
Editorial

Editorial: Those Who Live in Glass Houses ...; In this Issue

Those Who Live in Glass Houses ...

The European Commission launched an infringement procedure against Poland over measures affecting the judiciary a day after the publication in the Polish Official Journal of the Law on the Ordinary Courts Organization on 28 July 2017. Though the infringement procedure is formally distinct from the ongoing ‘Rule of Law Dialogue’ and the recommendations issued just a few days before commencement of such procedure, it comes under the latter’s penumbra; both form part and parcel of the Commission Press Release (IP-17-2205). If the concern was ‘The Rule of Law’, at least in some respects there is more bang than buck. The President of Poland blocked the most controversial parts of the new judicial regime in Poland, so that the infringement procedure was left with just two violations.

The first concerns a different retirement age for male and female judges. It is not clear if this distinction in the Polish law is by design or inertia but the infringement seems clear: what is sauce for Sabena (RIP) cabin attendant geese should be sauce for judicial ganders. But important as any form of gender discrimination is, this item in the Polish legislation does not directly concern the more troublesome aspects of political control over the judiciary and its independence. Should Poland not correct this anomaly, it should be an easy case for the Court.

The second item in the infringement procedure is far more serious. In the Letter of Formal Notice (the first stage in infringement procedures) the Commission raises concerns ‘... that by giving the Minister of Justice the discretionary power to prolong the mandate of judges who have reached retirement age, as well as dismiss and appoint Court Presidents, the independence of Polish Courts will be undermined’ (*id.*), allegedly contravening a combination of Article 19(1) of the TEU and Article 47 of the EU Charter of Fundamental Rights – a legal basis which is creative but not specious.

If indeed the prolongation of the mandate of a judge reaching retirement age rests in the hands of a Minister, it could be that the government of which he or she is part and acts and/or legislation issuing from the government might at that time be subject to judicial scrutiny by said judge. This may well consciously or otherwise impact, for example, the judge’s conduct prior to retirement or, no less importantly, give the appearance of lack of independence. I think this is indeed a serious matter impinging on the independence and appearance of independence of the judiciary. It is one

thing to have scrutiny and approval of judges by democratic bodies at the moment of appointment. But once appointed, the independence of the judge from political actors must be as absolute as possible, and this dependency described in the letter of intent clearly compromises such.

But there is an irony in this complaint; some might even think a ticking time bomb. At least on two occasions proposals were put to various Intergovernmental Conferences to amend the Treaties so that the appointment of judges to the Court of Justice of the European Union should be for a fixed period of time – say nine years – as is undoubtedly the Best Practice in Europe among higher courts where appointments are not until the age of retirement. Ominously, in my view, the proposals were rejected. So that now we live under a regime where the prolongation of Members of the Court(s) (judges and advocates general) rests in the hands of national politicians whose decisions and legislation may come before such judges.

I am sure one can draw all kinds of Pharisaic distinctions between the Polish law and the European practice. I take cold comfort from the collegial and confidential nature of proceedings as a shield guaranteeing independence and the appearance of independence.

There is clearly no such shield in the case of advocates general. The old hands among you will remember from years past at least one much commented upon Opinion of an AG which gave the appearance of being compromised by this political dependence. AGs do not give Opinions in cases where ‘their’ Member State is a defendant in a direct action. But they frequently do in Preliminary References, implicating directly or indirectly same. Far be it for me to impugn the integrity of any AG, present or past. But in this area appearances are as important as actual practice.

As regards judges, the shield, too, is far from a perfect answer to the appearance of independence. (This is often given as a reason why the European Court cannot entertain the idea of dissenting opinions lest judges be exposed to undue pressure or appear to be.) Leaks apart, in most cases the Court follows the outcome proposed by the *Juge Rapporteur* (though often with modified reasoning) which, given the concerns that are the subject of the infringement procedure, may result in a delicate situation, especially in chambers of three.

Also, recent practice (of 20 years or so) has seen Presidents serving for long terms. By not resubmitting their own national serving as President, a Member State can effectively terminate the mandate of the President of the Court.

Thus, in the case of AGs egregiously and the Court as a whole and its President more obliquely, the situation is at its core cut from the same soiled cloth as is the situation in Poland about which the Commission rightly has taken action.

Hopefully Poland will correct this anomaly too in response to the infringement procedure before it winds its way to the Court. I would not like to be in the shoes of the Advocate General and the European judges should they ever be called upon to adjudicate the complaint, each one of them having already been, or potentially could be in the future subject to a renewal process resting in the hands of politicians of the executive branch of their Member State – politicians whose actions they may have been called upon to pronounce in the past and may be called to pronounce upon in the future.

Be that as it may, in its forthcoming recommendations about its own future the Court should well consider proposing fixed-term appointments and rid itself of this cloud.

In this Issue

This issue opens with three articles addressing trade and investment in international law from different perspectives. In a valuable and timely contribution to the literature on the interpretation of investment treaties, Andrew Mitchell and James Munro consider whether the use of a third-party agreement in interpretation constitutes an erroneous application of the customary rules of treaty interpretation in the Vienna Convention on the Law of Treaties. Gracia Marín Durán then explores the respective responsibility of the European Union and its Member States for the performance of World Trade Organization obligations, proposing a ‘competence/remedy’ model to help untangle this delicate question. And Sergio Puig and Anton Strezhnev investigate the legitimacy of international investment law, based on an experimental survey of 266 international arbitrators, concluding that there is strong evidence that arbitrators may be prone to the ‘David Effect’ – a relative bias to favour the perceived underdog or ‘weaker’ party when that party wins, through reimbursement of their legal costs.

The next set of articles in this issue focuses on human rights, with particular attention to the European Court of Human Rights (ECtHR). Merris Amos examines the continued value of the ECtHR to the United Kingdom, illustrating what might happen if the UK were to withdraw from the Court (readers are also invited to watch the EJIL: Live! interview with Professor Amos on our www.ejil.org site). Susana Sanz-Caballero investigates the scope of applicability of the *nulla poena sine lege* principle before the ECtHR, looking especially at the decisions in *Kafkaris* and *del Río Prada* to highlight the Court’s increasingly flexible approach to the concepts of penalty, foreseeability and enforcement of penalty. Oddný Arnardóttir argues that the Court has effectively used the margin of appreciation to engender an *erga omnes* effect for its judgments through the principle of *res interpretata*. Vera Shikhelman offers a fresh, empirical look at the work of the United Nations Human Rights Committee, exploring whether geographical, political and cultural considerations correlate with the voting of committee members. Lastly, Thomas Kleinlein addresses an important development in the ECtHR jurisprudence, positing that the Court’s legitimation strategy – comprising European consensus and the new procedural approach to the margin of appreciation – enhances the potential for democratic contestation and deliberation.

Roaming Charges in this issue takes us to the Negev Desert in southern Israel, where the photographer, Emma Nyhan, poignantly captures the ‘outsideness’ of a cultural minority, the Bedouins.

This issue features a lively *EJIL: Debate!*, centring on an article by Jonathan Bonnitcha and Robert McCorquodale, which addresses the concept of ‘due diligence’ in the United Nations Guiding Principles on Business and Human Rights. The authors criticize the uncertainty caused by two different concepts of due diligence invoked by the principles and suggest an interpretation of the Guiding Principles that clarifies the relationship between these concepts. John Ruggie (the author of the Guiding

Principles) and John F. Sherman, III, respond to the article, questioning the interpretive approach adopted by Bonnitca and McCorquodale. The authors then offer a rejoinder.

This issue inaugurates a new rubric for the Journal, *A Fresh Look at Old Cases*. In the first entry under this rubric, William Phelan uses the writings of French judge Robert Lecourt to show how the legal philosophy he developed before his appointment to the European Court of Justice connects with the fundamental doctrines elaborated by the Court after his appointment. This discovery highlights what the Court was attempting to achieve in its ‘legal revolution’ of 1963–1964 and enhances our understanding of the EU’s essential organizing principles.

The articles section of the issue closes with a *Critical Review of International Governance* by Ekaterina Yahyaoui Krivenko who examines the *jus cogens* jurisprudence of the International Court of Justice as a means to analyse and appraise the potential for using feminist methods in the Court’s reasoning.

The *Last Page* poem in this issue, by Günter Wilms, was inspired by Georges Moustaki’s song ‘Sarah’ and presents a personal vision, both melancholic and euphoric, of the European Union 30 years after the Single European Act and 60 years after the signature of the Treaties of Rome.

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