Verfassungsblog
ON MATTERS CONSTITUTIONAL

The Life of Others

Maximilian Steinbeis

21.02.2020 doi: 10.17176/20200221-185134-0

In Hanau nine people are dead because a right-wing racist murdered them.

This is what right-wing terror looks like: It's not me who feels it. I am appalled, frightened, shocked, but I am not terrorized. I move through the streets of Berlin pretty much as unafraid as before. Just like most members of the government and parliament, police officers and public prosecutors and judges, newspaper folks and television talking heads. No-one is shooting at *us*.

There you have it. Here I am speaking in the first person plural. A plural to exclude the potentially and actually murdered. This is what right-wing terror looks like. This is what it does. That's its purpose, and that's where it's effective. It turns the terrorized into "foreigners" and their murderer into someone whose "xenophobic" motives and "crazy" manifesto we, the not-shot-at, can study from a safe distance. This is what right-wing terror looks like. Unlike left-wing terror, I and the Home Secretary and the police don't even need to be frightened to a point where we turn into terrorists ourselves. It's effective much earlier. This is what it does.

Meanwhile, Ursula von der Leyen, President of the EU Commission, considers the word "tragedy" appropriate for the terror of Hanau. Catharsis through fear and pity? That's what you had in mind, Madam President?

In Brussels, state leaders at the EU summit are negotiating the budget for the next seven years and whether and how effectively the Union succeeds in linking the receipt of EU funding to the recipient country's treatment of the rule of law. An urgent question these days, one might think. But Council President Charles Michel's view of the subject looks more like an ordinary quid pro quo: If Poland cooperates on climate protection, we'll be cool with their rule of law issues. That's a bit like saying: if you leave me my left hand, you can take my right leg.

Shortly before the summit, Viktor Orbán, still suspended but not excluded from the EPP, sent his fellow Christian Democrats a "Memorandum on the State of the European People's Party", a veritable sermon of penance in the middle of the carnival season, structured classically in three parts: It starts with the order as it should and used to be back when the EPP still held up the flag of anti-communism in "firm and confident" belief in the sanctity of the marriage bond between man and woman. Then the sinful present: the EPP as a pitiful, power- and colourless minority, compromised by concessions to its lefty liberal coalition partners to the point of indistinguishability. Finally: repentance! A powerful turn to what's right: the EPP should cleanse itself of Donald Tusk and the conflicts of Polish domestic politics and instead return to its actual right-wing, Christian, nationalist identity and be best of friends with the Tories, the US Republicans and "the Turks, the Russians and even the Chinese". Saint Wilfried Martens, pray for us now and at the hour of our death!

It would be easy to ridicule the chunky Capuchin of Budapest as he swings the scourge of repentance over the backs of the pious, all the while filling his generous potbelly with enormous amounts of EU money. But one should never underestimate Orbán. And doesn't he also have a point? Wasn't the European integration indeed designed from the outset as a living proof to those glowering commies on the other side of the Iron Curtain that the West knew a better way to peace and freedom than Politburo, Cheka and dialectical materialism? Of course it was, and Orbán probably hopes that, along with this reference to the obvious, his Christian fellow anti-communists will also buy into the implication that the left-green liberals of today and the communists of yore are essentially the same.

Who in her right mind would, though – outside the Thuringian CDU, that is? To be liberal means to recognize the Other as a bearer of rights. On this, Orbán – his "memorandum" makes no secret of it – is indeed on the other side. Just like the Communists in the 1980s sense of the term, by the way, as far as any of those still exist.

Turkey

The Turks, to whom Orbán would like to offer his friendship on behalf of the EPP, are probably rather the governing than the governed, and the nature of this government and the way it deals with the lives and rights of others has been revealed this week in a particularly devastating way. Osman Kavala, who has been in prison for years and even after the ECtHR decided that the detention was illegal, was surprisingly released from prison on Tuesday. But no sooner had he stepped into freedom than he was swiftly arrested again – for some hastily cooked-up new charges allegedly linked to the 2016 coup.

BASAK CALI describes what might be behind this as a "Byzantine manoeuvre": Its target is the European Court of Human Rights, which in the case of Kavala, as in the case of the also imprisoned Kurdish opposition leader Selahettin Demirtaş, had ruled that the continued detainment of both not only violates their human rights, but also Article 18 ECHR as the government pursued with the alleged pre-trial detention in fact other, illegitimate purposes unrelated to the criminal proceedings at hand.

So we acted in bad faith, have we? Well, is the message of the regime, watch us: We will show you some bad faith. We will just release the guy and arrest him again for something else. Then he can start the long and arduous journey to Strasbourg all over again. If necessary, we will repeat the game as long as we please. In this way we show the Strasbourg Court and our political opponents and the whole world what their precious rights and Article 18 ECHR are worth if they meet those proud, burly right-wing conservatives Viktor Orbán was praising as a model, who claim no other justification than the right of the strongest.

ECtHR

The Strasbourg court has made a decision the week before which has horrified many: It concerns the push-back of migrants at the EU external border between Spain and Morocco without giving them a hearing and access to legal protection – not a violation of the ban on collective expulsion (Art. 4 Prot. 4 ECHR) in the eyes of the Court, as long as there are ways to enter Spain and ask for protection legally (which, in fact, there aren't).

It is not just Art. 4 Prot. 4 ECHR which is at stake here but also Art. 3 – the ban on torture and inhuman treatment. No-one must be deported to a place where she will have to expect inhuman treatment. How can you keep that promise if you don't even examine what the people you deport might need to be protected against? *Non-refoulement*, according to ANNA LÜBBE, is the name of the big smelly elephant in the Strasbourg court room which the ECtHR has painfully avoided registering. This, in her view, was a misjudgment, and the role to ensure Human Rights at the EU external border now falls to the national courts and to the European Court of Justice in Luxembourg.

DANIEL THYM offers a less pessimistic interpretation of the Strasbourg judgment as far as refugee rights are concerned: The Court of Justice has not corrected its basic understanding of Art. 4 Prot. 4 ECHR, which amounts to a de facto right to an asylum procedure for migrants at the border. Instead, it had linked it to the condition of legal entry – an innovation whose consequences are difficult to foresee. Thym does not think it's clear that this would mean that pushbacks would also be allowed at other borders too, such as in Croatia or Greece.

CONSTANTIN HRUSCHKA doesn't read the Strasbourg ruling as a *carte blanche* for pushbacks either – on the contrary. The Court had only added an exception for the narrowly defined case of a "mass assault against the border fence" to the ban on collective expulsion. "One could also interpret the judgment as meaning that the ECtHR did not want to be used as a political vehicle by the strategic-tactical approach of the complainants."

Italy

In Italy last year the neo-fascist organization "Casa Pound" was banned from all platforms by Facebook. The fascists complained, and a court in Rome lifted the ban, referring to the right of participation in the democratic process under article 49 of the Italian constitution. ANGELO GOLIA and RACHEL BEHRING analyse this decision to apply the Constitution to the legal relationship between private actors and interpret it as an Italian variant of militant democracy.

Advertisement



MAX-PLANCK-INSTITUT
FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT
UND VÖLKERRECHT

Studentische Hilfskraft m/w/d (Jura)

Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

Studentische Hilfskraft m/w/d (Jura) am Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht im Bereich der Wissenschaftskoordination gesucht.

7,5h/Woche zur Unterstützung der virtuellen Präsenz der Deutsch-französischen Partnerschaft HeiParisMax durch inhaltliche Betreuung der Projektwebsite und Mitarbeit bei den Veranstaltungen des Projekts. Bewerbungen bis 29. Februar 2020 an **bewerbungen@mpil.de**.

Den ausführlichen Ausschreibungstext finden Sie hier.

The Italian Constitutional Court has changed its rules of procedure in January: In future, civil society organisations will also be able to express their views in proceedings before ist, and MATTEO ROMAGNOLI thinks this is a good thing.

Germany

After the debacle in Thuringia, the SPD in Germany's most populous state North Rhine-Westphalia has tabled an urgency motion according to which the state parliament should "commit itself" to never elect someone as prime minister or pass laws with the votes of AfD MPs. ROMAN LEHNER thinks it's highly problematic under constitutional law that a majority in parliament wants to declare the minority "irrelevant in terms of policy design". Such a resolution would not be unconstitutional, though, if only because it is not legally binding in the first place.

One of the constitutional questions raised by the Thuringia case is what a party at the federal level can do to discipline a state-level association that is going astray. Not a simple matter, as SEBASTIAN ROSSNER proves. It is true that the presence of the AfD in the parliaments increasingly forces the other parties to make and, if necessary, enforce that sort of decisions for the sake of their own coherence. But the ultima ratio, the amputation of the entire association, would be such a deep cut into one's own flesh that it will probably only in extremely rare cases come to that. Especially since neither the CDU nor the FDP have such a "bone saw" at their disposal because their statutes include no legal basis for this.

What else is new? 281 is the current number of our supporters on Steady, and for the measly sum of 4 Euros per month you can become one of them, if Verfassungsblog is worth that much to you in the long run. If you prefer to make a one-off contribution you'll be very much welcome, too, of course (paypal@verfassungsblog.de, IBAN DE41 1001 0010 0923 7441 03).

By the way: If you intend to go to this year's big assembly of the global comparative constitutionalism community in Wrocław, you should hurry. The Call for Papers ends on 1 March. Details are here.

That's it for this week. All the best, and take care,

Max Steinbeis

A previous version of this editorial contained a slightly different summary of Constantin Hruschka's post.

ABOUT THE AUTHOR

Maximilian Steinbeis
Maximilian Steinbeis is a legal journalist and writer and the founder and director of Verfassungsblog.

SUGGESTED CITATION
Steinbeis, Maximilian: The Life of Others, Verfassungsblog, 21.02.2020, doi: 10.17176/20200221-185134-0.

Licensed under CC BY-SA 4.0.

Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20200221-185134-0.