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Survey of recent developments & academic discussion: Justice and Fundamental Rights

No. 7 December 2014

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The academic literature on justice and fundamental rights, particularly in the field of law, is burgeoning. Three main topics seem to have been attracting the most interest recently, and also received frequent comment in both the regular media and online sources. Not coincidentally, these same three topics pose challenges to the new European Commission in equal measure; in particular to the three new Commissioners entrusted with the monitoring and enforcement of justice and fundamental rights in the EU: Mr Frans Timmermans (portfolio: Better Regulation, Interinstitutional Relations, the Rule of Law and the Charter of Fundamental Rights), Mr Dimitris Avramopoulos (portfolio: Migration, Home Affairs and Citizenship), and Ms Věra Jourová (portfolio: Justice, Consumers and Gender Equality). In itself, the content of the portfolio of Mr Timmermans is already a great sign that the Juncker Commission means business when it comes to justice and fundamental rights issues. Testimony to this is also the fact that he has been installed as 'First Vice President', exercising scrutiny and supervision over proposals and ideas submitted by any of the other members of the institution – hitherto a principally collegiate entity, whereby no strict system of hierarchy was in place with regard to either the entrusted portfolios or specific dossiers.

Towards a Genuine Area of Freedom, Security and Justice – 2014 and beyond

Already in the Treaty of Amsterdam, which entered into force on 1 May 1999, the EU expressed its ambition to become an 'Area of Freedom, Security and Justice' (AFSJ). Upon the entering into force of the Treaty of Lisbon on 1 December 2009, the EU was even proclaimed to constitute such an area, period. To an extent, these are but words on paper; as is the rich legislation that has in the past decade been enacted on the basis of the relevant legal provisions. At the same time, the actual application of the relevant rules has been raising manifold salient questions, and posed difficulties for various national courts and other public authorities in the Member States. Alongside the European Court of Justice (ECJ), they are however the ones expected to give proper shape to the AFSJ. A frequently re-emerging sentiment amongst authors analysing recent trends and developments here continues to be that the EU suffers from a 'justice deficit', in part caused by the fact that for the longest time, the supranational Union institutions have been consciously kept aside, and an intergovernmental approach has been favoured (see Kochenov et al, referenced below). Whereas the Lisbon Treaty already spelled great change in this respect, the legal architecture transformed definitively from 1 December 2014 onwards, when the last remaining transitional arrangements expired; from that moment on, the Commission is entitled to initiate so-called 'infringement proceedings' against defaulting Member States when it comes

to effectuating the measures adopted to realise the AFSJ, and restrictions on the jurisdiction of the European Court of Justice in this regard were lifted. The relevant measures include, inter alia, the framework decisions on the position of the victim in criminal proceedings (2001/220), on the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial (2009/299), and on the exchange of criminal records (2009/315). Moreover, from 1 December 2014 onwards, these and similar measures have obtained the same legal effects as 'ordinary' EU instruments (regulations, directives and decisions) – in particular the crucial quality of 'direct effect', enabling individuals to invoke and rely upon them immediately before national courts and authorities. Shortly prior to this, the United Kingdom made its final choices with regard to the measures it is no longer bound to apply per 1 December 2014, but which it is opting back into – amongst which the controversial framework decision on the so-called European Arrest Warrant (2002/584), allowing for the speedy surrender of suspects from one EU country to the other. A prevailing question however is whether the available instruments for enforcing all previously enacted, as well as all forthcoming measures that aim to give shape to a genuine AFSJ, suffice for achieving that very objective; the Commission may very well be in need of enhanced tools to overcome the alleged deficit, promote the 'rule of European law' in this domain, and effectively deal with repeat offenders. Suggestions to this end are advanced in different contributions to the academic debate, whilst being seriously considered in political circles too (see e.g. Bieber & Maiani; von Bogdandy & Ioannidis, further referenced below).

'Der Fall Ungarn' – Enhancing the Commission's Enforcement Powers?

A closely linked debate pertains to what has become known as the 'Hungary case' which, when brought to the European Court of Justice by the

Commission, already triggered two negative verdicts (case C-286/12 and case C-288/12), as well as a damning pronouncement from the Venice Commission active within the Council of Europe. Since coming to power in 2010, the government of Viktor Orbán has been accused of curtailing democratic freedoms, recasting the public sphere, dictating an orthodox morality, purging the civil service, high offices and the judiciary, even openly promoting the establishment of an 'illiberal state'. The concomitant entrenching of his own position, as well as that of the ruling FIDESZ party, has raised more than one eyebrow amongst other Member States, and prompted calls to counter these developments, if need be by isolating the country and stripping it of its voting rights in the EU Council of Ministers. Similar problems come to the fore with regard to political turmoil, acrimonious in-fighting and widespread corruption in Romania. Also in this light, the principal legal question has become whether the tools that are currently at the disposal of the Union institutions – including the 'systemic deficiency' clause, widely considered as much too blunt ('the nuclear option') – are fit for purpose, or whether the array should be broadened (see von Bogdandy & Ioannidis, referenced below). In 2013, four foreign ministers, including the then Dutch foreign minister Frans Timmermans, wrote a letter to the EU commission asking for a new "rule of law mechanism". The Commission itself came up with proposals earlier this year (Communication from the Commission to the European Parliament and the Council – A New EU Framework to Strengthen the Rule of Law, Brussels, 19 March 2014, COM(2014) 158 final/2.), but was immediately rebuffed by the legal service of the Council with claims that it was reaching beyond the limits of its conferred powers. Recently, Italy revived the debate by making the issue one of the priorities of its six-month presidency of the EU, and secured an agreement to hold regular debates in the Council on the rule of law in Member States. Meanwhile, Mr Timmermans has indicated that the Council debates are still only 'complementary' to what the

Commission can and will do – yet to what extent he will be enabled to live up to this promise remains to be seen.

The EU Fundamental Rights Charter and its Scope of Application

Last but by no means least, a third and final issue that has of late been making headlines and attracted a plethora of academic attention relates to the EU Charter of Fundamental Rights, which only obtained legally binding force in December 2009. In the past years, national judges as well as those at the European Court of Justice have been actively engaging with this document, whereby the determining of its exact scope of application forms a main bone of contention, particularly in light of the controversial ruling of the ECJ in the Åkerberg Fransson (Case C-617/12) that triggered a swift adverse reaction from the German Constitutional Court (judgment of 24 April 2013, 1 BvR 1215/07). One of Mr Timmermans's predecessors, Ms Viviane Reding, nonetheless happily mooted the idea of deleting the relevant clause (article 51) altogether, which would ensure the applicability of the European fundamental rights catalogue in all situations, including those where no connection with EU law exists at all. The exact delineation scope of application of the Charter becomes even more relevant as it contains rights and principles that do not feature at all, or not so prominently, in kindred documents (see e.g. Shu-Perng Hwang, further referenced below). So far however, the clarification offered by the Court of said clause remains fuzzy, with many other provisions also yet to receive a more extensive elaboration (compare Peers, Hervey, Kenner & Angela Ward, further referenced below). At the same time, a striking simultaneous development that deserves to be noted under this heading concerns the frequency with which EU measures have in recent times been struck down by the Court for violating the fundamental rights standards established by the Charter. Hereby, the annulment of

the telecommunications data retention directive (2006/24) in the Digital Rights Ireland judgment (joined cases C-293/12 and 594/12) takes pride of place. Thus, we may well be witnessing a brand new era in which the Court is more able and willing than ever to take fundamental rights seriously – deploying the Union's own 'Bill of Rights' as its key yardstick.

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Further Reading

Roland Bieber & Francesco Maiani, 'Enhancing Centralised Enforcement of EU Law: Pandora's Toolbox?', *Common Market Law Review* 2014/4, pp. 1057-1092

Armin von Bogdandy & Michael Ioannidis, 'Das systemische Defizit. Merkmale, Instrumente und Probleme am Beispiel der Rechtsstaatlichkeit und des neuen Rechtsstaatlichkeitsaufsichtsverfahren', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 2014/2, pp. 283-328

Dimitry Kochenov, Gráinne de Búrca & Andrew Williams (eds.), *Europe's Justice Deficit*, Oxford: Hart Publishing 2015

Shu-Perng Hwang, 'Grundrechte unter Integrationsvorbehalt? Eine rahmenorientierte Überlegung zur Debatte um die Bindung der Mitgliedstaaten an die Unionsgrundrechte', *Europarecht* 2014/4, pp. 400-419

Steve Peers, Tamara Hervey, Jeff Kenner & Angela Ward (eds.), *The EU Charter of Fundamental Rights – A Commentary*, Oxford: Hart Publishing 2014