

# Careful what you Wish for

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Maximilian Steinbeis Sa 25 Nov 2017

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Dear Friends of Verfassungsblog,

While the world at large watched in horror how unfamiliarly and worryingly ineffective Germany appears these days when it comes to forming a stable government, some Germans, far from being shocked, seemed even almost elated. It was the perspective of a minority government that seemed to galvanize not a few Merkel-weary Germans – the idea of a government that seeks a majority for every law it wants to have passed in parliament on a continuous basis. How exciting! How invigorating, how liberating! Parliament will be back as a place where policy issues of national and international consequence are fought over in a clash of arguments! Debate at last! Polarization at last! After twelve long, dusty Merkel years of pragmatic muddling-through and systematic elimination of all matters of controversy, the sky is finally breaking open, the suffocating fog is clearing up, the withered institutions of public opinion and democratic decision-making are gaining new colour and new strength.

At the beginning of the week, [FLORIAN MEINEL](#) took, with gusto, the opposite position on Verfassungsblog (in German): The venture of forming a minority government, he warns, would disrupt the established way of functioning of the parliamentary system in Germany in ways that are difficult to foresee. It's not that it can't or mustn't be done in these times of ever growing numbers of parties represented in the *Bundestag*, making coalition building ever more difficult, but one should be clear about the implications: The bulk of the legislative agenda of the government is planned and routinely executed in the interplay between parliament, chancellery and the ministries. If that interplay stops to work, we can't just shut down the legislative agenda which is required not least because of the extensive jurisdiction in Karlsruhe on the reservation of the law. There is also the whole matter of parliamentary information rights, of committee procedures, of rules for taking the floor. And finally, the entire process of European policy and the complex interaction of the *Bundestag* and the Federal Government is clearly tailored to the situation of a majority government. As everyone knows, there are some fairly important things on the agenda in the European Union right now, to say the least.

It is quite possible that the whole thing will remain hypothetical anyway (as it did in 2013), because the SPD will eventually, and with the help of a Social Democrat in the office of the *Bundespräsident*, find its way back to its established role as a taker of governmental responsibility. Some things seem to point in that direction, indeed (as of Friday evening). But there is still a long way to go before a new edition of the abhorred Grand Coalition is on the table. And until then, the minority scenario remains to be reckoned with.

It isn't a doomsday scenario, certainly not compared to the alternative of new elections. There are plenty of practical examples on state level and abroad that show that minority governments can work reasonably well for a while. But I can't say I share much of the redemption fantasies associated by some with this scenario.

A minority Merkel (or whoever succeeds her in the case of the SPD demanding and receiving her head in return for coming around) would have to undergo the humiliating procedure of three voting rounds before being elected, but other than that she would have the same rights as the majority Merkel we know – plus a powerful new tool she didn't have before. She could call for snap elections by means of a vote of confidence whenever it seems convenient to her. With this tool, she can transform any struggle for compromise and common ground between different policy interests into a plebiscitarian all-or-nothing question. Will that be a good thing for the culture of debate in Parliament? I wonder.

An SPD, on the other hand, which tolerates the minority government and provides the votes for its laws if the political price is right, would be halfway in, half out, not part of government, but not real opposition either. She would be involved in most the government achieves, but without taking responsibility for what it doesn't.

It's not that a minority government would be unstable – on the contrary, the chancellor could only be overthrown by a constructive majority for someone other than her as head of government, and unless that person

materializes she stays in office day in, day out until the legislative term runs out, no matter how much or how little she achieves. The key to the stability of a minority government is in the hands of the chancellor, but the key to its effectiveness is in the hands of the opposition. Whether that will help reviving parliament as the center of German democracy? Depending on how the SPD decides, we will find out.

## In the jungle

For its part, the Republic of **Poland** will find out what happens if it keeps on logging trees in the protected primeval Białowieża forest in the face of an ECJ injunction ordering it to stop it. According to a spectacular decision of the ECJ, a fine of EUR 100,000 will be due for every day Poland continues to disregard the interim injunction. [DANIEL SARMIENTO](#) analyses how the court justified this step and how it is related to the fight for the rule of law in Poland in general. We expect another analysis of this tremendously important matter from a Polish point of view by [ROBERT GRZESZCZAK](#) and [IRENEUSZ KAROLEWSKI](#) in the next few days.

An often overlooked aspect of the crisis in Poland is the way the PiS government uses politics of collective memory with respect to the Belarusian minority. [ULADISZLAU BELAVUSAU](#) draws attention to that matter.

In **Venezuela**, President Nicolás Maduro is trying to consolidate his power with an effort in constitution-making and has installed a "Constituent Assembly" for this purpose. In a three-part series of articles, [LAURA JUNG](#), [HANNA BUCK](#) and [MARIA HAIMERL](#) examine whether that "Constitutional Assembly" deserves to be called by that name or not.

The **German** District Court in Frankfurt/Main found no trace of illegal discrimination in Kuwait Air's refusal to transport an Israeli, as Kuwaiti law prohibits the conclusion of contracts with Israeli citizens – a decision many found appalling for obvious reasons. [MARIA LEE](#) and [AMALIE FRESE](#) take a critical look at the legal argument of the court.

The ECJ insists that EU citizens married to third-country nationals must be able to exercise their freedom of movement even if their spouse is, as such, not entitled to a residence permit in the country of destination. How far the court is prepared to go is shown by its recent decision *Lounes* decision analyzed by [ROMAN LEHNER](#) (in German).

## Elsewhere

[OLIVIER BEAUD](#) explains to his readers what unexpected power the German constitution grants to the Federal President in the current situation of uncertain majorities (in French).

[ROSELINE LETTERON](#) asks how the President of the French Constitutional Council, Laurent Fabius, reconciles his judicial function with his other job as environmental policy functionary for the United Nations (in French).

[MIGUEL ANGEL PRESNO LINERA](#) examines whether the refusal of the Barcelona city administration to authorise right-wing extremist demonstrations is compatible with freedom of expression and assembly (in Spanish).

[CHRISTOPHER McCRUDDEN](#) and [DANIEL HALBERSTAM](#) criticise the UK Supreme Court for neglecting the Northern Ireland situation in its *Miller* ruling on Parliament's right to participate in the Brexit decision.

On 5 December, the ECJ will deliver its eagerly awaited judgment *Taricco II* – the latest and maybe final chapter in the epic battle with the Italian Constitutional Court over the question of whether national constitutional identity can take precedence over the primacy of European law. [MICHAL KRAJEWSKI](#) shares his premonitions.

[NUNO FERREIRA](#) and [DENISE VENTURI](#) report on another case pending before the ECJ against Hungary, conspicuous in quite many constitutional respects, and its practice of submitting asylum seekers who have flown from persecution for their homosexuality to all kinds of testing methods to verify their sexual orientation.

That's all for this week. All best, and take care,

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