On the Creation and the Slaying of Monsters

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Antitrust law is not one of the areas of law you will usually find much about on Verfassungsblog. Mergers and acquisitions, corporations and competition, price fixing and market manipulation – that's hardly public law at all, that's private business, we don't know and don't care much about these matters, do we?

Turns out we do care. We find particularly exciting what is happening in the USA right now. President Biden is currently putting together his government team, and two very influential posts are likely to go to antitrust professors: Tim Wu and Lina Khan, both from Columbia University, both famous for their sharp criticism of big tech and the established antitrust law paradigm. Now they will get the chance to put their scholarly theories into government practice.

Lina Khan represents also a generational change. In the administration of the oldest president to have ruled the USA, the 32-year-old will apparently, if she is confirmed in the Senate, watch over competition in the USA as a member the Federal Trade Commission. The line she is likely to take can be seen in a paper she wrote while she was still a graduate student, published in the Yale Law Journal in 2017 and probably one of the most influential academic articles of our times.

The generational shift is already visible in the title of the paper: 'Amazon's Antitrust Paradox'. This is a reference to a book published 40 years ago, 'The Antitrust Paradox: A Policy at War with Itself' by Robert Bork, an epochal paradigm shifter in American antitrust law itself at the time. Before, in the post-war decades, the authorities and courts had frequently intervened if they observed the development of market structures that were harmful to competition. No player should become powerful enough to use its market power to kick competitors out of the market. This, according to Bork and the followers of the Chicago School, was utterly misguided and served only to keep uncompetitive weaklings in the play, to the detriment of consumers. The true and only aim of antitrust law is 'consumer welfare', and that means: lower prices. Everything else is, from this point of view, irrelevant.

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Three years after Bork's book was published, Ronald Reagan became president. Even before that, the Supreme Court had endorsed Bork's view of antitrust law. The golden era of corporate raiders and M&A law firms began, huge multinationals started roaming the world, and indeed: none of this apparently had a harmful effect on consumer prices. On the contrary. That these giants could forgo profit just to drive competitors to ruin – that, Bork and his disciples thought, was not to be feared anyway. That would be irrational. No one would do that, and if they did, they wouldn't last long. Neither would it be problematic if the giants buy up their suppliers in order to cut off their competitors

from their supply chains: if they become more efficient that way and offer cheaper as a result, then so much the better; if the don't, they will suffer the consequences on their own.

Along came the 90s, the 00s, the Internet and digitalisation. Dotcom start-ups and tech innovators raised billions in capital, and what they promised their investors was not profits. It was growth. As long as this promise holds and is believed, it is not at all irrational to accept losses for no matter how long, in order to force the competition out of the market. Expanding along the supply chain is no longer just a harmless means to increase one's own efficiency, but the way to go from being the owner of a market stall to the owner of the whole marketplace, of the platform where all buy and all sell but only one knows all about all. This is the world we live in now, forty years after Bork's book – a world dominated by corporations that cross out all the Chicago assumptions that made their dominance possible in the first place. And none embodies this more than Amazon.

In the light of Lina Khan's article and the real existence of Amazon et al, the old antitrust paradigm and the whole Chicago School doctrine appears as a tired and hollow ideology that is no longer able to convince anyone who does not have a tangible material interest in its continuation. My generation once believed in this, just as the generation before us believed in communism. The ideology is dead. The monsters it created are very much alive. May Lina Khan and her comrades-in-arms be strong enough to put them down.

Marlene Straub has contributed to this post.

The Week on Verfassungsblog

Before I turn to the past week, let me point to a particularly interesting event in the coming week: Recently, there have been more and more occasions to question the role of **constitutional expertise in the German political arena**. Some politicians are growing impatient with warning voices from academia, and vice versa, and the media play a special role in this. For this reason, we have organised a workshop together with MICHAELA HAILBRONNER and ALEXANDER THIELE, in which representatives from legal academia (ANNA KATHARINA MANGOLD, DANIEL THYM), politics (RENATE KÜNAST, KONSTANTIN KUHLE, GÜNTER KRINGS) and the media (GUDULA GEUTHER, PATRICK BAHNERS) will discuss this topic. The event will be streamed live on Verfassungsblog, next Friday at 2pm CET. Don't miss it!

In **Brazil**, a Supreme Court judge has declared the convictions of ex-president Lula da Silva void. THOMAS BUSTAMANTE and EMILIO PELUSO NEDER MEYER unravel in a highly readable way how this relates to the so-called Operation Car Wash anti-corruption campaign by parts of the judiciary against the socialist president and his government, and what is behind this and other judge's rulings in the first place. In another post, FELIPE OLIVEIRA DE SOUSA explains how this decision could affect the 2022 presidential elections and the fight against the Corona crisis in Brazil.

In **Poland**, a Warsaw court in early February ordered two prominent Holocaust scholars to publicly apologise for statements made in a book. ANNA WÓJCIK reports on other examples of strategic litigation by the Polish government aimed at intimidating scholars and steering public discourse.

In **Slovenia**, Prime Minister Janez Janša's bizarre tweets against the media and journalists are raising concerns about whether he might want to follow in Viktor Orbán's footsteps. MATEJ AVBELJ is among those who think this concern is exaggerated. We will publish more positions on this topic soon.

In Germany, the federal government has reached an agreement with the energy suppliers on compensation payments for the **nuclear phase-out**. RHEA TAMARA HOFFMANN explains why the agreement casts a dubious light on investor protection arbitration as a whole.

For several months, a special police commission has been investigating 24 police officers for allegedly participating in **right-wing extremist chats**. In February, the investigators had 12,700 phone numbers checked. THOMAS FELTES and DIRK BURCZYK consider such mass data searches illegal.

The Second Senate of the Federal Constitutional Court (BVerfG) has rejected as inadmissible an *Organstreit* application by the parliamentary group DIE LINKE against the **CETA** free trade agreement. BENEDIKT RIEDL takes the ruling as an opportunity to trace the development of the responsibility for integration in the BVerfG's case law.

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All best,
the Verfassungsblog team

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For a long time, there has been a debate in social law on whether and how to make access to social court proceedings more difficult for so-called "**frequent plaintiffs**". Although the Bundesrat (upper house of the German parliament) recently rejected a bill by the state of Hesse, the discussion about the tension between low-threshold legal protection and the prevention of alleged abuse of the social courts is not likely to end there, says MARJE MÜLDER.

The Federal Agency for Civic Education (BpB) is subordinate to the Federal Ministry of the Interior. Recently, the Ministry complained about a phrase in a BpB dossier on "**left-wing extremism**", which has been diligently adapted to the wishes of the head of the Federal security apparatus. TIM WIHL reflects on what can be learned from this in terms of legal and political theory.

Since 28 February 2021, Berlin's new **Freedom of Assembly Act** has been in force and allegedly liberalises the Federal Assembly Act after more than 60 years. LENNART LAGMÖLLER and LENNART ARMBRUST explain why it does not live up to its name.

In our COVID 19 Symposium this week we have reports from Iran, Estonia, South Africa, Hungary, Lebanon, Belgium, Iceland, Slovakia, Canada and Italy. Scheduled in week 4: France, Indonesia, Ireland, Slovenia, Turkey.

That's all for now. All the best to you, stay safe, thanks for reading, and see you next week,

Max Steinbeis

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