Verfassungsblog
ON MATTERS CONSTITUTIONAL

Booze in the Pandemic

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We have been organising symposia here on the Verfassungsblog for many years now. Online symposium is what we called the format when we had the honour of co-inventing it back then, and in some way the whole Verfassungsblog is nothing else but one big symposium: not in the sense of a dionysian carousal with dance, flute girls, and intoxication, of course, but rather a noble and elevating oratorical contest among virtuous scholars and pedagogues. Especially now, in the pandemic, we are seeing an explosion in demand for this format, and no wonder: carousals are banned, dancers and flute girls are out of work, and satyr and mystery or any plays at all are what we dream of in this long dreary Covid winter. Instead, each of us sits alone and isolated in front of her own little screen rectangle. So, why don't we get together on Verfassungsblog at least and discuss whether what is imposed on us all in terms of Covid measures is statecraft and just government, or darkest tyranny, or something in between, or something else altogether.

We've been doing this virtually non-stop now during these last months, not just with our "Power and the COVID-19 Pandemic" online symposium convened by the most praiseworthy Joelle Grogan, but also in the regular blog timeline. New stuff keeps coming up, restriction, relaxation, vaccination on, vaccination off, borders open, borders closed, stuff that must be measured against constitutional yardsticks and classified as imperative, permitted or forbidden, and we keep discussing these matters from dawn till dusk until the neighbours complain: They have to get up early and do their political job in government and legislature, so would we discussion-loving constitutional law symposiastes keep it down a bit for a little while, please! But we won't have any of that, we invite them all over, the politics and media neighbours, we fill their glasses and wreath their heads with vine leaves: How interesting, let's by all means discuss that! If we legal scholars call the doings of you politicians unconstitutional or constitutional, especially in public forums like Verfassungsblog, it has a much more direct effect on your scope of action than the advice of any other scientific discipline, virology included – and this affects, in turn, our scientific discourse, too. How? And what to do?

Constitutional expertise in the political arena was the topic of the online workshop we held on this topic this afternoon. RENATE KÜNAST (Greens), KONSTANTIN KUHLE (FDP) and GÜNTER KRINGS (CDU) were our guests from politics, GUDULA GEUTHER (Deutschlandfunk) and PATRICK BAHNERS (FAZ) from the media, ANNA KATHARINA MANGOLD (University of Flensburg) and DANIEL THYM (University of Konstanz) from legal academia, and the symposiarchs were MICHAELA HAILBRONNER (University of Gießen) and ALEXANDER THIELE (University of Göttingen). I found the debate tremendously exciting, including the biting criticism that Krings, Secretary of State in the Federal Ministry of the Interior and a connoisseur of constitutional law of his own right, addressed to parts of the legal discourse (and also to us). We will continue this debate with an online symposium with further numerous contributions, so that's something to look forward to.

But then, while we celebrate our communion of discourse participants, there is a rumbling at the door. Who is there? Revelers? No, not some lovelorn bacchant comes staggering in, but an distinguished white-haired gentleman steps into our midst, a law professor from Freiburg as stone-cold sober as can be: DIETRICH MURSWIEK is his name. What? Murswiek? The very Murswiek who demands that the German citizenry is constitutionally obliged to consist "in their great majority of ethnic Germans"? Murswiek, who advised the AfD party on how to avoid scrutiny by the Office for the Protection of the Constitution?

Murswiek, who argues that too much immigration can be unconstitutional because then the sovereign supposedly cannot remain identical with itself any more? Yes. The very one.

So, are we supposed to drink from one chalice with this man? Not an easy question at all. If we refuse, won't we be held in shame with all our precious discourse and our oratorical contest, if we reject his challenge for reasons that lie in his person and not in his speech? For indeed, what he is saying about Covid, about balancing and proportionality and fundamental rights, appears highly contestable, for sure. But is it not debatable? Of course it is. Nothing to be said about that. Well, you are a forum for constitutional law, the professor answers when I ask him why of all parties he seeks to join ours, a forum that is interested in the exchange of legal arguments and open to all those who seriously argue legally, regardless of political classifications. Or are you not?

Professor Murswiek has held his speeches on many a forum. Legal academic journals, of course, and conservative broadsheets like WELT and FAZ. *Tichy's Einblick*, a right-wing libertarian website. *Junge Freiheit*, a far-right nationalist weekly. *KenFM*, a conspiracy-mongering talk radio station. Now, Verfassungsblog, too. Elsewhere, he tends to make his point more keenly, here his tone and his conclusions remain comparatively moderate, but the argument itself remains the same: To restrict our liberties and wreak such havoc as the Covid measures do, can be justified only with respect to a risk of at least equal dimensions, and unless the state can prove that the latter outbalances the former, this whole Covid business is entirely unconstitutional.

Talking to the Right

Some may remember a book called "Talking to the Right" (*Mit Rechten reden*), which I co-wrote a few years ago. We were often accused at the time of stating a demand, in the sense of: Talking to the right is a good thing if done properly, and everyone should do it. That's not what we wrote, we used to defend ourselves at the time: the book states no demand but describes a problem. We describe how right-wing speech works, namely in a way that is frighteningly effective in making its counterpart trip over their own feet and deriving profit from that, which is to be always and from the outset the winner in an alleged world of perpetual fight. The guideline (*Leitfaden*) we were offering with this book was meant as a yarn to lead you out of the labyrinth: Not talking to right-wingers was our advice, but stopping playing their games.

Now, the first person plural is often a trickier matter than it may appear to be, and certainly in the case of us three co-authors. Leo | Steinbeis | Zorn are the authors' names on the cover of the book, but the extent to which each of us had contributed to its creation was in fact spread rather unevenly. The intellectual core of the whole argument (i.e. the *Kreisläufer* chapter) was developed by Daniel-Pascal Zorn, the philosopher, partly in Socratic dialogue with us two other beautiful youths, but largely on his own. My other co-author, Per Leo, historian and storyteller, had declared himself responsible for the "sound" of the book. It was primarily this sound, I suspect, that drove so many critics of this book mad with rage: this slithery, allusive sound, constantly shedding its skin, impossible to get a grip on and pin down on a firm position, always deniable, ironic, fictionalised, interpretable in many divergent ways and, at any rate, triple-tongued from the outset: who of us three is talking anyway? Thus we dance, slither and play above the heads of both the left- and the right-wingers and make fun of them and their hapless moves, we poke them and flirt with them and seem to sympathise with them and rebuke them at the same time, and the angrier they get, the more fun we have. Everything is sport, everything is play. We play with both. We join all parties, we drink with all comers, no one can touch us, nothing can affect us. We play and we fight and we compete, we like nothing better (to the extent that we can be sure enough to win). We are men.

The mother of all symposia, as told by Plato, is men-only as a matter of course, and fighting and competing comes naturally to those who participate: It would have been a drinking contest if they weren't still being hung over from the night before, so they decide to compete with speeches. What they speak about,

though, is Eros, of all matters, and what they compete for is who will praise him in the most beautiful way – Eros the demon, the one between God and man, the one who drives the divided towards unity. It is the third thing between divisive fighting human twoness and divine harmonic eternal oneness: love.

At the end of the contest, after Socrates has finished at last his lecture and initiated his listeners into the doctrine of the ladder of beholding beauty, all of a sudden, with much clamour and flute playing, the completely plastered Alcibiades crashes the party. Unlike Socrates, on whom neither pain nor danger nor alcohol nor lack of sleep seem to have any effect on his lofty ladder step, this beautiful young man is affected to the highest degree. And he speaks of it. He tells of his love as his own sensation and experience. His love for Socrates, a love which the cold teacher had withheld from him in turn. He tells of his shame. All this he tells in the first person singular. It does not end well for him, this banquet to which he has not been invited. Laughed at and abandoned and humiliated in the ugliest way by Socrates, he is not even mentioned by name as he leaves. Someone had just left, the text says, so the door was open, revelers invade, the party descends into excessive boozing, and no one knows anything any more, everyone is lying unconscious somewhere. Everyone but Socrates. He remains awake until the end, the last and only one, unaffected, cold and calm, even for the whole of the following day. Then, in the evening, the text finishes, he goes home to rest.

By the way, I observed in myself that I do no longer enjoy drinking wine at dinner. In Russia, they say, even the hardest drinkers never drink alone. If you don't have a fellow drinker, you go looking for one. Which we can't do now, can we?

So, what are we going to do? We'll stay sober, I suppose.

Thanks to Theresa Steinbeis for valuable input.

The week on Verfassungsblog

So, on with the discourse.

In terms of corona policy, the 7-day incidence curve in Germany is approaching the 100 mark again, and yet measures are being relaxed rather than tightened. The **Infection Protection Act** actually only marks 50 and 35 as thresholds. Does this imply an obligation on the part of the state to tighten measures if these thresholds are exceeded? JOHANNES GALLON sees good reasons that it does.

The EU Commission has presented its legislative proposal for the "**Digital Green Passport**", which should make it easier for vaccinated, recovered and negatively tested people to travel within Europe in the summer. IRIS GOLDNER LANG explains how such a measure is compatible with EU fundamental rights. And in our Corona Constitutional podcast, WALTHER MICHL explains the legal and political background in an interview with LUISE QUARITSCH.

The presidents of the European institutions have given the green light to the **Conference on the Future of Europe** after a year's delay. After all the inter-institutional disputes over governance structures and the resulting delay, STEFAN THIERSE no longer believes that the conference will be the citizen-driven forum it was promised to be.

In the post-Brexit EU-UK squabble, the EU Commission has called on the ECJ because the British government unilaterally extended certain transitional periods with regard to **Northern Ireland**. TOBIAS LOCK considers the action to be legally sound but politically problematic.

The House of Commons last week voted in favour of a law that will allow the police to crack down much harder even on peaceful but "noisy" or "disruptive" demonstrations. DAVID MEAD finds the law unbalanced and unnecessary and fears irreversible damage to **freedom of assembly**.

The protests and violence in **Myanmar** continue almost two months after the coup. How are neighbouring states reacting? LASSE SCHULDT hardly believes that normative considerations are likely to play much of a role.

In **Spain**, the rapper Pablo Hasél was convicted of insulting the royal family, for which there are specific offences in the Penal Code. These undermine freedom of expression and have already led to several convictions before the European Court of Human Rights, as JACOBO DOPICO GÓMEZ-ALLER explains.

Wolfgang Thierse, the former president of the Bundestag, worries that too much **identity politics** harms public spirit (*Gemeinsinn*), sparking a fierce dispute inside and outside the SPD. MATTHIAS GOLDMANN illuminates the shadier corners of this concept.

This year, the Federal Constitutional Court will rule on a constitutional complaint about cuts in the **Asylum Seekers' Benefits Act**. It is doubtful whether the reasons for legitimising these sanctions meet constitutional requirements. IBRAHIM KANALAN and JULIAN SEIDL venture a prognosis.

Since last autumn, there has been a proposal to create a "***GmbH in Verantwortungseigentum***". After a revision, it is now called a "*GmbH mit gebundenem Vermögen*" (limited liability company with tied assets), but its essential feature has remained the same: it excludes the shareholders' right to profit distribution. But is such a legal form necessary? Or is it even unconstitutional? BERTRAM LOMFELD and NOAH NEITZEL analyse the draft.

With the Second Corona Tax Relief Act, the tax authorities would have lost the possibility to collect proceeds of crime from illegal **cum/ex trades** if their claim by the tax authorities was time-barred. With a "reform of the reform", the legislator has now made this possible after all. A decision by the Federal Constitutional Court now suggests that this retroactive effect will also stand under constitutional law, writes KILIAN WEGNER.

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All best,
the Verfassungsblog team

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So much for this week. By the way, the number of our Steady members has now grown to 644 thanks to your fantastic support. We are now very close to the 4,000 € per month that I set as a target two years ago, and thus to the goal of having a base that makes us a bit less dependent on institutional partners and donors. That's great. 65.50€ are still missing to reach this threshold. We'll manage that now, won't we? You'll also get our great "Hold on to the Constitution" mug that everyone wants now. By the way, I dropped mine the other day, too bad. Now I'm going to have to stop drinking coffee, too, or what? Well, at least I know where I can get a new one.

All the best to you, thank you and see you next week,

Max Steinbeis

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