Verfassungsblog
ON MATTERS CONSTITUTIONAL

Competition and Algorithm

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In the US, elections (the same as court proceedings, for that matter) are first of all competitions: it's about who wins. Like a race, a boxing match or a football game, all start as equals, and the procedure is about sorting them into winners and losers. That is all that matters, and if, in the heat of the battle, there is a bit of foul play unnoticed by the referee here and there, that is too bad but usually no reason to question the result.

In Germany, on the other hand, elections are more like algorithms: they generate from millions of individual citizens' votes a specific output, as described in Article 20 (2) of the *Grundgesetz*: All state authority is derived from the people and shall be exercised by it through elections and other votes. The output is not so much who wins, but the composition of the next *Bundestag*. And if this computation is flawed, that can definitely be a reason to question the result.

Of course, elections, in both cases, are both. In the USA, to state the obvious, the election generates from millions of individual votes a specific allocation of power, too, and one half of the population has been claiming with growing enthusiasm, in good or bad faith, that the other half keeps manipulating this algorithm in their favour in order to do just that as an alleged counter-reaction in the most egregious way themselves. German elections, in their turn, are expected to produce winners and losers, too, which is why a large part of the public finds it entirely plausible that the Social Democrats with slightly more than a quarter of the vote has a "mandate to govern" whereas the CDU/CSU with slightly less than a quarter does not, even though both would equally pass the constitutional hurdle of an absolute majority in the *Bundestag* with the very same help of the very same two Green and Liberal coalition partners.

An election, seen as a competition, requires a finish line. This is what makes it so tricky to correct procedural errors, or even to demand that they be corrected, retrospectively. If the expectation of the election is that it will separate winners from losers, then every day it doesn't deliver that result is a failure. Insisting too fastidiously on procedural correctness thus may weaken the election process instead of strengthening it. Perhaps George W. Bush had fewer votes in Florida than Al Gore in 2000, and perhaps the Supreme Court was at fault to hand him victory without allowing a recount, but all we know is that at some point he was the President of the United States, and that anyone who, unlike Donald Trump, cares about the functioning of democracy had to stop questioning this fact.

This is also reflected in German electoral law which makes it notoriously difficult for anyone who feels tricked, marginalised or treated unfairly in a federal election to get justice. The *Grundgesetz* assigns in art. 41 the proceeding of electoral objections to the *Bundestag* itself, and one can then appeal against its decision to the Federal Constitutional Court. By the time you finally get a (almost certainly negative) decision, the legislative period is often a thing of the past anyway. In order for the objection to be admitted on its merits, the procedural error must have had an effect on the composition of the elected parliament, so in most cases the individual voter is practically without effective remedy in case her electoral fundamental rights have been trampled upon. Since 2012, she can at least obtain a sort of an acknowledgement of her individual rights violation from the Federal Constitutional Court, which is definitely an improvement. But having a procedural stain effectively removed from the election itself normally remains a theoretical option at best, and there are good reasons for that.

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At the elections last Sunday, there has been no shortage of procedural stains, as far as the federal capital of Berlin was concerned. In fact, the elections for the state parliament, the *Abgeordnetenhaus*, which took place along with the federal elections (and local elections, and a state referendum) in Berlin, have been stained to a degree which has has plunged even the hard-nosed Berliners, who have learned to live with their painfully dysfunctional state administration, in a state of shock and embarrassment. The administration had in many cases failed to provide the polling stations with sufficient ballot papers, so voters had to be sent away because there simply wasn't any ballot for them left to vote with. In other cases, voters were handed ballots from different districts, which made their vote invalid if they used it. New failures keep emerging every day, and the bottom line appears to be that an unknown yet substantial number of voters have been, out of sheer administrative inaptitude, effectively robbed of their franchise.

Whether and in which districts these electoral failures had an impact on the composition of the Berlin state parliament remains to be investigated. At the moment, there are recounts in some districts, but that is comparatively normal business and will do nothing to reinstall the disenfranchised voters in their citizen rights. Votes that were never cast because the polling station had to close won't be counted because they simply don't exist. Votes cast on the wrong ballot paper won't be counted because they are invalid.

In terms of legal remedy, the electoral objection process is speedier in Berlin than at the federal level: Objections can be filed directly at the Constitutional Court of Berlin instead of having to go through a parliamentary committee first. But it is highly doubtful if any individual disenfranchised voter would have standing in the first place. Section 40 of the law on the Constitutional Court of Berlin regulates who can challenge the election in which cases. If a voter had not received a voting card or if she had been wrongly removed from the electoral roll, she can object (para. 2 no. 7). But they did all receive a voting card. No one was deprived of their right to vote, just of their vote. This may be in violation of constitutional and statutory law, but in that respect only the State Minister of the Interior, state and district electoral officers and the presidents of the House of Representatives and district assemblies are authorised to lodge an objection (para. 3 no. 3).

I think it would make a lot of sense if the Berlin Minister of the Interior took the matter in hand and, after a thorough documentation of all incidents, lodged an objection with the Constitutional Court himself in order to have the election repeated in all the districts concerned, so that there is no longer any doubt that a citizen of Berlin can exercise her most fundamental political participation rights in free, equal and universal elections. This is a case which impacts not just the result of the vote for this or that party or candidate, but the functioning of the algorithm with which the will of the people of Berlin is formed. This is about averting danger to the constitution. This, if I'm not mistaken, is the responsibility of the Minister of the Interior. Also in Berlin.

The week on Verfassungsblog

I already wrote on Monday that this failure of the state in Sunday's election in Berlin cannot be allowed to stand.

On Tuesday, CHRISTIAN WALDHOFF sent me his account of his experience as an election volunteer at polling station 110 in the Papageno primary school in Berlin-Mitte, from the perspective of both a constitutional court professor at Humboldt University and a

citizen of this democratic polity, and equally stunned in both respects. His report and his demand that the Berlin State Election Commissioner had to step down immediately has caused a tremendous amount of attention and was quoted all over the regional and national press. And will you believe it: the next day the State Election Commissioner did resign. Verfassungsblog isn't always that impactful, but it's kind of great that it can be.

The Constituent Assembly in **Chile** adopted the basic procedural rules of its work on 28 and 29 September 2021. SVENJA BONNECKE shows that the political and socio-economic context has had a considerable influence on the work of its members since May 2021. At the same time, the Assembly makes certain claims to power in the current political discourse.

In July, a debate broke out in Germany between several authors/opinion makers about who is "Jewish". What is easily overlooked is the question what, how and why Jewish law is so adamantly protective of its matrilinear principle, and in particular the Jewish legal construct of motherhood. REUT YAEL PAZ casts light on this blind spot in the debate: "Opening up the ‚who's a Jew' question, in the name of (patriarchal) universality and equality gets precarious for Jewish women because it harms the little legal privilege it actually gives them."

On 16 September 2021, Facebook suspended more than 150 pages and groups run by people with connections to the anti-vaxxer *Querdenken* movement in Germany on the grounds of "coordinated social harm". The only legal basis for the removal is Facebook's community standards. AMÉLIE HELDT criticises the moderation of content.

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All best,
the Verfassungsblog team

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So much for this week. All the best to you, stay safe and healthy, please support us on Steady and/or Paypal, and see you next week!

Max Steinbeis

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

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