Constitutional Metastasis

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Unfair elections in Hungary? Highly unfortunate, but not for me: I'm not a Hungarian. That thought is as expectable as it is wrong, at least for an EU citizen – one of the many things I have taken away from our "Constitutional Resilience" Workshop this week in Berlin (more on this soon). Six months from now, at the European elections on 26 May 2019, we will be able to see once again how the cancer cells of the Hungarian autocracy are already spreading through our collective political bloodstream in the EU.

Elections in Hungary are, according to the OSCE election observers in 2014, free but not fair. Classical manipulation in the sense of destroying ballots boxes and faking vote counts – that's all old-school authoritarianism, Viktor Orbán doesn't need any of that. No, the fact that only he and no-one else can effectively win an election in Hungary is guaranteed by ways more subtle and difficult to grasp.

Take party funding, for example. In Germany, since the big party donation scandals of the 1980s and 1990s, we have been accustomed, for good reasons, to considering strict regulation and supervision to be a good thing. In Hungary, however, this seems to have turned into another rather useful autocratic tool. In January 2018, a couple of weeks before the national parliamentary elections, the State Audit Office, a parliamentary body in charge of supervising party funding, suddenly declared to have discovered a number of grave errors in the accounts of several opposition parties. Above all, the largest opposition party, far-right *Jobbik*, allegedly had purchased billboard space at reduced prices, which the SAO considered an illegal financial contribution and obliged *Jobbik* to pay back 663 million HUF (approx. 2 million €). The government, however, generously deferred the payment of this ruinous sum until an undetermined time after the election.

+++++*A Note from ICON*S*++++++

The ICON·S Italian Chapter is proud to announce that its Inaugural Conference, ***Unity and fragmentation within and beyond the State****, will be held in Rome, November 23-24. The program is available* ***here****(****here*** *is the full version, with all the parallel panels sessions).*

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Most parties in Hungary are dependent on the drip-feeding of state party funding; membership fees and donations make up but a small part of their income. The SAO, whose independence is as trustworthy as that of any other state institution in FIDESZ' Two-Thirds-Majoritania, routinely audits party finances every two years on the basis of a rather vague legal statutory definition of unlawful financial contributions. If it declares to have found a mistake, the party has to pay the allegedly illegally obtained amount to the state budget and has the same amount deducted from its share of state funding. The SAO does not disclose exactly the basis of its calculations, and anyone who criticises this is dismissed as politically motivated. The party concerned has no way to challenge the decision in court. Which also means that there is no further case law on how to interpret the statutory definition. Lots of leeway there to exploit if you (factually) serve at the pleasure of the Prime Minister.

That is pure Orbán, so subtle, so clever. Compare this to the clumsy, unsophisticated PiS yokels over in Poland with their constant breaches of the constitution. The showpiece of this is the temporary deferment of the sanction. This keeps the sword hanging above the head of the opposition, ready to strike at any time but never doing, never anything happening for which Orbán would have to take responsibility for. The opposition survives at the mercy of the all-powerful ruler. Until 2017, the SAO had always acted with self-restraint in terms of interfering in political competition, but then, all of a sudden and unexpectedly, it

lashes out. This is how you train a loyal opposition for yourself. Emperor Palputin is certainly very pleased with his favourite disciple.

And now to the European elections. As in the national parliamentary elections in April, Orbán's government will spend staggering sums to spray the whole country from top to bottom with toxic PR foam so thickly that not a single bit of the political public sphere will have a chance to flourish. A number of oddly meek and discouraged and unattractive competitors will be on the ballot. Orbán's FIDESZ will have no trouble keeping or extending its 12 seats in the European Parliament – seats that are very precious to the European People's Party because they will help to underpin its claim of its *Spitzenkandidat* Manfred Weber to the office of Commission President. With Orbán's support and the promise to "build bridges" and "reunite the divided continent", the EPP will once again conquer a quarter ore more of the seats in the European Parliament and become the strongest parliamentary group, and Angela Merkel's successor, in order not to have the CSU as an enemy, will push Weber through as Commission President, and all of us, whether we vote in Hungary and complain to the Hungarian election supervisor about the Hungarian EP elections or in Germany and to the German election supervisor about the German EP elections, will be told that all this is democratic like you wouldn't believe and a great success for the legitimacy of the European Union.

Confidential matters

In **Britain** the government is veering towards a cliff, and so is the belief that anything good can come from Brexit after all. Whether Theresa May will get a majority for her Withdrawal Agreement in Parliament appears uncertain, to say the least. KENNETH ARMSTRONG looks into the details of the "backstop" arrangement to avoid a hard border on the Northern Ireland and asks if it is a temporary safety net or a permanent trap or perhaps even a trampoline to jump on to something more stable and beneficial. TOBIAS LOCK explains what the agreement means for the European Court of Justice – in particular the planned arbitration system, which, as is well known, is not feature commonly regarded with delight in Luxembourg. But all that will be moot if the whole arrangement ultimately goes down that cliff, I guess.

In **Germany**, there was an attempt this week to once again fan the smoldering embers of the "rule of lawlessness" myth about the government's decision to keep the borders open to refugees back in 2015. A non-paper from the Ministry of the Interior from October 2015 has been leaked to the press which allegedly shows that the shutting of the borders was indeed considered and thought legally not entirely off the wall. DANIEL THYM explains why this revelation does nothing to prove the "rule of lawlessness" point, however – in effect, rather the opposite (German).

Another confidential paper with explosive content is the statement of the Council Legal Service in Brussels, which considers the conditionality of **EU** budget funds to rule-of-law compliance legally problematic whereby, in the opinion of KIM LANE SCHEPPELE, LAURENT PECH and DANIEL KELEMEN, this body ranks itself among the EU institutions that consistently refuse to read the signs of the time.

Signs, which are not exclusively written in Polish or Hungarian, as it seems: The EU Commission's latest report on **Bulgaria** under the Cooperation and Verification Mechanism is another shocker of the same mould. Again, the fact that the Bulgarian governing party is a member of Manfred Weber's (and Jean-Claude Juncker's) European People's Party seems to be enough to outweigh its most blatant sins against the rule of law, according to RADOSVETA VASSILEVA's bitter conclusion.

ROBERT UERPMANN-WITZACK offers a conciliatory reading of the UN Migration Pact, which the AfD in **Germany** uses as a mobilisation tool, and welcomes the opportunity for a debate in the *Bundestag* (German).

The **Vatican** City State has rarely been the subject of Verfassungsblog articles so far, and it is this week in a somewhat unobvious respect, too: Could the Vatican flag be flown by refugee rescue ships in the Mediterranean to end their predicament of not getting a registration anywhere else anymore? FABIAN ENDEMANN

and VALENTIN SCHATZ are investigating this possibility from the point of view of international law.

Elsewhere

JOANNE FISH criticises the ECtHR for not taking freedom of research seriously enough in its ruling on university protests in **Georgia**.

LEONID SIROTA reports on the decision of the Supreme Court of **New Zealand** (one of three countries in the world without a written constitution) to declare itself competent to state the incompatibility of statutory law with the human rights act.

SIGRID VAN WINGERDEN and JAKUP DRÁPAL praise the **Dutch** guidelines for prosecutors, which make their decisions and motions more consistent, as a potential model for abroad.

RAFAEL JIMENEZ ASENSIO is annoyed that the **Spanish** Judicial Council is in need of reform all over again.

ROBERT CRAIG explains what will happen constitutionally if the Brexit agreement will fall through in the **UK** parliament.

MIRIAM INGESON reports that in **Sweden** heads of corporations that have committed human rights violations abroad can be held criminally liable.

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

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