Our People

Maximilian Steinbeis

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It's over, the airlift from Kabul has been terminated. The mission had become too dangerous for *our* Bundeswehr, and indeed yesterday IS suicide bombers killed not *our* German soldiers, but 12 American ones and a horrible number of Afghan civilians. How many of them were *ours*, were people who worked *for us* and *with us* during the 20 years that we helped defend *our* freedom in the Hindu Kush? What does *us* even mean here? What kind of category is that now? As opposed to whom? Defined by whom? And by what right?

"Our work," writes Heiko Maas, nice guy and Social Democrat and – for the time being – Minister of Foreign Affairs of the Federal Republic of Germany, is by no means done with the departure of the last Bundeswehr aircraft. It will continue, he promises, for whatever it's worth, "until all those for whom we bear responsibility in Afghanistan are safe". What does "we" actually mean here? What does "safety" mean here? What does "responsibility" mean here?

Responsibility is a term that lawyers know a thing or two about. It's about competency, imputability, liability. A connection, a bond, is created between what someone does and what happens: You can't just walk away from that. You can't just say: oh, none of my concern, thank God! Expectations have arisen and are attributed to you, and will be enforced if necessary.

The Federal Republic of Germany has committed itself to take responsibility for the fate of its so-called Afghan local forces. The legal means by which it claims to do this is § 22 p. 2 Residence Act:

> *A residence permit is to be issued if the Federal Ministry of the Interior, for Construction and Home Affairs or the body designated by it has, to safeguard the political interests of the Federal Republic of Germany, declared admission. (Translation by me)*

This is the legal basis for the so-called "*Ortskräfteverfahren*", in which local employees of the Bundeswehr or other government agencies in Afghanistan can obtain entry visas and residency permits for Germany. It is not the Foreign Office, as one might think, that decides who gets in. It is the Ministry of the Interior who "declares admission". Or not.

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I•CON *International Journal of Constitutional Law*

The International Journal of Constitutional Law (ICON) invites abstracts for the symposium "Covid Stories: Stories of the impact of Covid 19 on inequalities in academia and beyond". The symposium will assemble short personal reflections that create a conversation about effects of the pandemic in academia and in the society more broadly. More details can be found here.

Please send your abstracts of around 500 words to iconassociateeditor@nyu.edu before 1 October 2021.

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Foreign policy, as is well known, is the domain of the executive, traditionally weakly bound by law, if at all, and weakly controlled by parliament. That is not what this is, though. This is domestic policy. This is (border) police. However, the only standard that the law binds the executive discretion to is the "safeguarding of the political interests of the Federal Republic of Germany".

2015 must not be repeated now, is the mantra of conservatives and/or home secretaries in Germany and Europe now. 2015 was the year of the alleged "opening of the borders" for refugees mostly from Syria and Iraq, or rather, and more correctly, of the omission to close the borders because that would have been in breach of European law. The core constitutional argument of its critics was that this was a decision too essential for

country and democracy to be made solely at the discretion of the executive: Parliament should have taken responsibility for this step. Now I wonder: Do any of these critics perhaps have anything to say about the executive's unfettered discretion in § 22 p. 2 of the Residence Act?

Sorting machines

Yesterday in Berlin, sociologist Steffen Mau presented his new book about the "Reinvention of the Border in the 21st Century." *Sortiermaschinen* is what he calls these borders: sorting machines. In his view, the narrative of globalization in recent decades is no longer solely a story of opening borders, but also and above all as one of closing them. In 1989, there were twelve fortified wall borders in the world. Today, there are 77. Who is let through where is becoming more and more selective. Those who have the right passport (Germans!) hardly feel those borders at all, sail through almost everywhere care- and visa-free, are welcome, at ease and at home pretty much everywhere (unless there's terrorists, of course). Those who have the wrong passport (Afghans!), on the other hand, are literally locked into their country. It is not Afghan policy that causes this (not even under the Taliban). It is the policy of distant countries with great leverage. Such countries as the Federal Republic of Germany. Afghan airlines that let visa-less Afghans board their planes in Kabul and fly them to Germany so they can ask for asylum there are violating German law which implements EU requirements. It is the German / European border that is defended in the Hindu Kush. And I am curious to learn whether the responsibility assumed by Foreign Secretary Maas on behalf of the German government for the safety of the *Ortskräfte* stuck in Afghanistan will result in a changed view of the escape helpers a.k.a. human traffickers who may effectively be the best hope for these desperate people to save themselves now.

§ 22 p. 2 of the Residence Act is not an expression of the beauty of the German humanitarian soul, but an integral part of this border regime. Responsibility is not taken for Afghans, but for sorting, selecting and, if necessary, keeping Afghans out. From the perspective of the border police and all those who think along their categories, this is only natural: borders separate the inside from the outside, with the border police inside and Afghans, whether local or not, outside, and the matter at stake being whether to let those outside in. No responsibility is owed to those outside, at least not in legal terms. It's purely a matter of political interest.

2015 was the year in which responsibility for the misery in Syria, Iraq and other war zones and for the dysfunctionality of its own border regime finally caught up with Europe. This must not be repeated? It does repeat every day, and of course it may, should and will continue to do so. Afghans are coming. They force us Germans and Europeans to face, reflect and politicize our *Sortiermaschinen* border regimes. It is not nature that runs these sorting machines. It is us. They are our's. Our choice. We could also choose not to. Our responsibility.

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gfr Recht und Politik im Dialog

64. Bitburger Gespräche: Der Klimawandel als Herausforderung für das Recht

Der Klimawandel verkörpert eine epochale Herausforderung – nicht nur für die Bewahrung der biologischen Vielfalt, für Politikgestaltung, Wirtschaftswachstum und gesellschaftliche Entwicklung, sondern gerade auch für das Recht.

Auf den 64. Bitburger Gesprächen soll diskutiert werden, wie sichergestellt werden kann, dass hinreichend strenge Maßnahmen beschlossen werden, um die Folgen der Erderwärmung in der Zukunft abzuschwächen.

Mehr Informationen gibt es hier.

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We've had, in my view, some extremely interesting posts this week on these issues. I'll get to that in a

moment. Before, let me make a few announcements on our own behalf:

Podcast 2.0

We have used the summer break to push a project that has been close to our hearts for a long time. Last year, in the midst of the first lockdown, we had launched the "Corona Constitutional" podcast: brief, intense expert interviews, a fairly impromptu affair that was great fun and generated quite a lot of response, but also clearly brought us to our limits.

Here's what we're up to: We want to relaunch the podcast – its future name: "VerfassungsPod." Every month, we want to get on the trail of a particular constitutionally hot topic and investigate what it's all about. We will interview academics and experts who really know what is going on and what to make of it, and we won't rest until we've gathered the knowledge needed to understand the whole matter. We will then present what we have found out in a podcast episode.

Central to this is the role played by our listeners. We will discuss with them in advance which questions we should specifically pursue and where exactly the hot topics lie in the respective area. Access to this forum is limited to those who support the podcast with a special Steady package of 5 € per month.

As a solid basis for this project, our task is to get 1000 additional Steady members who book this package. This whole thing comes with considerable expenditures if done properly. We have, among other things, created a new editorial position: JOCHEN SCHLENK, who has been a long-standing member of our team as a student assistant editor, has agreed to be in charge of this project, which makes us very happy.



If you become a member of our VerfassungsPod community, you can expect exclusive benefits: you can help shape the questions we ask. If you want to dig even deeper, you can listen to the uncut conversations we had with our expert interview partners for the episode. And of course, like all our Steady members, you'll get our famous mug (⇒) sent to you for free (EU only).

So: this way, please.

We aim to have the first Constitutional Pod episode ready in a month, just before the federal election, and the starting signal is… now! You can vote on which topic area we should tackle. The options are

a) Afghanistan

b) "Deutsche Wohnen Enteignen" (the highly controversial Berlin referendum to expropriate corporate residencial housing behemoths which will take place at the same time as the Bundestag elections), and

c) the election, party and parliamentary law issues surrounding the Bundestag election itself.

To pick your choice, click here.

This whole thing, to state the obvious, is still an experiment. If things don't work as expected, we will adjust. Your input is more than welcome, of course.

Two more news on our own account: Our editorial team continues to grow. MAXIM BÖNNEMANN, who was with us over the summer as a *Rechtsreferendar* on *Wahlstation*, was so much fun to work with that he

could be convinced to stay with us as an editor focusing on online symposia. LUISE BUBLITZ has also joined our team as an editor, replacing the fabulous Luise Quaritsch, who had been lured away from us to Brussels.

This week on Verfassungsblog

How the German Federal **Ministry of the Interior** works and thinks and operates has been thoroughly researched by social anthropologist WERNER SCHIFFAUER in recent years, and he describes in detail and without mincing words why the *Ortskräfte* debacle and the decisive role the ministry played in it did not surprise him in the least. Very worthwhile reading!

The shortcomings of the German ***Ortskräfteverfahren*** based on § 22 S. 2 of the Residence Act are examined by NERGES AZIZI, MOJIB RAHMAN ATAL, and STEFAN SALOMON, who conclude that there is a human rights responsibility of the Federal Republic to protect, which entitles all Afghans and not only the so-called *Ortskräfte* to an entry visa. NERGES AZIZI takes this line of thought even further in an additional post, showing how legal arguments for regular entry generally risk reproducing exclusive logics and constraints of the European migration and border regime.

How this European border regime works in 2021 can currently be seen in the most appalling way at the **Polish-Belarusian border**. There, 32 Afghans are stuck in no-man's land, and the only responsibility that Poland and the EU accept is that of not having to take responsibility. DIMITRY VLADIMIROVICH KOCHENOV and BARBARA GRABOWSKA-MOROZ make no secret of their horror.

The fact that the German government was caught so unprepared by the fall of Kabul also has to do with the failure of the secret services. Against this background, the chairman of the Parliamentary Control Commission, Roderich Kiesewetter, has called for a "**Federal Security Council**." KLAUS FERDINAND GÄRDITZ examines the constitutional framework for this proposal.

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All best,
the Verfassungsblog team

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The **Slovenian** government refuses to fulfill its duties in filling Slovenian posts for the European Public Prosecutor's Office. JURE VIDMAR sheds light on how the blockade came about, its legal background, and why it will not be resolved anytime soon.

In **Bosnia and Herzegovina**, the High Commissioner has imposed a law criminalizing genocide denial and glorification of war criminals. CARNA PISTAN stresses that this is the first concrete attempt to end the culture of denial with regard to the crimes of the civil war in the 1990s, but does not believe that it can contribute much to reconciliation.

Ahead of the German federal election, there continues to be a plethora of interesting individual cases involving electoral, party and parliamentary law. One of them concerns the deputy state chairman of the far-right **AfD** in North Rhine-Westphalia, who is facing a ban from office because of his self-promotion as the "friendly face of Nazism," but can't be removed from the election list. LAURA JUNG explains why.

There is no **duty to be vaccinated** against Covid-19 in Germany so far, and it would be rather unpopular if there were. MATTHIAS WACHTER discusses why compulsory vaccination, understood as a solidarity-based contribution to the protection of freedom-enabling institutions, would nevertheless be perfectly compatible with a liberal understanding of the state.

Do **negative interest rates** violate the fundamental right to property? Former constitutional judge and would-be federal finance minister Paul Kirchhof has answered this question in the affirmative in an expert opinion for a German bank. JOACHIM WIELAND is rather unconvinced.

That's all for now. All the best to you and have a good week, stay safe and healthy and get vaccinated if you aren't already so that your children don't have to.

Max Steinbeis

ABOUT THE AUTHOR

Maximilian Steinbeis
Maximilian Steinbeis is a legal journalist and writer and the founder and director of Verfassungsblog.

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