

Right-Wing Crits

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Maximilian Steinbeis Fr 15 Nov
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I'm old enough to remember the times when being critical about the judiciary was a decidedly leftist thing to do: exposing courts as places of reaction and repression, stuffy old judges pushing spokes of law (or what they declared as such) into the wheels of progressive legislation, policy roadblocks who narrow the space for democracy with their pretension that the answer to how we decide to live together is somehow always preordained by law which only middle-aged men with law degrees are entitled to interpret. To reveal what these guys in their musty robes are *really* about in terms of legally cloaked political power – that was what the left did.

Project of Power

What about today? I have taken a bit of an interest over the last days at a particularly powerful example of contemporary critical judicial studies: the *Judicial Power Project* of the British think tank Policy Exchange. This project, led by Oxford law professor Richard Ekins, has been during the four years of its existence a stunningly powerful source of support and academic expertise for the popular demand to clip the political wings of the judiciary in the UK. Its core argument is constitutional: In the British constitution, Parliament is sovereign, and courts have no place to question its decisions. The place of the judiciary is to decide disputes and apply the law, not to judge its validity and measure it against human rights, the observance of which is the sole responsibility of Parliament.

Lashing out against human rights judicature and "unelected judges" is nothing new in the UK, especially when those judges are based in Strasbourg or Luxembourg. Neither is the academic dispute about whether and to what extent the judiciary should leave the resolution of political conflicts of interest to the democratic process of collectively binding decision making, instead of treating them as being predetermined by human rights or constitutional law. That debate has been going on for many years, too, and by no means was led only by conservatives and right-wing people.

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MATHIAS HONG

Der Menschenwürdegehalt der Grundrechte

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276

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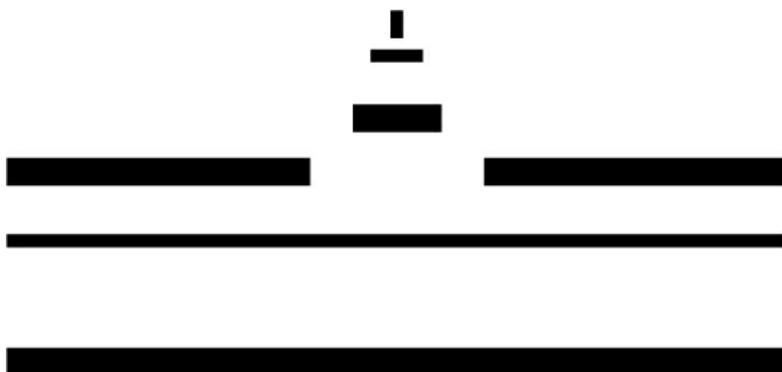
What *is* new about the Judicial Power Project is that it combines both academic expertise and popular campaign mode. I have talked to a number of constitutional lawyers in the UK about the project this week, including its director Richard Ekins, a fortyish New Zealander and widely respected constitutional law professor at St. John's in Oxford. The project is not subject to any political dependence or influence, he said, stressing that it publishes positions of both sides of the argument on a regular basis. That is true but doesn't change the fact that the whole thing is a project of a political think tank, whose aim is not always and necessarily the pure scientific exploration of the truth. Policy Exchange makes no secret of its proximity to the Conservative Party, and according to Ekins, it was PE director Dean Godson who approached him with the idea for this project. At the [inaugural event](#) in October 2015, Michael Gove, then the Minister of Justice and still Boris Johnson's best buddy, gave the introductory speech and assured the audience that he considered the project "one of the most important pieces of work by any think tank and academic institution in Britain today".



Like every think tank, Policy Exchange thrives on donations and contributions from people who have an interest in what they do because it helps their political aims. From whose pockets the money comes from exactly is not disclosed.

All the more visible is the use that money is put to. In October, after the UK Supreme Court's ruling on the prorogation of Parliament in the Brexit dispute (*Miller 2/Cherry*), Policy Exchange published a [paper](#) by John Finnis which described the Supreme Court's ruling as "unconstitutional" and "abuse of judicial power". That was the choice of words the Leader of the House of Commons Jacob Rees-Mogg adopted when he blamed the Supreme Court of a "constitutional coup". It was the same John Finnis who already in April, when Theresa May was driven crazy by Parliament's obstruction of her Brexit deal, had first [come up with the idea](#) that prorogation might come handy as a tool to break Parliament's resistance with.

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Am Institut für internationales und vergleichendes öffentliches Recht der Universität Münster ist am Lehrstuhl von **Prof. Dr. Niels Petersen** eine halbe Stelle als wissenschaftliche*r Mitarbeiter*in zu besetzen. Die Stelle bietet die Gelegenheit zur Promotion und ist auf drei Jahre befristet. Schwerpunktmäßig besteht der Aufgabenbereich in der Betreuung einer Kooperation mit dem CPG an der Thammasat University in Bangkok. Nähere Informationen finden Sie [hier](#).

John Finnis is not just some ordinary law professor: the Australian legal philosopher and student of H.L.A. Hart has until his retirement held a prestigious chair at Oxford University for many years and now teaches at the Catholic University of Notre Dame in the USA. His major work on natural law, published in 1980, is a classic. His PhD students include some of the most influential men of the right-wing US legal elite, such as Princeton professor Robert P. George, co-drafter of the infamous Manhattan Declaration which calls for civic resistance against abortion, stem cell research and gay marriage. Another, even more famous scion of Finnis's academic progeny is the US Supreme Court judge and Trump nominee Neil Gorsuch.

In an essay published in 2008, Finnis suggested that countries with a rapidly growing Muslim population should dispose of Muslim immigrants through "humane and financially compensated for and incentivised" remigration. Finnis, who will turn 80 next year, was the keynote speaker at the inaugural event of the Judicial Power Project, where Michael Gove also spoke. Many think he is a kind of *spiritus rector* of the whole project. (Richard Ekins denied this: Finnis, he said, is "a particular significant contributor, but so are many others".)

Soldiers, human rights, and Carl Schmitt

Is the Judicial Power Project a right-wing project? Of course it is, say progressive critics such as Jo Maugham, a lawyer who played a key role in organizing the Miller trials. It is a "nakedly political project", he said to me, and it would be "inconceivable" that it would campaign against judicial power if the executive were left-wing. Richard Ekins, however, disagrees: Depending on how the judges handle the case, he told me, he could "imagine judicial power being misused and misdirected against a Corbyn government" as well. The proper forum to provide shareholders and proprietors with proper protection was Parliament, not the courts.

I can't help wondering how this would sit with his Policy Exchange partners, though... Anyway, no issues of that sort are raised by a policy paper by Ekins and his colleague Julie Marionneau, published a few days ago, about human rights violations by British forces, currently in the Middle East and historically in Northern Ireland, and the possibility of bringing them to justice. This is what Ekins and Marionneau recommend: Boris Johnson should, after winning the election and before the next deployment, derogate from the European Convention on Human Rights in that respect. Instead of "encouraging a culture of risk-aversion and compliance on the part of UK forces which will be deeply inimical to fighting prowess", the government should itself adopt a "policy

of principled non-compliance with judgments of the European Court of Human Rights that purport to extend the ECHR to military action abroad". Furthermore, the government should protect veterans of the Northern Ireland conflict from "abuse" in the courtroom, by victims of torture and violence, that is, who keep suing the perpetrators and shouldn't be allowed to any more.

Also in domestic policy, some have the impression that the Judicial Power Project's primary concern is the power of the executive to execute its will as unhindered as possible – even when it is the allegedly sovereign parliament that gets in its way. In April, Ekins and his colleague Stephen Laws had argued in the Sunday Times that if Parliament took control of the Brexit legislation, the government should deny that law the Queen's royal assent without which it could not come into force – a mere formality so far that would become a weapon in the conflict between government and parliament.

LSE professor Thomas Poole, under the title "The Executive Power Project", suggested in the London Review of Books that the so-called Judicial Power Project was in fact not exclusively about judicial power at all:

... its targets seemingly include any institutional check on executive power, political as much as legal. This is not, to my mind, a programme of constitutional conservatism in the spirit of Blackstone or Burke. It is an anarcho-conservatism more familiar from the work of counter-revolutionaries such as Carl Schmitt. Authoritarian rather than conservative in disposition, it treats established constitutional forms and norms as fungible, even disposable, and presses exceptional moments in the direction of a central authority delivering the 'will of the people'. For all the constitutional posturing, the object of the power so directed is to make it easier to realise a purified version of an imagined past.

Ekins resists the accusation of being of an authoritarian disposition and a Carl Schmitt apologist, and as for his personal sympathies, I have no reason not to believe him. But the parallels to Weimar also have caught the eye of others.

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David Dyzenhaus, for example, with whom I also spoke. The legal theorist from Toronto has written a [book](#) about the great dispute between Schmitt and Kelsen and Heller in the late 20s and early 30s, and indeed he wonders whether John Finnis, the Catholic scholar with the extensive student network and the sulphurous views on state and law and human rights, couldn't be regarded as a kind of Carl Schmitt of our age.

According to Dyzenhaus, in Schmitt's view only the executive, as opposed to the fragmented and divided parliament, was in a position to articulate the will of the people and guard the constitution during the Weimar period of crisis. From the point of view of the new right-wing critics of the judiciary, the same is true of the Brexit crisis in the UK: the people have spoken, but it takes a sovereign executive, freed from legal and parliamentary shackles, to articulate what it really said.

Thanks to Alyson Young, Paul Craig and Jack Simson Caird for further valuable input.

How could this happen?

But now to the constitutional events of the week. The EU Commission is still incomplete, thanks to the EU Parliament, which as of this writing still defies the execrable idea to entrust the Hungarian nominee of all people with the enlargement portfolio. The idea of giving Viktor Orbán the opportunity to run around in Turkey and the Western Balkans and to sell his man in Brussels' future powers to his business partners – that is indeed a plan that would have made Manfred Weber's eyes water. Let's see whether Parliament can ultimately withstand the pressure to get the Commission finally on track.

This week, together with Democracy Reporting International, we have launched an [online symposium](#) to examine the Von der Leyen Commission and its rule of law policy. [PÉTRA BARD](#) lists the many reasons there are to be suspicious in this regard. [ARMIN VON BOGDANDY](#) describes the risks and difficulties of a union of values that are no less than those of a monetary union. [JAKUB JARACZEWSKI](#) examines how the EU cooperates with the Council of Europe, the OSCE and the OECD on the rule of law. [ALEKSANDRA KUSTRA-ROGATKA](#) asks whether the EU's soft law instruments are of any use. And [MICHAEL MEYER-RESENDE](#) calls for an effort to improve journalistic coverage of the rule of law crises in the countries concerned.

Meanwhile, the indomitable [LAURENT PECH](#) has collected evidence of the shortcomings the current Article 7 proceedings against **Hungary** and **Poland** have brought to light about that procedure, and identifies six key weaknesses.

In **Norway**, dozens of people have been wrongly convicted of social fraud simply because the authorities were so utterly clueless about EU law. HANS PETTER GRAVER tells how this could happen.

Austria is the home of the poet Peter Handke, who is once again in trouble since he got the Nobel Prize because he loves the Serbs so much. Turns out the Serbs had issued him a Yugoslavian passport back in the days because of all the affection they had for him in return, and that might now become a legal problem: If you accept another nationality you risk automatically losing your Austrian one. LORIN WAGNER, however, clarifies that such a formal approach would be very un-Austrian indeed and that Handke and the Alpine republic probably won't have seen the last of each other anytime soon, not least for reasons of EU law (remember Rottmann? Wasn't he an Austrian, too?).

After the fourth election in just as many years the formation of a government in **Spain** still hasn't become any easier. Since half of Europe is in a not much different situation either, CARLO FUSARO believes it is time to seriously worry about the future of parliamentary democracy.

In **Bolivia**, President Evo Morales has stepped down after violent mass protests – or did he? Wasn't that rather a military coup? MARIANA VELASCO RIVERA ponders the difficulty in comparative constitutional law to call things by their name.

In **Chile**, the protests continue and the President is losing more and more support. JORGE CONTESSE contradicts Sergio Verdugo's argument of last week and sees very valid reasons for a constitutional renewal.

There are massive mass protests in **Iraq**, as well, but these seem to catch much less interest than others, in Germany at least. HANNAH BIRKENKÖTTER asks whether this might have something to do with the German government's hesitation to address human rights violations in Iraq.

MATTHIAS HARTWIG takes a critical look at the argumentation of the **German** Federal Constitutional Court as to why it does not want to review the deployment of the German Armed Forces in Syria.

Elsewhere

OLIVIER BEAUD opposes the rumour that the Federal Republic of **Germany** has annexed the GDR 30 years ago.

LEIV MARSTEINTREDET and ANDRÉS MALAMUD do not necessarily consider the *coup d'état* against Evo Morales in Bolivia to be a bad thing from the point of view of democracy.

SIMON DRUGDA describes the background of a Slovak legislation banning judges from standing in parliamentary elections.

That's all for this time. Have a good week! And if one thing or the other in this editorial made any sense to you at all, I would be immensely grateful if you'd consider supporting us a bit.

Max Steinbeis



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All the best, *Max Steinbeis*

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