Just do it

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Electoral law is the operating system of democracy, it is often said, and rightly so: electoral law is a code, an algorithm that translates the input of votes into the output of a representative parliament, which explains why mathematicians are often much more passionate about this legal matter than even constitutional lawyers.

But that is not all. An election is not only a calculation, but also a competition. Election implies selection. Many run, but only one can win. That's why the election campaign is a fight. That is why there are *Spitzenkandidaten*. That is why the alleged "will of the voters" gives the relatively strongest of the parties the so-called "mandate to govern", which has no basis in the *Grundgesetz*, but can nevertheless have considerable normative force, as was recently observed in the *Bundestag* elections to the benefit of the SPD and in the NRW elections to its detriment.

According to the will of the governing "traffic light" coalition, this element of competition is to be sacrificed – not entirely, but to a considerable extent – in order to repair the federal election law which has been teetering on the brink of dysfunctionality for so many years. Winning a constituency, according to the core idea of the red-green-yellow reform proposal, does not necessarily mean winning a constituency. Rather, it depends (also) on the output of the algorithm. If the algorithm spits out a result that assigns fewer seats to a party than constituencies won, then the relatively weakest among their constituency winners have won for nothing: They do not get the mandate, but an even weaker candidate, who was picked as second choice by more voters via "*Ersatzstimmen*" (substitute votes). This happens until the result of the calculation is correct again.

++++++++++*Anzeige*++++++++

DFG-RESEARCH TRAINING GROUP
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Call for applications: Ten doctoral research positions at the research training group DynamInt

The DFG research training group "Dynamic Integration – Law in-between Harmonisation and Plurality in Europe" at the Humboldt Universität zu Berlin has ten open doctoral research positions (m/f/d) (3/4 part-time employment – E 13 TV-L HU). The intended date of employment is 1st October 2022, application deadline is 15th July 2022. You can find the call for applications here.

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Is this unconstitutional? As is well known, the Federal Constitutional Court applies strict standards to the *Erfolgswertgleichheit* (equality of success value) of all validly cast votes, and I don't suppose it will be a trivial task to explain to the voters of winning but unsuccessful candidate that their vote's success value of that of those who voted for the weaker, but effectively successful candidate, have been weighted equally.

The authors of this idea are of course aware of this problem. Christoph Möllers, in his capacity as constitutional lawyer and member of the expert commission, admitted to a "certain constitutional risk" in an interview with the FAZ. But the size of the *Bundestag*, inflated by overhang and compensatory mandates, is simply a problem that has to be solved. "There is no proposal that would not be called unconstitutional by someone", he said. In general, there is "too much constitutional perfectionism in the system".

Can a governing coalition simply say: I don't know, perhaps it's unconstitutional, but let's just do it anyway? Those who feel provoked by this regard the

constitution as a given, a program for the government to be guided and instructed by and from which to learn what they may and may not legitimately do. In fact, however, this is nothing other than practised constitutional interpretation. It is not as if the government – the prenatal primal trauma of German constitutionalism in general – simply says: unconstitutional? Boohoo. I can't do that? Watch me. (Unlike the Polish government.) It makes its decision on the basis of a constitutional interpretation that may in some respects be at odds with that of the Federal Constitutional Court, but that is firstly its right and secondly still to be proceeded and decided upon. The court, whose "perfectionism" many assume to be to blame for the whole mess in the first place, will certainly be given the opportunity to do so rather soon.

The week on Verfassungsblog

… is summarized by PAULINE SPATZ:

As every year, demonstrations commemorating the Nakba have taken place around the world, and this year journalist Shirin Abu Akleh's death will also be a topic. But not in Berlin, at least not legally. The police have banned five registered demonstrations; the Administrative Court and the Higher Administrative Court have upheld the bans. The reason: the **demonstrating Palestinians** act "tense and emotionalized". RALF MICHAELS points out the contradiction in this justification. He raises the question whether the reason for the ban is that the state does not want to deal with Palestinians and their protests.

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Universität Augsburg
Juristische Fakultät

Wissenschaftliche Mitarbeiterin / wissenschaftlicher Mitarbeiter (m/w/d) – Universität Augsburg

An der Juristischen Fakultät der Universität Augsburg ist am Lehrstuhl für Öffentliches Recht, Europarecht und Öffentliches Wirtschaftsrecht (Prof. Dr. Ferdinand Wollenschläger) ***zum nächstmöglichen Zeitpunkt*** *eine Stelle für* ***eine/n wissenschaftliche/n Mitarbeiter/in (m/w/d)*** *im Umfang der Hälfte der regelmäßigen Arbeitszeit in einem zunächst auf drei Jahre befristeten Beschäftigungsverhältnis zu besetzen.*

Bewerbungsschluss ist der 15.06.2022. Die ausführliche Stellenausschreibung finden Sie hier.

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The controversial **law on the extension of the grounds for retrial to the detriment of acquitted persons** of December 21, 2021 has passed its first practical test: in an extensively reasoned decision of April 20, 2022, the OLG Celle came to the conclusion that the law is compatible with the Basic Law in every respect. OLIVER GARCÍA considers the decision of the OLG Celle to be wrong and the new § 362 No. 5 StPO introduced by the law to be unconstitutional.

The German federal government wants to **decriminalise cannabis** – a plan that many consider to be against international law, i.e. the international conventions on the regulation of drug use. In his very comprehensive and thorough examination of the legal situation, KAI AMBOS comes to the conclusion that the concerns under international law can be dispelled if the "controlled distribution of cannabis" is exclusively for personal consumption.

This week it was announced that the Berlin Senate has declared the **petition for the referendum "Berlin car-free"** inadmissible. According to the Senate, the petition for a referendum violates the Basic Law, as it represents a disproportionate encroachment on the general freedom of action. JAKOB HOHNERLEIN explains why the Berlin Senate's decision is based on a constitutional misunderstanding of the scope of protection of general freedom of action.

Since the Russian invasion of Ukraine, the debate about possible **NATO membership of Sweden** and Finland has been intense. Sweden's ruling Social Democratic Party was against membership for a long time, but changed its position on Sunday, May 15, so that – until Turkey blocked the process three days later – everything was pointing in the direction of Swedish NATO accession. JOACHIM ÅHMAN looks at the constitutional requirements and finds that they are

probably surprisingly low and that parliamentary approval by a simple majority could suffice.

The possible NATO accessions of Finland and Sweden, among other things, gave rise to more threats by the Russian government. The **nuclear threat** has been a constant companion of the Ukraine war from the very beginning. PETER HILPOLD shows how a 1996 ICJ opinion, of all things, keeps the door to a permissible use of nuclear weapons ajar, through which the Russian Federation is pushing with the power of fact distortion.

In the dark post-Soviet 1990s, the West, embodied by Europe and America, was a shining star for young people born in the Soviet Union, promising peace, democracy and freedom. Against the backdrop of war in Ukraine ANNA PHIRTSKHALASHVILI shares her contemporary **Georgian, post-Soviet perspective on Russia, Ukraine, and the West.**

The case of ***Verein KlimaSeniorinnen Schweiz u.a. v. Switzerland*** is the first climate change case before the ECtHR in which all domestic remedies have been exhausted. The main issue is how to claim violations of rights due to climate change. The Swiss government believes that the **Swiss** political system, with its democratic tools such as the popular initiative, offers sufficient possibilities for the examination of climate claims. VÉRONIQUE BOILLET disagrees and argues that Swiss initiative law alone is not a sufficient means and therefore not an alternative to court proceedings.

The **ECtHR** has not yet decided the case, but it has the potential to become a landmark ruling that will determine the Court's course on climate change. To realize this potential, however, the ruling will need to go beyond symbolism and establish a firm link between the interpretation of international law on climate change and the rights enshrined in the ECHR, according to JOHANNES REICH, FLORA HAUSAMMANN & NINA VICTORIA BOSS.

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Frau.Macht.Recht. – Tagung zu 100 Jahren Frauen in juristischen Berufen 15. Juli 2022 an der Universität Heidelberg

Mit Gesetz vom 11. Juli 1922 erhielten Frauen erstmals Zugang zu beiden Staatsexamina und damit zu den juristischen Berufen. Wie stellte sich der Weg zu dieser Zulassung dar? Wo stehen wir 100 Jahre später? Was kann und soll noch erreicht werden? Diesen Fragen soll anlässlich des 100-jährigen Jubiläums im Rahmen einer interdisziplinären Tagung am 15. Juli 2022 an der Universität Heidelberg nachgegangen werden. Alle Informationen zu Programm und Anmeldung unter https://www.uni-heidelberg.de/de/frau-macht-recht.

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On April 26, 2022, the ECJ delivered its much anticipated judgment in Case C-401/19 – *Poland v. Parliament and Council*. The case concerns the validity of Article 17 of the DSM Directive, the **"upload filter"** article of the Directive on Copyright in the Digital Single Market in the light of fundamental rights. . JOÃO PEDRO QUINTAIS provides an overview of the ruling and its potential impact on the future of platform regulation and content moderation in EU law.

In its recent judgment in Case C-319/20, *Meta Platforms Ireland*, the ECJ has clarified that actions for the protection of general interests fall within the scope of Article 80(2) **DPA**. ALEXIA PATO welcomes the ECJ's broad interpretation of the standard, but criticizes the Court for leaving open the very task of bringing this provision in line with the Directive on Representative Actions.

The American **Conservative Political Action Coalition** is meeting in Budapest right now – a meeting that shows that U.S. conservatives have chosen Orbán's illiberal policies as a model. Not surprising, since the U.S. and Hungarian culture wars have followed the same pattern for years. KIM LANE SCHEPPELE fears that U.S. conservatives may take away mainly one thing from Budapest: that culture wars are an effective way to distract democracy's defenders from the creeping ascent of autocracy.

In early March, a video went viral in **Kenya** of a female driver being harassed by several motorcycle cab

drivers – shortly followed by a directive to register all motorcycle cabs, similar to the controversial *Huduma Namba* national population management system. GRACE MUTUNG'U uses these two cases as examples to show how government and private actors use high-profile incidents as an opportunity to collect more and more sophisticated data, while dodging criticism with references to the very incident.

In our**9/11 symposium** on the rule of law, STÉPHANIE HENNETTE-VAUCHEZ looks at France as an example of the consequences of normalizing permanent states of emergency and exception. ALAN GREENE sees the key in understanding permanent states of emergency not in the threat but in the decision makers who assert such a state of emergency. PHIL EDWARDS reflects on counterterrorism, the rule of law, and the "counter-law" critique. VALSAMIS MITSILEGAS sees a turn toward EU preventive justice as a result of the war on terror.

Finally, an important event note: our symposium series on 9/11 concludes this Monday with the **conference "9/11, two decades later: a constitutional search for traces**", organized by the Society for Freedom Rights (GFF) with us as media partner, and supported by the Federal Agency for Civic Education (bpb). The program is great! Tickets are sold out, but you can follow the entire event online. Register for digital participation here.

That's it for this week. All the best for you, stay tuned, and please don't stop supporting us on Steady!

Max Steinbeis

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