Verfassungsblog
ON MATTERS CONSTITUTIONAL

See you around

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Equating the EU with the Soviet Union is for nationalist dunces, of course, and silly to an extent that the less said about it the better. There is one thing, though, that the Soviet Constitution of 1924 actually *did* have in common with the EU Treaty: it contained a right to withdraw.

According to Chapter 2(4), the Soviet republics had a "right to freely withdraw from the Union". That right was, as such, as worthless as the rest of the constitution but is nevertheless interesting as a self-description. The pre-Stalinist Soviet Union, according to its preamble, saw itself not so much as a self-identical state but as a project of the "socialist family" in a specific historical constellation – as an internationalist union of those who stand in the camp of "reciprocal confidence and peace, national liberty and equality, pacific coexistence and fraternal collaboration of peoples," as opposed to the capitalist camp of "national hate and inequality, colonial slavery and chauvinism, national oppression and massacres, brutalities and imperialistic wars." In later versions (Stalin's in 1936 and Brezhnev's in 1977), this two-camps rhetorics had largely faded away, but the right to withdraw remained nominally in place. Until 1991, the integrity of the Soviet Union, unlike that of the United States, was kept by mere power, not by law.

The EU, unlike the Soviet Union, is under the rule of law, and the voluntary nature of its membership is not a lie but very much real, testified by the fact that the EU member state Great Britain was able and entitled to withdraw under Article 50 TEU. Which, of course, doesn't mean that we didn't hold it against them when they actually did on 29 March 2017. So, Brexit means Brexit and we're going to make a success of it. Oh, are we? Speak for yourself, Theresa May. Your success is no longer our success. The opposite even, perhaps. You wanted that. You wanted out. And it's cold outside.

Paradoxical loops

The right to withdraw is a tricky business. You easily get yourself tangled up in some rather awful paradoxical loops. The very constitution which gives you that right is what you withdraw from while you exercise it. Those who use it are inside and outside at the same time. The withdrawal process is at the same time a piece of interior policy, a legal procedure between mutually entitled and obligated parties, and a piece of tough-minded foreign policy between actors who owe each other nothing but the recognition of their respective interests. That sort of thing can drive you crazy, and you lose all sense of identity and distinction between inside and outside. I can see why so few states chose to include the right to withdraw in their constitutions, and so many explicitly preclude it.

Spain is known to be one of those states that protect their integrity with maximum rigidity against the willingness of their parts to withdraw, which is why the Catalan "independence referendum" of 1 October 2017 never had any existence outside a pair of quotation marks, and never even came close to any sort of reliable information as to whether that will on the part the Catalonian nation really existed at all. Only a legally ordered procedure can transform the individual will of a few million Catalans to leave into a collective will which could bind the opposing will of a few million Catalans to remain. No such procedure existed nor was it ever allowed to exist under the Spanish constitution.

For Spain, those few million individual leavers are simply people who want something unlawful. Dealing with them is purely a matter of interior policy. This dissolves the paradox but comes at a price, because it closes the door to any way of political solution to bring forth a collectively binding decision. As a result, the barricades are burning in Catalonia again, youngsters

are being bludgeoned bloody by the riot police, and nine men and women face years and years in prison.

The EU has no truncheons, and doesn't do interior policy. But it does do foreign policy. The British feel it, and so do the Western Balkan "accession candidates" which now painfully realise what all those lectures about propping up their rule of law standards and doing what they patronizingly like to call their "homework" are worth the minute Emmanuel Macron deems it in his interest to dump them. They are on their own. They are out. And it is cold outside.

But the EU is not a state. It is a project of states in a specific historical constellation to show them a way beyond their mere stateness. It creates institutions and procedures by means of which states and their citizens can engage with each other in an infinitely more fruitful way than just by foreign policy. Of course the Union comes with a right to withdraw. It's not a coercive community of fate. It is not about an interior as opposed to an exterior. It does not have to go crazy over the existence of no-more or not-yet member states, of entities not-quite-inside and not-quite-outside. On the contrary, making the existence of such things imaginable is its very purpose.

On the other hand, the EU is becoming more and more state-like in many respects. And I have many Eurofederalist friends who just love that. Part of me does, too: a resolute EU interior policy towards Poland, Hungary, Bulgaria, Romania – I'm all for it! (If only it finally happened at last.) But another part of me also shivers. An EU which turns into just another state, only bigger, more powerful and more imperial, in which I don't want to remain for any better reason than that I have to and it's so terribly cold outside – I'd find that horrible.

So, so mean

The **EU** has in common with Spain (and also with Great Britain) that there are no clear majorities in its parliament. At least there was no majority for the French Commissioner nominee Sylvie Goulard, whose rejection seems to have been partly an act of revenge at the hands of Manfred Weber, the head of the EPP parliamentary group, to pay back Emmanuel Macron for being so mean as to not let him become Commission President. Anyone who knows and appreciates Sylvie Goulard will regret that sort of tough-guy politics, as does INGOLF PERNICE who expresses his dismay in an open letter to the President of Parliament co-signed by a whole generation of prominent EU politicians and lawyers.

Manfred Weber and his EPP have been Viktor Orbán's most loyal friends for years, and still are to a much larger extent than their recents campaign manoeuvres would have us believe. The fact that their alliance with corrupt party friends is more important to these people than the rule of law in the EU is one of the historical villainies of our time, and appears to be manifesting itself these days also in the way the outgoing Juncker Commission is pampering their EPP buddy Boyko Borissov's **Bulgaria** which may get rid of the post-accession "cooperation and verification mechanism" with very little progress in terms of corruption to show for it and some extremely worrying developments in terms of judicial independence going on while they are at it. RADOSVETA VASSILEVA gnashes her teeth with scornful anger about that whole ignoble spectacle.

VICTOR FERRERES COMELLA answers and contradicts the very critical analysis of the previous week by José Luis Martí regarding the judgement of the **Spanish** Supreme Court in the case of Catalan separatist leaders.

In Brexit-related news, this week brought us the attempt of the **British** government to push the extraordinarily complex and risky legislation for the new Brexit deal through parliament within just three days, which, just like anything else that government has touched so far, went spectacularly wrong. JOELLE GROGAN reports. The risks of the deal for peace and democracy in Northern Ireland are explained by COLM O'CINNEIDE.

In **Germany**, the Federal Ministry of Labour wants to introduce a basic pension without a test of indigence, which some, such as the Heidelberg tax law professor Hanno Kube, consider to be highly problematic under constitutional law. THORSTEN KINGREEN is not entirely convinced by the bill in terms of social

policy, but in terms of constitutional law he doesn't see much to dislike. HANNO KUBE replies.

The **Bavarian** Supreme Court considers dumpster diving – i.e. salvaging perfectly edible supermarket waste from disposal – to be a criminal act, which ANNIKA DIESSNER comments on critically.

MUSTAFA ÖRGE takes **Turkey's** attack on the Kurdish territories in northern Syria as an occasion to reflect on cultural genocide.

CEM TECIMER examines how **Turkish** President Erdogan consolidates his base with the announcement of the reintroduction of the death penalty even if that is never going to happen.

The founder and former leader of the **German** far-right AfD party, Bernd Lucke, wants to return to his teaching position at the University of Hamburg after the end of his political career as though nothing much had happened at all, and quite a few students are rather determined to not let that stand. SAMIRA AKBARIAN asks how this conflict can be resolved while respecting fundamental rights, and MARYAM KAMIL ABDULSALAM investigates whether the University of Hamburg should better protect its professor's academic freedom.

In **Portugal**, the Constitutional Court has clashed with Parliament on the issue of surrogate motherhood, and TERESA VIOLANTE gives an account of how it has dealt with the situation.

In **Albania**, the President is fighting against impeachment for his role in setting a local election date. The Venice Commission of the Council of Europe has now published an opinion on this matter, and its member CESARE PINELLI warns of the expectation that this alone will pacify the current constitutional conflict in Albania.

Elsewhere

THOMAS KIENLE is puzzled by the concept of "digital self-determination" in the report of the Data Ethics Commission of the **German** Federal Government.

AUKE WILLEMS discusses whether the Catalan separatist leader Carles Puigdemont could successfully resist the most recent attempt of the **Spanish** judiciary to obtain his extradition from Belgium

BENEDICT DOUGLAS proposes to regard the Brexit referendum as a revolutionary moment in the relationship between the **English** and their state.

KENNETH ARMSTRONG sees the **British** bill to implement the Brexit deal as an eery continuation of the legislation on EU accession in 1972.

WILL HANSON reports on the decision of the **UK** Supreme Court to extend whistleblower protection to judges.

FENELLA BILLING examines the ECtHR case law on the human rights situation in **Greek** refugee "hotspots".

FEYZA BASAR finds much to like about the plans of the **Turkish** ruling AKP party for judicial reform.

KEVIN JON HELLER abates the fear that **Turkey's** NATO allies could be drawn into the Syria conflict by means of their Article 5 duties.

ANNA MASTROMARINO describes on the occasion of the reburial of ex-dictator Franco how the **Spanish** policy of forgetting starts cracking and what role the judiciary plays in it.

MARCELLO MELLA POLANCO relativizes the "**Chilean** model" on the occasion of the violent protests.

JULIO A. ASCARRUNZ MEDINACELLI examines the ramifications of the elections in also protest-shaken **Bolivia**.

SUSANNE GRATIUS draws our attention to the fact that **Venezuela**, of all countries, has taken seat in the UN Human Rights Committee.

JULIANO ZAIDEN BENVINDO points to the paradox that **Brazil's** dysfunctional party system offers some protection against the authoritarianism of its president.

That's it for this week. By the way, we have made an effort to give the editorial newsletter a much-needed face lift. From next week on, what you'll find in your email in-box will look much nicer and read much more easily, I hope.

And because all this costs money: please support us!

All the best,
Max Steinbeis

ABOUT THE AUTHOR

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Maximilian Steinbeis is a legal journalist and writer and the founder and director of Verfassungsblog.

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