An American in the Antique Store

Jannis Lennartz 2023-06-06T11:19:31

Last week, Adrian Vermeule gave a lecture at a conference at Berlin's Catholic Academy which brought together a diverse set of participants. Titled "Non Nova, Sed Nove: The Common Good in Constitutional Law", the catholic convert gave a glimpse of his common good constitutionalism with a focus, appropriate to the place, on what he draws on to concretize his American ideas about the common good: the European tradition of civil law, developed by the Romans, preserved by the See of Rome and brought to fruition by legal scholars from Baldus to Jhering. The latin phrase "Non Nova, Sed Nove" ("not a new thing, but in a new way") is typically applied to new interpretations of the bible – a text that is notoriously difficult to interpret but at least has widely accepted boundaries. The European legal tradition of the *ius commune*, that Vermeule uses to re-read US law, is more openly woven. His lecture, framed by comments from Corine Pelluchon and Joseph H.H. Weiler, wasn't really tying the threads closer. Vermeule reminds of an American tourist rummaging in the antique stores of Europe for things that will make an impression at home. Meanwhile, the locals are raising their eyebrows at his choices.

The common good in constitutional law

Vermeule exposed his idea around the common good to the public in an 2020 article in the Atlantic. Its title „Beyond Originalism" fits well with the conference's own title, "Beyond Liberalism". Last year, the article was followed by a book with an alternative to originalism in its name: Common Good Constitutionalism. In it, Vermeule calls on conservative jurists to turn away from originalism. In his view, this dominant 'conservative' method of constitutional interpretation, which aims to interpret the constitution how it would have been understood at the time it was written, does not correspond to the Framer's understanding of law, leads to results that contradict their ideas and is not suitable for preparing the ground for the right policies. The constitution is not about the protection of freedom as an end in itself but the common good. The protection of individual freedom as well as the expression of collective freedom are subordinate to it. Vermeule outlines a program that advocates for judicial restraint, a strong executive and significant rollback of individual freedoms, especially the First Amendment. His statements at least make it clear that he is not only concerned with a different description of the modern constitutional state. After all, it is not obligatory to place courts and individual rights at the center of such a description, as is often done. This perspective is the one which privileges lawyers over politicians – no wonder lawyers lean towards it. But Vermeule wants more than a different description of the status quo. He strives to change it. To quote his 2020 article: "The hostile environment that made originalism a useful rhetorical and political expedient is now gone. (…) Assured of this, conservatives ought to turn their attention to developing new and more robust alternatives (…) It is now possible to imagine a substantive moral constitutionalism (…) one can imagine an illiberal legalism that is not 'conservative' at all, insofar as standard conservatism is

content to play defensively within the procedural rules of the liberal order." Instead, he aspires to a "candid willingness to 'legislate morality'". His position has led to considerable criticism in the United States and accusations that Vermeule is working to dismantle key achievements of the second half of the 20th century. In Berlin, he avoided the candid statements of his article.

Vermeule's praise of the common good is an attempt to bring legal method and political aspiration together. This is something that liberals have long succeeded in doing. The common good is a mirror image of an expansive fundamental rights jurisprudence. As fundamental rights were suitable as legal carriers of certain moral convictions and political aspirations, the common good allows for conservative ideas to be framed as already preserved in the law of the land. Whereas originalism in its emphasis on original understanding represents a typically conservative, in most cases delaying and restraining methodology, Vermeule's approach promises more room to maneuver.

His approach seems to offer conservative jurists an alternative to the sectarian disputes inside the originalist's camp. The opening of the argumentative field to the European tradition pleases a European reader. But the persuasiveness of his – in his view – old but recently recovered variant of constitutionalism depends on the concretization of the common good. With regard to examples, in his Berlin lecture, Vermeule largely limited himself to references to the common good or general welfare in a variety of legal documents and the rather general statement that legal interpretation has traditionally been understood as being concerned with the common good. The actual concretisation of the concept is to be achieved by harking back to the civil tradition.

Finding American arguments in European legal history

Learning Latin was not entirely in vain: the language opens the gate to the civil tradition, in which Vermeule wants to anchor an application of law freed from too strong textual ties. Vermeule does not argue for a direct adoption of old ideas, but for a consideration of the principles present in them. But what does the civil tradition or the *ius commune* mean?

Ius commune refers to the modern interpretation of Roman law bundled in the *Corpus iuris civilis* (a collection of fundamental works in Roman jurisprudence), which, together with canon law and local traditions, characterized European jurisprudence for centuries and was also of considerable importance for legal practice. Until the Bürgerliches Gesetzbuch (the German civil code) came into force in Germany in 1900, German lawyers resorted to presentations of Roman law such as Windscheid's "Lehrbuch des Pandektenrecht". But the new Civil Code itself was heavily influenced by the *ius commune* and therefore did not cut the Roman roots of German private law. While lawyers in England and the United States use Latin primarily to show off their erudition, on the continent, Roman law never really left –

although its place for example in the German curriculum today is but a small one. In Italy and Switzerland, it has retained more prominence in legal education.

For lawyers who are aware of the roman roots of their everyday practice, it is strange to hear a scholar of US administrative law describe himself as someone who stands in the tradition of the ius civile. Not because the distinction between common law and *ius civile* is regularly brought up as a major distinction within the Western legal tradition, but because *ius civile* or *ius commune* is emphatically private law. And not only that: In the German private law scholarship of the nineteenth century, the romanists were the advocates of private autonomy, which was criticized by the germanists in particular as being one-sidedly fixated on individual interests, at the expense of collective concerns. Ironically, what Vermeule wants to use today to strengthen the common good in the United States was perceived as a threat to the common good in the 19th century. Little water can be drawn from this well for an orientation of public law toward the common good rather than toward individual rights. Vermeule is not concerned with a concrete legal framework, but with a large reservoir of arguments and references with which one can feed one's own ideas. Aquinas, the glossators, Spanish Theories of Natural Law, Cardinal Newman – all without the will to form this multitude of voices into a coherent sequence. There is no compelling connection between Christian natural law and Roman civil law.

In Vermeule's selection, one omission is interesting: There *is* a tradition of Roman *public* law in the European Tradition. No other than Theodor Mommsen, the greatest classicists of the 19th century and winner of the 1902 Nobel Prize in Literature wrote a systematic treatise on "Roman Constitutional Law" ("Römisches Staatsrecht") which uses the concept of the office to show the citizens of the German Empire the constitutional law of a republic. Mommsen's Rome, often referred to by the Weimar classics of constitutional law like Carl Schmitt or Gerhard Leibholz, gave its office holders *imperium* and the Senate its famous *auctoritas*, but always in a framework of constitutional balance, guaranteed by elections and the duplication of offices. Mommsen's Rome functioned and still functions as an example of a republic without a monolithic executive, then constructed around the Prussian king and German emperor. Today, they might be useful to argue against a president at the top of an unbound executive. Roman conceptions of public law in the European tradition serve as examples that plurality doesn't mean fracture. If one ignores this element, one ends up with a public law not for praetors, but for praetorians.
