

# Decision-Making under Uncertainty

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22 Oktober 2021

A well-functioning constitutional democracy can be recognized by the fact that you can lose in it. You can lose lawsuits. You can lose votes. If you do, you don't have to start a riot about it. You don't need to, because you are protected by human and minority rights. You mustn't do so, because the institutional and procedural framework within which the defeat is inflicted on you is itself generally accepted as fair. You lost, sure, but that's alright. Where this is the expectable reaction to defeats of judicial or political nature, there it's safe to say that constitutional democracy is alright.

There is no lack of examples all around where this is not (anymore) the expectable reaction. It is the hallmark of authoritarian populism to immunize itself against the possibility of defeat by reinterpreting defeat as proof that there is indeed something not alright, something out of order, with the order itself. That is what the PiS government in Poland, the Trump movement in the U.S., and far-right COVID deniers in Germany are systematically doing, and that is what makes the whole lot of them inherently anti-constitutional.

Against this background, I can understand up to a certain point why the Federal Constitutional Court has been struggling to find an adequate answer to the pandemic policies of the government. What I cannot understand, however, is why it has chosen to make its own hard life even harder.

## Fear of bias

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The nut the *Bundesverfassungsgericht* currently has to crack is the so called „federal emergency brake“ (*Bundesnotbremse*): In April 2021, the German Parliament enacted a law, set to expire by June 30 at the latest, which installed a mechanism to set a number of restrictions in force when- and wherever the COVID incidence number exceeded 100 for three days in a row. The list of measures which would then automatically take effect included personal contact restrictions and a nighttime curfew. This was constitutionally problematic, to put it mildly, under a whole range of aspects, as many constitutional law professors pointed out at the time. But after months of legal whingeing against pretty much everything the government came up with so far, lawmakers had turned somewhat wary of that sort of protest and decided to pretty much ignore it altogether. One of the most problematic aspects about the law is that it was self-executing: The law itself put those measures into effect. The executive, as it is called, had no business in its execution. No government official made the decision where and for how long people had to stay indoors, and could be taken to court for it. Against a decision made by the law itself, there is no remedy in administrative law courts. To file a motion against being locked up in one's own apartment at night, one had to go directly to the Federal Constitutional Court, which alone has the power to declare federal laws null and void.

At first glance, it may seem plausible to centralize constitutional control of the measures to combat the pandemic in the hands of the Federal Constitutional Court, instead of letting all sorts of different administrative courts add their two cents. In fact, however, (as Christoph Möllers had already pointed out during the legislative process) this puts the *Bundesverfassungsgericht* in an extremely awkward position. Instead of having the administrative courts work through the question of what is suitable, necessary and proportionate in the fight against the virus on a case by case basis – which might yield different answers from one region to another – and the Karlsruhe Court watching over their correct handling of the constitutional yardsticks they use in it, the *Bundesverfassungsgericht* now has to carry on its shoulders the crushing responsibility to absolve or condemn the Merkel government's entire pandemic policy.

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Hundreds of constitutional complaints are currently pending against the law before the Karlsruhe Court, and the complainants are by no means only or even primarily far-right COVID deniers – on the contrary. It is, however, far-right COVID deniers who will use the outcome of these proceedings to pursue their populist ambitions – if necessary, by reinterpreting a defeat as a sign that something is out of order with the order.

The First Senate of the Federal Constitutional Court, chaired by the new President of the Court, Stephan Harbarth, is in charge of proceeding these complaints. Harbarth, as is well known, was elected to his current office directly from the *Bundestag* where is was deputy chairman of the CDU/CSU parliamentary group, which in the eyes of some already exposes him to the suspicion of being Merkel’s man in Karlsruhe. In June 2021, Chief Justice Harbarth and Justice Susanne Baer had dinner with members of the defendant federal government to exchange ideas in a confidential conversation about, of all things, one of the core issues of COVID policy, namely

„decision-making under uncertainty“. The [Springer press](#), conspicuously committed in this respect, reported that the suggestion for this choice of topic came from none other than Harbarth himself. On top of all this, Harbarth was [quoted](#) as saying that in his opinion the fight against COVID in Germany is „within the bounds of the law“.

A motion of challenge for fear of bias was moved against Harbarth and Baer under § 19 (1) BVerfGG, but earlier this week the [Senate declared](#) being unable to recognise any aspect under which the two dinner participants could give cause for concern at all. In a „reasonable appraisal of all circumstances“, the Senate said, using the formula customary in these cases in Karlsruhe, there was no reason to doubt their impartiality, because a) such meetings with government members for the „exchange of ideas and experience“ were completely normal (which is true), b) Harbarth’s participation in the choice of topics did not yet imply a „substantive positioning“, „how to deal with it from a legal point of view“, and c) the topic of „decision-making under uncertainty“ and the associated legal questions are „manifold“ and „arise in numerous proceedings which the Federal Constitutional Court has already decided and will still have to decide“. After hearing this, the complainants [filed another motion](#) accusing the Senate of disregarding their fundamental right to a legal hearing.

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The decision on the merits is expected to come in the next few days or weeks. As far as COVID is concerned, the *Bundesnotbremse* has long since expired at this point anyway and thus is of historical interest only in this respect. That, of course, does not apply to the constitutional and political questions it raises: these remain highly explosive. However, the Senate did not [deem an oral hearing necessary](#), in which it could have discussed the questions of „decision-making under uncertainty“ with the complainants, too. Instead, in May, it [summarily dismissed](#) the complainants’ application to suspend the emergency brake by interim injunction, without even mentioning the constitutional core problem of self-execution as a point of view why they might be justified. Oliver Lepsius, in his case note published earlier this month in the *Juristenzeitung*, made no effort to mince his words in stating his opinion of this:

“The Senate did not want to issue the interim injunction and this was only possible at the price of simply ignoring the fundamental legal issues. This is unacceptable and erodes basic trust.

The summary proportionality test the Court appears to apply, Lepsius continues, is in reality a „test that hangs in the air and has no legal point of reference“, because it fails to clarify which goal the tested means are actually being put in relation to. „This diffuseness of goals and means and the inability to differentiate between life, health and protection of the health system as a reference point for the individual measures has hindered proportionality control since the beginning of the pandemic. To be unable or unwilling to provide guidance here after more than a year is constitutionally unforgivable.“

So far, so bad. It would certainly be unfair to blame the Federal Constitutional Court alone for the whole mess. After all, it was the outgoing federal government under Chancellor Angela Merkel that passed this law and thus got the court into this deplorable situation in the first place. It was the same Merkel Government that chose Stephan Harbarth for the job of President of the Federal Constitutional Court. It was the same Merkel Government whose leaden indifference to the specific constitutional dangers emanating from authoritarian populism in Hungary and Poland was also largely responsible for the current crisis of the rule of law at the EU level.

At her last EU summit, the Chancellor urged „dialogue“ with Poland. Moderating, seeking compromises, deciding nothing, not letting controversies come to a head, that was for better or worse the hallmark of her style of government: nobody should lose.

We can read the result in the smirk on the faces of the PiS party.

*Thanks to Uwe Volkmann for valuable input and to Theresa Steinbeis for help with the translation.*

## The week on Verfassungsblog

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In the certainty of soon being relieved of the burden of office, the German Federal Minister of Health is now also loosening up his rigid policies. According to Jens Spahn, the *Bundestag* should no longer extend the declaration of an „**epidemic situation of national significance**„, which is effective until 25 November 2021. [THORSTEN KINGREEN](#) notes that the *Länder* would then still be able to combat regional risk situations with several of the measures foreseen for the national epidemic situation, but according to the Conference of Minister Presidents, they do not want to. „One can therefore state: Either the new German Bundestag will make the counterfactual decision in one of its first official acts that the ‚epidemic situation of national significance‘ will continue to exist, or there may no longer be a legal basis for the ordinances in some *Länder* from 26 November 2021. There would be regional Freedom Days in the very places where infection rates are highest.“

The new federal government and the new *Bundestag* are facing major and correspondingly expensive tasks, which lends particular urgency to the question of whether the **debt brake** enshrined in the Basic Law will even permit all this. [HANNO KUBE](#) considers some creative ways out of the dilemma to be unconstitutional, first and foremost the demand to use the emergency clause, which has been activated before the background of the pandemic, to stack away massive amounts of funds for future investments.

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For many weeks now, employees of the Berlin-based online grocery store **Gorillas** have been on strike to force better working conditions. After trying to sit out the strike for a long time, the company has now sacked more than 300 of its employees. [EVA KOCHER](#) looks at the right of workers to strike under Article 9 (3) of the Basic Law and asks whether German union law is prepared for such „modern“ constellations of employment.

During an action against lignite mining in the Garzweiler II open pit mine on 1 October 2021, 22 climate activists were taken into **custody to establish their identity**. Since the „Lex Hambach“ of 2018, this is possible for up to 7 days in the state of North-Rhine Westphalia. This measure allegedly serves to avert danger, but [CLEMENS ARZT](#) and [MICHAEL PLÖSE](#) suspect that this is rather an unlawful police sanction for insubordinate behaviour.

The argument for **EU law primacy** classically refers to the effectiveness of EU law and the need to resolve conflicts between Union and Member State law. In view of the recent decisions of the constitutional courts in Poland and Germany, these justifications seem to have lost their persuasive power. [MARCUS KLAMERT](#) argues that primacy should rather be anchored in Article 18 TFEU and justified via the prohibition of discrimination based on the individual.

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

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SUGGESTED CITATION Steinbeis, Maximilian: *Decision-Making under Uncertainty*, *VerfBlog*, 2021/10/22, <https://verfassungsblog.de/decision-making-under-uncertainty/>.

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