Constitution without Qualities

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The German *Grundgesetz* is celebrating the 70th anniversary of its accession to the throne this week, and for this solemn occasion I would like to recommend a book for you which you probably already know, at least from the outside, namely Robert Musil's classic of modern literature, the "Man without Qualities". One of the convoluted plot strands in this literally endless novel (there is a fantastic audio book version on Spotify) unspools along the attempts of some members of the educated upper class in Vienna in 1913 to set up a "great patriotic action": an action to make the meaning of "World Austria" visible, palpable and comprehensible in a way appropriate to the occasion of Emperor Franz Joseph's upcoming 70th throne jubilee. But what that action should be and what this "World Austria" should mean exactly and how it should be symbolized, that is something that the Diotimas, Arnheims and Count Leinsdorfs of this novel strive to determine as passionately as unavailingly, watched by the tauntingly smiling "man without qualities", the *Möglichkeitsmensch* (man of possibilities) Ulrich, who considers all this a great load of humbug and yet cannot escape the attraction of this empty signifier and, for the inexhaustible pleasure of the reader, orbits over hundreds of pages around this vacuous shining central star.

Gallery of Values

In contemporary Germany, we have no emperor, we have the *Grundgesetz*, and we know just as little as Diotima and Count Leinsdorf what will become of it in the near and distant future. We celebrate it s anniversary because we know one thing about it: that it holds us together. It is thanks to it that we can say "we". Without it, we'd just be a bunch of people who have nothing much to say to each other. We know that, but we would like to know so much more. We'd like to know what it looks like. We'd like to be able to look at it like a picture gallery in which we hang everything we are proud of and that is important to us and in which we can regard and recognize our pretty and pleasant self, the "we" of and as which we're speaking. And most of us have strong opinions about what pictures could or should be hanged next to those hanging there already: sports, children, less taxes, more taxes, all things of undeniable fundamental importance which is why they shouldn't be refused their rightful place in the value gallery of the *Grundgesetz*. Thus the letters keep flooding in to Diotima, Count Leinsdorf and Ulrich, each carrying another excellent proposal for public improvement to commemorate the august event, and the bewildered recipients can keep the *Kaiser-Franz-Joseph-Reichssuppenanstalt* and Öhl's shorthand at bay, but otherwise helplessly watch the pile of splendid ideas grow higher and higher.

+++A Note from Forum Transregionale Studien+++

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re:constitution

In democracies the people's will is expressed and limited by law: "Democracy" and "Rule of Law" adress the same issue from different sides. Political dynamics in the countries of the European Union have shifted their intersection in a way that merits discussion and analysis. Therefore, the new programme ***re:constitution*** *– Exchange and Analysis on Democracy and the Rule of Law in Europe aims for an European exchange on constitutional law and values that leads from common words to shared concepts. Scholars and practitioners of law will discuss these questions in the course of their* ***re:constitution*** *Fellowships during the academic year 2019/2020. Please see the full Call for Applications here. Deadline: 1 June 2019.* ***re:constitution*** *is a joint programme of the Berlin-based*

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But the *Grundgesetz* is not a gallery of values and important things. It's a constitution. It makes democracy, diversity of opinion, dispute and majority decision possible by establishing a distinction between what democracy, diversity of opinion, dispute and majority decision can and cannot do. The constitution makes things possible by making other things impossible: the procedures and institutions of democracy, the rule of law and the federal state, free communication and the public sphere, human and civil rights and the claims to autonomy of the functional systems of society such as art, science and religion are withdrawn by the constitution from ordinary political dispute and majoritarian decision-making. For if they were not, then no one could expect the minority to submit peacefully to the will of others just because they are in the majority. That is what a constitution does, as opposed to an emperor, which is perhaps a reason why the *Grundgesetz* actually lived to see its 70th anniversary and old Kaiser Franz Joseph did not.

Where Gauland is right and where he isn't

One who has understood something important about this *Möglichkeitsverfassung* of possibilities, but at the same time fails to understand something even more important, is Alexander Gauland of the AfD. As an anniversary speaker in the *Bundestag*, he follows the common script of sermonising about the duration and merits of the *Grundgesetz* in the face of its enemies and dangers, as which he identifies those "who interpret their political goals into the Constitution in order to narrow the political discourse and thus, protected by the *Grundgesetz*, gain an advantage for themselves in the struggle of opinions". That's nicely said and wisely observed: over-constitutionalization, the urge to see one's own interests and leanings solidify in the mould of constitutional law and thereby be withdrawn from the forge of democracy – that, I'd completely agree, is indeed a bad thing and can't be condemned enough.

"The real danger," Mr Gauland goes on, "comes from those who want to shift the balance between liberty and equality at the expense of liberty," by means of "political correctness (…) which hits inconvenient professors today and social networks tomorrow". And to those who seek refuge to constitutional law, he countered that within the framework of the *Grundgesetz* "much is possible", including the "democratic identity politics we represent".

I'm not entirely sure who he's talking about when he refers to "inconvenient professors" (Dr. Gunnar Beck perhaps?), but if I interpret this correctly, Mr Gauland imagines that "inconvenient professors" do what "inconvenient professors" do by dint of their liberty, and the *Grundgesetz*, instead of restricting them in the name of equality, makes, on the contrary, these actions of inconvenient professors "possible" as a normal political argument about majority or minority in democracy. Correct?

Now, my suspicion is that the thing that makes these professors "inconvenient" in the first place is that their actions and speeches refer to minorities to which they themselves do not belong. That is what Mr Gauland is talking about, is it not? Do I understand correctly that, in Mr Gauland's view, the *Grundgesetz* makes it "possible" to determine what the majority can do to the minority – by majority vote?

That, to be frank, seems to me the exact opposite of what a constitution does. I am sure Mr Gauland would very much like to pursue his so-called "democratic identity politics" as a matter of normal debate about democratic majority or minority, made "possible" by the Grundgesetz. The problem about this, however, is not that his opponents unjustifiably elevate their particular political interests and leanings to the level of constitutional law. The problem is, on the contrary, that Mr Gauland declares it a matter of "identity" for himself and his ilk to be able to treat blacks, gays, women and Muslims badly, because, after all, he is in the majority and they are in the minority, right from the start and as a matter of societal normalcy and not as a result of democratic dispute. Mr Gauland would like that and calls it "democratic identity politics". But surprise, Mr Gauland: The very thing that denies him the right to that sort of "identity" is the constitution. That is exactly what it's there for.

More surprises

Next week, the citizens of the European Union start electing a new parliament, and we will see whether Gauland and his right-wing populist friends are right about their claim to represent a silent majority or at least an insurmountably strong minority of the population in the EU. Maybe it's wishful thinking, but my hunch is that they are in for a surprise…

A little-known fact about **EU** party law is that it obliges parties to adhere to the fundamental values of Article 2 TEU, which is why EPP and ACRE must ask themselves how they reconcile this obligation with the continued membership of Fidesz and PiS in their ranks. ALBERTO ALEMANNO and LAURENT PECH did ask that question to them and report what they experienced.

Disenfranchised in the elections are most of the young people who demonstrate each Friday against climate change but are not entitled to vote under **German** electoral law. MORITZ VON ROCHOW asks if this can be justified after the Federal Constitutional Court's ruling against the electoral exclusion of people with disabilities.

This week, the **European** Court of Justice has caused a huge stir with its ruling on the obligatory recording of working hours. CLEMENS LATZEL asks what right the court has to make itself a substitute legislator in this way and accuses Luxembourg of "loosely dealing with the separation of powers".

A few weeks ago, the European Court of Justice had already handed down a judgement that was no less revolutionary but has caused much less sensation: in the alleged corruption affair involving the **Latvian** chief central banker Rimšēvičs, it had ruled that his dismissal was contrary to European law and, most of all, assumed the right for itself to overturn that decision. This has never happened before. JÜRGEN BAST analyses the decision and its constitutional ramifications in detail.

In **Poland** last week, the case of an artist who was accused of blasphemy for a poster of the Virgin Mary with a rainbow halo was headline news. DOMINIKA BYCHAWSKA-SINIARSKA examines how the Polish legal situation fits in with the European Convention on Human Rights.

In the **USA**, more and more southern states are enacting draconian anti-abortion laws in order to bring down the Roe v Wade jurisdiction of the Supreme Court. CLAIRE LOPS describes the legal and historical background.

In **Venezuela**, opposition leader Leopoldo López has found asylum in the Spanish embassy, which raises the question of whether this is actually permitted under international law or a violation of rule of non-interference. MEHRDAD PAYANDEH and CHRISTOPH SAAKE see good reasons for the latter.

In **Germany**, the Federal Constitutional Court ruled last week that the exclusion of non-marital partnerships from stepchild adoption is incompatible with the principle of equality. MICHAEL VON LANDENBERG-ROBERG analyses the decision.

Malaysia has bid farewell to the International Criminal Court. LASSE SCHULDT sheds light on the internal and constitutional background of this decision.

Elsewhere

PAOLO CAVALIERE draws our attention to an upcoming CJEU ruling on the rights of Facebook users whose posts get deleted.

EDOARDO STOPPIONI reports on the CJEU hearing on infringement proceedings against **Poland, Hungary** and the **Czech Republic** for their refusal to resettle refugees.

GAUTAM BHATIA is horrified by a ruling by the **Indian** Supreme Court on a Facebook meme that mocks a politician. A user who shared the meme was imprisoned for two weeks – and the court, instead of defending her fundamental rights, sentenced her to apologize to the politician. For Bhatia, the ruling is " yet another example of the judiciary abdicating its role as the guardian of fundamental rights, and opting to play moral censor instead".

JEAN-JACQUES URVOAS does not expect much from the plans to strengthen the rights of the opposition in the **French** National Assembly.

MARIUSZ JAŁOSZEWSKI reports another case of disciplinary intimidation of judges in **Poland**.

SIMON DRUGDA investigates why **Slovakia** is capping the retirement age by amending its constitution.

That's it for this week. As I write this, the news about the Strache video comes in. A part of me is beginning to hope that I will be in a good mood after the elections. To you I wish the same, and all the best,

Max Steinbeis

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