

Be Aware or Be Next!

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David Law , Maximilian Steinbeis Fr 22 Nov
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Dear Friends of Verfassungsblog,

I could not *not* write about Hong Kong after this week, and since I myself know next to nothing about what is going on over there, I have decided to call David Law instead, whose judgment is, unlike mine, informed by both unrivaled expertise in comparative constitutionalism and first-hand perception of what is going on on the ground as a professor of public law at the University of Hong Kong.

Here is what we talked about:

"MS: Protests and police violence in Hong Kong have been escalating in the most dramatic manner during the last week. Has the Hong Kong protest movement reached its make-or-break moment?"

DL: I didn't expect it to become so heated. One of my biggest concerns was that the unrest would lead to the cancellation of the upcoming district council elections. There are now news reports that Beijing is pushing the Hong Kong government to go out of its way not to cancel or postpone the [district] council elections. If that is true, it would be one of the smartest or least stupid things that Beijing has done in some time. You know, the argument is frequently made that that the police should be applauded for their restraint, because if this were France or UK or Germany the police would never behave in such a relatively restrained fashion. But that is a nonsensical hypothetical. In none of those countries would the government insist on turning a political issue into a policing issue instead of coming up with a political solution. In a democratic country, you don't need a violent mass movement to get the government to listen: you can just wait for the elections. The district council elections are of course less important than the elections for the Legislative Council or the Chief Executive, which aren't real elections. But it is still an opportunity for people to register their unhappiness.

MS: But won't their registered unhappiness just continue to be ignored?"

DL: Maybe. The government created a huge mess by ignoring peaceful mass protest and instead taking a hard line against peaceful protest. Not just this year but also 5 years ago in its response to Occupy Central. Its response then was to make zero concessions and in fact to throw the peaceful protest leaders in jail. So what should we learn from this? Hopefully it will be harder to ignore elected officials than to ignore peaceful mass protest. Democracy means that there is always a possibility for peaceful change of government. If enough people are unhappy enough, they don't have to resort to violence but just wait until the next election. The way to prevent violent change is to provide a

mechanism for peaceful change. That's what elections do. And that is what the people of Hong Kong are denied. Hong Kong is a liberal non-democracy. Because it's liberal, people can protest, have freedom of speech, freedom of assembly. But because it's a non-democracy, the government can ignore them. That is a rare combination. Maybe what we're seeing is that it's not a stable combination.

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MS: So will Beijing turn Hong Kong into an illiberal non-democracy, just like the rest of mainland China? Will this be Tiananmen Square all over again?

DL: I think that's unlikely. First, there are strong incentives for Beijing not to send the army in. Hong Kong is where Chinese elites launder their money. You don't burn down your own money laundering operation if you can avoid it. Lately, there were some signals that the army might leave the barracks, but I believe they were just bluffing. This is not like Tiananmen Square. You don't have an open square full of protesters that you can just run tanks over. You'd potentially have urban guerilla warfare in a hyperdense environment full of alleys and highrises and hide-aways, just a complete nightmare for an occupying army. The protesters in Tiananmen Square were not armed, were not

expecting anything, they were lined up like ducks in a row. That is not the case in Hong Kong. I asked a US Army military police commander about this. The Chinese don't have good options for dealing with a purely political mass movement that enjoys mass support and a high degree of legitimacy. Policing requires some level of cooperation from the public. The public has turned against the police. In my neighborhood, I see everyday people booing and jeering at the police. Not protesters in face masks, just regular people. The level of force the police are using is not a sign of control but of desperation.

MS: What is the role of universities in Hong Kong for the protest movement?

DL: In some countries like in Greece, protection of universities from the police entering their premises is a matter of constitutional law. In Hong Kong there is an agreement in principle that the police will not enter a university except in three situations: an emergency call, a warrant or in hot pursuit of a suspect. In my university, the University of Hong Kong (HKU), there was allegedly an emergency call about a blocked road. It's hard to believe anyone from HKU would have called the police about that. The police charged onto campus and arrested HKU students. That was a provocative move. Some of my colleagues at the HKU law faculty actually mediated and urged restraint on the part of both the protesters and the police. That worked out. Generally, if the police show restraint, the protesters do too. If they don't, things can go really bad. Especially given that police violence is the very thing they are now protesting against. An extreme example: you have some protesters throwing petrol bombs, that's bad, but to put that in context, they do that mainly to try to keep distance between themselves and the police. That's not to say that there haven't been terrible excesses by protesters, but that is the tactical reason. What do you do if you are a protester and you have no idea what the police will do to you if they get their hands on you? More importantly, what *won't* you do? Now, HKU wasn't occupied by protesters, unlike CUHK [Chinese University of Hong Kong] and Polytechnic University. Classes are cancelled, and there are now ID checks to enter the campus, but the campus is not on fire, it's not a smoking ruin. It's fine, actually. You see the worst of the worst in the media. The things you see in the media are not happening everywhere.

MS: The Hong Kong High Court has declared the ban of face masks unconstitutional, whereupon Beijing declared Hong Kong courts incompetent to interpret the Basic Law in the first place. What is at stake here?

DL: A Chinese government spokesperson has just suggested that the Hong Kong courts should be stripped of the power to interpret the Basic Law. Interpretation of the Basic Law by the National People's Congress Standing Committee is binding on the Hong Kong courts. But the Basic Law also says quite explicitly that Hong Kong courts can interpret it, subject to an overriding interpretation by the NPCSC. Now Beijing is making noises about not allowing any interpretation by the courts at all, against the plain text of the Basic Law. They are basically threatening to do away with the entire field of Hong Kong

constitutional law. They are threatening to abolish judicial review. It could be meant as a way to intimidate the Court of Final Appeal into backing down and overruling the High Court.

MS: *China and Germany both take pride in being export nations, and with Germany at least this includes legal export: We like to see ourselves as a successful model for other transitional democracies to copy. Does China regard itself a model in any constitutional respect as well?*

DL: There has been some talk about the „Chinese model“. Whatever that is, I have no idea how it can be packaged in a normatively appealing way to non-Chinese. What may appear attractive about the Chinese regime is the economic wealth that has accrued under its watch. But even in that respect one might ask whether the Chinese Communist Party isn't merely taking credit for slowly undoing its own mistakes of the past. The „great leap forward“, the one-child policy, the cultural revolution – this is a history of spectacular blunders which a democratic government couldn't have made because it would have been thrown out of office. But still people do give the CCP credit. The irony about the Chinese refusal of elections is that if they had elections tomorrow, even if there were an organized opposition, the CCP would win. Their appeal to pocketbook politics and ethnic nationalism is highly successful. But this is not an ideology that travels easily. The Chinese belt-and-road initiative is basically about spreading Chinese influence through a sphere of economic co-prosperity, but that is not a model of governance. But some Chinese seem to think they have an exportable model, and the election of Trump and the Brexit decision and such are leading them to gloat that liberal democracy is flawed and leaves people worse off, and it's easy to see the force of that criticism.

MS: *There was a graffiti in the occupied Polytechnic University which went viral on social media: „Dear World, CCP will infiltrate your government, Chinese enterprises \$ interferes your political stance, ChiNa will harvest your home like Xinjiang – Be Aware or Be Next!“ Would you agree?*

DL: I think statements like that are resonating with concerns about anti-liberal and anti-democratic influence spreading from China. I think Americans in particular had a bit of a wake-up call because they were always assuming that they would export their norms elsewhere. When some basketball team official tweeted support for protesters in Hong Kong and the Chinese responded by cancelling all the NBA broadcasts and the NBA backed down, Americans were furious. This was in the runup to the passage of the current legislation in Congress. The law itself does very little, it's really mostly a repackaging of existing practice and law, but it is a strong signal of where the sentiment lies. And it passed both the House and Senate unanimously, in the current environment where Democrats and Republicans can barely agree on what day of the week it is. There is a sense of: my goodness, how is it that we can't speak our views in our country about what is going on in China, and not just the state but we ourselves as private citizens? When the Chinese government and media had this tremendous backlash against the

NBA, they could not have done a better job of guaranteeing that the Hong Kong Human Rights and Democracy Act would pass. So, when protesters say this is coming to your back yard, I think Americans just got a small taste of it.

MS: *And what about Europe? What about the UK?*

DL: The UK has been trying to curry favour with China for years, and now, as they have thrown themselves out of the world's largest trading bloc, they are even more desperate to establish trade relations. This thing about the former UK consulate worker who was arrested in China and says he was tortured for weeks – we'll see whether the UK can find the spine to deal with this. The Chinese reaction is simply: if you yell at us, we will yell back at you louder, and what we say doesn't even have to make any sense. We will just show that we will not tolerate any criticism of anything we do, period. We'll immediately label it an intrusion upon our sovereignty and a foreign interference. It's a knee-jerk response, the same one you would get from some dictatorship in Africa. The reality is, no foreign government, not the British, not the American, has the capacity to get a million-plus people to protest on the streets in Hong Kong. The West just does not have that kind of soft power. That is genuine popular unrest, but it is represented to the Chinese people through the Chinese media as the result of foreign meddling, another humiliation and degradation of China at the hands of the Five Powers doing it again. Ethnic nationalism, playing the victim card. Literally the party line."

Not very kind at all

In **Poland**, the first judge has been censured for a judgment she gave by the new Disciplinary Chamber of the Supreme Court, the judicial tool of the PiS to bully independent judges into submission with. The European Court of Justice has issued its long-awaited decision whether this Chamber and the body which appoints its members are in line with the requirement of an independent judiciary under EU law. The result is somewhat ambivalent, as BARBARA GRABOWSKA-MOROZ and JAKUB JARACZEWSKI note in a first reaction. We hope to publish a thorough analysis of this momentous decision early next week. In the meantime, the trial against the world-renowned constitutionalist Wojciech Sadurski for "insulting" PiS will open before a Warsaw court next week. GRÁINNE DE BURCA, JOHN MORIJN and myself have called for solidarity #withWoj, and more than 100 signatories have followed the call so far.

Another sensational ECJ decision was about the duty to flag products from **Israeli** settlements in Palestinian occupied territories as such. In MONIKA POLZIN's view the court has overstepped its competences to an extent that its decision should be ignored by national courts as *ultra vires*. ODEY HARDAN, on the other hand, argues that the decision is well-founded and correct.

The General Advocate of the ECJ has issued his opinion in the case of coercive detention against **Bavarian** office holders who refuse to comply with the law and introduce Diesel bans. TOBIAS GAFUS points to an extremely worrying trend to openly disobey the law on

the part of German officials in general.

The notorious "transit zone" in **Hungary** at the Serbian border is not necessarily a right to liberty problem: In the view of the ECtHR in Strasbourg, refugees are always free to go back to Serbia if they wish. The disturbing implications of this verdict are analyzed by MAXIMILIAN PICHL.

In the **US**, courts have ruled against President Trump in the matter of the publication of his tax returns. JUD MATHEWS examines what the Supreme Court with its conservative majority on the bench might ultimately make of the matter.

In **Norway** – not a member of the EU but as an EEA member bound by much of its law – dozens of people have been wrongly convicted in a social security scandal which had to do with the inept application of EU law by the authorities. Now, the long-time president of the EFTA Court in Luxemburg, CARL BAUDENBACHER, weighs in on the debate, and what he says about Norse abidance of the law is not very kind at all.

In **Germany**, law-makers have expanded the right of investigators to analyze DNA traces in terms of color of skin, eyes, hair, and age. This, in the view of TOBIAS SINGELNSTEIN, opens not just one Pandora's box but two.

In the **EU**, Ursula von der Leyen's Commission is finally complete, including the Hungarian nominee who will be the fox in the Western Balkan rule of law hen house for the next years, it seems. The one person missing is the British nominee, which is why the Commission has opened an infringement procedure against the UK. DANIEL THYM shows that there would have been other ways to solve this conundrum.

As if there weren't enough serious problems to tackle, **Germany** has also to bother with compensation claims of the former royal/imperial family of Hohenzollern. NILS SCHAKS analyzes what the *Grundgesetz* tells us about Germany being a republic.

The decision of the **German** Federal Constitutional Court about social security and the minimum of existence keeps being debated. Former FCC Justice GERTRUDE LÜBBE-WOLFF defends the decision against the accusation of opening the door to a relativization of human dignity protection.

Elsewhere

ARGYRO CHATZINIKOLAOU brings an ECtHR decision about regulation of pornography in **Russia** to our attention.

STEVE PEERS disabuses the British public of deliberately false claims by the Tory government about EU citizens in the **UK**.

GAUTAM BHATIA puts the achievements of outgoing **Indian** Chief Justice Ranjan Gogoi in a nutshell: he "oversaw a drift from a Rights Court to an Executive Court".

PAMELA FIGUEROA appreciates the agreement in **Chile** about a path to a new constitution.

MARTY LEDERMAN points out what is wrong about US Secretary of State Pompeo's statement about **Israeli** settlements no longer being considered illegal.

VASUKI NESIAH calls for a new approach in reckoning with German colonial legacy in **Nigeria**.

That's it for this week. Thanks for your attention, and please don't forget to support us on Steady. And note the fancy new picture of the four of us on our Steady site. I think we look like a badass indie rock band on tour, truth be told.

All best

Max Steinbeis



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All the best, *Max Steinbeis*

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