A Bug, not a Feature

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20.09.2019 doi: 10.17176/20190920-112349-0

"I do not know if you have noticed, but there has never been an opposition that has not stopped opposing after it has come to the helm. That is not just a matter of course, as one might think, but it is something very important. Because, if I may put it that way, the real, the reliable and the continuous in politics emerges from it."

Count Leinsdorf from Robert Musil's 'Man without Qualities'

The idea that the end may be near for social democracy in large parts of Europe is something we have almost gotten used to by now. Hardly less dramatic, although perhaps less visible, appears to me the decline of its traditional counterpole. In Italy, the political camp we conveniently used to call "conservative" has shrunken to the point of near-irrelevance, in France as well, in Austria it has turned into something as unconservative as a charismatic "youthful Basti for Chancellor" movement, and in the UK it has turned into something even more unconservative, namely a radical sect of redemption-seekers led by a bunch of gambling cynics. One may be excused for considering the fate of social democracy almost enviable in comparison.

Only in Germany everything looks once again pretty much okay in this respect, at least as long as Angela Merkel is Chancellor and does what she's been doing for the last decade and a half, i.e. exactly what is necessary to stay in power. This might be actually a pretty good definition for this notoriously hard-to-define concept of conservativism: to claim that it's all just about "reasonable and responsible" government, staying calm and even-minded and basically using power mostly to make sure that all those other rabble-rousers and busybodies can't do too much damage with all their big ideas. The emptiness is not a bug, it's a feature. (Which, of course, allows to make invisible the hard-nosed policy interests they actually pursue, which may very well be the purpose of the whole business.)

I am not altogether unsympathetic towards that sort of conservatism, but it has one big weakness: It's awfully bad at recognizing authoritarian populism for what it is, namely a savage attack against everything that is dear to them.

Nothing specifically European about being a decent person

This week the future EU Commission President Ursula von der Leyen, a dyed-in-the-wool Merkel conservative in this sense of the term, in an op-ed in various European newspapers defended her decision to describe the responsibilities of her deputy for migration as "protecting the European way of life". By which, von der Leyen writes, she means nothing more scandalous than human rights, democracy, the rule of law and so forth – the fundamental values of the Union entrenched in Article 2 TEU. That's what she means when she says "European way of life", as opposed to the terrible, terrible meaning those "home-grown populists with cheap nationalistic slogans" attach to these words, snatching them away from "us" real Europeans as their rightful owners, those rowdy good-for-nothings.

The problem with right-wing populists is from this perspective that they are rabble-rousers and busybodies who will use otherwise perfectly fine words in a stupid and evil way because they are stupid and evil. The right policies, so to speak, in the hands of the wrong people. (Which, of course, makes conveniently invisible the rather obvious fact that every Syrian refugee who has placed her life and limbs at stake for democracy has an infinitely better-founded claim to embody these precious Article 2 TEU values with her "way of life" that any old European on his comfy living-room sofa.)

++++++++++*A Note from BMJV*++++++++++



Konferenz am 8. Oktober 2019 *im Deutschen Historischen Museum in Berlin*

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Wir erleben, wie Hass im Netz in brutale Gewalt umschlagen kann. Aus Worten werden Taten. Der Rechtsstaat handelt und erhöht den Verfolgungsdruck auf Rechtsextremisten. Wie rassistische Taten entschieden verfolgt werden und was wir dem Hass im Netz entgegenhalten, werden Politik, Justiz und Zivilgesellschaft diskutieren. Mit dabei sind Bundesjustizministerin Christine Lambrecht, die Kölner Oberbürgermeisterin Henriette Reker, Bundestags-Vizepräsidentin Claudia Roth, Rechtsanwältin Seda Başay-Yıldız und viele andere.

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A not insignificant part of the history of the rise of authoritarian populism in Europe can be described as the history of attempts by conservatives to wrest authoritarian populist policies from the foul hands of authoritarian populist politicians. Oh, these disreputable Hungarian Guards and Jobbik thugs! Viktor Orbán, big admirer of Helmut Kohl, and his suit-and-tie FIDESZ are so much more palatable an alternative, aren't they? Oh, these ill-mannered Le Pen lowlifes! Nicolas Sarkozy won't allow *these* people to define *vivre ensemble* for the Fifth Republic all by themselves, will he? Oh, this awful Farage character and his vulgar suits and pints and guffaws! Theresa May can't let *him* have all the Brexit fun, can she? These people are despicable, of course. But their policies? Good Lord, it all depends if it's implemented in a sensible and responsible manner, doesn't it?

The bad news about authoritarian populist policy is, however, that it cannot be reconciled with the claim to govern in a sensible and responsible manner by definition. If conservative government means to act appropriately and reasonably and on solidly justifiable grounds with regard to the rights and interests of everyone concerned, then it is precisely the opposite of what authoritarian populism does: Its signature is to create an outside to which one doesn't owe any justification at all, over which one exercises power for no other reason but because one can.

It is often said that it is not a good idea for conservatives to copy authoritarian populists because voters tend to go for the original if they get to choose. In fact, the main reason why it's not a good idea is that you stop being conservative in the first place. You kind of start looking like rabble-rousers and busybodies yourself. And conservative voters, more often than not, strongly dislike that.

The CSU, after their forays into AfD country had earned them an epic defeat at the Bavarian elections, seems to have learned that lesson for now, as far as their newly discovered passion for climate protection and refugees can be trusted. So, apparently, has the CDU in Saxony at last, after decades of denial and appeasement towards the extremist right. And Ursula von der Leyen? I have some hope that she will learn that lesson eventually, as well.

Something like a constitutional court

This week, the **United Kingdom** is beginning to realise that it may possess something like a constitutional court after all. In the Supreme Court hearing on Boris Johnson's forced suspension of Parliament, everything is still open at the time of this writing. But it seems at least conceivable that a majority on the bench would come to the conclusion that the tasks of the judiciary could include the protection of democracy and the rule of law from one's own government in the prorogation dispute – even if this would give the authoritarian populists in politics and the press the opportunity to brand them once again as Brexit inhibitors and "enemies of the people" and enlist them for their populist policy cause ex negativo, so to speak. JOELLE GROGAN looks ahead to what is probably the UK's most important constitutional supreme court decision for a long time to come.

Not only on the British Isles, but also on the continent constitutional lawyers watch this spectacle with a mixture of shock and fascination. From a German constitutional perspective, ALEXANDER THIELE concludes that the failures of the political elite bear a

good part of the blame for the disaster, but not all of it: it also reveals a number of systemic weaknesses of the unwritten British constitution.

Whether the state of **German** electoral law is testament to the detrimental aspects of constitutional jurisdiction or only to its own internal contradictions: one way or another it is clear that it is in dire need of reform as it leads to an ever more grotesque inflation of the *Bundestag*. A reform which the German Parliament seems to be unwilling and unable to deliver, so far. 100 German *Staatsrechtslehrer* have signed a call to change this before the end of this legislative term.

Bringing the judiciary under their control is currently the aim of an alarming lot of governments in **EU** Member States, and one means of doing this could be the Council of the Judiciary which is responsible for the selection of judges. A survey by the European Network of Councils for the Judiciary (ENCJ) shows how vulnerable many judges feel, as KEES STERK and FRANS VAN DIJK report.

A year ago in **Germany** a young Syrian died in a fire in a prison cell in which he was sitting because the police had confused him with someone else. SEBASTIAN GOLLA shows that the linking of police databases causes serious, literally life-threatening risks, and that an adequate data protection law must keep this in mind.

Elsewhere

ALESSANDRA DONATI on the blog *Droit Europeen* calls on European law to join the fight against climate change.

MANUEL MÜLLER takes a critical look at Ursula von der Leyens new **EU** Commission.

STEVE PEERS answers the most important legal questions on the no-deal-Brexit prevention Act recently passed in the **British** Parliament. JEFF KING emphasizes the difference it makes whether the court only declares the parliament's prorogation unlawful or actually quashes it. STEPHEN TIERNEY finds that the prorogation itself does not have to be illegal just because the PM's advice to the Queen was. MARK BENNISTER explains how the election of the successor to Parliament Speaker John Bercow works. CHRISTINA PAGEL and CHRISTABEL COOPER come to the conclusion on the basis of empirical data that leave voters could be made to think twice when they learn that constitutional manipulation cuts both ways.

JIP STAM is concerned about hate speech legislation in the **Netherlands** and the independence of the judiciary on the occasion the current trial against Geert Wilders.

PRZEMYSLAW TACIK discusses how **Poland** could return to the rule of law after the upcoming parliamentary elections.

LIZE R. GLASS ponders whether the ECtHR should reinstate the lawsuits against **Ukraine** about for non-implementation of court rulings which it had summarily removed from the list two years ago.

GAUTAM BHATIA sees a large number of the central principles of the **Indian** constitution torn to shreds in the recent Supreme Court decision on the communication shut-down in Kashmir.

That's it for this week. All the best, and take care – and don't forget to support us on Steady!

Max Steinbeis

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SUGGESTED CITATION

Steinbeis, Maximilian: A Bug, not a Feature, Verfassungsblog, 20.09.2019, doi: 10.17176/20190920-112349-0.

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Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20190920-112349-0.