A Ghost Story

Maximilian Steinbeis

20.10.2018 doi: 10.17176/20181026-150006-0

Every country has its own preppers, freemen, anti-vaxxers, home-schoolers and self-rulers. To empower oneself against the state and the law, to declare oneself autonomous and self-sufficient and free, to reject with a proud gesture the demand to subordinate oneself to the common good, is a temptation that people all over the world feel (and sometimes, to be honest, I do as well). The libertarian furor of those who succumb to that temptation can take on quite bizarre and sometimes very dangerous forms. But the specifically German form of this phenomenon is more than just bizarre. In Germany, we are mostly dealing with people who by no means strive for a free, wild libertarian life as far away from state and law as possible. Au contraire, they seemingly can't get enough of state and law. They perform a hellish spectacle full of stamps and documents and legal reference and solemn authority like you wouldn't believe. It's a ghost law and a ghost state they are conjuring up: As they deny the legal reality of the *Bundesrepublik Deutschland* in all its manifestations, it is the German *Reich* they claim to be citizens of, which is why they are called *Reichsbürger*. Driving courts and authorities to the point of exhaustion, they put on a gruesome charade of incoherent bits and pieces of lawyerliness, mock officialdom and garrulosity, so that one could almost think that it was all just an elaborate prank if they did not mean and take all this so terribly seriously.

From the internal perspective of law, the reasonable thing to do seems to be leaving these people to the mental ward without further ado: they are madmen and that's all there is to say about it. But that would be a pity, in fact. They do have something to tell us, although it may not always immediately be clear what. This was demonstrated at an enormously fruitful conference in Düsseldorf, organized by the royal couple of German constitutional law, Sophie and Christoph Schönberger, in which I took part this week.

Facing the *Reichsbürger*, said Sophie Schönberger, is an encounter with the "imaginary core of the law": *Reichsbürger* do not just fight the Federal Republic of Germany and its entire legal order as wrong and unjust – they claim it doesn't even exist in the first place. It's a mere illusion. Smoke and mirrors. Wake up, folks, open your eyes: nothing there!

Who is crazy now?

From their point of view, our belief in the validity of German federal law is just as crazy as their unbelief is from our point of view. And why not? The validity of the legal order, said Sophie Schönberger, can neither be logically proven nor enforced, but only imagined – the law is valid when and as far as we can be expected to be *convinced* that it's valid. We believe in a narrative that lets us imagine the validity of the applicable law, such as the beautiful tale in the preamble of the Federal Constitution that "the German people, in the exercise of their constituent power, have adopted this Basic Law".

If one considers this narrative, as the *Reichsbürger* does, to be a factual report, this tale looks remarkably like, well, a lie. Fiction, if you will. As he realizes that, the *Reichsbürger*, like a renegade Catholic turning his back to the Trinity doctrine and its implausibility, succumbs, half desperate, half electrified, to the temptation of heresy: *Extra ecclesiam* it is he himself as much as anyone else who determines what leads to salvation. And that doesn't feel all that bad, does it? Just moments ago he was a poor sucker with a heap of tax debts and custody disputes, a helpless figure at the mercy of those horrible bureaucrats and their incomprehensible legal babble, and all of a sudden, bam! It's all gone. Just an illusion.

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

Please consider supporting our work at Steady or Riffreporter!

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

If that is in his power, if he can make the whole state and all its law disappear with the magic spell "The Federal Republic is a limited liability company!" – then he can just as well be crowned king (which, in fact, they were in large numbers. Watch these videos. It's quite a spectacle). All these magical designations and stamps and documents and identity cards and legitimations and letterheads on which the authority of the lawyers who tormented him seemed to be based until just a moment ago – he can simply issue them to himself and to those who follow him. At any rate, they can't be worth less than those of those *Bundesrepublik* illusionists, can they?

This disillusionment trick can maybe conjure law away, but it can't make law appear. It empowers by delegitimizing: What you think is the real law has in fact no reality at all! But when it comes to legitimizing, its power ends. Law empowers whom it binds, and binds whom it empowers, and as long as the *Reichsbürger* King only empowers without binding himself to anything, he can fidget around with his magic wand and his sealed documents and his legal-sounding lingo as long he pleases. After all, it's all just a trick in the end.

The *Reichsbürger* are no revolutionaries and no secessionists and not state founders. They merely devalue the rule of law. In that, they are less out of the ordinary than one might think. Horst Seehofer, our incumbent Home Secretary and minister in charge of the protection of the constitution, did quite the same thing by using the term "*Herrschaft des Unrechts*" (rule of lawlessness) with regard to the Chancellor's refugee policy under the Dublin asylum in the EU, as Sophie Schönberger pointed out. The guy is still in office, believe it or not, even after his party losing on an unprecedented scale in the Bavarian regional elections. People have fallen from faith for lesser reasons.

Christoph Schönberger, in his turn, spoke about the *Reich* in the *Reichsbürger* and showed that even the Federal Republic of Germany itself is not entirely above the delegitimizing narration of ghost stories. For many decades, German constitutional doctrine with its "continuance thesis" did not want to entirely let go of the German *Reich* either, whose sparkling and mysterious reality could be asserted against all evidence and put in contrast to bland little post-war *Bundesrepublik*. The purpose of this was to delegitimize – first the communist GDR in the East, of course, but then also the Federal Republic itself. In the judgment of the Federal Constitutional Court on the GDR/BRD Basic Treaty of 1973, Schönberger said, the German *Reich* appeared in a "schizophrenically doubled" form, on the one hand identical with the Federal Republic and thus capable of action, on the other hand arching over the whole of Germany, but incapable of action. Just how little substance there really was behind all this balderdash became apparent during reunification, when the two German states and the four powers negotiated their treaty without anybody even missing the German *Reich* at the table: "The legal mummy of the German *Reich*," said Christoph Schönberger, "was left carelessly by the wayside". And as it happens if you don't bury your dead: they come back to haunt you. Hello, *Reichsbürger*!

One month time

The biggest constitutional news of this week is the injunction the European Court of Justice has issued against **Poland** to suspend compulsory retirement at the Supreme Court and reinstate the affected judges in their previous status and stop filling their posts with new judges. The Court has not intervened in the ongoing court packing scheme pursued by the President, as the Commission hadn't requested a court order in that point. For the time being, imposing a non-compliance penalty is not yet on the table. Poland has one month to implement the order.

Just days before, Poland's Prosecutor General and Minister of Justice Zbigniew Ziobro had ratcheted up the escalation wheel a couple of notches by applying to the PiS-subservient Constitutional Tribunal to declare referrals to the ECJ about the "judicial reform" unconstitutional. KACPER MAJEWSKI analyses the devastating consequences it would have for the integrity of EU law if he had his way.

For the time being, however, the Polish judiciary is still capable of astonishing deeds, as ANNA MAZUR-

CZAK's report shows: The Supreme Administrative Court in Warsaw has cleared the way for the registration of same-sex couples as parents.

The **UK** Supreme Court last week, as already discussed in the last editorial, did not want to oblige Christian bakers to bake cakes to celebrate gay marriage. MATTHEW BURTON is unconvinced.

The **Netherlands** must reduce its CO2 emissions by 25 percent according to a ruling by the Court of Appeal in The Hague. INGRID LEIJTEN fears that the court may have overplayed its hand in terms of human rights law.

With the Bavarian election behind and the **Hessian** one before us, SEBASTIAN ROSSNER examines the limits the constitutional principle of equal opportunity for political parties sets to the use of parliamentary employees in election campaigns.

The disappearance of the Interpol President in China has prompted HENRIK PEKÁREK and KILIAN WEGNER to point out the structural vulnerability of this organisation with regard to authoritarian regimes trying to get back at their political opponents abroad – as **Turkey** has recently done again in the Can Dündar case.

German criminal law knows no more powerful voice than that of the former Supreme Court Justice, Penal Code commentator and pugnacious columnist Thomas Fischer, whose new book KLAUS FERDINAND GÄRDITZ warmly recommends to all readers.

Elsewhere

Our own KATHARINA MANGOLD, shaking her head in disbelief, dismantles the AfD draft law to abolish marriage for all in **Germany**: "This five-page draft law has such basic technical shortcomings that the question arises as to whether the AfD really is serious about its claim to be a conservative force in Germany" (German).

Our own MICHAELA HAILBRONNER brings the global constitutional law community up to date in terms of AfD and the rule of law in **Germany**.

PIETER CANOOT reports on a ruling by the Strasbourg Human Rights Court in favour of a transsexual woman from **Italy** who was refused a change of her first name by the authorities.

JACOB ROWBOTTOM examines the *gay cake* ruling of the **British** Supreme Court with regard to the baker's right to be protected against compelled speech.

MICHAEL DORF does not agree with the **US** Federal Court ruling that President Trump did not insult Stephanie Clifford by calling her a liar because that was just "rhetoric hyperbole".

JULIAN R. MURPHY reports on the difficulties in **Australia** to come to terms with its citizenship law.

That would be all for this week. All the best, and take care,

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: A Ghost Story, Verfassungsblog, 20.10.2018, doi: 10.17176/20181026-150006-0.

Licensed under CC BY-SA 4.0.

Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20181026-150006-0.