Developments

Conference Report—Collectivity: Public Law between Group Interests and the Common Good; The Annual Meeting of Public Law Assistants in Hamburg 2012

By Mehrdad Payandeh[*]

A. Introduction

Since 1961, research assistants, doctoral students as well as post-doctoral researchers from universities all over Germany – and meanwhile also from Austria and Switzerland – come together once a year to debate current topics of public law.[1] Over the last decades, the annual meeting has developed into an important forum for young public law scholars; they present their ideas, get a glimpse of the world of academia, and get to know their colleagues. From March 13th to March 16th, 2012, the 52nd *Assistententagung* took place in Hamburg.[2] The meeting was organized by the three law schools located in Hamburg: the University of Hamburg,[3] one of Germany's largest universities; the Bucerius Law School,[4]

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[1] For conference reports on previous Assistententagungen, *see* for example, Daniel Thym, *The European Constitution: Notes on the National Meeting of German Public Law Assistants,* 6 GERM. L. J. 793 (2005), available at: www.germanlawjournal.com/article.php?id=593 (last accessed: 16 June 2012); Marten Breuer, *Law and Medicine: Notes on the Meeting of German-Speaking Public Law Assistants in Vienna* (2006), 7 GERM. L. J. 445 (2006), available at: www.germanlawjournal.com/article.php?id=722 (last accessed: 16 June 2012); Lukas Bauer & Konrad Lachmayer, *Networks in Public Law: Notes on the 47th Meeting (2007) of German-Speaking Public Law Assistants in Berlin*, 8 GERM. L. J. 1069 (2007), available at: www.germanlawjournal.com/article.php?id=872 (last accessed: 16 June 2012); Matthias Koetter, F*reedom, Security and (the) Public(ity): Notes on the 2008 Heidelberg Conference of German-speaking Public Law Assistants*, 9 GERM. L. J. 737 (2008), available at: www.germanlawjournal.com/article.php?id=964 (last accessed: 16 June 2012); Stefan Kirchner & Sebastian Recker, Risk in Law – Law in Risk: The 50th Annual Meeting of Public Law Assistants in Greifswald, 23-26 February 2010, 11 GERM. L. J. 551 (2010), available at: www.germanlawjournal.com/article.php?id=1256 (last accessed: 16 June 2012).

[2] For further information *see* 52 *Assistententagung Hamburg 2012*, *Kollektivität* (available at: www.assistententagung.de/2012 (last accessed: 16 June 2012).

[3] For further information *see* Universität Hamburg, *The Faculty of Law: Facilities and Services*, available at: www.jura.uni-hamburg.de (last accessed: 16 June 2012).

[4] For further information *see* Bucerius Law School, *Welcome to Bucerious Law School in Hamburg, Germany*, available at: www.law-school.de (last accessed: 16 June 2012).

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Germany's first private law school; and the Helmut-Schmidt-University,[5] one of two German universities of the Federal Armed Forces (*Bundeswehr*). With *collectivity* as the general topic of the conference, the organizers provided a rather broad but nonetheless useful framework for the thirteen presentations given over the three days. While the presentations approached the concept of *collectivity* from different perspectives settled in different fields of the law, the relationship between individuals and groups as well as the significance of an overarching community interest appeared as recurring themes of the discussion.

B. The Presentations

The first presentation by Benjamin Rusteberg, from the University of Freiburg, highlighted the dark side of *collectivity* and its potential for justifying limitations on fundamental freedoms through references to an overarching interest of the community. Rusteberg presented a nuanced and thought-provoking critique of the mainstream approach to the doctrine of constitutional rights in Germany. According to this approach, (almost) every right is potentially subjected to limitations, depending on the specific circumstances of the particular case at hand. This approach which also underlies the jurisprudence of the German Federal Constitutional Court (*Bundesverfassungsgericht*) is furthermore characterized by *proportionality analysis* which requires balancing a fundamental right with other rights or with community interests. Rusteberg pleaded for an alternative model that constructs the scope of rights narrowly and more concretely defines the circumstances where consideration of the common good can justify limitations on constitutional rights. During the discussion, the audience proved to be sympathetic to Rusteberg's goal of making the constitutional rights discourse more predictable and carving out more precisely the scope of constitutional individual guarantees. At the same time some listeners expressed skepticism as to whether Rusteberg's approach would achieve these goals.

While Rusteberg's presentation dealt with the theory and doctrine of domestic constitutional law, the second presentation by Clemens Kaupa from the University of Vienna introduced the European perspective into the conference. Kaupa analyzed the role of the *proportionality principle* in the balancing of different interests within the European Union (EU)'s doctrine of fundamental freedoms. As a starting point he emphasized that the complex and multi-faceted mix of interests underlying the fundamental freedoms cannot adequately be comprehended through the dichotomy of individual versus community interests nor through economic versus social values. Kaupa rather emphasized how meta-theories about the "right" approach to European integration determine the decision-

[5] For further information *see* Heltmut Schmidt Universität, *Homepage*, available at: www.hsu-hh.de (last accessed: 16 June 2012).

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making process, thereby raising the question of who gets to decide what is "good" for the EU. Against the background of an examination of the European Court's jurisprudence with regard to social security systems, Kaupa highlighted the merits of an approach that openly acknowledges that EU law is not based on one specific economic model and that would democratize the internal market by leaving systemic choices to the member states.

The next three presentations turned to the actors of *collectivity*, approaching the question from three very distinctive perspectives. Michaela Hailbronner, from Humboldt University of Berlin and Yale Law School, chose the perspective of comparative constitutional law. She started with the diagnosis that under the German legal system governmental decision-making processes were reluctantly opened up to allow collective actors such as NGOs to participate. She then rejected the idea that cultural or historical rationales could still justify this reluctance. Presenting case studies from India, the United States, and South Africa she derived conclusions from their respective experiences with more inclusive practices. In conclusion she argued in favor of a farther reaching enclosure of non-governmental actors in legislative and executive decision-making processes while expressing skepticism towards a more extensive approach with regard to standing in front of courts.

Angelika Günzel, from the University of Trier, then analyzed the Treaty of Lisbon's promise that the EU institutions "shall maintain an open, transparent and regular dialogue with representative associations and civil society".[6] On the basis of a doctrinal analysis of this provision, Günzel highlighted that under the current state of the EU decision-making processes, the inclusion of non-governmental institutions does not precede in a transparent and representative manner. This deficit would further compromise the democratic representativeness of the EU. In her conclusion she argued in favor of more transparency and a clearer delimitation between the competences of the EU organs and civil society actors.

Turning to the perspective of African international law, Julia Schaarschmidt, from the University of Halle Wittenberg, analyzed the concept of group rights under the African Charter on Human and Peoples' Rights (Banjul Charter).[7] Schaarschmidt first presented an overview over the peculiarities and problems with this collective approach to human rights, in particular the problem of defining the specific group that is the holder of the right, the challenge in finding general principles for the balancing of group rights and individual interests, and the constraints with regard to the procedural implementation of group rights. It soon became apparent, however, that Schaarschmidt regards group rights as an essential part of the human rights canon, thereby triggering the question whether

[6] Consolidated Version of the Treaty on the Functioning of the European Union, art. 11, May 9, 2008, 2008 O.J. (C 115) 47.

[7] African Charter on Human and Peoples' Rights (Banjul Charter), June 27, 1981, 21 I.L.M. 58.

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this dimension of the universal human rights idea should find a stronger functional equivalent within the European tradition of human rights.

With the presentation by Bilun Müller, from Trinity College Dublin, the discussion turned to the procedural dimension of the inclusion of collective actors. Under the German legal order, administrative procedures and proceedings before administrative courts are focused on violations of subjective rights. This traditional orientation of German administrative law increasingly conflicts with the more open approach under EU law and the jurisprudence of the EU Court of Justice. According to this EU approach in particular environmental NGOs have a rather far reaching right to be included in administrative proceedings and to sue before administrative courts, regardless of whether their subjective rights are specifically affected. Müller critically presented possible approaches to bring German law in accordance with EU law. In the subsequent discussion rather fundamental questions regarding the relationship between EU law and the German legal order were raised and it was controversially discussed whether the German focus on the concept of the subjective right was still suitable to accommodate the requirements of EU law.

Thorsten Ricke, from the University of Münster, then illustrated the potential conflicting interests of individuals, groups and the general public with the example of the regulation of electric supply networks. He highlighted the possibilities of the different actors to introduce their interests into administrative decision-making processes. With regard to judicial review Ricke explained that neither the general public nor collective groups that are not directly affected by a decision had standing before administrative courts. However, Ricke did not regard this as a deficit since the primary concern of the judiciary should be the protection of specific individual interests and not considerations of general public interests. He further highlighted the possibility to exclude judicial proceedings already at an early stage of the decision-making process through compensatory payments to affected municipalities, a possibility that was critically assessed in the subsequent discussion.

The conference turned multidisciplinary when Eva Marie Schnelle, from Berlin, argued in favor of a more active legal engagement with Elinor Ostrom's analysis of common pool resources. Schnelle examined whether and how Ostrom's concept of *common property* could be encompassed by the German constitutional understanding of *property* and contrasted the German doctrine with other approaches such as the property rights theory. She highlighted the potential challenges of incorporating the polycentric governance approach that underlies the theory of the *commons* into the German administrative structures. Schnelle's presentation triggered controversial discussions regarding the understanding of the *commons* and the possibility of its legal implementation. Some commentators expressed serious concerns, in particular with regard to the rule of law and to questions of democratic legitimization.

Dana Burchardt, from Freie University Berlin, then asked whether future generations can be understood – or constructed – as bearers of collective rights. While such a concept would challenge the general notions of rights and of legal personality, Burchardt nevertheless argued that such an understanding would be theoretically possible and also feasible since it would facilitate taking the interests of future generations into account in present decision-making processes. The rights of future generations would correspond to obligations of the present generation. Burchardt then derived the content of the future generations' rights from the principles of sustainability – in particular the obligation to use natural resources in a sustainable manner – and of intergenerational justice which she saw embodied in international law.

The next two presentations were discussed under the general topic of solidarity. Peter Haversath, from Berlin, examined the content as well as the limits of solidarity as a legal principle. Haversath identified elements of solidarity in the German constitutional order in the context of social security as well as embodied in the constitutional guarantees of freedom and equality. Turning to EU law, Haversath pointed out the pivotal importance of the solidarity principle. He identified a tension between solidarity between union citizens and solidarity between national citizens. Furthermore, he highlighted that solidarity is not applicable in cases where the potential recipient of solidarity measures is responsible for causing the problematical situation.

Boas Kümper, from the University of Münster, then asked to what magnitude concepts of individuality, collectivity and solidarity are embodied in the legal rules concerning the liability of public authorities. As a starting point he demonstrated that these rules are traditionally based on the concept of subjective rights and thereby focused on the individual. Pointing out the deficits of such a purely individualistic reading, Kümper then highlighted instances of collectivity within the legal rules regarding the liability of public authorities. According to Kümper, however, solidarity was not a paradigm underlying these rules and he was also highly skeptical with regard to attempts to introduce farther-reaching elements of collectivity or solidarity into the body of these rules.

The last two presentations analyzed direct democracy in Switzerland and in Germany through the lens of individuality versus collectivity. Against the background of the Swiss model of democracy with its strong focus on elements of direct participation Rafael Häcki, from the University of Bern, examined the conflict between democracy and the rule of law that becomes apparent when popular initiatives potentially violate the rights of individuals or groups under the Swiss Federal Constitution, the European Convention on Human Rights or other rules of international law. According to the Swiss Constitution the only substantive limits for popular initiatives are the peremptory rules of international law.[8]

[8] BUNDESVERFASSUNG DER SCHWEIZERISCHEN EIDGENOSSENSCHAFT [BV] [CONSTITUTION] Apr. 18, 1999, SR 101, art. 139, para. 3 (Switz.).

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Rejecting intermediary approaches that could mitigate but not solve this problem Häcki argued in favor of a general primacy of constitutional rights and of the rule of law over popular initiatives.

Roman Lehner from the University of Göttingen then turned to the discussion of the admissibility and feasibility of direct democracy under the German Constitution. Against the background of the strong focus of the German political system on the principle of representative democracy Lehner exhibited skepticism towards more extensive elements of direct participation on the federal level. He expressed doubts as to whether direct democracy would enhance the level of democratic legitimacy and substantiated his critique with empirical studies that suggest that direct democracy furthers primarily interests of the elite and of economically backed group interests.

C. General Remarks

A broader look at the presentations delivered at the *Assistententagung* in Hamburg allows for some general observations with regard to the state and alignment of the young generation of academics in the field of public law. First, it is remarkable that not only almost every field of public law was represented – constitutional law, different fields of administrative law, European Union law, international law as well as comparative law – but that there is a tendency to accept and incorporate the insight that the different fields of public law and levels of governance are highly interrelated. Even when dealing primarily with domestic law, the presenters as well as the discussants also felt comfortable considering aspects of European law and international law and oftentimes also took account of the perspective of comparative law.

Second, the presentations showed that the young generation of public lawyers is similarly concerned with classical topics of public law as it is with new ones. Rusteberg, for example, dealt with the general doctrine of constitutional rights while Ricke, for example, dealt with the rather new and timely field of the regulation of electric supply networks. However, even when dealing with newer or more innovative concepts, the participants showed considerable concern for the conservation and protection of the well-established achievements of public law. In the same way, they were not willing to easily bid farewell to the German legal order's focus on the concept of the subjective right. Even in light of increasing pressure from the EU legal order, they were rather skeptical with regard to new regulatory concepts: With regard to the far-reaching re-conceptualization of the constitutional concept of property contemplated by Schnelle, for example, the participants immediately voiced concerns with regard to democratic legitimacy and to the rule of law.

Third, while the conference exhibited the general openness of young public law scholars, it at the same time showed a rather conservative stance with regard to the methodology of legal academia and even some level of uneasiness with multi-disciplinary approaches. In

terms of methodology most presentations stuck to rather traditional doctrinal analysis. With the exception of Schnelle's engagement with Elinor Ostrom's concept of the commons, theoretical considerations were either absent or only a supporting factor. Whenever empirical research was brought forward, most notably in the presentation by Lehner, discussants expressed rather general criticism with regard to the explanatory power of empirical studies and questioned the validity and legitimacy of such "non-legal" methodologies within legal academia. This lack of multi-disciplinary research might be understandable in light of the general alignment of the Assistententagung and might even be helpful in order to ensure that the presentations and the discussions are open and accessible to all members of the audience. However, against the background of the ever increasing multi-disciplinary nature of legal academia, in particular outside of continental Europe, it seems desirable that in particular the younger generation of legal scholars turned to a more intensive and critical engagement with the methodology of legal scholarship.

The 2012 Assistententagung in Hamburg was remarkably well and professionally organized. The organizational team has to be congratulated for choosing highly interesting presentations under a timely and relevant general topic, for creating the conditions for open, friendly but nevertheless critical and controversial discussions, as well as for putting together a very attractive framework program. The 53rd Assistententagung will take place in the Swiss city of Bern from February 5th to February 8th, 2013, and will be devoted to the theme: "The last word: law-making and judicial review in a democracy."[9]

[9] For more information *see* 53 *Assistententagung Bern 2013*, available online at: www.assistententagung.de/2013 (last accessed: 16 June 2012).

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