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ON MATTERS CONSTITUTIONAL

Finally a Horizon

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09.12.2017 doi: 10.17176/20171211-093245

„Wir wollen die Vereinigten Staaten von Europa. Nous voulons les États-Unis d'Europe. We want the United States of Europe": There he is at last, the ardent European Martin Schulz, making a commitment of considerable magnitude to get the European Union back on track as his party gets ready to enter another, yet diminished Grand Coalition to govern Germany for the next four years. One wonders who "we" might exactly be, whether Schulz himself in the form of *pluralis maiestatis,* or Germany's Social Democrats, or the global community of the well-meaning, but that is not what matters. The most important addressee of Schulz's message is Emmanuel Macron. He needs a partner in Berlin to deliver what he so courageously promised back in September. All those weeks the line to Berlin was busy. Finally, so it seems, someone picks up the phone.

Schulz backed up his tweet with a few rather radical-sounding phrases in his speech before the SPD national convention this week: He envisions the Union to be based on a new constitutional treaty until 2025 and each of its 27 member states to face a "in or out" option – join if you like it, quit if you don't. The realism of this message aside, its intention is certainly to signal that Germany is back, Europe-wise. And that is good news in itself. The emerging Grand Coalition will have a Grand Project that gives its purpose and direction and, if successful, will pay off politically for both partners in a way the social justice issues its predecessor undertook didn't. Berlin will be a locomotive again and not a wagon. We are, to quote Macron, talking about horizons again instead of red lines. That alone is a reason for confidence. (I do feel kind of sorry for the Greens, though, who were very much the party of common sense in the last months, not just in EU policy, and as a reward will now wither in some shadowy recess of parliamentary opposition for another legislative term at least.)

In terms of content, I believe that Schulz's radical rhetorics are, to put it cautiously, a beginning. With his talk about a constitutional treaty and *Bundesstaat* and so forth, one feels rhetorically transported back to the turn-of-the-millennium days when Joschka Fischer prodded us to talk about the "finality" of integration and to determine the *gestalt* the ever closer union would take on at the end of its path of ever closer closeness and to let the constitutional spirit be poured out over the apostles of European Transnational Federal Republicanism who walk on it. That has always been a somewhat academic and decidedly German endeavour and can by now safely be considered water under the bridge after the Euro crisis and the Brexit vote and all the bloody rest of what has happened in the meantime, no matter how visionary Martin Schulz exerts himself to appear.

Most of all, the idea of an "in or out" option for reluctant member states is preposterous at best and dangerous at worst. To force European federalism down the throats of flailing Poles, Danes, Swedes and Czechs is no way of helping the Union back on track and all the more effective in convincing them that Europe is just a thin disguise for German lust for power. We want Orbán and Kaczyński to comply with the constitutional rules of the Union, not to renounce them. A forced exit of member states is nothing anyone can seriously wish for, and surely this includes a man as well-versed in European politics as Schulz, whose demands are probably best explained as an attempt to make Macron's proposals appear comparatively middle-of-the-road and therefore easier to stomach for his prospective conservative coalition partners.

Speaking of Europe: Five years ago I conducted a series of interviews under the title "Europe 2023 – An Educated Guess" here on Verfassungsblog – extensive conversations with some of the best experts in the

field such as Franz Mayer, Mattias Kumm, UK Preuß, Jo Shaw, Christoph Möllers, Christian Hillgruber and Josef Isensee, Frank Schorkopf, Beate Kohler-Koch, Christian Joerges, Giandomenico Majone, Saskia Sassen and Richard Sennett. My first question was always the same: If you close your eyes and think of the EU in ten years' time, what do you see? The answers I received were diverse, as expected, and no one could have imagined at that time what would happen in the UK, Poland, Turkey and the USA in the future. Now, half of those ten years are over, and these conversations make already a rather interesting read in retrospect.

Harder or softer

This week has been eventful not only in terms of European politics but also of European law: the European Court of Justice has handed down its judgment on the *Taricco II* case, challenged by the Italian Constitutional Court, which had insisted with unprecedented harshness on shielding the self-defined constitutional identity of **Italy** against overly imposing requirements from Luxembourg – and, lo and behold, Luxembourg shows itself to be compliant. Much to the delight of MARCO BASSINI and ORESTE POLLICINO, who very much praise the ECJ for shifting their "genuinely radical understanding of the primacy of EU law to a different and softer one, based on the concept of constitutional tolerance". DANA BURCHARDT, on the other hand, finds that very shift a decisive cause for alarm: "Without explicitly addressing it, the court in fact introduces a constitutional law exception to the principle of primacy."

The Brexit talks seem to have made some headway this week. IOANNIS GLINAVOS makes fun of the British Government's attempts to handle the conflict with its Irish counterparts over Brexit for **Northern Ireland** and the exact degree of hardness it will have in the end, and the innovative ways those degrees of hardness are defined remind him of some of the shadier shenanigans of Greek politics during the euro crisis.

In **Poland**, the other source of constant worries and despair in European politics, the independent judiciary seems to be finally dealt with, as President Duda's reform plans reach the plenary in parliament. This and the current reorganisation of government dominate the headlines about Poland, whereas another riveting story has gone largely unnoticed, namely the attempt of the PiS-appointed president of the Constitutional Court Julia Przyłębska to get journalists who wrote a critical story about her as a person prosecuted for disparagement of a constitutional body. What this case is all about, is reported by DOMINIKA BYCHAWSKA-SINIARSKA.

A very important judgment came this week from the European Court of Human Rights in Strasbourg: the question raised in a **Georgian** case was what happens when Member States make use of human rights restrictions for purposes other than those the Convention allows them for. For BASAK CALI, this was "THE judgment to wait for", and all the more disappointed she is about the court's answers. "The mountain," she concludes,"gave birth to a mouse."

For many years, **Germany** has faced serious trouble with the Strasbourg Court of Justice because of its practice of keeping dangerous criminals in preventive detention far beyond the time of their punishment. Whether the current state of regulation will find Strasbourg's blessing at last is was is at stake in a pending case. MARTEN BREUER reports on his impressions of the hearing (in German).

The Federal Constitutional Court had to instruct Germany about its obligations if it wanted to extradite a Russian citizen wanted by the notorious justice system of **Chechnya**. FREDERIK VON HARBOU and JOHANNA KÜNNE analyse the implications (in German).

The **University of Hamburg** attempts to regulate religious practices with a code of conduct, and whether his can be called a success is examined by PAULINE WELLER and SHINO IBOLD (in German).

Elsewhere

Further notewhorthy contributions to the ECJ judgement Taricco II come from BARBORA BUDINSKA and ZUZANA VIKARSKA, MASSIMO FICHERA and DANIEL SARMIENTO.

JONATHAN McCULLY reports on a decision by the Strasbourg Human Rights Court on the extent to which the dead – in the specific case the late Polish President Lech Kaczyński, who died in the Smolensk plane crash – have a right to protection of their personal privacy.

WOJCIECH ZAGORSKI shows how the subjugation of the judiciary in Poland is linked to the planned reform of the electoral law (in French) – an extremely important and alarming issue on which we will also hope to post a comment by ANNA RAKOWSKA-TRELA next week.

MIGUEL ANGEL PRESNO DE LINERA reflects on why it is so desperately difficult to reform the Spanish Constitution (in Spanish).

And of course a lot more which I can't list here.

Take care, and all the best,

Max Steinbeis

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SUGGESTED CITATION

Steinbeis, Maximilian: Finally a Horizon, Verfassungsblog, 09.12.2017, doi: 10.17176/20171211-093245.

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Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20171211-093245.