

When Might Makes Right: A New Legal Philosophy

by Elke Fimmen

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In recent weeks, the shift in the CDU/CSU [Christian Democratic Union/Christian Social Union] from a party with a commitment to the Christian image of man, to a radical, neo-conservative mob, has come out in the open. The legal thinking that lies behind this shift is well-illustrated by a book by Germany's former President, Roman Herzog. Its title is *Wie der Ruck gelingt (Making the Shift)*, and it has been serialized, since Aug. 31, in that neo-liberal daily, the *Frankfurter Allgemeine Zeitung*.

As Federal President, Herzog gave the official signal in 1997 with his so-called "Ruck" or "Shift It!" speech, in which he said that the "hoary old" structures in Germany should be swept away and be replaced by the allegedly "changed realities" of a "globalized" world. From Friedrich von Savigny (1779-1861) to the Nazis' "Lawyer Laureate" Carl Schmitt, German legal scholars have attempted to spin a philosophy of law and of the State such as would serve to legitimize the Powers That Be, and the "Zeitgeist."

In his latest little opus, Herzog expresses his distaste for those Germans who refuse to watch their living standard be wrecked, and instead insist that the general-welfare state (*Sozialstaat*) is essential. They are still the majority, and they vote for governments that pledge to uphold it. Herzog claims that Germans "shy away from all risk" because that there are too many older people relative to the general population. The elderly, he writes, are "in a word, less prepared and less willing to admit of reforms, at this point in time when the need for ever-swifter, ever-more decisive changes in social life is manifest." Were youth in the majority, he says, the problem could be dealt with at a stroke.



Roman Herzog

What options are there then, to "right the balance" in the relationship, so that "society become sufficiently flexible"? One solution might be to take away the right to vote from older people, or else introduce "family voting rights."¹ Herzog does acknowledge that this might amount to "deviating" from a fundamental constitutional right, viz., that the entire citizenry enjoy a general, and equal, right to vote.

According to Herzog, there is another option to that same end: One could cut back so drastically on the prerogatives of a government elected by the majority, that whatever said government might decide would not make the slightest difference. As Herzog writes: "One could approach the problem the other way round, and cut back on the area where the democratic principle of the majority takes effect, substantially reducing, relative to those it now enjoys, the State's prerogatives vis-à-vis society. Thereupon, many decisions—as has been the case for the economy—will be taken solely by those who actively intervene and bear the brunt of the economic risks entailed by shaping society." The essential demand of "political liberals" is of course: "As much of the State as one needs, but as much of Freedom (or Society) as can be." That slogan, he writes, should be uttered "perhaps for the last time, as a political program"! How delightfully frank of the Honorable Mr. Herzog to acknowledge that this would be the very last time that one would need to put forward such a "political program" at all. Because as he sees it, elections will, in the future, have become quite superfluous.

The potential for a political and social system to survive, according to Herzog, is the greatest when it rests upon "simple principles" that can be "understood, believed in, and followed by the masses." Herzog argues in favor of a State undergoing something like "biological evolution," where the ability to survive is crucial.

Let us, therefore, turn to examine just where Herzog acquired that outlook. The former President, it so happens, was the closest associate of Prof. Theodor Maunz, a constitutional lawyer and authoritative commentator on the Constitution, who nonetheless has become rather controversial since 1993. From 1933 to 1945, Maunz taught at the University at Freiburg, where he wielded considerable influence, and notably busied himself with the legal position of the police in the Third Reich. Alongside Carl Schmitt and other legal scholars, he was amongst those who strove, through their writings, to lend the Reich legitimacy. Despite heavy protest from the French Occupation Forces, precisely on account of those war-time activities, as early as 1948 we find him back on the job, indeed, sitting on the Committee that drafted the German Constitution. From 1952 until he became Professor Emeritus, Maunz was professor at the Ludwig-Maximilian University at Munich. He became Minister of Culture for Bavaria (1957-

1. This amazing proposal, which has been put forward by CDU and SPD politicians, would allow parents with young children to cast two votes—one for themselves, and one for each under-age child in the family!

64), but, owing to his activities on behalf of the Third Reich, was finally compelled to resign.

Until the very day of his death in 1993, he continued to be one of the country's most prominent constitutional scholars, and in that capacity worked closely with Roman Herzog, who, with others such as [Bavarian governor] Edmund Stoiber, praised and honored him to the skies. (Paul Kirchhof, Angela Merkel's proposed finance minister, also studied law at Freiburg and Munich, and graduated from the latter university in 1968.) How embarrassing then that it emerged only after his death that Theodor Maunz had been in the very inner circle of advisors around Dr. Gerhard Frey, who today leads the neo-Nazi National Democratic Party-linked far-right German People's Union (DVU), and publishes the right-wing paper *Nationalzeitung*. And it further emerged that Maunz had been writing—though anonymously—for the latter newspaper!

Building New Structures

Since 2003, Roman Herzog has led the "Konvent für Deutschland," a Committee that sees its task as fostering "the ability to reform," and that intends to have Germany's system of political decision-making overseen, on an ongoing basis, by so-called "experts" independent of elected government. The Konvent numbers amongst its acolytes people like the business consultant Roland Berger, ex-chairman of the BDI (Association of German Industry), Olaf Henkel, Prof. Manfred Pohl, responsible for cultural issues and chairman of Deutsche Bank's historical institute. And Otto, Count von Lambsdorff of the Free Democratic Party, the Trilateral Commission's chairman for Europe. Since the Bretton Woods system was destroyed in 1971, the Trilaterals have been greatly concerned to prevent orderly reorganization of the world financial system, while intervening to smooth the path for authoritarian regimes, and destroying living standards worldwide.

Otto Lambsdorff is also amongst the leading figures of the Mount Pelerin society, and an outspoken opponent of all state intervention in the public interest. Very recently, he declared, alongside CDU ideologue Meinhard Miegel and former Bundesbank Chairman Hans Tietmeyer, that former Chancellor Konrad Adenauer's general-welfare laws were the root of our problem today. It was Tietmeyer, Kirchhof, and Herzog who, in the year 2000, tidied up the more obscure corners of the CDU's finances.

Their idea is to wreck the "old" structures, and hack out a path to the new. Amongst their purported achievements: the CDU's candidate for Chancellor, Angela Merkel. On June 16, 2005, Miss Merkel, speaking on the occasion of the CDU's 60th anniversary, stated that Germans "are not entitled to democracy and the social market economy to all eternity."

On Sept. 18, our citizens will, one hopes, sharply beg to differ.