We Super-Europeans

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In the summer of 2009 I did a small radio feature for Deutschlandfunk under the title "*Droht der ‚Krieg der Richter'?*" (will there be a ‚war of judges'?). It was about the notorious Lisbon judgement of the German Constitutional Court, about ultra vires and identity control and about the anxious question whether and how the Karlsruhe Court would use these instruments and expand its jurisdiction on EU law from now on. Many people said at the time that predicting a "war of judges" was a gross exaggeration. That would never happen. A cold war at most, in which the arsenal for mutually assured destruction is presented to one another at a cautious distance, in order to never have to actually use it. Karlsruhe would never go as far as actually pressing the red button and blowing the whole delicate balance to pieces and force the Federal Republic of Germany to break EU law. That, to most, was pure science fiction.

Well.

Along came the financial and the euro crisis, and in its wake the great German indignation that we, the world's export champion, should take on budgetary risks of unforeseeable proportions for the sake of those profligate happy-go-lucky Mediterraneans. Along came the Troika, along came the AfD, along came those pretty young Spaniards in Berlin who served us our Latte Macchiato for next to nothing in charmingly broken German because they couldn't sustain themselves any more in their country. Along came the bad news from Hungary, then from Poland, where our German industry behemoths, on best of terms with the local rulers, have invested their money to the benefit of the common European good. Along came the realisation that the said rulers don't give a damn about European law when it requires them to grant protection to one single Syrian refugee. Along came the collapse of the European migration and border regime.

All the while we Germans were in the middle, in safe distance from all problems most of the time, smug, rich and self-satisfied. We Super-Europeans. Guiding star and solace of the whole continent which, unlike us, was caught in a vortex of right-wing populism, irresponsibility and mistrust, looking enviously and hopefully at us who do everything right and have our *Grundgesetz* and our budget surplus and our human dignity and they don't, the poor things! This is how we'd like to see ourselves on the day of the 75th anniversary of the Nazi capitulation. Lords of Europe, but this time in a good way, you know. Learned our lessons from history like you wouldn't believe. Damn, we're so good it almost hurts.

Well.

All the time the Federal Constitutional Court had kept the conflict between itself and the European Court of Justice skillfully in abeyance. It had made European law-friendliness a constitutional principle. It had limited ultra vires control to obvious cases. In the end it had even started referring questions to the ECJ itself. It had founded a legal scholarly republic called "*Verfassungsgerichtsverbund*", in which the wise men and women of European constitutional jurisprudence ambulate the agora together in erudite dispute and work out amongst themselves in speech and counter-speech what is right and what is wrong in Europe.

Dance Steps

In Karlsruhe's internal perception, it appears, last Tuesday's judgement is basically just another argument within this ongoing dispute, slightly more robust than usual for sure, but what are you going to do if your interlocutor in Luxembourg stubbornly refuses to see the error of his ways? An editorialist in *Süddeutsche Zeitung*, who I suspect had had the legal situation – folks know each other in Munich, I guess – explained to him by an intimate connoisseur of Karlsruhe's way

of thinking, tried to describe this dispute this week as a "dance of the courts": It's not a conflict, but an elaborate business between two courts who negotiate with each other at eye level where the respective competences and control powers begin and end. And if those Poles and Hungarians believe that they can now just throw their EU legal obligations out of the window and point to Karlsruhe as their role model, well, then "the step sequence of the complex dance between the German and the European supreme court must be beaten into them".



That's a pretty way of putting it, isn't it? You literally see that German dancing master gracefully hopping in front of those Eastern European country yokels, showing them how the quadrille is done at the court of Karlsruhe. You almost pity the poor fellow. Kids can be so cruel at that age.

Let's remember for a moment what the world of 2020 looks like outside the dance school. The idea that the law as interpreted by the competent courts binds power as a matter of rule confirmed by exceptions, a.k.a. the rule of law, is being widely overturned these days, in Europe as elsewhere. The exceptions are taking over and no longer confirm anything. European asylum law is only the most glaring example of this. And nobody should believe that this hasn't become an internal German phenomenon, too.

In this situation the Federal Constitutional Court – the Federal Constitutional Court! – joins the camp of those who say: You don't get to tell us what to do! It had referred questions about the correct interpretation of EU law to the ECJ, it had received answers to those questions, and now, doing all sorts of dance steps, it says: Nope. We don't like those answers and will hold on to what we said in the first place, thank you very much. And for what? In order to ensure that the ECB, doing what it is doing anyway, explains better why, with a view to its redistributional economic consequences, it still considers it to be the right monetary policy. Great. So much for proportionality.

On Tuesday, when the judgment was handed down, one emotion prevailed in my circles over all others: sadness. Something has fallen apart. Something has came to an end.

What? The eurozone? The legal community? The position of influence of the FCC? The sovereignist strand of German *Staatsrechtslehre*? Time will decide.

My prognosis: Its verdict won't be merciful.

The week on Verfassungsblog

On Verfassungsblog, we had another pretty crazy week, so I'm emphatically asking you: Please support us on Steady! We need it. And if you don't wish to commit yourself regularly, please transfer whatever you deem appropriate to paypal@verfassungsblog.de or IBAN DE41 1001 0010 0923 7441 03, BIC PBNKDEFF. Thanks a million!

To my great relief, Lennart Kokott has summarized this eventful week for this editorial, a huge thanks to him!

ALEXANDER THIELE concludes that the **ultra vires verdict of the FCC** opens Pandora's box for other constitutional courts without need and hardly any prospect of closing it again in the European judicial network. He also talks about the verdict and immediate reactions in our Podcast #21. MATTHIAS KOTTMANN and ROYA SANGI would have expected more sensitivity in terms of the signal effect of the FCC's critique of the ECJ and also see the verdict as a breach of a monetary policy taboo. MIGUEL POIARES MADURO points out the argumentative inconsistency of the ruling and warns that the standards of the Federal Constitutional Court for the interpretation of Art. 123 TFEU could have particularly serious consequences with regard to the new bond purchase programme in the Corona crisis. BERNHARD WEGENER writes that it is becoming apparent that the

FCC no longer understands the world and its role in it. ALEXANDER BRADE and MARKUS GENTZSCH, in their examination of the judgement and its history, think that the FCC may have exceeded its competence with this decision and thus may have acted ultra vires itself.

ARMIN STEINBACH, on the other hand, defends the FCC and calls for a procedural containment of the ECB in order to stabilise thinned out strands of legitimacy. MATEJ AVBELJ takes a similar view, understanding the ruling as an expression of constitutional pluralism and recognising the opportunity to prop up the democratic foundation of the European fiscal union.

ANDREJ LANG places the judgment in the ongoing dialogue between the Federal Constitutional Court and the European Court of Justice on the bond purchase programme, which has become a serious conflict, and states that both courts could pay a high legitimatory price. FRANZ C. MAYER finds the judgment a heavy disappointment and the FCC profoundly misguided, which must lead to infringement proceedings to prevent the emergence of a "law of the jungle" (*Faustrecht*) in the European judicial network. MICHAEL WILKINSON looks at the ruling in its context of sovereignty policy, links it to the current state of European integration and attests that the Union is in a serious dilemma.

In the reactions to the FCC decision, there is a recurring reference to the fatal effects it could have on the discourse on the **rule of law in the EU**. Hungary and Poland, of course, remain the most prominent examples. There, the rule of law crisis is constantly deteriorating: VIKTOR Z. KAZAI deals with its economic aspects in Hungary, where investors rarely show much concern about constitutional issues. The analysis reveals economic dependencies – the knowledge of which is also of value for constitutional discourse. In Poland, on the other hand, the PiS conceded only a few days before the presidential elections scheduled for this Sunday and agreed to postpone the elections. In harsh words, MARTIN MATCZAK criticises the ways of the ruling party and states that the morally and constitutionally untenable conduct of the election process has seriously damaged the legitimacy of the eventual winner. Many people feel the burden of the ongoing rule of law crisis on a daily basis. TOMASZ TADEUSZ KONCEWICZ explains the legal ethos needed in the "constitutional pandemic" and gives an insight into his family history, which motivates him to emphatically defend democratic values in the constitutional order.

In **Brazil**, too, the government under President Jair Bolsonaro has been showing authoritarian tendencies for some time. DOUGLAS CARVALHO RIBEIRO puts the resignation of the Minister of Justice into context, looks at the country's political prospects and fears that even a impeachment procedure against the President would not help to stabilize the situation.

The decision of the European Court of Human Rights not to apply the ECHR to visa procedures for refugees is addressed by ADEL-NAIM REYHANI, who sees it as further evidence of the systematic exclusion of **refugees** from the international legal order and states that we must talk about the universality of human rights.

Besides the ultra-vires ruling, INDRA SPIECKER and SEBASTIAN BRETTSCHNEIDER point to another momentous decision by the FCC: In a decision on the **Digital Supply Act**, it relieves the legislature of the burden of argumentation in the interim legal protection in a way that considerably lowers the chances of success of injunction applications before the FCC – and also shakes the data protection law and the protection of fundamental rights in digitisation to its core.

In a week in which a coalition dispute about defence policy in the German government is looming, ANDREAS SCHÜLLER scrutinizes the view of the Federal Government about international law with regard to the use of **armed drones** in view of the coalition agreement and warns that, based on this standard, recently leased drones of the German Armed Forces which are able to carry arms could violate international law during missions.

The **Corona** pandemic also continues to raise constitutional questions en masse. HEIKO SAUER uses the example of North Rhine-Westphalia to look at the

limited re-opening of schools and examines whether general compulsory schooling needs to be relativized in view of the associated health risks. Speaking of relaxation, ANIKA KLAFKI takes a look at the debate about an "immunity card" and discusses whether it might be constitutionally required, as well as weaknesses in the corresponding draft law. More from her in issue #20 of our podcast. German residents whose partners live abroad will also long for a relaxation of the lockdown. JULIA WEITENSTEINER doubts that the entry ban for non-citizen partners abroad can be upheld constitutionally at all. Legal protection against corona measures, however, sometimes involves its own problems: MARTIN HEUSER deals with the case law of the Bavarian Administrative Court of Appeals on measures to combat the pandemic and points out its methodological shortcomings. A voice from the judiciary can be heard in our podcast interview with THOMAS SMOLLICH, the president of both the Higher Administrative Court and the State Court of Lower Saxony, who talks about the work of the courts during the pandemic and the surprising fact that, on a regional basis, there is no such thing as a constitutional complaint in Lower Saxony, so far.

ALEXANDER SOMEK's topic is the new normality in the pandemic. He shows which insights are required for a normative handling of a *Lebenswelt* that has gone off the rails and how the balancing act between memory and hope, necessary for a productive processing, could be achieved.

In our international online symposium "**Covid-19 and States of Emergency**", ALEKSEJS DIMITROVS reports on the rapid response in Latvia. KRISTIAN CEDERVALL LAUTA warns against drawing false conclusions from the success of Denmark. VINCENT A. DE GAETANO reports from Malta, RIDWANUL HOQUE takes a critical look at the chaotic and legally unclear situation in Bangladesh. IAIN CAMERON and ANNA JONSSON-CORNELL present the Swedish strategy. NIALL COGHLAN analyzes the extent to which states derogate from international human rights treaties with regard to measures against the pandemic, with various illustrations and drawing conclusions for international human rights regimes.

Next week we will try something new: a live **discussion event on COVID-19**, organized by Pierre Thielbörger and his venerable IFHV institute at the University of Bochum, via Zoom and streamed live on Verfassungsblog and with, in my opinion, an exceptionally attractive cast. On Tuesday afternoon at 4 p.m. CEST, we will start with a panel on German infection control measures and their constitutionality, composed of former Federal Minister of Justice SABINE LEUTHEUSSER-SCHNARRENBERGER, CHRISTOPH MÖLLERS, PIERRE THIELBÖRGER and BENEDIKT BEHLERT, ANIKA KLAFKI and ANDREA RÖMMELE, moderated by your's truly. On the following two Tuesdays, further panels will follow, also with very exciting participants. Details here. Stay tuned!

All best,
Max Steinbeis

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