

Project Waterproof

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Maximilian Steinbeis Sa 27 Jan 2018

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Dear Friends of Verfassungsblog,

If, for a moment and to calm our nerves, we assume that another Grand Coalition in Germany is really on the way (which is not what I dream about at night, but, well, you know...): I'd have a proposal to make for the upcoming negotiations. After all, the exploratory talks so far haven't yielded all that much to look forward to, with exception of the Europe chapter. Without overestimating my influence – perhaps a modest suggestion how to make that current 19. legislative period a noteworthy episode in German history comes in handy right now.

The proposal would be this: Set up an expert commission that identifies ways how to waterproof the *Grundgesetz* for coming tides of authoritarian legalism. In Poland, Hungary and elsewhere, there are plenty of tangible examples of what an authoritarian parliamentary majority can come up with in order to zombify the institutions of the liberal democratic constitutional state and set them up against their own purpose of existence. Take these examples and ask to which extent a corresponding plan could be pulled off within the German legal and constitutional framework. And where you find that, yes, damn it, that might actually work – design a constitutional patch that might make that at least a little more difficult.

In my last [editorial](#) I have listed some of the damage a determined authoritarian majority could do to the Federal Constitutional Court – the guardian of the constitution which would probably top the list of institutional obstacles an authoritarian majority would seek to remove. There are, however, a number of other issues where plenty of lessons could be learned from the experience in Poland, Hungary, etc. What about the process of appointment for judges? How storm-proof are the media supervision and public broadcasting systems? What kind of abuse and manipulation could one come up with regarding electoral law?

It is quite possible that, all things considered, the constitution has already reached the optimum level of protection, depending on what issue you are talking about – but to consider that a foregone conclusion seems naïve to me. Make no mistake, my proposal is not about stuffing all sorts of details into the constitution. I am well aware that overconstitutionalisation can be harmful in its own way and lead to legal and political petrification. That is a valid argument and would have to be taken into account in the balance with the aspect of averting danger.

What the Constitution regulates itself and what it leaves to the ordinary legislator is codified experience – back in 1949, when the *Grundgesetz* was enacted, above all experience from the fate of the Weimar Constitution. Today it is the fate of the Polish, Hungarian, Russian, South African and Indian constitutions that is at the disposal of the German constitutional legislator to learn from. I see no reason to expect anything else from him but to make use

of that wealth of experience. These are not just hypothetical horror scenarios. This is actually happening, with one authoritarian regime eagerly learning from the successes and defeats of the other.

Such a project – let’s call it “Project Waterproof” – would require two-thirds majorities in both chambers of Parliament. Unlike the previous Grand Coalition, the upcoming one hasn’t that sort of majority in the *Bundestag* any more. But that’s no harm at all, on the contrary. Constitutional changes shouldn’t be decided along the lines of the government/opposition distinction either way, no matter how large the majority the governing coalition commands. That is what the supermajority requirement is there for, after all. The not-so-grand-anymore Grand Coalition should seek a cross-party majority in both chambers, which would also force the new far-right AfD party to make their position clear. I’d certainly be interested to see what that would be.

On Thursday, Susanne Baer, a well-respected judge at the First Senate of the Federal Constitutional Court and constitutional law professor at the Humboldt University, delivered a big speech on Europe in Berlin. The attacks on judicial independence in Hungary, Poland, Romania, and generally the widespread contempt for institutions in so many parts of the world are not a “problem of the others”, she said, but rather an “attack on *our* legal order”, on “*our* human rights’ protection”. Specific context matters, of course, “those who do comparative law know that”. But the independence of the judiciary is a “red line” beyond which looms the “unlimited rule of an essentialist ,We”. And that threat often becomes reality “frighteningly quick”.

My question what she’d think of “Project Waterproof” was answered rather cautiously by Justice Baer. She hadn’t given that question much thought yet, she said. The Federal Republic of Germany, however, had a tradition of amending its constitution rather sparingly. At the moment, she didn’t see any urgent need given the solid majority that would currently thwart any attempt at manipulation.

It seems to me that the opposite conclusion is way more plausible, though. True, there is such a solid majority – still. Which makes it all the more important to use it while it lasts. The liberal democratic constitutional state must bolster up its immune system while it still in healthy enough shape to do so. Or, to change the metaphor: Now, with a comparatively fair blue sky arching over most of Germany, is the time to identify the spots where it will rain through the roof once the weather turns bad. And to fix them as long as conditions permit. Because once the storm is there – it will be too late.

Virtue, sex and wealth

ADAM BODNAR is the current Commissioner for Human Rights of the Republic of **Poland**, an office with constitutional status, and the last top-ranking state official to fight for the rule of law – a man whose courage and tenacity I admire enormously. He tells the story of Stanisław Zabłocki, a Supreme Court judge who is to be removed from office by the so-called “judicial reform”. The virtue of judicial independence, embodied by Judge Zabłocki, will live on, Bodnar hopes – in the memory of free men and genuine judges in Poland.

In **Turkey**, recent events prove that after a rigorous purge of the judiciary, even a comparatively steadfast constitutional court can achieve only that much. The Turkish Constitutional Court had mustered the courage to protect right holders against state power – but the criminal judges whose decisions were reviewed simply refuse to obey. [BASAK CALI](#) traces this clash between legalism and constitutionalism in detail, and [TOLGA SIRIN](#) shows how the case fits into Turkish constitutional law doctrine and how the conflict between constitutional and criminal justice could end.

In **India**, the Supreme Court's stern position on the matter of decriminalisation of gay sex seems to be somewhat loosening up, as [GOVIND MANOHARAN](#) reports: In 2013, the apex court had harshly rejected the attempt by a lower court to overcome this residue of the colonial era in the Penal Code. But now, however, a new lawsuit seems to give the Supreme Court an opportunity to change its mind.

According to a recent study, wealth in **Germany** is more unequally distributed than ever before. This is not seen as a problem of constitutional law as long as the welfare state principle in the Basic Law only refers to personal freedom and not equality. [ALEXANDER THIELE](#) calls for this understanding to be reconsidered (in German).

In the **European Union**, the European Court of Justice has once again painted the freedom of establishment of companies in an extremely business-friendly hue and confirmed that it includes the right to “regime shopping” in order to get rid of the co-determination of employees on the supervisory board. [MARTIN HÖPNER](#) is unconvinced (in German).

Also in **Germany**, there is much political controversy on the matter of family reunification for Syrians and other refugees with subsidiary protection. [BENEDIKT BEHLERT](#) shows that this question is covered by a lot more international law than many participating in that debate seem to think (in German).

Elsewhere

[ELSPETH GUILD](#) and [STEVE PEERS](#) report on a new CJEU decision on the question of when a third-country national with a residence permit in one member state can be deported by another.

[JEAN PHILIPPE DEROSIER](#) gives an overview of the institutional reforms in **France** in 2018 and promises a year full of “passionate constitutional discussions” (in French).

Under the title “Immunity is not Impunity”, [MIGUEL ÁNGEL PRESNO LINERA](#) explains how parliamentary immunity as guaranteed by the **Spanish** Constitution relates to the fact that many secessionist Catalan MPs can be and are prosecuted and incarcerated (in Spanish).

Over at I-CONnect, there is an extremely noteworthy symposium on the ongoing crisis at the **Slovak** Constitutional Court, with contributions from [SIMON DRUGDA](#) and [MAREK DOMIN](#) and further contributions by [KAMIL BARANÍK](#) and [TOMÁS LALÍK](#) to follow. We are expecting a post by [MICHAL OVÁDEK](#) on the same topic next week.

MEG RUSSELL predicts how the **UK** House of Lords will handle the “European Union (Withdrawal) Bill”.

PIERRE DE VOS thinks rather little of President Jacob Zuma’s announcement to set up a commission in **South Africa** to investigate state capture.

LEONID SIROTA criticises the government’s decision in **Canada** to fund NGO summer jobs only if they attest their loyalty to, among other things, women’s reproduction rights.

Next week, BIANCA SELEJAN GUTAN will bring us up to date on the situation of the judiciary in **Romania**. The post-socialist governing party PDS, corrupt to the core, is about to neutralize the judiciary as an impediment to their intent to line their pockets – a development no less alarming than that in Poland and Hungary. The way the European S&D party keeps wriggling about with regard to its debauched Romanian comrades is no less disgraceful than the European People’s Party unflinching fealty towards its own Viktor Orbán and one of the many bitter aspects of this current chapter of European constitutional history.

Anyway, let that not discourage us from keeping up the good fight. Have a fine and productive week, all best and take care!

Max Steinbeis

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