

Maximilian Steinbeis Sa 29 Jul 2017

A week of reckoning for the ailing European asylum system – this was what many had expected last week to be. The ECJ would certify, in its judgments *A.S.* and *Jafari*, the blatant inadequacy of the Dublin system in the face of humanitarian crises, of migration flows of unprecedented proportions, of tens of thousands drowned, frozen, and murdered on the way – just as Advocate General Eleanor Sharpston had so eloquently argued in her opinion.

It did not turn out that way. The Dublin system is what we have, and the Luxembourg judges give us no other. The states on the external borders remain, in principle, alone with the responsibility to manage refugee figures in the six and seven digits range in the case of a crisis. Politically, that is disappointing – but on the other hand, as far as the function of the ECJ as a court is concerned, this result, [unsatisfying](#) as it may be, still has quite a lot going for itself. The ECJ, as FERDINAND WEBER [puts it](#), has kicked the ball back into the field of politics. And this is where, [according](#) to CONSTANTIN HRUSCHKA, it belongs: "The court demonstrates a calming responsibility towards the rule of law in the overheated asylum debate by not trying to read solutions for unresolved, fundamental problems into the legal norms. Progressive solutions must come from the legislature, which on the European level is the European Parliament and the Council".

We would gladly receive such progressive solutions from the legislature, but neither past experience nor present evidence give us much hope on that account. What we have heard about Dublin IV so far sounds rather like more of the same. The relocation of 120,000 refugees from Italy and Greece remains as dead in the water as it was ever since its inception, even if Advocate General Yves Bot considers the complaints of Hungary and Slovakia against that obligation to be unfounded (on which opinion we expect, by the way, a comment by RALUCA BEJAN).

Things get in motion, and the ball is rolling back into the field of the judiciary, when people claim their rights in court. Dublin III not only regulates jurisdiction between states, but also grants procedural rights to asylum-seekers. In another judgment, proclaimed on the same day as *A.S./Jafari*, the Court recognized as such the right to have jurisdiction on the asylum procedure examined within three months. Legal agency of asylum seekers, says DANA SCHMALZ in her [comment](#) on the *Mengesteab* decision, the possibility for right-holders to promote justice one case at a time – that is perhaps the best hope for "progressive solutions" we have at the moment.

Facticity and fiction

A.S., *Jafari*, *Mengesteab*, the AG opinion on *Hungary/Slovakia* – if you believe that the ECJ would have had enough with these four heavyweights on one single day, you are wrong. On top of these the court also hauled another colossus of a case onto our desk, the opinion on the EU-Canada agreement on passenger name records (PNR) – the most important data protection decision from Luxembourg since *Schrems*, finds CHRISTOPHER KUNER in his [extensive analysis](#). RAPHAEL BOSSONG [examines](#) the reverberations of this decision on the EU's own PNR directive.

In the week before, the ECJ had saved the German system of employee participation from the Commission's urge to level the member states' social policy standards, much to the [satisfaction](#) of MARTIN HÖPNER. The Commission's reflections on the "social future of Europe" are examined by EBERHARD EICHENHOFER as a [kickoff](#) for a series of contributions developed within the framework of the new "We think Europe" political salon organized by Sinthiou Buszewski and Tim Wihl.

Speaking of the future of Europe: In Poland, President Duda surprisingly vetoed (parts of) the government's plan to put the judiciary under its thumb – a veto that, unlike the one that was initially announced, actually was meant and is to be taken seriously. MARCIN MATCZAK [investigates](#) what Duda's change of mind is about and what can develop from it. The prospect of suspending Poland's voting rights in the EU by opening a so-called Article 7

procedure against both Poland and its ally and potential veto player Hungary is [analyzed](#) by ALEXANDER THIELE, to the result that, yes, that would probably work.

The Federal Constitutional Court in Karlsruhe had proclaimed a verdict on the right of the opposition to get information from the federal government about secret intelligence sources in connection with the Oktoberfest bombing in 1980 – the outcome is [according](#) to BENJAMIN RUSTEBERG a lot less promising for the parliamentary control of intelligence services than one might suppose at first glance.

My personal highlight of the week was our [online symposium](#) on the question of what the Federal Constitutional Court had done to literature ten years ago with its notorious decision to condone the ban of Maxim Biller's novel "Esra" – with contributions by [GEORG M. OSWALD](#) and Biller's publisher [HELGE MALCHOW](#) from the perspective of literature, by [HANS-JÜRGEN PAPIER](#), [EVA INÈS OBERGFELL](#), [SANDRA WESTPHAL](#), and [SOPHIE SCHÖNBERGER](#) from the perspective of the law, and by [RUSS MILLER](#) with a phenomenal connection of both.

Elsewhere

MANUEL MÜLLER describes the EU's [options in the Polish drama](#), and ANNA SLEDZINSKA-SIMON tells the tale of the "[Polish revolution 2015-2017](#)".

MARK ELLIOTT [explains](#) the UK Supreme Court's recent constitutional landmark decision on court fees for labor disputes as a violation of the rule of law, and so do DOMINIC RUCK KEE and CHRISTINA LIENEN.

ERIC POSNER has an [idea](#) how the Möbius strip of "Trump commits obstruction of justice by pardoning himself" and "Trump pardons himself for committing obstruction of justice" could be escaped in the end.

MENAKA GURUSWAMY [reports](#) on a case before the Indian Supreme Court which could establish a right to privacy in India.

In the next few weeks of August, I will give you a break with these emails – you are probably on vacation anyway, if you are not already, and do not intend to be bothered with all that irksome business for a while. In any case, I am. Verfassungsblog will continue to cover matters constitutional as they occur, but on a more leisurely pace. Beginning of September, we will continue with the weekly Verfassungsnews as usual.

A nice and relaxing summer to you and all of us! All best, and take care,

Max Steinbeis

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