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DE, UK, EPO: A Few Thoughts on Constitutional Matters

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Times where a lot is written about matters of constitutional law are not necessarily good times. When the wheels of a state or state-like organization engage smoothly with each other and when separation of powers, rule of law and checks and balances are considered as self-evident and given, there is no particular need to spend much thought on the inner workings of a written or unwritten constitution.

I am lucky to live in a country (Germany) where the constitution, our Grundgesetz (Basic Law), and our constitutional court (the Bundesverfassungsgericht) enjoy very high respect. This does of course not exclude occasional critique of the court and political or academic debates about some of the more important decisions, but on the whole, the vast majority of Germans and I are very happy about the independence and competence of this court. The FAZ reported in 2012:

> Since the middle of the last decade, confidence in the court has continued to rise from an already high level, from 66 to 75 percent. No other political institution enjoys as much trust as the Basic Law and its guardians. The Federal President (Bundespräsident) enjoys great confidence with 63 percent, about 40 percent trust the Bundesrat and the Bundestag, and only 22 percent trust the European Commission. The parties are at the bottom of the league with 17 percent.

Most importantly, the Bundesverfassungsgericht has so far mostly managed to stay above the political trench warfares and is remarkably little politicized, even though many of its decisions have political implications and repercussions. This may be helped by the peculiar mode on how its judges are appointed, which (in the final stage) requires a 2/3 majority in the Bundestag or Bundesrat (each of which elects 4 judges per Senate; there are two Senates each composed of eight judges). Compare that with the way Supreme Court judges are appointed in the USA with very small partisan majorities, and you see the obvious advantages of a system driven by the desire and need to compromise and balance.

Another thing of which no one would dare accuse the Bundesverfassungsgericht is undue haste with its decisions. The most beloved topic on this blog, i.e. the constitutional complaint against the UPC, has meanwhile aged well over two years and is very unlikely to be decided this year. I would expect that the Bundesverfassungsgericht will first decide on the compatibility of the EAPP (Expanded Asset Purchase Programme) with the Basic Law, as it held oral proceedings about this case in July. Which of the other “big” cases pending before the competent department of Prof.

Huber will be next is a matter of conjecture. The Court has a choice between the constitutional complaints against insufficient legal protection against decisions of the EPO Boards of Appeal (four cases pending since 2010 (!), 2013, 2015 and 2016), constitutional complaints against CETA (the free trade agreement between the EU and Canada, pending since 2016), a referral decision by the Administrative Court of Bremen whether the Bremen state law prohibiting the transhipment of nuclear fuel in Bremen ports, is incompatible with Article 71, Article 73 (1) No. 14 of the Basic Law and the principle of federal loyalty (pending since 2015), municipal constitutional complaints whether certain obligations of cities and municipalities enshrined in a federal law are compatible with the right to local self-government guaranteed by the Basic Law (pending since 2012), and, last but not least, Dr. Stjerna's constitutional complaint against the UPCA which was filed in 2017 and thus is a comparatively recent case, though (the only) one where the Bundesverfassungsgericht asked the President not to sign a ratification law passed by Parliament.

Why do these cases take so long, you may ask? Well, first of all, the Bundesverfassungsgericht receives about 6000 constitutional complaints per year, and every single one must at least be briefly reviewed. Secondly, the cases put on the official agenda of the Bundesverfassungsgericht published on the internet, which are only the tip of the iceberg, are of formidable complexity and must be decided by at least three, and often all eight judges of the competent senate. Thirdly, this court is proud of its thoroughness and autonomy in determining its own time schedule.

But decisions of utmost constitutional importance do not always have to take years, at least not in other countries. A shining example of a well-reasoned decision with a huge impact on constitutional law is the most recent decision by the UK Supreme Court in the cases of Gina Miller and Joanna Cherry MP and others against the UK Prime Minister who attempted to "prorogue" (suspend) Parliament for five weeks. It is reasonably short, beautifully written without too much legalese, and all in all a highly recommendable read.

As this is a patent blog, I will refrain from an in-depth discussion of this case at this stage and refer the interested reader to real experts, e.g. here. I would just like to present two central paragraphs of this decision because both of them make, at least in my view, points of fundamental importance. The first is about the relationship between the legislative and executive powers, separation of powers and the risk of executive overreach:

> 55. Let us remind ourselves of the foundations of our constitution. We live in a representative democracy. The House of Commons exists because the people have elected its members. The Government is not directly elected by the people (unlike the position in some other democracies). The Government exists because it has the confidence of the House of Commons. It has no democratic legitimacy other than that. This means that it is accountable to the House of Commons – and indeed to the House of Lords – for its actions, remembering always that the actual task of governing is for the executive and not for Parliament or the courts. The first question, therefore, is whether the Prime Minister's action had the effect of frustrating or preventing the constitutional role of Parliament in holding the Government to account.

The second deals more specifically with the Supreme Court's role in securing the rule of law against unlawful acts by the excutive:

> 69. This court is not, therefore, precluded by article 9 or by any wider Parliamentary privilege from considering the validity of the prorogation itself. The logical approach to that question is to start at the beginning, with the advice that led to it. That advice was unlawful. It was outside the powers of the Prime Minister to give it. This means that it was null and of no effect: see, if authority were needed, R (UNISON) v Lord Chancellor [2017] UKSC 51, para 119. It led to the Order in Council which, being founded on unlawful advice, was likewise unlawful, null and of no effect and should be quashed. This led to the actual prorogation, which was as if the Commissioners had walked into Parliament with a blank piece of paper. It too was unlawful, null and of no effect.

We will see which, if any, effect this decision will have on the UK government's plan to "get Brexit done", and what the circumstances will be under which the UK will actually leave the European Union, if it does. One thing appears clear to me: If there is no withdrawal agreement in place at that time, it goes without saying that this would be a highly unstable, shambolic state with potentially massive effects on trade and supply of essential goods in the UK, which means that negotiations about the future relationship between the UK and the EU must follow very soon. These may then also encompass the UPCA some day, but the EU's priorities will clearly lie on other fields (citizens rights, UK budgetary obligations, no hard border in Northern Ireland). Thus, at least in my opinion, it would be completely delusional to assume that the UK could join or stay in the UPCA before these essential points have been addressed and agreed upon. This is probably the meaning behind the cautious diplomatic words by Germany's Ministry of Justice that "The real and legal implications of withdrawing must be examined with regard to the Agreement and agreed at European level. This opinion forming is currently not finalized, not least because significant factors of the expected exit are not yet known", as reported here.

With that, let me add a few thoughts about the 'constitutional order' of the European Patent Organisation.

The problem is, there is very little of it.

So what, might you ask. Why on earth should a patent office need its own state-like constitutional order with separation of power between a legislative body, an executive body, and, above all, independent courts?

The answer is that any normal patent office does indeed not need this, because it is firmly embedded in the constitutional and legal order of the state in which it is domiciled and for which it performs its official functions.

But what is the constitutional order of the European Patent Organisation? Article 4 EPC stipulates the following:

> (1) A European Patent Organisation, hereinafter referred to as the Organisation, is established by this Convention. It shall have administrative and financial autonomy.
> (2) The organs of the Organisation shall be:
> (a) the European Patent Office;
> (b) the Administrative Council.
> (3) The task of the Organisation shall be to grant European patents. This shall be

> carried out by the European Patent Office supervised by the Administrative Council.

This is not much, and in particular the European Patent Organisation has no court to guard whether the EPO and its President observe the European Patent Convention and its by-laws. Moreover, and importantly, the EPO and its President enjoy far-reaching immunities as enshrined in Art 8 EPC and the Protocol on Privileges and Immunities.

I am of course aware of Art 13 EPC stipulating that employees and former employees of the European Patent Office or their successors in title may apply to the Administrative Tribunal of the International Labour Organization in the case of disputes with the European Patent Organisation, and I have written about the Boards of Appeal and the problem of their independence before. However, even if legal protection by the Administrative Tribunal of the ILO were perfect (which it is not for several practical and legal reasons – in particular the AT-ILO is not an independent instance of fact) and if the Boards of Appeal were indeed completely independent of the Office President (which they are not), there would still be a lacuna, because the AT-ILO only hears cases in labor law, whereas the Boards of Appeal substantially only hear patent cases, with the exception of the Enlarged Board of Appeal, which also has the competence under Art 23 EPC to propose the removal of an Appeal board member from office if there are serious grounds for such removal, but so far the Enlarged Board never made such a proposal. This leaves most areas of law substantially court-less. It would then be for the Administrative Council to exercise its disciplinary authority over senior EPO employees, which it has under Art 11(4) EPC.

However, there are at least two problems with this oversight function of the Administrative Council (AC). The first is that the AC is ill-equipped to actually perform the function of an independent supervisory body. It consists of two envoyees of each of the EPO member states, who are mostly heads of their national patent office and/or ministry officials. To my knowledge, they have very few expert staff of their own and are as such not well suited to independently check e.g. the EPO's financial accounts independently or form an informed opinion of whether e.g. the move of a part of the office to Haar makes sense from a financial or organisational point of view, or whether HR matters are managed well within the EPO. On top of that, they are also not really independent of the management of the EPO. Quite on the contrary, they tend to elect the EPO President and Vice Presidents from among themselves. While this may be acceptable in a constitutional system that includes independent courts as a control instance, it is very problematic where there is no such independent third power and where members of the AC who want to improve their own financial situation via an attractive position in the EPO management may be lured into not being too critical with the Office.

Let me give you two (of course, completely hypothetical) examples of the difference between a national patent office and the Eponia world. Assume the President of a national patent office received a bill or a fine due to some personal wrongdoing, such as, e.g. misbehaving in the public under the influence of alcohol or other drugs. Assume, furthermore, that this President would then submit the bill to the accounting department of his/her patent office, requesting them to pay it. What would happen? I assume that a President of a national patent office would not get very far with such a request, and if they were, they might encounter pretty serious problems later, if and when the payment is uncovered. In Germany, such a President might even have to face an action for embezzlement and abuse of trust (Sec. 266 DE Penal Code).

But what would happen in the EPO? Would the Administrative Council even be informed of such a

request? And even if so, how would they react?

Or, to imagine another hypothetical example, assume the HR boss of your patent office starts disciplinary measures against three staff representatives on the same day, but for entirely different and independent reasons. Assume further that these measures were in fact of a political nature and that key facts used for their substantiation were simply made up. (Just an assumption to make my point, not an assertion of fact, to be clear!). The question is, where is an independent instance of fact to which the staff representatives so affected might turn to set the record straight? Are the EPO's internal Staff Committees and Appeal Committees sufficiently independent to enjoy the trust of both parties? Or does the EPO rather act here both as executive organ and judge at the same time? At least in Mr. Corcoran's case, the AT-ILO criticized this point and quashed the EPO's decision.

I will not take these hypothetical examples any further, but reiterate, as a *ceterum censeo*, that a reorganisation of the European Patent Organisation and the establishment of a truly independent and effective judiciary inside the EPOrg for all patent and non-patent matters would appear highly desirable – and perhaps even necessary, if fundamental constitutional principles such as the separation of powers and the rule of law are to be lived and honored. And such a reform could then also dispose of the causes of the four pending constitutional complaints before the German Bundesverfassungsgericht.

This entry was posted on Sunday, October 6th, 2019 at 3:02 pm and is filed under EPC, EPO, Patents
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