Against the Apocalyptic Swan Song

A Plea for Practical Hope in Times of Crisis

Anuscheh Farahat

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Gloomy future scenarios are currently popular. Hardly a day goes by without predictions of the demise of the EU, a spiral of nationalism or the path to an authoritarian, xenophobic surveillance state. This is hardly surprising in view of the catastrophic images, figures and news we are confronted with on a daily basis, in the light of the massive restrictions on fundamental rights and the frustrating debate on European solidarity. However, in the current competition to outbid disaster scenarios, we tend to forget that political developments are just as little inevitable and without alternatives as crisis response measures (against the rhetorics of "there-are-no-alternatives" here and here). The choice between alternatives still exists and is more important today than ever.

The shaping of our future after Corona relies as much on political choices as the immediate measures taken to contain the acute health crisis. The damage our political systems will suffer after the acute Coronavirus pandemic depends to a large extent on three factors: the active confrontation with the social consequences of the crisis; the consequences we draw for the organization of transnational solidarity; and the resilience of our constitutions during the crisis.

The way out of the crisis must be socially just

In order to overcome the crisis and escape the gloomy scenarios described above, it is essential to actively manage the foreseeable social consequences of the economic emergency to contain the pandemic. Otherwise, the loss of confidence in public institutions may increase once again. A further upswing of right-wing populist parties would be the likely consequence. However, the Coronavirus pandemic also offers the opportunity to regain lost trust and to compensate for social inequality.

These days, cashiers and caretakers are being celebrated as "heroes of everyday life", while at the same time several large corporations (including Adidas for the time being) have announced that they will suspend their rent payments in response to the expected drop in profits. Against this background, we should take the Coronavirus pandemic as an occasion to correct the fatal misunderstanding of the past decades, according to which only those count as systemically relevant who work in privileged positions or are able to create jobs themselves. Even before Corona, the below-average wages in retail, the health sector and parcel delivery services in Germany were an expression of a massive social imbalance and a fatal misunderstanding of value creation in society. In times of Corona, this imbalance seems downright cynical. Trust can only be won here if social value creation is discussed and appreciated anew. The German Basic Law not only offers sufficient room for such a readjustment, but also provides orientation in the form of the welfare state principle. The social side of the democratic federal state not only includes the guarantee of state services, but also the design of the economic system as a whole. In cushioning the effects of the crisis, we should therefore not only look at the large companies labelled as "systemically relevant" and the maintenance of the stock and financial markets, but also at the social consequences at the grassroots level.

The Coronavirus pandemic powerfully illustrates deficits in the health care system, which go far beyond the underpayment of nursing staff and point more generally to the relationship between the market and the state. No other branch illustrates so clearly how much the focus regarding the provision of public services has shifted in favor of the market. Public services and market-oriented efficiency are often diffi-

cult to reconcile, because cost savings are ultimately at the expense of the quality and availability of public services. However, the policy of privatization and liberalization pursued over the past few years is neither natural law nor constitutionally mandatory. On the contrary, the German Basic Law is neutral in terms of economic policy and leaves the concrete design of the relationship between market and state to the political decision-makers. With the welfare state principle it sets the direction for a sufficient guarantee of social services of general interest. The Corona crisis represents an opportunity to update these constitutional principles and to rebalance the relationship between the state and the market in a way that is also capable of reestablishing confidence in state institutions.

As in every crisis, those who already lived in dire conditions are particularly affected and vulnerable in the Coronavirus pandemic. It is shocking how quickly the misery in the refugee camps at the European external borders disappears from public attention and how brutally we are prepared in times of crisis to let even emergency-proof international legal obligations at the European external borders go by the board (see here). European governments did not even seriously consider alternatives that would reconcile refugee protection with health protection. However, human rights-based protection of refugees has become a central component of European constitutional law and is secured by the ECHR and Article 18 of the EU Charter of Fundamental Rights. The new challenges posed by the Coronavirus pandemic make the vulnerability of refugees and the unsustainable hygienic conditions in the hotspots at the external borders particularly evident. The time has come to make effective use of European constitutional law here and to prove that the protection of human rights in Europe is not a fair-weather phenomenon.

Rethinking transnational solidarity

Secondly, the Coronavirus pandemic offers an opportunity to rethink transnational solidarity. It shows how existential the global division of labor has become, how dependent we are on international supply chains not only in our economic production processes but also, and especially, in our basic health care. While the question of the protection of human rights along the supply chain has often been regarded as a mere accessory, the Coronavirus pandemic illustrates that we also have a massive self-interest in humane working and living conditions all over the world. If the corona virus continues to strike at the many production sites around the world with under-equipped health systems and lacking basic services, this will have a massive impact on European economies, which are dependent on supplies from all over the world. How badly the European economies are hit by the crisis and slowed down in their reconstruction, will therefore depend on the health and social standards in the countries along the ramified supply chains. This does not bode well for the moment. However, it could be an opportunity to awaken and institutionalize a global interest in decent and healthy living as well as working conditions and thus strengthen global respect for social rights. In view of the global extent of the coronavirus, this applies all the more to the development of improved cooperation structures and capacities in the health sector. The importance of global networking and joint resources in this area is currently becoming particularly clear.

In addition to the global dimension, the Coronavirus pandemic also reveals yet again how eminently important a European solution is in the light of a danger that is by definition transnational. Coordination problems and the dispute over financial aid dominate the picture for the moment. In reality, however, the Coronavirus pandemic offers an extraordinary opportunity to create new legitimacy for Union-wide cooperation projects and to strengthen European solidarity. The mistakes of the euro crisis, which de facto drove the Member States apart, must not be repeated. Instead, the costs of this crisis must be borne jointly and the consequences drawn jointly. There are also constitutional points of reference here: Article 3 TEU formulates the objective of promoting the well-being of the peoples of the EU, combating social exclusion and discrimination and promoting social justice. Solidarity is considered a European constitutional principle. These lofty goals have hardly been brought to life in the euro crisis and have instead given way to a logic

of apportioning blame. Now, however, we are dealing with the consequences of a virus for which nobody can be blamed. This is an excellent opportunity to breathe new life into solidarity and social justice in the EU. Again, nothing is inevitable, but much is possible, provided that political awareness and political will can be created.

Resilient constitutions as a framework for orientation on the way out of the crisis

European and national constitutional law form the framework within which political decisions now are to be made. However, constitutions, as the preserving framework for orientation, are in direct tension with the logic of crisis. The logic of crisis entails an accelerated pressure to make decisions and often calls for eliminating seemingly inconvenient demarcations and in-built loops of reflection in the democratic process. In serious social crises constitutions therefore always run the risk of being replaced by other frames of reference and identification symbols, as is evident in the popular references to the people and the nation. Constitutions can only fulfil their function as a "normative script" beyond a crisis phase if they develop resilience, i.e. if they survive the crisis without losing their normativity.

This can only succeed if we insist that constitutional analyses do not replace political decision-making. Constitutions do not provide a silver bullet out of the crisis, but only a normative framework for action that sets limits and contains mandates to shape the situation. What the concrete norms of a constitution require is by no means fixed. Rather, crises are historical junctures at which the concrete meaning of individual constitutional norms is renegotiated through conflict. It is precisely these conflicts, in which different actors claim the constitution for different things, that maintain the normativity of the constitution even in times of crisis. The common, albeit different, reference to the constitution connects the actors to the political order. Resilient constitutions must therefore provide both continuity and change.

The current disputes about the constitutionality of curfews, shop closures, data protection and shifts of competence in favor of the executive (including here, here, here and here) are therefore not constitutional navel-gazing. On the contrary, they are of crucial constitutional significance, regardless of the outcome of the evaluation of concrete measures. They should urgently be supplemented by Union constitutional disputes. Such debates make it possible, even under acute pressure, to act, to insist that the constitution sets limits and that a democratic constitutional state cannot afford a state of emergency in which the constitution is set aside, not even if we are dealing with a catastrophic natural event potentially involving many thousands of deaths. Constitutional dispute also keeps the constitution present as a normative frame of reference in the acute crisis. It remains however a genuine political decision, how to fill this frame.

We therefore should not reduce our current political debate to a fear-driven, apocalyptic swan song of all cherished freedoms and structures. Instead, we should broaden our horizon of possibilities. It is not about utopian dreaming, but about developing something like practical hope (Martha C. Nussbaum). In other words, a hope that is closely linked to concrete action here and now and therefore focuses attention on what can be shaped. Practical hope in this sense is the commandment of the hour.

This article has also been published in German.

Dieser Artikel ist auch in deutscher Sprache erschienen.

ABOUT THE AUTHOR

Anuscheh Farahat
Anuscheh Farahat is a Professor of Public Law in European Context at the University of Vienna.

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