

# Dreaming of the User Republic

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Maximilian Steinbeis Sa 8 Apr 2017

Dear Friends of Verfassungsblog,

Heiko Maas, the German Federal Minister of Justice, has brought his much-maligned Hate Speech Act through the federal cabinet this week, and across the board pretty much everyone seems to agree: This is really awful. This is about entrusting Mark Zuckerberg with the democratically legitimized state institutions' job of enforcing the law. This is about censorship. This is about stripping the social networks of all their free and colorful wildness and turning them into drab places where anonymous minions of unreachable corporate overlords stomp out every spark of controversy lest their employers run an ever so slight risk of being held liable.

I do not disagree. There are a lot of plausible awful scenarios of what could go wrong, as well as numerous [legal](#) problems with the act. I wonder, though, if there might also be a chance within the threat.

## Three sorts of fear

The so-called network enforcement act or *Netzwerkdurchsetzungsgesetz*, the name already one single vicious sibilant, is supposed to force Facebook, Twitter and YouTube to act on user complaints about hate postings and, if found unlawful, delete them. This intent alone, regardless how well or badly it will be realized, causes fear in at least three dimensions. There is political correctness – the right-wing libertarian fear. There is the fear of state responsibilities being outsourced to private actors unaccountable to anyone and legitimized by no-one – the etatist fear. And there is the fear of hamfisted bureaucratic attempts to regulate and domesticate the anarchic, unruly online discourse – the left-wing libertarian fear.

The right-wing libertarian fear is fed to some extent by the fact that freedom of speech in German constitutional doctrine is a less-than-clear-cut matter. What you can say without running into legal trouble appears to depend on all sorts of sensitivities, your right to express yourself to exist only in balance with the offense taken by others. One man's freely speaking his mind, it seems, is another man's hate speech and you would hardly even trust a judge determining the difference, let alone a lowly Facebook clerk. That is not entirely false. And yet: in recent months, the Federal Constitutional Court has delivered a whole number of chamber decisions that do a great deal to sharpen the contours of the right to freedom of speech.

Last Wednesday, the very day the Cabinet adopted the Hate Speech Act, the Karlsruhe court once again lectured a criminal court about the difference between merely offensive speech and so-called *Schmähkritik* – abusive speech that does not enjoy the protection of freedom of speech in the first place, before all proportionality tests – in the case of a right-wing extremist who had called a Green Party member of parliament a Nazi *Gauleiter*. Does that count as *Schmähkritik*? No. A slander like that is, deeply offensive as it may be, and stupid on top of it, still something that can be argued about. Freedom of speech is protected because no liberal democracy can thrive without the possibility of a rational argument about all sorts of matters. [Hate speech – personal abuse, racial slurs, all speech meant to exclude the spoken-to from rational discourse – for the same reason, is not.](#)

The etatist and the left-wing libertarian fears are not so easily dismissed either: Facebook, Twitter and YouTube are to the public sphere what shopping malls are to the market square. These forums are run by private companies as their property. To give them quasi-judicial authority over the way users make use of them, against their own will even, appears to be a deeply perverted thing to do for a republic. And yet, speaking of shopping malls – once again, the Federal Constitutional Court in the ground-breaking *Fraport* decision six years ago might have shown the way how to deal with that kind of situation: A corporate airport owner, property rights notwithstanding, may have to

tolerate that people will not just shop and board planes on his premises but occasionally hold political protests there, too.

Social networks are far from being republics to their users, in any conceivable way. But in the long run, so I hope, they will be. They will constitutionalize, not today, not tomorrow, but at some point. We have barely started out on this way, but as we do the legislator is not necessarily our enemy but also our ally (whom we have to keep an eye on, of course, to keep him from making nonsense). Heiko Maas's Hate Speech Act may be imperfect in many respects, deficient, perhaps even partly counterproductive, but it will sit like a thorn in the flesh of the corporate social network owners and will leave them no rest. This is a chance.

## Filibusters and Dual States

A community that has deconstitutionalized for quite some time and with terrifying success is the Republic of **Hungary** (or correct: Hungary, as the country now officially calls itself according to Orbán's constitution of 2012, which is no coincidence). RÉNATA UITZ has [examined two legislative texts from Orbán's government](#), one already adopted about the alleged regulation of foreign-funded universities and the other a leaked draft on the alleged regulation of foreign-funded NGOs. Why alleged? Because, according to Uitz, these laws on closer inspection are in fact not abstract laws but concrete measures aimed against concrete political opponents – in the case of the university law the CEU, whose Comparative Constitutionalism program is headed by Uitz. Should you consider this a mere technicality, you might want to read up a bit on the interesting issue of the [Dual State](#).

In the **US** Trump's nominee Neil Gorsuch has been confirmed as Associate Justice of the US Supreme Court on Friday. Do do so, the Republican majority had to abolish the so-called filibuster to keep the Democrats from blocking their candidate. Both the process and the result may add further to the perception that Supreme Court Justice is a political office more than a judicial one. I have talked at length with MATTIAS KUMM [about the implications and ramifications of this whole affair](#) – highly recommended.

At the behest of President Erdogan, **Turkey** may be about to scrap its constitution and turn itself into an autocracy by means of a plebiscite in which Germany's 1.5 million Turks are called upon by Erdogan to cast their votes, and, what is more, in favor of him. This gives Germany reason to ask itself whether the introduction of dual citizenship some years ago was perhaps less of a no-brainer than many of us thought. Two Americans with intimate knowledge of Germany take controversial positions on Verfassungsblog: PETER SPIRO, since 2013 a German-American dual citizen and one of the most prominent experts in the field, sees [dual citizenship as an opportunity to win the Turkish diaspora for the cause of democracy](#), while DAVID ABRAHAM, a lawyer, historian and currently a visiting professor in Jena, points to the fact that in most countries [the diaspora is the most reactionary and nationalist part of the citizenship](#), for whichever reason. His recommendation: "the quicker Turkish Germans leave Turkish politics behind, the sooner they will be successful and liberal Germans of Turkish culture and ethnicity."

**Russia**, after the annexation of the Crimean, is facing sanctions of the EU, and this week the CJEU has published its judgment on their legality of the *Rosneft* case. PETER VAN ELSUWEGE has [taken a closer look at the judgment](#) and emphasizes that the Court clarified the scope of its jurisdiction with respect to foreign and security policy acts and made sure that the EU system of judicial protection fully applies in relation to sanctions targeted against natural and legal persons.

## Elsewhere

MANUEL MÜLLER gives an [overview of the many feeble gestures of the EU towards Hungary and Poland over the years](#),

PIET EECKHOUT [considers the exit from Brexit to be legally feasible](#),

FARRAH AHMED rejects the idea that [religious freedom is mainly about protection of autonomy, with consequences](#)

for the right to proselytize and other constellations,

LEA RAIBLE and LEAH TRUEBLOOD clarify that [Switzerland is by no means a model of direct democracy](#),

ANTHONY SFEZ finds the [roots of the Spanish difficulties to form a majority government in the Franco era](#),

MARKO MILANOVIC can think of [no remotely plausible argument how Trump's air strike in Syria after the poison gas massacre of Idlib could be justified under international law](#), neither can MARTY LEDERMAN under [US constitutional law](#), whereas HAROLD KOH's [imagination, given the enormity of the crime, suffices for the task](#), and,

as to the filibuster against Gorsuch and its abolition in the US Senate, here are some notable comments by ABBE GLUCK, JONATHAN ADLER and [ERIC POSNER](#).

Please note that next week there will be no newsletter as I will be celebrating Easter in Sicily. Happy holidays to all of you!

All best, and take care,

Max Steinbeis

P.S.: If you read German, you might want to switch to the German version of this newsletter. You can do so at any time by clicking [here](#).

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