Closing Loops, Unclosing Loops

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It looks already like old news in these incredibly fast-moving times. But please let's take a moment and reflect on this: At the general elections in Poland last weekend, nearly one out of two has voted for the governing PiS coalition. They did so regardless of the damage PiS had done to the rule of law and quite unabashedly promised to continue doing if reelected. They put the new PiS government in a position to say: Look, we didn't hide our intention to crack down on what's left of the independent judiciary and media, did we? And here we are, reaffirmed with a solid governing majority in the Sejm by the people. Now watch us keep our promises.

It is a hallmark of authoritarian populism that it pits democracy against the rule of law, claiming prevalence of the first over the latter. Authoritarian populists use the power bestowed upon them by the democratic will of the people to change the legal rules by which that will is formed in the first place. They strive to tune the constitutional apparatus by which the democratic will is produced in a way that makes it more likely or even inevitable that the outcome will corroborate their own populist claims about what the true will of the people is. This tuning encompasses the entire process of politics, the whole chain of deliberating, making, implementing and scrutinizing collectively binding decisions: the media, electoral law, parliamentary proceedings, civil service, independent courts – every element of democratic decision making under the rule of law becomes a target of authoritarian populist encroachment, with the aim of turning the democratic process into a closed feedback loop where being in power and belonging in power are by and large the same thing.

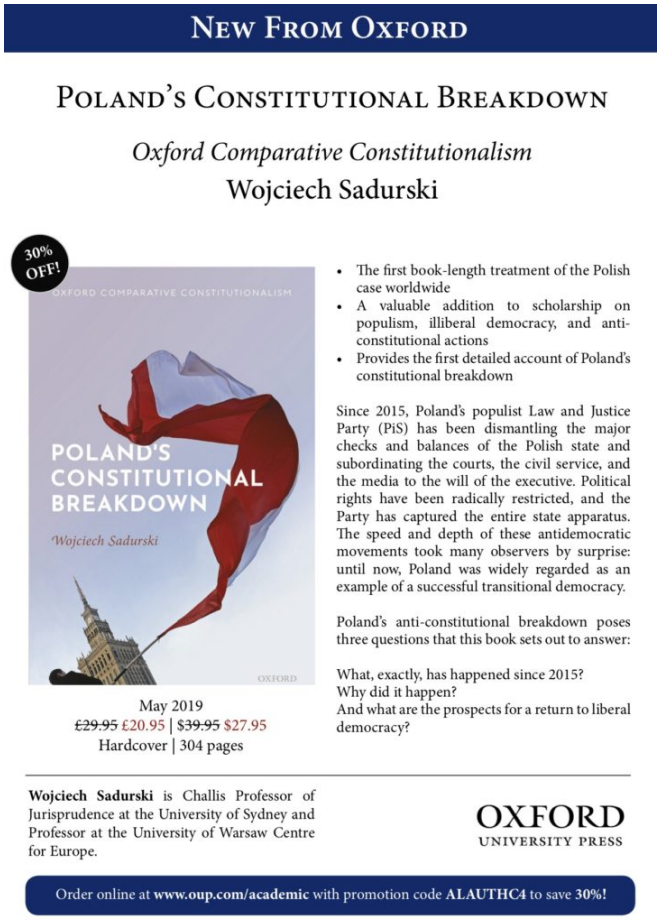
Budapest on the Vistula?

In Poland, this feedback loop is, so far, still incomplete. Nevertheless, the endeavour to close it has already had an impact: According to the OSCE, turning state television into a tool of rank government propaganda did in fact compromise voters' ability to make an informed choice how to cast their ballots. And if the PiS goes through with their plans to „repolonize" foreign-held private media, things might deteriorate very quickly. Add to that the things the PiS majority now can and very well might do to electoral law and oversight, to campaign financing, to the whole range of legal fine-tuning of the democratic process, and you get a picture of what to expect.

But the largest contribution to the closing of the loop comes arguably from the EU itself. The PiS party owes its popularity and thereby its electoral victory principally to the lavish social policy it has pursued over the last four years in government. Whatever sympathies you have for that sort of reallocation of wealth, it is principally EU money which allows the Polish government to afford this kind of spending. In the current 2014-2020 period, Poland has been allocated 86 billion Euros from European Structural and Investment Funds. There have been proposals to change this and introduce new or use existing means to cut funding for deviant member states, but the Council so far seems to be disinclined to let that happen.

Personally, as a European tax payer, I deeply resent the fact that my tax money is used to subsidize and actually facilitate authoritarian populism. And I truly believe that this could do severe damage to the trust and support of those who have defended the EU against its critics most passionately. In Hungary, the largest recipient of EU funds per capita, EU subsidies have allowed the government to maintain a network of clientelism and personal enrichment for cronies of the Prime Minister, much like oil revenues in any old Petro state. If the EU lets this stand, then to its own peril.

++++++++*A Note from Wojciech Sadurski*+++++++



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Most EU activities towards Poland in recent months were about judicial independence, and rightly so: Judicial independence is a centrepiece of the rule of law, no question about that. But there is also a larger issue at stake: the replacement of a far from blameless but altogether functional constitutional system of collectively binding decision-making with a populist closed loop where the output determines the input and vice versa.

Political forces who push for that sort of closed loop exist in pretty much every European country. And with the current decay of the old post-war party system of Socialists v. Christian Democrats throughout Europe, not one of them, Germany included, can be sure that these authoritarian populist forces won't at some point get into a position of wielding some serious political power. Therefore, every EU country as well as the EU itself has ample reason to take a critical look at the resilience of their constitutional system in that case.

Take, once again, Hungary. For the the rise of Fidesz authoritarian populism, all sorts of explanations abound, cultural, historical and otherwise. But first of all, the rise of authoritarian populism in Hungary was facilitated by the fact that the Hungarian constitutional system was exceptionally vulnerable: a grossly disproportionate electoral system transformed a 50% majority of votes into a two-thirds majority of Parliament seats in a unicameral system! I still find it mind-blowing in retrospect to see a constitutional system handing to the winner of one simple election such unfettered power without any effective checks and balance whatsoever. Ten years after, in the case of Hungary, that power has been put to use, and the feedback loop of power successfully closed. And the EU institutions, to their everlasting shame, have mostly been sitting on their hands while it happened. When I look at the sorry spectacle of the EPP's „membership suspension" for Fidesz, I gain the impression that many still prefer to sit on their hands to this very day, for whichever reasons.

Not quite yet

Compared to the Hungarian constitutional system, the Polish has proven to be much more resilient, surprising as that may sound. First of all, and most importantly, it didn't give the authoritarian populists the right to change the letter of the constitution on the basis of a single won election. In order to get around their constitutional constraints, PiS had to break them in the most blunt and brutal way. Fidesz didn't even have to get their hands dirty.

The institutional setup of Poland is more robust, too: Poland does have a second chamber of Parliament, the Senate, as we notice now that the opposition indeed was able to break the PiS majority in that chamber. This might be instrumental, as MARCIN MATCZAK notes, particularly when it comes to the nominations of key office holders, most of all the successor of the heroic Ombudsman Adam Bodnar next year. As far as legislation is concerned, the Senate cannot avert much but it can slow things down. That is also a lot more than nothing. It keeps open a space of political deliberation which will be in dire need in the

coming years, particular with the PiS majority constantly driving coach and horses through the parliamentary standing orders in the Sejm. Then, there is the President. He has a basis of democratic legitimacy independent of the government's. With the current incumbent, this worked in favour of PiS most of the time, but it might turn into a serious headache for them if the opposition – like in Romania – manages to place one of their own in that office at the presidential election next year.

And even the Hungarian case, it seems, may not be as bleak as one would have thought after all. The fact that the opposition has managed to win the municipal elections in Budapest and a number of other cities is no small feat at all. Not just that it offers the opportunity to break up the mind-numbing uniformity of the Hungarian public sphere, with a young mayor with own administrative and political competences and a budget to do things and a space to discuss things in a way Fidesz cannot control governing over the nation's capital. It also proves that a strategy for the opposition to combine their forces and to overcome their differences in the interest of defeating authoritarian populism can indeed be successful. In a place like Hungary, it makes little sense to fight about policy as long as authoritarian populists remain in a position in which they can make fighting for divergent policy interests totally pointless in the first place. To remove them from that position must be the first priority for all, and to see a place where this is possible, Viktor Orbán now just has to look out of the window.

He won't like that, for sure. And he will wreck his mind to find ways to re-close the loop. Let's hope his imagination fails him.

The right to protest

It's hard to believe, I know, but we didn't have a single Brexit-related post on the blog this week. This is not going to last, I am sure.

The big news of this week was the **Spanish** Supreme Court's decision in the Catalan secessionist case. The exceptionally harsh judgment is vehemently criticized by JOSÉ LUIS MARTÍ who points to the vital importance of the right to protest for democracy, in stark contrast to the dismissive words the Supreme Court found for that right.

The **Hungarian** municipal elections and their effect on Orbán's rule are analyzed by VIKTOR KAZAI and JÁNOS MÉCS.

+++++++++*A Note from MPIL*++++++++++

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What Legal Framework for the OSCE? A Book Launch Conversation

The OSCE lacks a constitutive treaty and an established international legal personality. An increasing number of voices have been advocating for more formal and autonomous institutional structures, for international legal personality, or even for the adoption of a constitutive treaty. A new book edited by Mateja Steinbrück Platise, Carolyn Moser and Anne Peters critically analyses the reform proposals and provides new arguments for revisiting the OSCE legal framework.

Details here.

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In **Poland**, memory politics is taking over the law, and anyone who writes something critical about Poland during World War II might be taken to court, a development examined by ALEKSANDRA GLISZCZYŃSKA-GRABIAS and MICHAŁ JABŁOŃSKI.

TOMASZ KONCEWICZ, on the occasion of the general elections, takes a step back to look the new constitutional doctrine that has emerged in **Poland** since 2015 and its effect on the European Union.

MARCIN MATCZAK, as already mentioned, provides an analysis about the unexpected change brought forth by the **Polish** elections, particularly with respect to the now opposition-dominated Senate which could in fact change many things to the better with respect to the rule of law and democracy.

In the **EU**, both the Polish PiS and the Hungarian Fidesz are members of European parties which can be and in fact was attacked as a violation of these parties' obligations under EU law. GIORGO GRASSO takes a

look at the way the European Ombudsman handled this matter.

Slovakian politics is embroiled in a corruption scandal of unseen proportions which also includes parts of the judiciary, as MICHAL OVÁDEK observes.

In **Italy**, there is another attempt underway to reform Parliament, this time however, as EDOARDO D'ALFONSO MASARIÉ notes, being only about reducing the size of the assembly, not amending its powers and competences.

In the **USA**, the Supreme Court has accepted a case which could initiate a break with the Court's jurisprudence about abortion. SARAH KATHARINA STEIN examines what Trump's new conservative majority on the bench could bring about.

Trump is in facing impeachment for his dealings with the **Ukraine** president, but the latter doesn't look that good either in the transcript of the phone call between both. ALINA CHERVIATSOVA reports on the reverberations of the scandal in the Ukraine.

In **Bulgaria**, the legislator has revived the totalitarian practice of secret arrests, under the pretext of implementing an EU directive on the right of access to a lawyer in criminal proceedings. RADOSVETA VASSILEVA is alarmed about the lack of action by the EU.

In **Germany**, the Federal Constitutional Court has issued a verdict about the right of hotel owners to „discriminate" against far-right politicians by refusing their services to them. FABIAN MICHL regrets the lack of clarity caused by the FCC jurisdiction.

Elsewhere

RONAN Ó FATAIGH and DIRK VORHOOF are irritated about the length the ECtHR is prepared to go to avoid condemning **Turkey** for violation of the freedom of expression of a newspaper editor who had been prosecuted for quoting PKK leader Öcalan.

OLIVER GARNER thinks that the European Council would be legally entitled to impose conditions on the extension of the Brexit deadline on the **UK**, but nevertheless warns against doing so.

HANNAH WOOLAVER argues that a failure to comply with domestic constitutional law might prevent the **UK's** withdrawal from the EU from taking effect in international law.

That's all for this week. My special gratitude goes to those wonderful people who support us with a little something each month on Steady – Verfassungsblog wouldn't exist but for you! All best, and take care,

Max Steinbeis

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