Verfassungsblog
ON MATTERS CONSTITUTIONAL

Into the Open

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When the German parliament elects officials, whether its the chancellor, court members or its own speaker, it usually does so by secret ballot. In the solemn quiet of the election booth, alone with herself and unencumbered by overbearing allies and superiors, the MP, representing the German people in its entirety, places her x wherever her conscience commands her to. Free is her mandate, and that includes the freedom to settle her political bills with whomever she is called to vote for or against, in the most elegant and discreet manner and without having to expend any political capital at all.

I wonder what is so terribly democratic about this. I do so on the occasion of the latest failed attempt to elect a candidate of the far-right AfD as a deputy speaker of the German Bundestag. According to the parliamentary rules of procedure, every parliamentary group has a right to have one of their own elected as deputy speaker. In the first round a year ago, the candidate proposed by the AfD repeatedly flunked the vote because of his markedly islamophobe record. Now, the AfD produced a seemingly much more viable candidate, a rather non-descript lawyer from Hesse named Mariana Harder-Kühnel with expectably conservative views on reproductive rights and the "natural" gender order but otherwise conspicuous by her inconspicuousness only.

It is interesting to see how synchronously the positions of the AfD and the rest of the *Bundestag* shifted over the past year. In the beginning, the non-AfD position was: we do accept the claim of the AfD for the deputy speaker position but not their candidate. Send us someone we can vote for in good faith and we will! This, however, was decidedly not to the liking of the AfD which preferred to draw out its victimization role as long as possible and therefore chose to not name any candidate at all for the time being.

Since then, the AfD has significantly radicalized, which became particularly visible at the protests in the Saxon town of Chemnitz where its top personnel marched side by side with a bunch of hard-boiled right-wing extremists. From the point of view of many SPD, Left and Green MPs, this was a game changer: it won't do for the AfD anymore to just send someone who seems personally acceptable. The AfD as such is what contaminates its candidates. Only those who expressly distance themselves from right-wing extremists are acceptable. The AfD, in their turn, delightedly recognized and seized its chance and swiftly put up that lady from Hesse, naturally and explicitly without any sort of distancing from anything at all. They are not stupid, those fellows.

The public sphere

In this situation, you have only bad choices as a non-AfD MP. Which is what the AfD intended right from the start, I suppose. I wonder, though, if this kind of double bind could not be met in a different manner: by going public.

You can watch the vote here. Deputy Speaker Thomas Oppermann of the SPD calls the agenda item, whereupon you see MPs swarming hither and thither for roughly 20 minutes, votes are cast, election is closed, the result will be announced later, next agenda item. It's hard to imagine a process more mechanical and unpolitical and less inspiring.

Why not giving Ms Harder-Kühnel an opportunity to explain her position on right-wing extremism and the Honourable Members to grill her about it? Why is the decision on yes/no/abstention not turned into a matter for debate? Why am I, as a citizen, kept in the dark which of my parliamentary representatives voted for Mrs Harder-Kühnel and which against? And for what reasons, respectively?

The more I think about it the less sense the common justification for the secret ballot in parliamentary elections seems to make. As if freedom of the mandate meant that an MP mustn't be asked to justify her decisions. As if not being subject to instruction was equivalent to saying it's none of anybody's business. As if the mandate was a piece of private property the exclusive and deliberate use of which is protected as it's owner's right.

The German fear of discussing and making political HR decisions out in the open for the public to see has something weirdly pre-democratic about it. And we'd better watch out. In Hungary and Poland we can study what happens when the majority in Parliament falls into the wrong hands and what tremendous leeway such technical, finicky and easily overlooked things as parliamentary rules of procedure offer to aspiring autocrats to immunise their rule against political competition. (Our Constitutional Resilience workshop the other day has produced a wealth of insights about this, more to come soon.) If one sad day we get into that situation ourselves we better have robust parliamentary conventions in place that actually secure each group its place on the speaker's bench, and solid rules that guarantee transparency and make sure that the choice of officials and other important things are publicly justified.

Thanks to Anna von Notz for valuable input!

Ireland, Iceland, Islam

There is currently a case pending before the European Court of Human Rights in Strasbourg that may have what it takes to turn the European asylum system upside down. It is about the issue of embassy asylum, which the European Court of Justice recently dealt with, too, and behind it the question of whether the ECHR Member States' responsibility for the rights of those in need of protection actually ends at their territorial border. DANA SCHMALZ illuminates what is at stake.

The **German** *Bundestag* is currently discussing the status of Georgia, Algeria, Morocco and Tunisia as safe countries of origin in order to speed up the deportation there through limited legal protection. However, according to CONSTANTIN HRUSCHKA's analysis, the ECJ could put a spoke in the wheel.

Another hearing in the **German** *Bundestag* focused on the implementation of the ruling of the Federal Constitutional Court on the Third Option in Civil Status Law. The government's draft had met with much criticism. HA MI LE and BENEDICT ERTELT report on how the hearing went.

In **Ireland**, Judge Donelly had referred the Polish EU arrest warrant against the alleged drug trafficker Artur Celmer to the ECJ, giving it the opportunity to clarify the effects of the crumbling judicial independence in Poland on the principle of mutual trust. Now Judge Donelly had to decide whether Mr Celmer could in fact be extradited to Poland according to the test the ECJ demanded. CILLIAN BRACKEN reports how the Judge got out of that pickle.

Every once in a while we look back in melancholy on the constitutional experiment in **Iceland** 2011, which I had reported on here at the time. The attempt to have the people write their own constitution is still unfinished because the parliamentary majority wants no part of that threatening piece of popular sovereignty, but the unbending THORVALDUR GYLFASON does not give in and insists that the political injustices that once motivated the experiment still persist.

So Islam does belong to **Germany** after all, according to Home Secretary Horst Seehofer who only rather recently had come to a decidedly different conclusion. Well, the most reliable fact about Seehofer is that he will not resign from office no matter how much of a fool he makes of himself, so that is that. Anyway, Seehofer has launched the fourth round of the Islam Conference this week which gives HANS MICHAEL HEINIG the opportunity to make a proposal as to how to promote the self-organisation of Islamic communities in and of Germany.

Malaysia has not ratified the UN International Convention on the Elimination of All Forms of Racial Discrimination. PIN LEAN LAU explains what this has to do with the constitutionally privileged status of ethnic Malays.

A few weeks ago, the European Court of Justice condemned **France** for the jurisdiction of the Conseil d'État as an infringement of France's treaty obligations – the first time that judicial disregard of European law has been sanctioned in this way. ALBRECHT WENDENBURG and JÖRG MÜLLER-SEILS analyse the impact of the decision on the position of the Commission and on the intra-judicial dialogue in the EU.

Elsewhere

FLORIS TAN interprets the judgment of *Navalny* v. **Russia** as a token of the European Court of Human Rights ' determination to effectively face down autocracy.

SARAH PROGIN-THEUERKAUF, in her turn, praises the ECJ for standing tall in protection of refugees in the *Ayubi* ruling.

MANUEL MÜLLER examines the chances of the European far right to expand its influence via a large parliamentary group in the European Parliament.

JULIEN FOUCHET fights for the post-Brexit continuation of the **British** vote in European elections.

JOSEPH WEILER doubts whether the EU would even take back the **British** if the Brexit referendum were revised.

ANNA LORENZETTI analyses the ruling of the **Italian** Constitutional Court on common surnames in civil partnerships.

CHRIS PIGGOTT-McKELLAR describes the pitfalls of anchoring a fracking ban in the constitution of the Australian state of **Victoria**.

SIMON DRUGDA explains what the **Slovak** Constitutional Court will encounter in the upcoming replacement of nine of its judges.

That's it for this week. All the best,
Max Steinbeis

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