Week #1 after Trump

Maximilian Steinbeis

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Dear Friends of Verfassungsblog,

I will not bore you with yet another account of how stunned I still am and how I shake in my booths now and so forth. We all do, I suppose. The world has changed over night, quite literally. And the world we woke up in on Wednesday morning appears to be a far less habitable place for liberal constitutionalists who believe that state and society should respect human dignity, protect the vulnerable, overcome discrimination and impose on their own power those legal restraints that empower them in the first place.

How could this happen? What did we do wrong? What can we do now? Shall we stand our ground or adapt?

In my last email, I invited you to share your thoughts on these questions, and many of you did. How could this happen? "Neo-liberalism's chickens have come home to roost", writes DAVID ABRAHAM – a "crisis of representation" is taking place in the US, not (yet) a constitutional crisis. According to CORMAC MAC AMHLAIGH, a "tendency to view constitutional politics, to borrow Goethe's metaphor, as architecture rather than music" is to blame; "as fixed and immutable rather than a dynamic phenomenon which requires the ongoing assertion and reassertion of the key values and terms of engagement of our mutual interaction with each other and with authority."

What can we do now? Go local, says MASSIMO FICHERA. Embrace popular constitutionalism, says MATEJ AVBELJ. See the big picture and ride the constitutional moment in both the European Union and the UK, says LORENZO ZUCCA. Withstand the pull of popular jurisdiction, pleads FRANK CRANMER. Most of all, don't panic, recommends ROB HOWSE in his 13 provocative theses on Trump and liberal democracy.

Meanwhile in Europe…

The Conseil d'Etat, the supreme administrative court of France, has made an important decision if and when Christmas cribs can be displayed in French city halls – a big thing in the land of Laïcité, and, in IBTISSEM GUENFOUD's view, a wobbly and unconvincing piece of judicial reasoning.

Victor Orbán, Prime Minister of Hungary and as much of an autocrat as Donald Trump ever aspires to be, had what appeared to be a setback of sorts when the Hungarian Parliament failed to adopt his latest constitutional amendment proposal by two votes. That, however, is not what this is actually about: According to RENATA UITZ, it is all just a part of Orbán's ongoing strategy to play the "EU is interfering with our constitutional identity" tune and keep the predominantly anti-migrant Hungarians dancing to it.

Geert Wilders, the leader of the Dutch far-right, is hoping to get where Victor Orbán already is and Donald Trump is about to go, as Netherlanders are called to the polls in March 2017. Currently, he has to face charges for "incitement to discriminate" Moroccans before a criminal court in The Hague. What that is all about explains PETER VAN DE WAERDT.

Germany's supreme civil court, the Bundesgerichtshof, had decided a few weeks ago that the civilian victims of the botched air strike in the Afghan province of Kunduz cannot sue the Federal Republic for damages: military operations in a war, according to the BGH, are exempt from official liability action. Now, the reasons for that decisions are public. PAULINA STARSKI has taken a closer look and finds the Court's reasoning much at fault, both from a constitutional and a public international law perspective (in German).

Last week's legal debate on Brexit and the respective rights of the UK government and parliament to

push the Art. 50 button has taken a EU law turn when some claimed that the British Supreme Court would be obliged to call on the European Court of Justice for clarification about the famous "constitutional requirements" in Art. 50 TEU. Is it? It is, says RICHARD LANG. It is not, says MIKE WIENBRACKE. It very well might be, says DANIEL SARMIENTO, but the result would probably please the hard-core Brexiteers a lot more than the recalcitrant Remainers.

The Spirit of Liberty

Here are some things on other pages very much worth reading, too:

- OLIVER LEPSIUS explaining why it is not just not undemocratic but essentially democratic to give the people the opportunity to think twice after a popular decision they might have come to regret (in German),
- Hints for survival under a Putinesque autocracy from the russian-american writer MASHA GESSEN,
- ORIN KERR's speedy analysis of the checks and balances in place and what they can do to rein in Trump should he decide to move the system to its "break point" (frightfully little), and, a bit more uplifting,
- JON MICHAELS on the same topic, pointing to division of power elements within the US executive branch,
- JULIAN KU with some preliminary thoughts on the suddenly topical question of whether California and Oregon could now legally secede from the US (they could not),
- ANNE PETERS on China and Russia moving from "norm-takers to shapers of the international legal order",
- STEVE PEERS on the European Arrest Warrant and whether the Luxembourg Court, formerly reluctant to enforce human rights in that respect, has turned "from poacher to gamekeeper",
- former UK foreign secretary DAVID OWEN's proposal for a Federal UK Council, modelled on the German Bundesrat,
- and finally a text more than 70 years old but much in need in these trying times, Judge Learned Hand's "Spirit of Liberty" speech of which, to conclude this letter, I quote:

"What then is the spirit of liberty? I cannot define it; I can only tell you my own faith. The spirit of liberty is the spirit which is not too sure that it is right; the spirit of liberty is the spirit which seeks to understand the minds of other men and women; the spirit of liberty is the spirit which weighs their interest alongside its own without bias; the spirit of liberty remembers that not even a sparrow falls to earth unheeded; the spirit of liberty is the spirit of him who, near two thousand years ago, taught mankind that lesson it has never learned, but has never quite forgotten – that there may be a kingdom where the least shall be heard and considered side-by-side with the greatest."

All best, and take care
Max Steinbeis

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