

Seven Long Years

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Maximilian Steinbeis Sa 14 Jul 2018

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Dear Friends of Verfassungsblog,

Before I start: after my request last week, our number of supporters on Steady has jumped from 139 to 184. That's great, thank you so much! I harbour the suspicion, however, that some of you are still secretly saying to yourself: Damn it. Actually, I have no good reason *not* to support the work of those people with measly 4 euros per month. All I need is just a little nudge. If only somebody could give me a little nudge! Just the tiniest of nudges. Then I'd do it.

In that case: with pleasure. Consider yourself nudged!

Oh, not at all, dear sir/madam! Thanks are all mine.

Alright, then. This week, another international organisation, NATO, has taken a long hard look into the abyss of the post-multilateralist era. The European Union has been staring into that abyss for at least seven years.

2011 was the year in which the euro crisis dominated all the headlines. Rather few people noticed what, at the same time, was happening in European asylum law. Strasbourg, Karlsruhe, Luxembourg, one court after another came to the conclusion that it was no longer viable to turn refugees registered in Greece back to Greece as the fate they met there was a violation of human dignity. That was the beginning of the undoing of the European asylum system we are facing today. And today it is the other way round: The whole world is talking about the asylum system, and rather few about the euro zone. The structural problems of the one, however, are just as unsolved as those of the other.

Greece and Italy were, in both parallel crises, supposed to play the role of letting us Germans enjoy the well-earned fruits of our export champion probity and geographical situation in the middle of border-less Europe, undisturbed by all those boats swept to the shores of Lesbos and Lampedusa and unbothered by the plight of all those unemployed youths and impoverished pensioners in Madrid, Athens and Rome. For seven years we have been confronted with that insight now. Seven bloody years! Who was born in 2011 is now in the second grade of primary school. Who graduated from high school in 2011 may now be well into her PhD. Seven years was the time Jacob had to labour to wed Rachel (that's what he thought). Seven years was the time Hans Castorp spent on the Magic Mountain. Seven years, that is more than half of Angela Merkel's chancellorship, so far! And now, right-wing extremists govern in Italy! And we are surprised that the followers of Donald Trump, Viktor Orbán, Boris Johnson and Markus Söder find post-multilateralism so attractive?

No flowerpot is like the other

We won't despair. CLAUS OFFE has talked to MAURIZIO FERRERA about the Euro and its structural dysfunctionality, about Polanyi's satanic mill in which we keep turning, for seven years, without a way out, and about the devastatingly stupid German "flowerpot theory". Whoever has lost courage in these long seven years should read the transcript of this conversation and draw new energy from it.

++++++A Note from MPIL+++++

CfP "Cultural Heritage in a Post-colonial World – New Framings of a Global Legal Problem".

Cultural heritage from former colonies arrived in Europe in great amounts since the 17th century. Many empires established large collections to display this "shared heritage". Last year, the stepback of Bénédicte Savoy from the committee advising the new Humboldt Forum in Berlin and the promise of Emanuel Macron to restitute objects taken during French colonial rule caused societal discourses about the colonial provenance of collections and artworks in museums. The Völkerrechtsblog welcomes contributions that consider which role (international) law could play in these debates.

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Speaking of the asylum crisis: A whole array of Verfassungsblog authors have worked with great passion and diligence in recent weeks to fight back against the ongoing attempts to push Germany on the unilateralist path along with our Eastern and Southern European neighbours. DANIEL THYM is worried that the sober legal dispute will be jeopardized by political irreconcilability, and calls for rhetorical and argumentative "disarmament" in the impending Cold War between human rights/open borders proponents on the one and state sovereignty/ border protection proponents on the other side (German).

ADEL-NAIM REYHANI reconstructs the way states and refugees meet nowadays as a game of hide-and-seek: The leeway demanded by states is "used (...) to seek creative ways of hiding from the law and only having to meet international obligations formally instead of in substance. (...) The same lack of rights that was once the reason for European states to establish modern refugee protection is now being created in a new guise by a strategy of externalisation in which the right degenerates into an act of grace" (German).

The sovereign state decision on the composition of the nation and the European and international legal ties that bind it are at stake in the Tjebbes case currently pending before the European Court of Justice, which concerns loss of citizenship for long-term expatriates in the light of Rottmann proportionality. I have taken a look at the opinion of the Advocate General who recommends to the Court of Justice to take an approach of utmost restraint (German).

FABIAN MICHL, in his turn, examines the recent compromise of the German government coalition to track down refugees registered elsewhere by dragnet controls in the border area. The result: this makes the conflict with European law worse, not better (German).

As if the police had no other worries nowadays: the Administrative Court of Appeals recently had to deal with the question of whether the state of North Rhine-Westphalia may refuse applicants of less than 1.63 meters of height entry into police service. This may sound silly, but is a full-blown discrimination. For which the Court found allegedly justifying reasons, which, according to [KIRSTEN WIESE](#), don't quite hold up to scrutiny, though (German).

Should we let the AfD nominate constitutional judges?

The German fruit of these seven years is AfD. The far-right party is here to stay for the time being, it has plenty of MPs on the federal and regional level, and it demands its share in the representation of the people. Does that mean it has a right to nominate judges to the federal and state constitutional courts? [MICHAEL HEIN](#) has investigated how the regional parliaments have so far dealt with this situation and observes three strategies: Exclusion, conditional and full integration. None of them actually work (German).

The judiciary and its independence are under pressure in many European countries in a way no one would have imagined seven years ago. Hardly anyone talks about Bulgaria, though. [RADOSVETA VASSILEVA](#) reports on what the President of the Bulgarian Supreme Court has to suffer nowadays, which defies belief.

Two major constitutional issues of our time meet in a judgment handed down by the European Court of Justice this week, analyzed by [THOMAS HOEREN](#) (German): Freedom of religion and data protection. The decision is about Jehovah's Witnesses going door to door and making notes about the people who open or not. Yes, they too must comply with European data protection regulations, even if this is a challenge under German state-church law.

The **German** Federal Court of Justice, in turn, had to decide who owns your social media data after you die. According to the BGH, it is the heirs, although [KARL-NIKOLAUS PEIFER](#) calls the way in which the highest German civil court comes to this conclusion "shirt-sleeved" (German).

Finally, as always, the man whose Monday glosses mark the beginning of the Verfassungsblog week: [FABIAN STEINHAUER](#). Boats float on the Mediterranean like Géricault's [raft of the Meduse](#), and Europe tries to escape the freezing effect of the Gorgon head's stare by staring into the reflecting Frontex shield and also into the abyss of its own abysmality. Steinhauer's recommendation (German): "Consider carefully whether you want to commit yourself against the captain of the *Lifeline* and against the cynically termed do-gooders. Consider how you want to deal with the European-African conflict, in a European or African or (which I would recommend) transnational way, in other words also with a Europe that is similar to Africa. Your sentences and deeds will be brought up again in later times, traces of them will be found in the archives, perhaps you will even be appreciated in some museum. If you think Perseus is better than Medusa and Perseus finished off Medusa, I won't object, people have to believe in something. I will object, however, if you expect that you and your commitment will not be remembered."

Elsewhere

SOLON SOLOMON sees **British** PM Theresa May's decision in favor of a soft Brexit as a sign that the era of multilateralism is the opposite of over: "This is not a time for lonely cowboys."

JESS SARGEANT and ALAN RENWICK examine the proposals of an independent commission to reform referendums in the **UK**.

DJORDJE GARDASEVIC reports on a popular initiative in **Croatia** that wants to change electoral law by constitutional referendum and restrict the rights of representatives of national minorities in parliament, which could lead the Constitutional Court to stop the referendum question as unconstitutional constitutional law.

JORDI NIEVA-FENOLL finds the decision of the Higher Regional Court of Schleswig to extradite the former **Catalan** President Puigdemont foreseeable (Spanish).

STEVE PEERS explains the EU Commission's latest advance on visa policy.

ADRIANO MARTUFI analyses how the practice of combating crime by confiscating property relates to the European Convention on Human Rights.

On the occasion of this week's hearing before the **Indian** Supreme Court about the penalization of homosexuality in Art. 377 of the Indian Penal Code, TARUNABH KHAITAN explains in a [two-part blog post](#) what constitutional law has to say on that matter.

QUIRIN WEINZIERL reports on the **US** Supreme Court ruling in the *Carpenter* case, which – 20 years late – establishes some protection against state access to private mobile phone location data (German).

To quote but one of countless posts on the nomination of Brett Kavanaugh as Trump's candidate for the **US** Supreme Court: MARK GRABER points to the clichés advocated by Trump and Kavanaugh that constitutional interpretation must be both pursuant to the constitutional wording and common-sense. "The more serious problem is that when the two conflict, Kavanaugh always selects the option that promotes Republican policies and politics."

So much for this week – and so much for this summer. This is the last editorial before our quasi-summer break during which we will continue to be active on *Verfassungsblog*, but probably in a bit more leisurely pace as before. We've all had some very strenuous weeks and we need some repose, don't we? I wish you all the best and look forward to seeing you again in September!

Max Steinbeis

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