We cannot outsource the protection of democracy to the judiciary and politicians.

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In Favour of Civilian Constitutional Protection

Should the AfD be banned or should Björn Höcke be stripped of certain fundamental rights? There is growing support at a political level for a party ban, an impressive 1.6 million people are calling for the forfeiture of fundamental rights in a petition by the organization Compact. Discussions about the use of these repressive instruments of defensive democracy are important. However, this is also accompanied by the false expectation that courts and authorities will solve the threat to the rule of law and democracy posed by growing authoritarian-populist forces for us.

But political party banning proceedings take years. And with regard to the forfeiture of fundamental rights, there is a lot that is legally unclear and controversial – as the constitutional law expert Florian Meinel recently explained in the “Philosophie Magazin”. In any case, there will be no AfD ban or forfeiture of fundamental rights before the elections in Thuringia, Saxony, and Brandenburg this autumn. In the meantime, an active civil society is needed. And even if an AfD party ban procedure is successful in a few years’ time, civil society will remain a crucial institution as a critical supervisory body. In other words: one way or another, it depends on them.

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Relying on the law, the constitution and state institutions is problematic for two reasons: firstly, it is not possible to build a watertight constitution. A constitution does not simply have gaps that can be closed with additional legal norms. Rather, our constitution relies in many places on voluntary consent and consensus in order to fulfil its function of guaranteeing political plurality and fundamental freedoms.Proposed solutions that rely on the law in order to protect the law are usually themselves exposed to the risk of abuse. The problem is therefore not solved by amending the law, but at best shifted. Even the most well thought-out constitution is not immune to abuse.

Certain areas of tension arising from our constitutional order are unavoidable. For example, the complex interplay between the majority and the minority. A liberal democracy thrives on the fact that different interests compete with each other and must be balanced. Unilaterally resolving these tensions in the hope of a more watertight constitution cannot be the goal but would in turn be authoritarian.

On the other hand, the specific instruments of defensive democracy provided by the legal system are not unproblematic. Bans on political parties or associations, constitutional loyalty clauses and other mechanisms are designed to protect the “free and democratic basic order”. However, this term is vague, loaded with different values and therefore open to abuse. Historically, the instruments of defensive democracy have primarily been used

against left-wing groups, such as at the “Radicaldecision” of 1972, which primarily affected members of the German Communist Party (Deutsche Kommunistische Partei) and the K-groups. Other examples also show that the instruments were not effective on the other side, in recognizing and preventing right-wing dangers.

Furthermore, as repressive instruments, they themselves tend to reduce democracy. There is a danger that society will relieve itself of responsibility by delegating tasks to the courts and authorities. This can lead to the critical public shirking its responsibility – and not looking at it in the crucial moments. They stop anticipating and being vigilant. Moreover, repressive constitutional responses at best suppress the problem of growing anti-liberal actors, but they cannot solve it. A court ruling does not simply wipe away the causes of the AfD’s rise. Court decisions can therefore solve some things, but not everything.

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Anticipation instead of repression

That's why civil defence is key. It depends on anticipation. Anticipation – unlike prevention – does not mean preventing a crisis but preparing for a certain situation in good time. This is also effective when dealing with anti-liberal actors such as Viktor Orbán or the PiS party. This is because such actors change the rules of liberal democracy in a formally lawful manner in order to appropriate electoral law, the judiciary or the media and thus neutralise them as institutions. They typically proceed step by step and do not try to do everything at once. An informed civil society, state officials and democratic parties that recognise an authoritarian-populist move when it is made are essential for preventing such developments. The media then report on it, civil society organisations mobilise and neighbours exchange views. The critical public takes to the streets and protests. Education and awareness can thus prevent the liberal constitutional state from being quietly and insidiously undermined. Anticipation also guarantees that the eye is sharpened for the tactics that undermine the rule of law, which are the main issue – instead of focusing too much on individual parties or politicians and thus losing sight of other threats. A resilient democracy is therefore first and foremost a prepared democracy.

The preparatory work for an anticipatory civil society includes analyses such as those currently being carried out by the Thuringia project of the Verfassungsblog. The aim is to run through scenarios in a kind of test run that have not yet occurred but could occur with political and legal plausibility in the event of AfD election successes.
Apart from a few exceptions, law and the constitution have so far rarely been interpreted in a forward-looking manner. But the Thuringia project shows that it can work. Concrete threats and weak points for the democratic constitutional state have already been identified and the academic debate on previously unresolved issues has been driven forward. Recently, for example, it was possible to understand what happens when an authoritarian-populist interior minister instructs the President of the Office for the Protection of the Constitution to take action against certain opposition alliances. Telling these stories in detail can help civil society to grasp the significance and scope of a certain step and identify the decisive institutions, people and moments – so that it can stand by its side.

The most vivid example of this anticipatory interaction between legal science and civil society can be found in Israel. There, thousands of people took to the streets against the so-called judicial reform. They had recognised that the seemingly technical question of exactly how far a court's scope of review extends, which was one of the issues at stake in the reform, was of concern to everyone. Such changes to the law and the constitution, it seems, have nothing to do with our individual lives – until they do. And by then it is usually too late.

In Israel, numerous legal scholars, such as Tamar Hostovsky-Brandes, have invited people into their homes to explain to them what is behind the Israeli government's plans. In doing so, they were able to draw on experiences from Poland and Hungary. Unlike there, civil society awareness of illiberal moves in Israel has led to the government's plans coming

under social pressure. At the beginning of the year, the Supreme Court overturned the law. With its vociferous protest, Israeli civil society backed the Supreme Court in legitimising its decision.

This is how civilian constitutional protection works. In order to prevent the strengthening of illiberal actors and the implementation of their plans, civil society in Germany must finally network, inform itself and take to the streets at key points – as hundreds of thousands are now doing.

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Verfassungsblog
ON MATTERS CONSTITUTIONAL

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This Week on Verfassungsblog…

In what is probably our longest long read ever, MATHIAS HONG argues in favour of using the instruments of militant democracy against those state chapters of the German AfD party that are most probably unconstitutional. Part I is dedicated to the forfeiture of fundamental rights under Art. 18 of the Basic Law and explains why the prominent party functionaries of radical state chapters are meet the requirements. Part II takes a closer look at the requirements to the party's radical state chapters and highlights the role of constitutional law scholars who interpret the term "people" in the Basic Law in an ethnic-exclusionary sense. The concluding Part III explains why allegiance to the constitution entails an obligation to file applications for forfeiture and party bans. It also requires public officials – and constitutional law scholars in particular – to take a stronger stance against the threats to liberal democracy.

Speaking of threats to liberal democracy: KONRAD DUDEN argues that the German Federal Constitutional Court should be better protected. In addition to constitutionalisation, he brings procedural protection into play, as exists in France or Spain in the form of organic laws.

That Germany is not a unique case in Europe is also emphasised by HANNAH BECK and MARIE MÜLLER-ELMAU in their response to Friedhelm Hufen's article in the FAZ. The two research assistants in the Thuringia project criticise Hufen for missing the point of the debate, namely that authoritarian populists in Poland, Hungary, Italy and Turkey are not restructuring liberal democracy against the constitution, but with it.

Nils Kohlmeier and Andreas Gutmann assessed the sustainability chapter in the EU's new association and free trade agreement with the Mercosur states as lacking in participation rights and the protection of indigenous groups. Their analysis also takes a critical look at the prevailing concept of sustainability and lithium mining as the dark side of the so-called 'European Green Deal'.

In Switzerland, the Federal Council started formal negotiations with the EU to conclude a Framework Agreement 2.0, introducing modified monitoring and novel judicial mechanisms. CARL BAUDENBACHER critically sees the attempt as a triple B approach: in substance, it consists of unsuccessful bricolage, the foundations were laid by bullshit, and bustle is supposedly of the essence.

There was much puzzling and wrangling over what would ultimately be included in the EU's Artificial Intelligence Act. Some things were toned down, but many good ideas remained. PAUL FRIEDL and GUSTAVO GIL GASIOLA provide a comprehensive and critical overview of the three main areas covered by the now (almost) final version of the AI Act: High Risk Systems, General Purpose AIs, and the newly established governance system.

In France, the government promulgated and published the new French Immigration Act, a day after the Conseil Constitutionelle declared a whopping 35 articles unconstitutional on procedural grounds. It thereby constitutes the most repressive adopted Act since 1945 and heightens a migration restrictive dynamic, argues MARIE-LAURE BASILIEN-GAINCHE.

Earlier in January, the Advocate General delivered his opinions in two infringement proceedings against the Czech Republic and Poland. NORA VISSERS highlights the potential these proceedings bear to allow the Court to clarify the core of the EU value of democracy which has so far remained largely unexplored.

Following allegations that several members of its Palestinian area staff participated in the October 7th atrocities, UNRWA preemptively dismissed them. This was politically necessary, given that 17 donor states have suspended their contributions, posing an existential threat to UNRWA, the largest provider of humanitarian assistance in Gaza. However, as OMAR YOUSEF SHEHABI explains, it also demonstrates the sui generis and subordinated nature of UNRWA's Palestinian area staff which has the same obligations but not the same rights than other UN staff.

If social workers make use of their right to refuse to testify, they usually have to pay a fine. However, they also face criminal prosecution under Sections 258 and 13 StGB. KEREM DYKAST shows why this practice violates the ne bis in idem principle and Art. 14 para. 7 of the ICCPR.

ALICE BERTRAM calls on the German government to recognise the signs of the times. It should finally implement the EU directive, which offers a ten-day entitlement to paternity leave. Moreover, she argues that the Basic Law guarantees a "subsistence minimum for time".

Verfassungsblog Debate: The Russian Constitution at 30

The Russian Constitution has just turned 30 years old. But do law, constitution, and courts still play a role in a deeply authoritarian and aggressive regime? What has gone wrong in the history of Russian constitutionalism? These questions are not only of domestic relevance: For Soviet dissident and Nobel Peace Prize laureate Andrei Sakharov, peace went hand in hand with human rights and progress. A new blog debate, in collaboration with the German Sakharov Society, is seeking answers and sheds light on the legal tools of Russian authoritarianism. In the first three debate contributions, VLADIMIR GEL'MAN shows how the 1993 constitutional crisis paved the way for violence, while CAROLINE VON GALL contemplates the regime adaptation of Russia's judicial elites, and MARIANNA MURAVYEVA discusses the role of women's rights in the Russian constitution and reality.

Verfassungsblog Debate: Ruling without the Power to Govern – Authoritarian Populism and Parliamentary Obstruction

PAUL GLAUBEN continues the second week of the online debate by analysing parliamentary control rights in terms of their suitability for obstruction. MATTHIAS LUKAN outlines the Austrian experience with parliamentary obstruction and analyses more and less successful attempts to curb it. From a political science perspective, ANNA-SOPHIE HEINZE analyses how the AfD abuses parliamentary instruments and exploits parliament as a stage. Speaking of staging grounds: AZIZ Z. HUQ and TOM GINSBURG focus on the subnational level when comparing the Republican Party with the AfD. In the final contribution to the debate, ANITA NISSEN explores the extra-parliamentary influence of minority positions using the example of Quran desecration acts in Denmark, Sweden, Norway and the Netherlands.

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