Verfassungsblog
ON MATTERS CONSTITUTIONAL

Terrible Order

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In Hong Kong, the democracy movement is about to be run over by brute force, and along with it a whole free and prosperous mega-city whose free citizens in the past could freely voice their opinions and freely take to the streets and, while unable to freely elect their representatives, were nevertheless protected against their abuse of power by robust basic rights and strong and independent courts. This miracle, this island of liberty and the rule of law in the middle of an authoritarian, if not totalitarian state, has survived for almost a quarter of a century. That probably now comes to an end. One more reason to mourn, as if there weren't enough of those already.

But it is not just violence that is sweeping over Hong Kong, but also at least some semblance of law and order: the People's Congress in Beijing has decided to pass a National Security Law for Hong Kong. Under Article 18 of the Basic Law, national laws are not valid in Hong Kong unless they are listed in Annex III to the Basic Law. This exception is to be explicitly limited to defence and foreign policy matters and those specifically mentioned in the Basic Law. At the same time, however, it is for the Standing Committee of the National People's Congress to decide what laws to include in this Annex. The competence to determine the limits of this competence lies with Beijing, not Hong Kong. That competence is now being exercised by the central authority. And there is no-one who is authorized to say: You mustn't.

Which brings us to the notorious German topic of *Kompetenz-Kompetenz*, the competence to determine the limits of competence, a topic which Edmund Stoiber used to gibber about so admirably back in his days, and without the exclusive possession of which, according to orthodox German doctrine, collective self-determination and popular sovereignty are unthinkable. Now, the EU, in sharp contrast to China, has of course no armed forces under its command, to name but the most obvious of the many reasons why any equation between both is out of the question. But the suspicion that a democratically deficient whole like the EU could, in relation to its member state parts, usurp the power to control its own limits of competence, has put German constitutional doctrine under tremendous strain for decades. And now, with the recent ultra-vires ruling of the *Bundesverfassungsgericht*, that suspicion has turned into an affirmation.

The borders of competence

A) Where the borders of EU competence lie is regulated in the Treaties and is therefore a question of European law. B) Where the EU's limits of competence lie is decided by the Member States and is therefore a question of constitutional law. Both sentences are as true as they are incompatible with each other. From a scientific perspective, one could go mad. But legal practice had basically already found a balance in the 1980s that seemed to make the coexistence of the incompatible by and large possible: Usually, you will do your thing and we do ours and we will leave you alone. In the event that your thing gets completely out of hand, however, we reserve the right to make sure that we won't be involved.

Strictly speaking, of course, this only shifted the dilemma one step up: You can go right back to arguing about who decides when a conflict is so bad that it qualifies as getting totally out of hand. The *Solange* reservation and its siblings did not solve the dilemma. (Neither, by the way, would the old proposal which EPP Group leader Manfred Weber has now brought back into play, namely to install a new "competence court" instead of the notoriously integration-crazy and therefore allegedly untrustworthy ECJ, in order to patrol the EU's competence borders.) But it kept it manageable. It left open what has to remain open. Thus the field of tension between the two poles of the dilemma was

turned into a fertile garden which for many years bore a rich harvest (and many a thistle, too). In recent years there have been more and more short circuits, though, in Denmark, in Italy, which, thank God, did not do much permanent damage after all. This could be different now with the Karlsruhe mega meltdown in the ECB case.

Perhaps the greatest thing about constitutional law in general is not so much what it determines as what it keeps open. The constitutionally ordered world is not a world of order and harmony, but one of incompatibilities which are kept in an unstable balance through a precarious force field of fundamental rights, duties to protect, competences and procedural rules: individuality *and* sociality, unity *and* diversity, power *and* commitment – a fascinating, ceaseless, astonishingly permanent vortex of incompatible things, if you look at it from that angle.

What keeps this state of affairs precarious is not least the fact that all the time all sorts of latter-day Carl Schmitts keep coming in to demand: What kind of order is this? How are we supposed to know what's what? This or that, which is it going to be? That must be decided! And if you want to know who should decide and in whose favour: we actually have a pretty solid idea about that right away.

I don't want decision. I insist on not deciding. I insist on keeping things open, on *tertium datur*, on the open force field between the poles of incompatibility. Because that is the only place where I can breathe. This is not neutralism nor fence-sitting, on the contrary: I know all the more clearly what I am fighting for and against. I am against the unambiguous. I am not on the side of those who want to have *Kompetenz-Kompetenz* all for themselves, whatever side that is. I am neither on the side of those who, in the name of the people, family and fatherland, seek to order the world in categories of superiority and inferiority, of belonging and not belonging. Nor am I on the side of those who strive to harmonise every regulatory obstacle out of the way of the free play of the law of the strongest.

I will not take sides between those two. And when I look around the world, I am not at all sure what ultimately distinguishes them from each other anyway.

The week on Verfassungsblog

… is summarized by LENNART KOKOTT:

The Hong Kong Security Act has passed the People's Congress and it does not bode well for **the rule of law** worldwide. MAX STEINBEIS talked to DAVID LAW in Corona Constitutional #30 about the recent developments, including the responsibility of academics when civil liberties are at stake. Speaking of civil liberties, LUÍSA NETTO looks at the Brazilian government's response to the Covid-19 pandemic, which dramatically disregards scientific knowledge, and against this background sheds light on what a human right to science could mean for citizens, but also for other state organs demanding action from the government. From illiterate to illiberal democracy: KIERAN BRADLEY discusses JOHN COTTER's proposal to deny Hungarian representatives to attend Council meetings on the basis of Art. 10 TEU and concludes that this would not be a good idea: crises of the rule of law cannot be solved by disregarding the rules of law, he writes. Disregard of the rule of law takes place in Poland as well, particularly in the appointment of judges, write MICHAŁ KRAJEWSKI and MICHAŁ ZIÓŁKOWSKI, and note that the election of the new First President of the Supreme Court raises serious doubts about the independence of the court. MIMOZA BECIRI presents the constitutional situation in Kosovo, where in the midst of the pandemic, the Prime Minister received a vote of no confidence, as a result of which the President of the country initiated a constitutionally unsustainable procedure to form a new government. In South Korea, much praised for its fight against the virus, religious freedom is suffering under containment measures where government agencies early on publicly denounced a religious sect, writes CIARÁN BURKE. Paraguay is another example of a country with a successful health strategy, which, according to CARLOS CÉSAR TRAPANI, did not, however, take place along constitutional lines, but involved questionable methods of constitutional interpretation and a low

degree of mutual control between the branches of government.

RÍÁN DERRIG presents the **regulatory theory** of nudging, a libertarian alternative to state intervention, which has been well received by many governments in recent years. Its shortcomings, he states, become obvious in response to the pandemic. For LAUREN TONTI, one regulatory issue that governments should consider sooner rather than later is the need for a long-term strategy for dealing with the virus, which might include a discussion of vaccination obligations.

In **Germany**, the long-term strategy is still in progress, but the short-term strategy has recently led to the re-start of the *Bundesliga*, albeit in front of empty stands. STEFFEN UPHUES discusses whether this is the result of good lobbying or the consequence of a proportionate approach to the fundamental right to freedom of occupation. Meanwhile, the pandemic has so far not been able to persuade the responsible supreme authorities of the *Länder* to stop the deportation of refugees. ANNIKA FISCHER-UEBLER has written down why such a stop would be necessary and, indeed, legally required. FELIX HANSCHMANN deals with the state's educational mandate in the pandemic and explains that it is the task of the state and school authorities to provide the necessary learning materials as school attendance is restricted. Such questions of residence and education law also point to constellations of German federalism in the fight against the crisis. SABINE KROPP argues that the much-scolded federal system is better suited for this purpose than the wishful thinking of an all-competent central state.

Last week, the **Federal Constitutional Court** caused a stir with its decision on the BND law governing the German Federal Intelligence Service, in which it adjudicated that the fundamental rights of the *Grundgesetz* bind the state in the exertion of state powers abroad. TIMO SCHWANDER presents the decision and points out which questions remain open. MATTHIAS LEHNERT writes about another decision of the FCC that deals with the judicial review of conversions to Christianity in asylum proceedings – the FCC, he maintains, makes certain clarifications, but they do not extend to remaining problems in the evaluation of evidence undertaken by administrative courts. SASCHA WOLF looks ahead to the FCC's upcoming decision in the *Seehofer* case and uses the case dealing with the limits of ministerial freedom of expression as an opportunity to question the concept of *Amtsautorität* (official authority) and its role in the FCC's setting of standards. JENS T. THEILEN deals with a decision of the **Federal Court of Justice** in which the court interprets provisions on intersexuality in the *Personenstandsgesetz* (Law on Personal Status) and points to the political dimension of the interpretation, in which a problematic biological essentialism is expressed.

PHILIPP DÜRR looks at the possible procurement of **armed drones** for the German *Bundeswehr*. Both the acquisition and the use of such weapon systems are possible under constitutional and international law, the acquisition may even be required under constitutional law, he argues.

The **PSPP ruling** by the Federal Constitutional Court has continued to emit waves of shock and awe this week. In Corona Constitutional #28, CHRISTOPH KRENN talks to ALEXANDER MELZER about the way in which the ECJ works and produces its rulings, which differs significantly from that of the FCC – a fact that may contribute to the strained relationship between the courts. ALBERTO ALEMANNO also looks at the working methods of the ECJ, which have been under much public srutiny so far, partly due to the reticence of the court. This will probably change now that not only the decisions of the ECJ, but also the court itself are increasingly being the object of public scrutiny, he maintains.

Meanwhile, **criticism of the FCC** continues. In a joint statement, R. DANIEL KELEMEN, PIET EECKHOUT, FEDERICO FABBRINI, LAURENT PECH and RENÁTA UITZ underline that national courts, for the sake of European legal unity, must not ignore ECJ rulings, but must suggest other solutions if they consider court decisions to be incompatible with their national constitutional system. This statement co-signed by 32 leading EU lawyers is contradicted by MARCIN BARANSKI, FILIPE BASTOS BRITO and MARTIJN VAN DE BRINK who warn against further

damage to the European immigration by taking a "take it or leave it approach" towards the member state's reservations with respect to *Kompetenz-Kompetenz*. The FCC's European vision would amount to a financially passive Union and would result in economic and social distortions similar to those of the acute euro crisis, writes EVANGELOS VENIZELOS (who, having been the Greek Minister of Finance back then, was in the room where it happened in those days). The Bundesbank is now confronted with a norm conflict at the highest level, for which there are no agreed collision rules, ANDRÁS JAKAB and PÁL SONNEVEND state. The fact that the ruling has thus provoked an inevitable breach of law is a problem for European integration as well as for the rule of law in the Union, they write. In Corona Constitutional #29, CHRISTIAN WALTER talks to MAX STEINBEIS about the consequences of the judgement for the institutions obliged to implement it.

In the final week of the *Covid-19 and States of Emergency* **symposium** PAUL KALINICHENKO and ELIZAVETA MOSKOVKINA present the initially hesitant, then increasingly vigorous Russian approach, the legal basis of which, however, remains ambiguous, especially for citizens. KWAKU AGYEMAN-BUDU analyses the answer to the pandemic in Ghana with regard to the constitutional framework. In China, a Fraenkel-style prerogatory state has been in full bloom in the fight against the pandemic, writes EVA PILS, who sees a lasting constitutional problem in the confrontation of such an approach with that of liberal constitutional states. MICHAEL MEYER-RESENDE looks at the member states of the European Union, most of which perceive themselves to fall into the latter category, and identifies the main challenges for the rule of law as a result of containment measures against the coronavirus. The studies of the Global Access to Justice Project on the negative consequences of the pandemic for access to justice, presented by DIOGO ESTEVES and KIM ECONOMIDES, examine a similar context. Finally, JOELLE GROGAN brings together the many different strands of this impressive fifty-day symposium, and wraps it up by highlighting the most worrying developments in the global emergency caused by the pandemic as well as best practice examples to be derived from the comparative analysis the symposium has undertaken.

So much for this week. To conclude, let me remind you that we keep depending on your support which you could give us either via bank transfer (paypal@verfassungsblog.de, DE41 1001 0010 0923 7441 03, BIC PBNKDEFF) or with a voluntary subscription on the crowdfunding platform Steady. If you haven't done so yet: please! If you have: thank you! Either way: all the best!

Max Steinbeis

P.S. By the way, you can also book an ad in this editorial, e.g. for job offers or anything of that kind. Do shoot me an email if you're interested! You might reach just the right kind of audience that way.

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