Openers for Interpretation

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Something, they say, needs to be done about these judges. That this elitist caste of jurists and expertocrats keeps standing in the way of the will of the people – that, they say, is undemocratic. They keep declaring our laws unconstitutional, they say, they keep thwarting our plans in spite of our democratic mandate – we will not stand for that. We are legitimised to exercise power, and exercising power is what we will do to break their resistance.

It is typical for authoritarian populism to talk like this: in Hungary, in Poland, in so many other places in- and outside Europe. Authoritarianism and constitutional courts, it seems, are natural enemies, authoritarianism being as a matter of principle unable to come to terms with the independence of the judiciary in general and judicial review of their laws in particular. No wonder that the first target an authoritarian populist leader usually takes to task after rising to power is the Constitutional Court.

The USA is the first and so far only country in which an authoritarian populist leader has not just gained, but also lost power democratically (for now). Trump has been voted out of office, the Republicans are defeated – and now it is their opponents who seem to be announcing rather similar things in rather similar terms: Something needs to be done about these judges, their resistance is undemocratic and unacceptable etc., and their target is first and foremost the Supreme Court. All kinds of more or less radical options have been discussed for months on how to dismantle the right-wing 6:3 majority that had been cleverly and purposefully installed by the Republicans during the four Trump years and before. To weigh these options and their pros and cons, US President Joe Biden has appointed a commission of three dozen of the most respected liberal law professors in the country. Last Wednesday, the commission held its first public hearing.

One statement that caused quite a stir came from the young Harvard professor Nikolas Bowie: In his view, the Republican control of the Supreme Court is a symptom of a much deeper problem, which is judicial review itself. The orthodox belief is that judges not applying laws they consider unconstitutional are generally a good thing and beneficial to democracy, justice and the prevention of majoritarian tyranny. Bowie dissents from that belief more passionately, harshly and relentlessly than anyone has in a long time and holds that it has been rebutted in both practice and theory. That the opinion of five Harvard or Yale graduates on the Supreme Court bench should be decisive for whether a law has binding force or not, is in Bowie's view an attack on democratic equality. The interests of fundamental rights holders and minorities, he argues, are in no worse hands with the Congressional majority than with a court that during its history has time and again intervened precisely against legislative attempts to take action against discrimination and harassment of vulnerable minorities.

From a German perspective, this position appears a lot more shocking than from an American one, I suppose. In Germany, the orthodoxy of the Federal Constitutional Court as a "citizen's court", where fundamental rights holders harassed by state power find refuge, remains powerful, and not without reason (the fusty traces of resentment towards parliamentary politics it contains notwithstanding). In the US, on the other hand, criticism of judicial review is not so new. Where this comes from can be seen in a judgement, handed down on the very day after the reform commission hearing, which seems designed to confirm the worst fears of the Supreme Court's critics.

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The case, *Brnovich v. DNC*, concerns the recent voting rules reforms in the state of Arizona. Throughout the Republican-governened parts of the US, states are passing laws aimed at making it disproportionately difficult for minorities to cast their ballots. Preventing Black Americans from voting and thus invalidating their hard-won constitutional citizen rights has been an established practice in much of the country for the better part of last century. It was the legislature, not the judiciary, that finally put an end to this practice with the Voting Rights Act of 1965. It was the Supreme Court, on the other hand, that in 2013 pulverized the central norm of this law on the grounds that Congress had not reviewed the factual basis for its application for too long.

In the current case, another norm of that law was at stake, which prohibits any voting standard, practice or procedure which "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color". Samuel Alito, on behalf of the right-wing majority on the bench, is subjecting this norm to a painstakingly narrow interpretation that amounts to saying that pretty much everything is fine in Arizona and wherever. What seems no less remarkable to me, however, is the minority vote of the three liberal judges, written by Elena Kagan. This vote is much more than just a dissenting opinion on how to apply and interpret the law in a correct way. It is an indictment. It accuses the majority of having "rewritten" the Voting Rights Act, a "monument to American greatness" that protected the nation from its "basest impulses" – in order to "weaken" and "damage" it (3).

One does not necessarily recognise a functioning constitutional court by the fact that it serves the progressive cause. A constitutional court is neither inherently progressive nor inherently conservative, but an institution that ideally makes it easier for both progressives and conservatives to coexist. Well-functioning constitutional courts are *Deutungsöffner* ("openers of interpretation", Anuscheh Farahat). They are places where different interpreters of the constitution meet and process their differences: opposition and government, citizens and bureaucrats, powerless and powerful, minority and majority, progressives and conservatives – different parties with different interests, priorities and preferences, who can articulate their differences as different interpretations of the same constitution, defend them with arguments and bring them to a binding decision. That is also the great thing about minority votes: The openness of the interpretation of the constitution becomes visible and tangible right in the decision itself.

The US Supreme Court seems to have completely stopped being a *Deutungsöffner* at all. The minority and the majority are not just contesting one another's different interpretation of the same law, but now the minority is accusing the majority of acting in bad faith

and actually wanting to "weaken" and "damage" the law – and in view of the judicial policy of the Republicans in recent years, who can blame them? That judicial policy has in common with that of all authoritarian-populist governments that its aim is *Deutungsschließung* ("interpretive closure"). It aims to keep their own interpretation of the constitution uncontested, and to force the judiciary into the service of this intention. It is about destroying the courts, while the intention to reverse or revise this policy is about fixing them. Seen in this light, the rhetorical parallel between the two is, I guess, nothing but a bluff.

This week on Verfassungsblog

In **Hungary** next spring, authoritarian populism could also suffer an electoral defeat if the united opposition succeeds in winning a majority in parliament. But Viktor Orbán has made constitutional provisions for this eventuality. As long as the constitution, which he and his Fidesz party have tailored to suit themselves by means of their two-thirds majority, is in force, the opposition turned government has hardly any chance of success. Against this background, the debate on how and under what conditions the government may press the constitutional reset button is in full swing. The presidents of the Constitutional Court and the Supreme Court, both Orbán loyalists, drop hints at a coup d'état and their readiness to resort to means of militant democracy in that event, and RENÁTA UITZ analyses what they might be up to. ANDREW ARATO and GÁBOR HALMAI argue that Hungary's constitution should be renewed with the help of a 1989-style round table.

In **Poland**, only a few weeks ago, the ECtHR denied the PiS-subjugated Constitutional Tribunal its status as a court with its Xero Flor ruling. Now the Strasbourg Court has struck a new blow against Polish judicial reforms: It is about the removal of court presidents and vice-presidents by order of the Ministry of Justice. MATHIEU LELOUP fears, however, that the ruling will have few consequences: too little, too late.

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The EU Joint Declaration on the **Conference on the Future of Europe** makes no mention of judges. MAX STEUER thinks this is a mistake as the judiciary is a neglected but effective actor in shaping the future of Europe.

In Berlin, the stage is set for the petition for a referendum to expropriate huge residential housing corporations. But thousands of signatures from foreign citizens living in Berlin are invalid. TIMUR HUSEIN asks whether this exclusion must also apply in the future.

That's all for now. As you see: it's summer, extreme weather conditions, a dearth of topics and posts, and we all are in need of a vacation. All the best, and apply sunscreen! Next week there'll be another editorial, but after that I'll need a break too.

In the meantime, a deep bow to all our Steady members, without whom we could not do all this.

Max Steinbeis

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