Verfassungsblog
ON MATTERS CONSTITUTIONAL

Bavarian Curses

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Dear Friends of Verfassungsblog,

Bavarians are not known for their demureness in the face of enmity. They take great pride in the range of expletives at their disposal to fire at anyone brazen enough to cross them, particularly if that person is one of those insufferably priggish, prudish, pedantic "Prussians" (i.e. non-bavarian Germans). A very common way to vent one's anger is to exclaim: *Ja, wo samma denn?* (where are we?), the implication being, of course, that the behaviour in question is, to a proper Bavarian, utterly alien: One might even think one is in some other country where such conduct may be condoned and considered acceptable, as opposed to our well-ordered, god-fearing Bavarian *Heimat* where it most emphatically is not! This is what a Bavarian means when she growls *Ja, wo samma denn?*, and the ill-mannered Prussian should better watch out carefully to not further instigate her indignation.

Horst Seehofer, the German Home Secretary and chairman of the Bavarian Christian-Social Union, was quoted this week with having asked the "where are we" question in a newspaper interview. What he referred to was the possibility of being sacked by the Chancellor for insubordination. The head of government is constitutionally entitled to determine the directives of governmental action (Art. 65 of the Basic Law), including the interpretation of EU asylum law. So, if Angela Merkel, in line with most asylum law experts, finds the unilateral rejection of asylum seekers at the German border unlawful, and if Horst Seehofer gives an order to reject refugees in direct defiance of her explicit directive, one might be tempted to think that this appears like a rather solid reason to relieve him of his duties. Not so Seehofer. He claims that the very reason of existence of a Home Secretary is to manhandle both asylum seekers and EU asylum law in the most robust manner in order to keep the citizens of well-ordered, god-fearing Bavaria safe and comfortable. Firing him for that? *Wo samma denn?*

So, where the hell are we? We are in Germany, where the Federal Government and the Home Secretary are bound by the law under Article 20 paragraph III of the *Grundgesetz*, a constitutional provision which contributes decisively to my feeling safe and comfortable in my home country.

Where are we? We are in the Schengen area, where, in principle, we travel from one country to another without border controls. I was in Vienna last weekend, but had accidentally left my ID at home and was without any valid document at all – no one noticed, no one cared. At the German-Austrian border, there are so-called "controls" which basically consist of the motorway from Innsbruck, Salzburg and Linz becoming single-lane and the border police peering through the windscreen to see if someone looks suspicious. But if you don't, you can cross the border back and forth as often as you wish without anyone checking whether or not you have a right to enter our country beforehand. We don't do that anymore here in the Schengen area. *Wo samma denn?*

Where are we? We are in the European Union, where we have binding rules on what happens if someone claims asylum. We have the Dublin Regulation, which ensures that one thing won't happen: that we simply push the fellow back across the border to be someone else's problem and no longer our's. Seehofer insists in doing just that, especially since the neighbouring country Austria then would do the same, and Italy anyway, because as Seehofer's Italian counterpart and Bavarian-Austrian axis partner Matteo Salvini puts it so elegantly: "Italy only helps the Italians". *Ja, Himmel Herrgott Zackrament! Wo samma denn?*

++++++++*A Note from EuConst*++++++++++++

The editorial board of the European Constitutional Law Review will hold a colloquium on 5 October 2018, to

take place in Amsterdam. Researchers are invited to send in contributions on topical issues in the field of constitutional law in Europe. Young scholars are especially encouraged to submit their proposals. Please find the call for papers under www.Cambridge.org/euconst/cfp.

++++++++++*Paid Advertisement*++++++++++

Geography in Europe is changing rapidly in these days, more violently and disruptively than ever since 1990. This weekend, one part of the member states gathers for a "mini-summit", a breach of law in the view of another part, in order to prepare the saving of the Union at the actual summit next week, a goal which seems to become both more urgent and more difficult to attain by the minute. At the same time, CJEU Advocate General Tanchev will deliver his opinion in the *Celmer* case which will make clear what it means for the Union – one way or another – that the independence of the judiciary in Poland can no longer be trusted. From the Baltic Sea to Sicily, authoritarian villains rule, and in my own country there are people in government who seem to have nothing more urgent to do than to follow suit. Where the hell are we anyway? I know the answer less and less. The continent is tearing apart. Does the part I'm standing on still hold? What if not? Where to flee then?

Can't be done in a legal way

On Verfassungsblog this week, just as in the one before, we have made tremendous efforts to push back the "rule of lawlessness" (Horst Seehofer) with everything we have: PAULINE ENDRES DE OLIVEIRA and DANA SCHMALZ show that an asylum seeker who has entered Germany via the open borders cannot simply be expedited to Austria or anywhere else even if he is subject to an entry ban after a rejected asylum application. CONSTANTIN HRUSCHKA traces the case law of the European Court of Justice since 2016, according to which a refusal at the border without conducting a Dublin procedure would be clearly illegal. STEFAN TALMON, on the other hand, contradicts Dana Schmalz's argument from the previous week that rejections would violate the Geneva Refugee Convention. MATHIAS HONG, in his turn, points out that our own supreme German constitution prohibits rejections insofar as the refugees would be threatened with inhumane treatment. MICHAEL SCHLIKKER points out that Schengen still applies legally and is binding and the controls at the Austrian border are in breach of that law for lack of an emergency situation. KLAUS FERDINAND GÄRDITZ explains how the Chancellor's authority to guide her Ministers by means of government directives works legally, and does not conceal the political limitations of this tool.



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The spy novel stunt performed by the Federal Police to catch an alleged murderer and rapist in Iraq and bring him back to justice in Germany has caused quite a stir, and so has the article HENDRIK PEKÁREK and KILIAN WEGNER which raises quite a few legal doubts about that spectacular affair.

Surprisingly little attention was attracted by the news that the German states are considering a return to the 1970s practice of subjecting applicants for the judicial service to a routine background check about their loyalty to the constitution. CHRISTIANE SCHMALTZ considers this measure disproportionate and foolish.

Law students from the Universities of Erlangen, Munich and Würzburg have filed a popular suit at the Bavarian constitutional court against the super-tough new police law in Bavaria. TIM SCHILDEROTH describes this amazing law clinic achievement.

EVA KOCHER examines the decision of the German Federal Constitutional Court to correct the Federal Labour Court in its handling of chain temporary employment contracts.

PETER SCHAAR, the former German Federal Commissioner for Data Protection, informed ANNA VON NOTZ in an interview about the consequences of the recent ECJ ruling on Facebook pages, which concerns not just us and our 6500 Facebook followers, but also the general question of whether and how Facebook is still a legally safe way to distribute media (all of the above German).

On Sunday, **Turkey** will vote and we'll know whether it is following its President Erdogan into

authoritarianism or – despite all Erdogan's political and institutional machinations – the *Raïs* has miscalculated in the end. Which is all but inconceivable, according to SERKAN KÖYBASI.

Italy has a government by now, to the dismay of many, but the shock of the potential constitutional crisis during the formation of the government still runs deep. MASSIMO FICHERA returns to his reflections on what could have legitimized President Mattarella to reject a Eurosceptic Minister of Finance and Economy.

In **Lebanon**, crisis is a permanent state of politics. After years of gridlock, a new parliament was finally elected in May. ISSAM SLEIMAN, President of the Lebanese Constitutional Council, describes his ideas on constitutional reform in an interview with ROBERT POLL.

Finally, our glossator FABIAN STEINHAUER: This week he recommends jaywalking every now and then just to stay in practice in terms or moral and legal compliance (German).

Elsewhere

DAVID HUG is constitutionally unconvinced by the **German** coalition plans to help themselves to additional millions of state party funding (German).

LENA RIEMER investigates Italy's joint liability for human rights violations by the Libyan coastguard against refugees in the Mediterranean.

ANDERS HENRIKSEN reports on a court decision in Denmark to award compensation claims against the Danish government to a group of Iraqis for the role of Danish troops in their arrest and mistreatment in 2004.

ELINA LEMAIRE welcomes the French government's plan to remove from the Constitution the lifetime membership of former *Présidents de la République* in the Constitutional Council (French).

DÁNIEL G. SZÁBO reports on the new laws in Hungary to criminalize refugee support NGOs and establish special administrative courts.

ANNA VENTOURATOU analyzes the agreement between Greece and Macedonia to settle their decades-long name dispute.

ILYA SOMIN considers the US government policy to separate children of migrants from their parents unjustifiable.

MARK GRABER reflects on the similarities between Mitch McConnell, the Republican majority leader in the US Senate, and Hitler's Minister of Economics Hjalmar Schacht.

LEONID SIROTA is appalled by the decision of the Canadian Supreme Court to allow law societies to deny membership to the graduates of law schools which demand religious chastity vows from their students.

Next week, the global constitutionalism community will gather in Hong Kong for the International Society of Public Law conference. I won't be there, much to my regret. Too busy at home. Let's see where we meet next year. And in what mood.

All the best to you, and a successful week! To all of us!

Max Steinbeis

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