After the Explosion

Maximilian Steinbeis

15.10.2021 doi: 10.17176/20211016-045149-0

I have been thinking of Chernobyl a lot in the last few days since 7 October 2021. Something big has blown up. What exactly? We don't know yet, but in any case it was more than just a piece of the energy supply system. Who is responsible? The men in the control room made horrible mistakes, to be sure, but that it could come to this in the first place is somebody else's fault. What will happen to all of us now? The fallout cloud darkens the sky above us, and only the wind knows where it will unload its noxious cargo.

For the time being, I keep stumbling through the world I know and in which I operate and function, my gaze directed suspiciously skywards, like a grey, old Soviet functionary: in my case (unlike the Soviet functionary's)[1] it is a world in which law binds power and in which the latter respects these bonds of its own accord. A world in which the constitution matters, in which democracy, the rule of law and human rights matter, and in which power can be brought before independent courts when it does what it mustn't do.

Into this world, the organisation in Warsaw currently operating under the title "Polish Constitutional Tribunal" has blown a deep, gaping hole with its "verdict" of 7 October 2021. As is well known, it was preceded by another judgement in another member state, which may appear to be to that one what Three Miles Island was to Chernobyl: the PSPP judgement of the Federal Constitutional Court.

Of course, as ALEXANDER THIELE has convincingly shown here, there are at least 10 weighty reasons why equating Karlsruhe with Warsaw and holding the BVerfG in any way responsible for 7 October 2021 is out of the question. The allegation by the Polish government and other commentators that Poland is basically just doing what Germany did before is a smokescreen, because the PSPP ruling is fundamentally different in almost every respect from what happened on 7 October.

Except in one. Namely, in the use of the right to declare EU legal acts non-binding as a national constitutional court.

++++++++*Advertisement*++++++++

CONSTITUGENT
RESEARCH AND EDUCATION ON CONSITUTIONAL LAW
GHENT UNIVERSITY

Friday 29 April 2022, ConstitUGent and the Human Rights Centre will organise an **expert seminar on intensity of review in public law**. It is open to new and ongoing research from a theoretical, empirical or exploratory angle. Both comparative and jurisdiction-specific proposals are welcome, as are proposals that focus on particular contexts (e.g. the COVID-19-pandemic). During the seminar, researchers are invited to present their findings.

To apply for participation, please submit an abstract in English of no more than 500 words to benjamin.meeusen@ugent.be by 30 November 2021." Further details can be found here.

++++++++++++++++++++++

The question of this right, however one answers it, has been one of the most productive and exciting to occupy German, if not European, constitutional law scholarship over the past three decades. The theory behind it has been developed by the Federal Constitutional Court since the 1990s, and the debate on it has spanned my entire professional life. The implied tension between Karlsruhe and Luxembourg has not only produced an enormous amount of learned literature, but also, among other things, Verfassungsblog, which I founded in 2009 not least to give a forum to

[1] by which, needless to say, I expressly object to the evidently and obviously whacky equation EU = USSR.

the rising irritation in legal academia and practice about the path taken by the Second Senate of the BVerfG in its Lisbon Treaty ruling. This field of tension remained on the whole stable and productive and, although dangerous, also tremendously interesting, as long as (*solange*) the theory remained theory and did not find its way into the tenor of the decisions. Which is what happened with the PSPP ruling.

An bogus giant

Interestingly, at this very moment, apparently for the first time after three decades of expansive legal scholarship on the subject, the question has been asked what exactly happens when an EU legal act is actually defective in the sense of the Karlsruhe criteria (i.e. exceeds the competences transferred to the EU as an ultra-vires act or violates the identity of the German constitution). Lucas Hartmann, a young scholar from the University of Freiburg, has undertaken this investigation in an essay recently published in *Der Staat* and comes to the conclusion: what happens is actually – nothing much at all.

If, according to Lucas Hartmann, the BVerfG declares an EU legal act ultra vires or contrary to constitutional identity, that does not mean that this legal act is null and void. It remains in force as a legal act that was produced incorrectly, but is nevertheless valid. The defect concerns the right, but not the ability of its creator to create that law. According to Hartmann, this lies in the logic of the BVerfG caselaw itself, which allows an act that is ultra vires or contrary to constitutional identity to remain valid until it itself establishes the violation – as a matter of constitutional law. And even if it does establish a violation, this, according to Hartmann, only affects the case in which it occurs and does not change the continued existence of the general binding effect of the EU legal act. The general binding effect of a BVerfG decision, on the other hand, does not arise by virtue of the Constitution and certainly not by virtue of Article 79 (3) of the Basic Law, but by virtue of simple statutory law, namely § 31 BVerfGG, and in this respect is not applicable because of the primacy of EU law. All other German constitutional bodies, authorities and courts thus remain bound by EU law even after it has been declared to be ultra vires or contrary to constitutional identity, again as a matter of constitutional law.

If this is true, the sobering conclusion is that the whole 30-year effort was, in terms of the consequences, actually pretty much for nothing. Ultra vires and identity challenges are procedures from which literally almost nothing follows. A "bogus giant", as Hartmann puts it.

After GroKo

The demystification of the Second Senate's European caselaw has previously been advanced by another essay, also recently published in *Der Staat*. In it, Florian Meinel, professor of constitutional law in Göttingen (and former associate editor of the Verfassungsblog), places the BVerfG's caselaw since the Lisbon ruling in the context of something that is also about to end these days: the age of the CDU/CSU/SPD government called "Grand Coalition", or "GroKo".

The existence of that coalition since 2005 does indeed coincide to a large extent with the heyday of the conflict-laden European *Verfassungsgerichtsverbund*, as former BVerfG President Andreas Voßkuhle used to call it, especially if one takes into account the de-facto consensus Grand Coalition on European policy matters, which also existed before and during the "black-yellow" CDU/CSU/FDP intermezzo of 2009-2013. Left and right are blurring into one another, there is coalition instead of competition between the two competing major political forces, opposition is virtually non-existent. Except for Karlsruhe. There, the little man, the common people still find protection from the governing elites in Berlin and Brussels who are so suspiciously united in their uncritical surrender of sovereign nation-state territory to the democratically so poorly legitimised European Union.

According to Florian Meinel, it is Parliament that is constantly reminded of its "responsibility" by the guardians of the constitution in Karlsruhe: in 2005 in the European Arrest Warrant proceedings, in 2009 in the Lisbon Treaty proceedings and since then ceaselessly and by no means limited to matters of European integration. The BVerfG is not primarily concerned

with the responsibility of the government towards the elected representatives of the people, but instead these representatives themselves are held responsible. To whom? To the people. Who are represented by whom? That, according to Meinel,

> *… can, of course, be no one other than the Federal Constitutional Court itself, which in this way sets itself up as the representative of institutionalised criticism of representation.The ideal of popular representation by lawyers instead of a parliament has a famous tradition in Germany; as competition to representation by a democratic parliament, however, this caselaw is in the true sense what the court perhorresces: Populism. (S. 70)*

In Meinel's eyes, this whole thing is the consequence of the half-baked concept that the Second Senate has of parliamentary democracy. The BVerfG has turned parliament into a kind of government authority that bears "responsibility" for the tasks assigned to it by law. In doing so, it has lost sight of what parliament is actually there for, namely to carry the government by majority vote, and what the democratic trick of such a majority is: to make possible decisions that are binding not due to their reasonableness and proportionality, but because they are the result of a genuinely political process. To keep the decision-making process democratically *open*. To actually make that leap of faith.

This is something we can afford especially and only with a robust constitutional court, supported by broad popular trust and brimming with self-confidence, which vigorously precludes the majority from trampling on fundamental and minority rights.

The GroKo is history and will not return any time soon. In the BVerfG's Second Senate, there is a lot of change in terms of personnel, and Karlsruhe's caselaw has rarely lacked flexibility in changing times. In the *Bundestag*, for better or worse, there will again be a proper opposition, and it will certainly articulate different ideas on European policy than the governing SPD/Green/FDP "traffic light" coalition. I don't know what will come out of all this and how I will like the new world that is now emerging. But at least there will probably still be more than enough to do for us constitutionalists (unlike for Soviet functionaries). So: buck up!

The week on Verfassungsblog

… was understandably dominated by the explosion in Warsaw: JAKUB JARACZEWSKI explains what the "ruling" is all about and why it violates both European and Polish law. It will nevertheless not fail to achieve its intended effect: to provide a constitutional cover for the continued harassment and punishment of Polish judges who continue to stand up for judicial independence. 27 former judges of the Polish Constitutional Tribunal and the Committee of Legal Sciences of the Polish Academy of Sciences have issued public statements opposing the ruling.

Can Poland remain a member state of the EU as long as this state of affairs continues? HERWIG C. H. HOFMANN interprets the Polish government's publication of the "decision" in the Official Journal as an implied declaration of withdrawal from the EU. MERIJN CHAMON and TOM THEUNS see the requirements for a regular **Polexit** according to Art. 50 TEU not yet fulfilled, but also no reason to accept Poland's behaviour fatalistically. Now it is above all up to the other member states to be prepared, if necessary, to continue integration by means of enhanced cooperation or even to withdraw collectively from the EU themselves and then re-establish it – without Poland.

In the meantime, the **rule of law mechanism** allows the EU to cut funds in the case of rule of law abuses in member states in order to protect the EU budget. The Council and the President of the Commission have, however, undertaken not to activate this mechanism until the ECJ has ruled on the complaints against it by Hungary and Poland. This week, a two-day hearing took place in Luxembourg. ROYA SANGI and JOHN MORIJN were both present and report on this historic incident, the critical questions of the judges and other impressive moments.

In the **Czech Republic**, the state of health of President Miloš Zeman threatens to plunge the country into serious constitutional troubles. According to the constitution, the president moderates the post-elec-

tion negotiations between the parties, convenes the first session of the newly created Chamber of Deputies and appoints the new prime minister and government. Instead, he is now in intensive care, and no one knows what his health is actually like. ZUZANA VIKARSKÁ reports on the constitutional stalemate that results from this.

Before the Czech parliamentary elections on 8 and 9 October 2021, Prime Minister Andrej Babiš banned a group of journalists from Czech and foreign media from attending his press conference with Hungarian Prime Minister Viktor Orbán. For TEREZIE BOKOVÁ, this shows once again Babiš disregard for the democratic rules of the game.

In **Austria**, Chancellor Sebastian Kurz had to resign from office after new revelations by the economic and corruption prosecutors. The process raises constitutional questions which BENJAMIN KNEIHS addresses.

+++++++++*Advertisement*++++++++



A new special issue of the European Journal of Risk Regulation discusses some of the challenges posed by the introduction of **COVID-19 certificates** as a privileged tool for opening up mobility and access in order to restore a semblance of normality to social life. While at present there is no international consensus either on how – or why – such certificates should be used or on how they should be designed and applied, a growing number of countries have already introduced COVID-19 certificates in one form or another.

Yet the scientific community as well as the World Health Organisation (WHO) have expressed caution, noting that such certificates might **disproportionately discriminate** against people on the basis of race, religion and socioeconomic background, as well as on the basis of age due to the sequencing of the vaccine rollout. Indeed, while the new COVID-19 certificates may appear to promise a magical solution enabling us to free up global mobility and reopen economies, they actually risk creating new borders and new forms of inequality through an exclusionary sorting and profiling mechanism that delimits "safe" from "unsafe" bodies, based on differential access to "immuno-privilege" – but also differential forms of "bio-securitisation". They also provide an illusion of pandemic safety – assuring citizens that through the "fetish" of the certificate "safe travel" can magically be reinstated.

++++++++++++++++++++++

MAX STEUER reports from one of the European Citizens' Panels (ECP), which are part of the **Conference on the Future of Europe**. These offer randomly selected citizens the opportunity to articulate their visions of the EU.

In recent years, six **Schengen** countries (Germany, France, Austria, Denmark, Norway and Sweden) have reintroduced border controls. If the ECJ follows a recently published opinion of the Advocate General, these would be made much more difficult. POLA CEBULAK and MARTA MORVILLO explain what would have to change.

In a long-awaited ruling, the ECJ last week had the opportunity to revise its case law on the duty of national courts to **refer questions to Luxembourg**. However, the Court has largely maintained its strict approach, showing at first sight little confidence in the handling of EU law by national courts. JESSE CLAASSEN, however, offers a different reading of the judgment.

The so-called **Energy Charter Treaty** (ECT) has been criticised for its investor-friendly provisions and the threat it poses to the energy transition. More and more EU member states, including France and Spain, for example, are considering leaving. NATHALIE BERNASCONI-OSTERWALDER, LUKAS SCHAUGG and AMANDINE VAN DEN BERGHE believe this is possible under international law and desirable in terms of climate policy.

In **Mexico**, the Supreme Court has strengthened the reproductive and sexual rights of pregnant women in a series of rulings. Never before has a constitutional court in Latin America provided such strong protection, according to JOY MONSERRAT OCHOA MARTÍNEZ and ROBERTO NIEMBRO ORTEGA.

In the wake of the Covid pandemic, a blanket, state-wide exit ban came into force in **Bavaria** more than 18 months ago – for the first time in the history of the Federal Republic. In the meantime, the ensuing passionate jurisprudential debate has widely calmed down. FELIX SCHMITT reports on the most recent decision of the Bavarian Administrative Court, which finally declared the exit ban unlawful in retrospect.

According to the Berlin Administrative Court, the *Bundestag's* **BDS resolution** of 17 May 2019 is lawful as a "mere expression of opinion" and also does not violate the plaintiffs' fundamental rights. SEBASTIAN SCHEERER disagrees: "In no liberal democracy are constitutional bodies allowed to congratulate other holders of public decision-making power for unlawful actions, to encourage them in doing so, to call on them or incite them to do so, i.e. to do exactly what the Bundestag took upon itself to do with its BDS resolution."

++++++++++*Advertisement*++++++++

Making outstanding research visible – this could be your ADVERTISEMENT!

If you want to draw attention to a conference, a job offer, a CfP or a book release, you can do so on Verfassungsblog. Our weekly editorial is sent out to more than 12,000 constitutionalists world-wide!

Please do not hesitate to contact us for any requests or queries.

All best,
the Verfassungsblog team

++++++++++++++++++++++++++

So much for this week. All the best to you, stay safe and healthy, please support us on Steady and/or Paypal, and see you next week!

Max Steinbeis

ABOUT THE AUTHOR

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

SUGGESTED CITATION

Steinbeis, Maximilian: After the Explosion, Verfassungsblog, 15.10.2021, doi: 10.17176/20211016-045149-0.

Licensed under CC BY-SA 4.0.

Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20211016-045149-0.