A Hymn to the Rechtsstaat

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Now thank we all our God: The threat has passed. The proud German *Rechtsstaat*, dear heavens, had fallen among thieves in the bucolic Swabian town of Ellwangen but soon after was rescued by a hundred balaclavaed policemen who charged into the local refugee accommodation centre to apprehend a Togolese migrant whose arrest and deportation had been prevented three days before by a few dozens of his comrades in misfortune, and to shackle and incapacitate the hands that – as our Home Secretary Horst Seehofer so aptly put it – had "punched the face of the law-abiding population". The poor fellow is safely in custody now and will most likely be shipped off to where he came from in the most swift and efficient fashion, and so are a number of his defenders who have fallen afoul of the law by defending him and thereby have foregone whatever slight chance they might have had to legalize their status. The insurgence is quashed, the rule of law is restored, and security officials, conservative MPs and FAZ editorialists fold their hands, lower their heads, open their mouths, to intone, as the organ booms, their hymns of gratitude.

The rule of law, as you know, is most dear to me, too, of course. I am not quite prepared to sing along, though, and that has to do with some questions going around in my head. *Rechtsstaat*… the power of the state is constrained by law, right? The state may do as is allowed, not as it can. Unlike, for example, the state of Hungary in the case of refugee distribution, and the state of Poland in the case of its so-called constitutional court "reform"…

I have no reason to believe that in the Ellwangen case the police and the judiciary in Baden-Württemberg haven't complied with the law. But that doesn't seem to be the point here. It's rather the compliance of those African refugees… They did not want to accept what had been lawfully decided, namely that one of them was to be deported to Italy on whose shores he once had entered the continent and was therefore obliged to seek asylum by law…

Italy… Those black fellows who sell those pesky luminous-parachute-flinging thingies on the Piazza del Duomo to tourists – why are they all in Italy? Never seen one of those here, I believe. Plenty of tourists in Berlin, too. But no parachute flinging. No black peddlers at all, unless you count the drug dealers at Görlitzer Park. I wonder why that is. Must have to do with the rule of law…

And why are 150 Africans resisting a deportation in Ellwangen a threat to the rule of law?

I know, you pious security officials, conservative MPs and FAZ editorialists, I know: You can't reduce the rule of law to mere law abidance by the state. No *Rechtsstaat* remains a *Rechtsstaat* if it allows its citizens to simply disregard what has been lawfully decided. Of course not. The rule of law is entrusted as a *res publica* to the respect and care of all citizens; we are no longer mere subjects to authority after all. And if the police, when it arrives to enforce the law, is smirkingly recommended to run for their own safety, then the rule of law is done for.

That's all very well. It's just… pardon me, but aren't we talking about people who are to be deported? Who are told that they can stuff their participation in our German *res publica*? To whom explicitly nothing is entrusted for respect and care, for lack of a so-called "prospect of permanent residence"? Expecting law-abidance, but denying rights – does that fit together?

Of course it does, chants the choir of security officials, conservative MPs, FAZ editorialists. The law also applies to them as long as they walk on German soil. It's *our* state. *Our* rule. *Our* law. They're free to leave if they don't like it, aren't they?

Alright, I guess. But, so… is that what the rule of law is about? The rule of law is what enables us in here to keep those out there at bay? Or is the rule of law

rather what demands that we in here, instead of keeping those out there at bay, keep their rights in mind? Or…

These are all terribly difficult questions. But how is a guy supposed to concentrate with that constant hymn singing? Excuse me, I'd rather get out of these narrow pews, stretch my legs a little, sorry, sorry, and tiptoe to the door, open it creakily and step outside, out into the sunny, fragrant spring, into beautiful May, into the birdsong. Where I can breathe.

What counts and what doesn't

For a not insignificant part of the conservative spectrum of opinion, the rule of law in **Germany** has already been a thing of the past since the so-called "opening of the borders" of 2015, because ever since, according to an apparently ineradicable myth diligently nourished by many a distinguished law professor, the Federal Republic has found itself in a state of "continued breach of law". This myth is seemingly confirmed by a look into the Basic Law which says that there is no right to asylum for those who enter Germany via one of the EU member states surrounding it (Article 16a (2)). However, many people, those distinguished law professors included, are simply oblivious of the fact that the asylum rules in the Basic Law have been largely supplanted by European law for quite some time now, where proof for a "continued breach of law" is a lot harder to come by, since it regulates national asylum policies in a way that not only determines where a refugee can not find asylum, but also where he can. That is why DANIEL THYM's extensive and thorough dismantling of the myth of the "continued breach of law" (German) on the occasion of the disturbingly successful right-wing "*Erklärung 2018*" is a veritable piece of enlightenment that will hopefully be of great service to all who take up the burden of debating migration law with populists.

Confidence in the rule of law has also suffered by the fact that the **European** refugee system has been in such a terrible state even before 2015. A reform idea that appeals to many Member State governments is to establish protection ghettos in third countries outside the EU. ANNA LÜBBE clarifies what the Geneva Convention on Refugees has to say about this.

On the subject of human rights violations abroad, the **US** Supreme Court has issued an important ruling this week that leaves little room for compensation lawsuits against foreign companies before US courts in such cases. RUTI TEITEL reports and comments.

The **Danish** Institute for Human Rights was strongly criticised last week by Helga Molbaek-Steensig for its role in drafting the Copenhagen Declaration on the further development of the European Convention on Human Rights. Institute Director JONAS CHRISTOFFERSEN and Chairman DORTHE ELISE SVINDT respond.

The **German** Federal Constitutional Court has ruled on the question whether football clubs must respect the right to equal treatment if they impose stadium bans on fans. MATTHIAS RUFFERT applauds Karlsruhe for having sought and found a reasonable solution for a specific case, whereas MICHAEL GRÜNBERGER sees in the decision far more than just that but a "very considerable shift in emphasis away from traditional German thinking in categories of freedom towards the (also) constitutionally required sensitization of private law to unequal possibilities of freedom in the environment of law" (both German).

The **British** House of Lords has again incurred the wrath of the Brexiteer press with an attempt to make the conclusion of a withdrawal agreement contingent on parliamentary approval. TOBIAS LOCK analyses what this means and what prospects of success it has.

In **Portugal**, the Constitutional Court has ruled on surrogate motherhood and sperm donation, which interests TERESA VIOLANTE not only in terms of what it struck down but also of what it didn't.

Lebanon, after years of gridlock, finally elects a new parliament this Sunday. JAMAL EL-ZEIN sheds light on the political and historical background (German).

Elsewhere

JULIAN KRÜPER dismantles the motion of the far-right AfD in the **German** Bundestag to raise the presence of MPs at plenary debates and concludes: "The

AfD is not interested in strengthening the plenary or in its actual work, but only in its simulation" (German).

MANUEL MÜLLER is frustrated by the **EU** Council's success in diluting the reform of the EP electoral law (German).

CLAUDIO DI MAIO examines the consequences of the Maltese – and thereby the Union – citizenship for sale (Italian).

JAN SMITS calls on **Dutch** legal scholars to become more visible.

ORIOL BARTOMEUS shows that the **Catalan** nation is hardly as unified and uniform as one might expect (Spanish).

JULIANO ZAIDEN BENVINDO attempts to make constitutionalist sense of the cataclysmic events in **Brazil** over the last five years.

ASANGA WELIKALA reports on the sad state of the constitutional reform in **Sri Lanka** initiated by the government of national unity in 2015.

Many exciting things are already planned for next week on Verfassungsblog. In cooperation with the Asser Institute in The Hague, we will host an online symposium we are quite excited about, on the role and position of constitutional courts in counter-terrorism cases. All the best, and a successful week to you!

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