Verfassungsblog
ON MATTERS CONSTITUTIONAL

Matters of Belief

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William Barr, the US Attorney General, uses his office to save Donald Trump and his people from having to answer to the law. This is known and well documented. Manipulating the Mueller report, fending off sexual abuse allegations, dropping the prosecution of loyalists even after they had pleaded guilty: that is what he considers to be his job, and he makes no secret of it.

This week, in a speech at a conservative college in Michigan on Constitution Day, AG Barr explained the constitutional theory which guides him in this. It goes, in a nutshell, like this: What separates the US from tyranny is the rule of law, and separation of powers is there to ensure it. The decision to go after an individual with the state's full penal power is the responsibility of the executive branch and its alone, bound exclusively by the constitution. This decision rests entirely on the shoulders of the executive, and it is his democratic legitimization and political accountability which allows the Attorney General, unlike his supposedly "independent" lowly line prosecutors and public servants, to bear that heavy burden.

Against this background, it is not only not a scandal, but actually even a democratic imperative for the AG to remind the FBI agents whose *agents* they actually are, and to "interfere in investigations" in order to shut them down if that is what he thinks is best. Having the AG make that decision is also an imperative of the rule of law because it ensures consistency and equal treatment, unlike when each individual prosecutor decides on her own.

What is not to like about this constitutional theory? Given the diametrically opposed conclusions, it's less easy to say than one might think: rule of law, responsibility, consistency and equal treatment – it all sounds quite lovely at the outset.

The pivotal point around which this constitutional theory revolves seems to me to be another concept, though: decision. It implies that there is no normative guidance for the answer to the question of whether to investigate or not, beside the whims and fancies of whoever is responsible to give it. One guy is summoned, interrogated and arrested, his property searched, his privacy violated, his reputation shredded and his life in pieces, and the other guy in similar circumstances is not? Well, yes, if that's what has been decided. If you don't like it, recall or vote out or otherwise hold politically accountable the one who made the decision, but don't ask him to explain the criteria he used and the reasons he had. He doesn't owe you any of that. Normative "consistency" arises solely from the fact that it is one will which decides everything.

This sort of constitutional theory, or variants of it, seems to me to be behind most of the authoritarian-populist regimes that have emerged in recent years. What I hear and read from Ordo Iuris and other apologetics of the Polish PiS regime, or from the Judicial Powers Project in the UK, it all sounds largely rather similar. William Barr is, like most of those people, known to be a Catholic of, let's say, pronouncedly traditionalist description. I have long been waiting for someone who understands political theology and Schmitt and Donoso Cortés more than I do, to explain to me how it all fits together; I would also be grateful for reading tips.

My hypothesis would be that decisionism itself is in fact what is most important to defend to all these people: that the world is suspended somewhere up there on one that *decides*. Thy will be done. In contrast to the web of considerations and claims to justification that covers the world today. To tear this apart and to push through it is the goal that drives them. To fight this would-be threat they are prepared to do the most monstrous things, to believe and spread the most grotesque lies, to tolerate and commit the worst vileness and breaches of law. Grab them by the pussy, break the law in a strictly limited and specific way,

none of what is actually being said and done matters much really before the overpowering attraction that *someone decides*: ruthless, irresponsible, lawless.

Lord, have mercy upon their souls.

This week on Verfassungsblog

Next week, we will start a new project we are very excited about: Together with the German bar association Deutscher Anwaltverein (DAV) we will launch a new podcast. The aim is to initiate a European discussion about the rule of law: about what happened in Poland, in Hungary and in many other EU member states, but as a European topic that we have to talk about as Europeans, among Europeans. "We need to talk about the Rule of Law" is the title of the podcast, and on Wednesday the first episode will be released, on the topic of constitutional courts, with Stanisław Biernat, Pedro Cruz Villalón and Michaela Hailbronner as panelists, and you are warmly encouraged to send us your questions: by e-mail to podcast@verfassungsblog.de, via Facebook, Twitter and our brand new Instagram site, using the hashtag #lawrules.

What has happened in the last week? To no-one's surprise and everyone's horror, a chat group has been discovered in **North Rhine-Westphalia** where police officers sent each other right-wing extremist stuff. Instead of trivializing this as an individual case, the structural problem must be tackled at its root, TOBIAS SINGELNSTEIN demands.

The former mayor of **Bonn**, Bärbel Dieckmann, must pay damages of 1 million euros for gross negligence, the Cologne Administrative Court recently decided. BERND GRZESZICK welcomes this decision as an investment in the citizens' trust in the administration.

Speaking of trust in police and administration: The German Home Secretary intends to introduce a **uniform citizen number** to streamline administrative procedures. According to HANS PETER BULL, this is not only in conflict with data protection law, but also with the principle of the separation of powers with regard to information.

The refugee camp of **Moria** has burned down, the untenability of the conditions can no longer be denied, and the law, notes DANA SCHMALZ, has lost its force in the case of European refugee protection. (*Herrschaft des Unrechts* anyone?)

In this context: With **Bulgaria and Romania** the EU maintains a cooperation and control procedure since their accession in 2007, so that both establish the constitutional standards necessary for membership. There is still some miles to go until that goal is reached, to put it mildly, but Ursula von der Leyens Commission has already gained the impression that enough progress has been made to guarantee the necessary level of rule of law by ordinary means. RADOSVETA VASSILEVA shows that the European Commission is living in a parallel universe and noticing only of the side of the coin that is politically agreeable.

The case of ECJ Advocate General **Eleanor Sharpston** remains controversial this week: did her term of office automatically end with Brexit? Or perhaps with the new appointment of her successor? And (how) can Sharpston defend her position? In any case, TOBIAS CRONE finds the ECJ worthy of criticism for disregarding the ambiguous wording of primary law and thus undermining the effectiveness of interim measures.

In the opinion of CIARÁN BURKE and POLINA KULISH, the **UK** government with its Internal Market Bill violates the principle of good faith as a core principle of international law. In doing so, this not only casts doubt on the UK's loyalty to future trade agreements, but also on its concern for the international rule of law.

In **Hungary**, the government's takeover of media and universities is progressing steadily. ZSOLT KÖRTVÉLYESI examines the climate of fear and the increasing (self-)censorship of academics.

In **Greece**, seven years have passed since the musician Pavlos Fyssas was murdered by members of the neo-Nazi party Golden Dawn. For a long time the Greek government was sitting on their hands. Next month a court verdict will finally be announced. NATALIE ALKIVIADOU analyzes whether it heralds the end of this hideous party.

Corona demonstrations exist, as in many countries, also in **Israel**, but there the protests have a special urgency due to the ongoing political crisis. So far, freedom of assembly has not been severely curtailed, but this is not over yet, as TAMAR HOSTOVSKY BRANDES notes on the eve of the second lockdown.

The Inter-American Commission on Human Rights (IACHR) and the General Secretariat of the Organization of American States (OAS) are in public disagreement over the appointment of the IACHR Executive Secretary, and NELSON CAMILO SÁNCHEZ LEÓN explains how this affects the protection of human rights in **America**.

Chileans will vote in October on whether they want a new constitution. ALBERTO CODDOU McMANUS and CLAUDIO FUENTES-GONZÁLES warn of the populist temptations that this process presents to the Chilean government.

In **France**, a government employee has tried to ban the book "I hate men" by blogger Pauline Harmange – for "incitement to gender hatred". BERIT VÖLZMANN explains what can be learned from the case and what distinguishes the regulation of opinion content from the regulation of discourse rules.

Johanna Kuchel helped with the weekly review.

So much for this week. Did I mention that we will be starting a new podcast? Yes, I did, but I haven't mentioned that we need your support: Steady is the proven way to do it, but we also accept one-time payments via Paypal (paypal@verfassungsblog.de) or bank transfer (IBAN DE41 1001 0010 0923 7441 03, BIC PBNKDEFF) with the utmost gratitude.

Many thanks and all the best,

Max Steinbeis

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