Verfassungsblog
ON MATTERS CONSTITUTIONAL

A Glimpse of the Future?

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Is Venezuela today what Hungary or Poland will be tomorrow? I'll admit that it may seem slightly overdramatic to compare the proto-authoritarism of those two EU member states to the populist military dictatorship of the bankrupt petro-state Venezuela which fails to deliver even the most basic public goods and where people are literally starving right now.

And yet…

This week I went to a fascinating conference at the Berlin-Brandenburg Academy of Sciences organised by Alexandra Kemmerer on behalf of the Heidelberg Max Planck Institute for Comparative Public Law and International Law (MPIL). One of the discussants on the podium was MPIL Director Armin von Bogdandy, who was unafraid of making that risky but interesting comparison. Maybe, he said with a view to Poland and Hungary, "we will soon have a Venezuela constellation on our doorstep".

According to Armin von Bogdandy, the left-wing populist regime of Nicolás Maduro in Venezuela and the right-wing populist regimes of Viktor Orbán in Hungary and Jarosław Kaczyński in Poland, have one thing in common: They are rooted in a situation of crisis of inclusion. Too many people had not benefited adequately from the previous social order. Mass exclusion was the basis on which Hugo Chávez founded his "Bolivarian Revolution" in the 1990s and Orbán and Kaczyński their revenge campaigns against post-communist neoliberalism in the 2010s.

In Venezuela, Armin von Bogdandy continued, one can now see what happens when the populist approach to solving the inclusion crisis falls into crisis itself: all democratic and rule-of-law control mechanisms are dismantled, and nothing is left to stop the system from slipping into corruption and clientelism. The country's entire economy is geared to keeping the regime in power and its supporters well off; nothing works without the rulers and their cronies skimming off the profit. Elites leave the country by hundreds of thousands, taking their social, financial and educational capital with them, driven into exile by economic and political hopelessness, oppression and fear.

Hungary seems to fit this description already pretty well to a certain extent. If an economic collapse like in Venezuela still appears unlikely at the moment, that is because of Hungary's membership of the EU, most of all. The structural subsidies from Brussels are what keeps Orbán's regime afloat. Which is probably the main reason why Orbán is mobilising so massively for the EP elections right now. He needs an election result that gives him a position of power in Brussels with which he can prevent transfer cuts as a sanction for violations of the rule of law. That is why he is currently investing so much political capital in making the European elections a plebiscite about immigration. That is why he keeps playing his games with the EPP and its pitiful "*spitzenkandidat*" Manfred Weber. He has fixed his eyes on the goal to control the composition and profile of the next Commission. (And, by the way, he will be successful if we don't go and vote on 26 May, EVERY SINGLE ONE OF US!, and, what's more, convince a minimum of another 10 people each to do the same. Orbán is so much better at mobilizing his fan base than his opponents, it's downright scary. So, please, *please,* ***please*** go and vote! And don't tell me that the weather was so nice or that it was your mom's birthday or whatever lame excuse you'd be likely to come up with. I don't care. I count on you. And don't forget to bring those other 10 people, too!)

In Poland, the political and economic alignment of power is not as far advanced as in Hungary. In the meantime, however, regime critics like Wojciech Sadurski or the civil rights commissioner Adam Bodnar now face the prospect of being dragged into court by the government's minions. If the Polish judiciary turns out to be already subservient enough to actually

convict them, then Poland will indeed have taken a big step towards its Venezuelanisation (and those judges might commit a crime themselves). And if not, let's wait and see what happens after the PiS has won the general elections in 2020.

Constitutional law v. international law

Now, of course, this parallel has limits. At the event in Berlin, Claus Offe pointed out two obvious differences between Venezuela and Poland/Hungary: oil and US foreign policy. Nevertheless, the parallel seems useful insofar as it reminds us that populism is not just bad constitutional policy, it's also economically ruinous. Those who seek to legitimise their power against the constitution rather than through it will end up with nothing more than the right of the strongest to rely on when all their ideological fuel tanks have run dry.

Armin von Bogdandy replied to Offe's objection by pointing out that Venezuela, despite its oil wealth, had for decades been regarded as a model of stable democracy in Latin America. Even *Chavismo* didn't look all that bad at the outset. After taking power in 1999, Hugo Chávez initiated a constitution that was supported by a broad consensus and exemplarily inclusive. Juan Guaidó can now rely on this constitution as a legitimate interim president of Venezuela in the situation of a lack of leadership after the fake presidential election in 2017.

If Guaidó is Venezuela's legitimate president in terms of constitutional law, what does this mean for his recognition under international law? This question was another hotly debated issue at the MPIL event. Jochen von Bernstorff (Tübingen) had assumed the role of advocate of classical international law. In his view, the prohibition of intervention and use of force – "if international law had a constitution, these two norms would be an elementary component" – stand in the way of Guaidó's recognition and the possibility of a foreign armed intervention on his invitation, at least as long as the UN Security Council remains silent. For international law, a revolutionary counter-government can be recognized only if it has at least some of the territory under *de facto* control. To recognise it while its government is merely an assertion, no matter how well-founded in terms of constitutional law – that would be a forbidden interference in internal affairs. And this not just as a matter of 19th century sovereignism, but for valid reason: This is the way to keep open diplomatic channels of communication to those who actually possess power. The premature recognition of a counter-government blocks these channels, which is what happened with the expulsion of the EU member state ambassadors, to the detriment of not least the Venezuelan opposition.

Achilles Skordas (MPIL) countered that the Maduro government, with an inflation rate of 1.3 million percent and 3,7 million malnourished citizens, had hardly any valid claim to be recognized as an effective government of Venezuela, either. Maryhen Jímenez Morales (Oxford) objected that Guaidó's recognition was the "logical" consequence of the fact that the fake presidential elections of 2017 were not recognized either. Jochen von Bernstorff stood firm, tough: international law, he said, is "constitutionally blind" and only looks at effective, i.e. executive power. During and after the Cold War, the international community strayed from this principle time and again in Africa and elsewhere, counter-governments were recognized regardless of their effective rule if that fitted the ideological bill of the respective camp. That practice resulted in more than one devastating civil war. The consequences, Jochen von Bernstorff added, are felt in Syria and Yemen, conflicts of unfathomable cruelty which the international community seems totally impotent to get to grips with.

(Full Disclosure: We have a cooperation with the MPIL, but I would have written this just the same if we hadn't.)

Signal to Poland

Back to constitutional law: The European Court of Human Rights this week ruled in an **Icelandic** case that a criminal conviction violates human rights if the judge has been nominated in an incorrect manner. This appears to be a signal from Strasbourg to Poland before the backdrop of the subjugation of the judiciary there. My five cents on the matter are here.

The European People's Party will decide next week if they will boot out Viktor Orbán and his Fidesz Party after all. LAURENT PECH and DAN KELEMEN dissect the EPP's so-called "red lines" which the governing party of **Hungary** has crossed so many times with total impunity that their color must have faded to the sickliest shade of pink by now.

France was condemned by the Strasbourg Court for the inhumane conditions under-age refugees were subjected to in the so-called Calais jungle without the government giving as much as a shrug. MARIE-LAURE BASILIEN-GANCHE analyses the verdict in the case of 11-year-old *Jamil Khan*.

In **Germany**, the Federal Office for the Protection of the Constitution allegedly screens its 3000 employees for membership in the AfD. According to KLAUS GÄRDITZ, this is only permissible where employees carry out tasks where AfD membership could lead to conflict.

Schoolkids all over Europe are going truant every Friday to protest about climate change – what does stern **German** school law have to say to this? Less stern things than one would think, argues FELIX HANSCHMANN and emphasizes the fundamental rights of schoolchildren to express their opinion.

In the discussion on whether states have to retrieve their nationals among the former ISIS fighters and their families from **Iraqi, Syrian and Libyan** prisons, FRANCESCA CAPONE comes to the conclusion: The one option they have to resolve the tension between security and compliance with international law, is to bring them home.

The book "How to Save a Constitutional Democracy" by Tom Ginsburg and Aziz Huq is one of the most important and useful new publications in comparative constitutionalism, which is why we are very pleased with thorough and insightful reviews of the volume delivered by SUJIT CHOUDHRY from a US and DIETER GRIMM from a German constitutional law perspective.

Elsewhere

QUIRIN WEINZIERL is not at all convinced that Mark Zuckerberg deserves applause for his idea of a "Supreme Court of **Facebook**".

STEVE PEERS explains what happens next in the **UK** after the government's renewed defeat in the Brexit "meaningful vote".

LEONARD BESSELINK and BASTIAN MICHEL explore whether and how an extension of the Brexit deadline could be reconciled with the need to hold European elections in May. And ELEANOR SHARPSTON, as of this writing Advocate General at the CJEU, has some ideas how to make that possible under EU law (part 1 and 2).

MICHAEL SPENCER reports on a **UK** Supreme Court decision on denying asylum to a torture victim because the burn scars might have been inflicted on him with his consent in order to gain asylum.

THOMAS PERROUD is scandalized by the new law in **France** to allow anonymised court rulings which he sees as a democratic turning point and attack on the principle of public justice.

That's it for this week. All the best to you, and stay safe,

Max Steinbeis

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