

# If that's the happy ending, could I have another look at the unhappy ending, please?

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So this is it, the great dénouement, the happy ending, the final act in which everything falls into place and all contradictions dissolve and bride and groom are finally allowed to kiss: The EU summit has laboured and given birth to an “interpretative declaration”. The document seems to have achieved what no one had been able to do before, which is making Hungary and Poland give up their veto in the EU budget dispute. Our German government, in its capacity as the current Council presidency, has negotiated the deal and is taking much credit for overcoming the Hungarian and Polish obstacle while keeping the rule of law mechanism intact – this is the line currently spun to the German and European public. Certainly, a price had to be paid, namely that the mechanism will only be activated further down the road now, after the ECJ has decided sometime next year or the year after whether it is legal in the first place. Until then, well, Orbán can calmly win his parliamentary elections in 2022 and Ziobro can finish off what's left of the independent Polish judiciary, but they can still be held responsible for this retroactively afterwards. Isn't that great? Huge success!

The bad news is, however, that if this “interpretative declaration” is more than a bad joke, then Hungary and Poland may indeed have won. And not just the battle, but the war.

Since this whole thing is about the rule of law, which is supposedly so terribly important to all of us, I suppose I'll be excused if I ask a few legal questions.

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Schriftliche Bewerbung, unter Angabe der Registrier-Nummer 361/2020 **bis zum 04.01.2021** an: Prof. Dr. Anna Leisner-Egensperger, a.leisner@uni-jena.de.

Weitere Informationen finden Sie [hier](#).

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First of all, what is being “interpreted” and “declared” here, and by whom and on which basis? The rule-of-law conditionality mechanism will be installed as a regulation, a piece of proper EU legislation which has certain legal effects after it comes into force. Which part of it makes it conditional to “guidelines” issued by the Commission “in close consultation with the member states” to guide its discretion, let alone allows for its suspension until such guidelines are finalised?

Then: What makes the Council think that an action for annulment by Hungary and Poland against such a regulation before the ECJ now suddenly has a suspensive effect? Where does that come from? The treaties don’t seem to mention that, do they? The Council seems to have just plucked it out of the blue sky, hasn’t it?

Furthermore: How does the EU Commission get involved in this? The Commission is an independent EU body, entrusted with the task of monitoring the member states’ compliance with the treaties. And now it is being made an accomplice, if not a perpetrator, of a breach of treaty by the member states? Ursula von der Leyen has agreed to this? With the approval of her legal service? Why, then, do we need a Commission at all? Why don’t we just scrap it altogether and let the Council Secretariat perform its job then?

These are just a few questions which come to my mind, and I don’t even know all that much about these matters, very much unlike [ALBERTO ALEMANN](#) and [MERIJN CHAMON](#) who have a whole load of further questions, and quite a few strongly-worded answers, too.

Oh, come on, this is all just small-time lawyerly objectionism, you may think. I don’t think so. On the contrary, this could not be more political.

After all, this dispute was never solely about judicial independence. From the beginning, the Hungarian and Polish governments have made no secret of the fact that they see this as part of a larger dispute about what the EU should be and look like. Their vision of Europe boils down to the idea that it is most of all a community of mutual protection for national governments to be allowed to maximize their power and – in the case of Hungary, at any rate – their wealth as unhindered by democratic and legal control as possible. What, if anything, distinguishes the spirit of the “interpretative declaration” and the nonchalance with which it flicks the EU-level rule of law off the playing field from this vision? Are Orbán and Morawiecki, when they brag at home in Budapest and Warsaw about their great victory in Brussels, perhaps simply right?

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So what to do? I was on the phone this morning with Sophie in't Veld, the liberal Dutch MEP, and I can't remember ever talking on the record to a politician half as angry as her: The Commission, she said, had accepted that the Council was giving it instructions – “unprecedented” and a “flagrant breach of the Treaties”, and, what irony, at the hands of the guardian of the same. “I'd really like to see Ms von der Leyen explain this to the judges in Poland”, who are putting their careers and livelihood and freedom at risk to uphold the rule of law in their country. The least she could do now, the MEP said, is explain herself to the European Parliament. “If she is not willing to do that, maybe we should reconsider our support for her.”

Of course, the Commission President could now do just that and explain before the EP, quite correctly, that this “declaration” is legally non-binding and irrelevant, unlike the regulation on the rule-of-law conditionality which of course will be treated as the very law, binding from the moment it enters into force, which it is. Not completely far-fetched, one would think.

But who would be so naive as to believe that.

## The Week on Verfassungsblog

[PETER LINDSETH](#) and [CRISTINA FASONE](#) propose a much friendlier reading of this week's compromise: as setting the course for a truly "constituted" Union in the sense of legitimized power to mobilize human and fiscal resources.

[ALBERTO ALEMANN](#) and [MERIJN CHAMON](#), mentioned above, are all the more appalled: Not only is the "interpretative declaration", contrary to what many claim, by no means a mere political act without legal effects, but on the contrary a legal disaster, ultra vires on the part of the European Council, incomprehensible on the part of the EU Commission, and with the European Parliament as the only hope of remedy, if necessary by an action for failure to act or even an action for annulment at the ECJ.

What we will never find out now is whether "Next Generation Europe" could have been achieved without including Hungary and Poland. [JOHANNES GRAF VON LUCKNER](#) explores the possibility of enhanced cooperation between the 25.

[EWA #ETOWSKA](#), the grande dame of Polish constitutional law, explains why the rule of law mechanism does not demand more from Hungary and Poland than can and should be expected from member states of the European Union.

The EU Commission's new country reports on the state of the rule of law in member states could become a tool for autocrats. [RADOSVETA VASSILEVA](#) sheds light on the plans of the Boyko Borissov's government of to use the report as a basis for reforms that will further deteriorate the state of the rule of law in **Bulgaria**.

**Ukraine** has always had a massive problem with corruption, the fight against which was one of the key goals of the Euromaidan. Since 2014, there have been legal and institutional reforms, which the Constitutional Court has now called into question in a ruling – among other things, because it feels that it is being overly restrained itself. The backlash from the Ukrainian population as well as from the president has been enormous and puts the rule of law in danger. [ANDRII NEKOLIAK](#) on the ruling and the constitutional crisis the court has created.

In **Northern Ireland**, three decades ago, the lawyer Pat Finucane was shot dead by a Unionist terror squad. Suspicions that British officials had a hand in it still linger, but the government has now ordered the investigation closed. [ALAN GREENE](#) looks at the background and consequences of this decision.

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In September, the EU Commission presented its “**New Pact on Migration and Asylum**“. The member states have not yet agreed on the legislative package; next Monday, the European interior ministers want to negotiate again. However, looking at the drafts on the one hand and the current practice of the member states on the other, it is likely that the implementation of the proposals will lead to blanket detention of a large number of people seeking protection at the EU’s external borders, fear [INGA MATTHES](#), [WIEBKE JUDITH](#) and [JOHANNA DU MAIRE](#).

Last week, the **Spanish** Constitutional Court published a ruling on “push-backs” of refugees at the borders of Spanish enclaves in Morocco. [CARLOS OVIEDO MORENO](#) explains why the court contradicts itself: on the one hand, it has emphasized the human rights of the refugees, which cannot be safeguarded by the current implementation of push-backs, on the other, it has declared the underlying article authorizing push-backs to be constitutional.

In Germany, one year ago the last **asylum law reform** was enacted which, as all reforms in recent years, have been primarily aimed at tightening the access to asylum in Germany. [STEPHAN GERBIG](#) and [GONZÁLEZ MÉNDEZ DE VIGO](#) explain how children suffer particularly under this system. Structural human rights vulnerabilities stand in the way of effective protection. A child rights-based approach must prioritize addressing residence times in reception facilities.

Bavaria is planning a new **reform of police law** and has, on the surface at least, given in to protests to some extent. However, as [FELIX SCHMITT](#) describes, especially the improvements to the category of “imminent danger” in the currently discussed draft law are only marginal, which is why considerable constitutional doubts remain.

In the **COVID-19** pandemic, is a law needed to define the criteria in the so-called triage situation and to regulate who receives treatment and who doesn’t in the event of an overburdened health care system? Or are the existing guidelines sufficient? [ANN-KRISTIN KNOLL](#) and [CHRISTIAN RAUSCH](#) take the latter view.

A few months ago, the constitutional courts of Thuringia and Brandenburg declared the **parity laws** there null and void. The judgments testify to an outdated understanding of democracy, finds former Federal Constitutional Judge [CHRISTINE HOHMANN-DENNHARDT](#). It is time to claim that the equal rights requirement in Article 3 (2) of the Basic Law is also taken seriously where the fate of the state and the common good are decided,

That's all for this week. Please don't forget to support us on [Steady](#), by Paypal (paypal@verfassungsblog.de) or bank transfer (IBAN DE41 1001 0010 0923 7441 03, BIC PBNKDEFF). Many thanks and all the best to you,

Max Steinbeis

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