up what Udo Di Fabio and other luminaries of constitutional law had placed before them in terms of legal wisdom. The salubrity of that dish, though, might become a whole lot less obvious when (and if) the CJEU will follow AG Sharpston's opinion.

According to the Advocate General, the ordinary chain of conclusions – illegal border crossing from Serbia to Croatia, therefore Croatia responsible under Article 13 of the Dublin III Regulation, therefore no jurisdiction for us, therefore breach of law if we still process these cases anyway (replace, *mutatis mutandis*, Croatia with Hungary) – just didn't apply any more in 2015/16. Hundreds of thousands approaching the frontier, preparing to set up improvised Idomeni-style camps in the coming winter, certain to crash – if taken in – the asylum system by sheer number as they had in Greece before: this was what Croatia had to face, and what to do in that situation is simply not regulated by Art. 13:

Neither that provision nor the Dublin III Regulation as a whole was designed to cover a situation of authorised border crossings by a mass inflow of potential applicants for international protection. That regulation is not aimed at ensuring a sustainable sharing of responsibility for applicants for international protection across the European Union in response to such an inflow of people.

Article 13 (1) of the Dublin III Regulation thus does not provide for this extreme constellation, and neither do any of the other criteria of Chapter III of the Regulation. Does this mean that the Dublin Regulation has "failed"? By no means. If none of these criteria fits, the competent state is, according to Article 3 (2) of the Dublin III Regulation, the one where the application for asylum was filed.

I know, of course, that a proper right-wing populist worth his salt will not allow just some Luxembourg official to question his legal convictions. This is not my concern, though. Of course, Luxembourg can still be seen as mistaken, and of course it is possible to insist, and with good reasons too, that the 2015/16 refugee policy was unlawful in all possible aspects. That just gets a little bit more demanding. One can no longer simply point to Di Fabio and say: look, the fellow used to be a constitutional judge, so he is in the know about all these legal matters. One never really could, anyway. Law is something that has to be negotiated with arguments, not stated by alleged or actual expert authority. AG Sharpston's opinion makes it easier to make that point.

Self-Defence

Why the alliance of the British Conservatives with the Northern Irish DUP is a Faustian pact that will cost the Tories its soul and Theresa May her job is described by AIDAN O'NEILL in his first [thoughts on the results of the UK general elections 2017](#). Redemption may come if the Tories chose Ruth Davidson as their leader instead, who is everything Theresa May is not: young, gay, likeable, of working class background and a Scotswoman.

How can the judiciary defend itself against subjugation by legislative and government? In Poland, this question is anything but theoretical right now. At a recent conference at the University of Oxford, four outstanding experts from Poland discussed the plight of the Constitutional Tribunal, with contributions by [MARCIN MATCZAK](#), [TOMASZ GIZBERT-STUDNICKI](#), [ADAM CZARNOTA](#), and [LECH MORAWSKI](#), the latter one of the three Constitutional Tribunal judges nominated by the current PiS government for seats already occupied by judges elected before PiS's takeover. Can the constitutional policy of PiS be justified by "republican" arguments? Morawski tries to do this, and [PAUL BLOKKER disputes this attempt](#). [TOMASZ KONCEWICZ](#) describes how "[judicial self-defence](#)" in Poland would look like and what encouraging signs he observes.

The German Federal Constitutional Court has declared the nuclear fuel tax unconstitutional this week, which is bad news for the German treasury and the government's nuclear energy policy. The decision is interesting news in terms of constitutional policy as well, as [RAINER WERNSMANN explains](#), as it limits the creativity of the legislator in the invention of new taxes and in deliberately declaring them purchase taxes.

That the new German law on the federal police *Bundeskriminalamt* (BKA) is a worrisome affair is something we rather sensed than knew, given the complexity of the matter. That is [changed](#) by MATTHIAS BÄCKER who nails down what is so problematic about the law – which is not least its ambiguity: "Possibly it leaves police information largely to the BKA's disposal; this would not be compatible with fundamental rights. Remarkably, the law can also be interpreted just the opposite way, in that it establishes excessive and impracticable requirements for the BKA's information regulation. "

Glossator FABIAN STEINHAUER gives us in his weekly column observations on [montages, mandorlae, vagaries, and the need to take a close look](#).

Elsewhere

KENNETH ARMSTRONG has [little sympathy with British Prime Minister Theresa May](#) and her epically backfiring attempt at securing a "strong and stable" majority for hard Brexit. AKASH PAUN predicted even before the election that a [hung parliament would not be the end of the world](#). How Brexit destabilizes peace in Northern Ireland, even without sectarian Unionists with a grip on power in Westminster, is [described](#) by COLIN HARVEY and DANIEL HOLDER.

MARIO GARCÍA shows how the [Spanish Constitutional Court](#), while remaining remarkably open towards EU law, is also becoming increasingly tense about the the growing role of the Court of Justice of the European Union in constitutional matters.

MICHAL OVÁDEK reports on the efforts of [Slovakia to get rid of a blatantly unjust amnesty law](#) from the era of authoritarian president Vladimir Meciar in the 1990s, including a constitutional amendment and a recent judgment of the Constitutional Court.

JEAN-PIERRE GAUCI raises alarm about the return of [refoulement in Italy](#), sending refugees back to war-ridden Libya.

DEBORAH PEARLSTEIN considers it not implausible to hold the US Congress to the standards it set in [impeaching Trump's predecessor Richard Nixon](#). ERIC POSNER [contradicts](#) ALAN DERHOWITZ's [claim](#) that the President, in his omnipotence to hire and fire FBI Directors, can not be charged with obstruction of justice at all, and so does [RICK PILDES](#). A selection of short commentaries on the Comey hearing, some of them by highly prominent constitutional lawyers, can be found [here](#).

So much for this week. In the next we expect among others an assessment by MIGUEL AZPITARTE of the announced independence referendum in Catalonia and its constitutional ramifications. In the meantime, all best and take care,

Max Steinbeis

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