A Gentle Breeze

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The other night, it became known that the Manhattan District Attorney is opening criminal proceedings against Donald Trump. This is historic: for the first time, a (former) US president will be indicted. There may be a mug shot, but probably no handcuffs. The trial will deal with alleged hush-money payments to two women before the 2016 presidential elections. Is this the culmination of Donald Trump's countless scandals, possibly even his end? Hardly. On Twitter, Tarik Abou-Chadi resignedly pointed out that this move was, again, not the one that would change anything. To the contrary, whoever jumped on this media circus bandwagon was ultimately only helping the potential candidate for next year's US elections. In this sense, Trump is the king of scandals: arguably, no other figure in public political life gets out of countless scandals unscathed, even strengthened. Anne Spiegel, on the other hand, had to resign her ministerial post – not because she burned 500 million euros of taxpayers' money, but because she went on a summer holiday with her family. The storm that cost Christine Lambrecht her job as Minister of Defence would not even count as a gentle breeze for Donald Trump or Boris Johnson. Why do scandals harm some but not others? What does it mean when scandals have no consequences? Do they have the potential to corrode liberal democracies?

Coinciding with Trump's indictment, the annual Party Studies Symposium of the Düsseldorf Party Research Institute (PRUF) explored the question of what we actually know about political scandals. How do they work? Law, as quickly turned out, is quite blank on these questions – unlike other disciplines. In political science, history, media studies and sociology, the subject of research is dealt with intensively. And so it was both necessary and rewarding that the PRUF organised the symposium in an interdisciplinary way. It became clear how ambivalent the political scandal can be. It can take on very important, stabilising functions for the political system: The scandal exposes shortcomings, enables reform and correction and contributes to updating social norms. In the best case, a scandal can cathartically cleanse the system. In the German Empire, for example, scandals were associated with the hope of an expansion of democratic participation, as Martin Kohlrausch showed in his presentation. Scandals can thus develop a participatory dimension that is also expressed in deliberation; in public interaction, controversy and agreement. Scandals live on affect, they are attention-grabbing for the actors, but also for the political system. Not least, they are a source of entertainment, to quote Sophie Schönberger (also on Deutschlandfunk): "Scandals are somehow fun". And that too was evident in Düsseldorf, where the many references and anecdotes exposed a rich history – even a collective memory – of political scandals. Scandals are points of reference, precisely also in cultural terms: people laughed about the fact that a top politician would only in Germany stumble and fall over plagiarism. In Italy, on the other hand, it would be hard to imagine a president losing his office over an affair with his intern.

Jurisprudence, however, is unfamiliar with the political scandal. Yet there are evident parallels. First, a scandal is characterised by a violation of a norm. Of course, no legal norm must be violated; a breach in the broader socio-political sense could be sufficient. The scandal draws attention to the respective norm, it can contribute to the clarification of the norm or lead to its tightening. Usually, scandals involve sanctions. And thus, questions of attributing responsibility also play a role: scandals usually go back to human misconduct, they are the "human factor of politics" (Sophie Schönberger). The [German] law, however, likes to make a formalistic distinction between office and office holder, between organ and organ administrator. In a

political scandal, this separation does not seem to work.

This shows that the process takes place in a different context; political scientists would speak of an arena. Significantly, in Ulrich von Alemann's "matrix" for systematising political scandals, jurisprudence did not appear as an arena in which process of the political scandal could be negotiated.

Of course, the law has a role in dealing with a scandal, because scandals are often transferred into legal proceedings. However, it is also evident that major political scandals do not necessarily end in legal sanctioning – think of Alfred Sauter and Georg Nüsslein, for example, or Christian Wulff. In most cases, the criminal trial takes too much time compared to the attention span of the political public. It seems that the law is overwhelmed when it comes to dealing with political scandals (Christoph Schönberger).

Still, there are sanctions: The political scandal demands either resignation or an apology – terms that jurisprudence knows but uses differently. These sanctions are subject to a different logic, they are categories of other arenas. In these arenas, it is about attention, about dynamics of indignation, which could have "unintended consequences" (Stephan Malinowski). The central element of a scandal – it seems to me – is not the violation of a norm, which may well remain without sanction, but its eventfulness: a norm violation must be taken up and made public, and an audience must feel outrage. The dark field of scandals that have not managed to become exactly that – a scandal – is presumably infinitely large.

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Das Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht lädt in Kooperation mit der Württembergischen Landesbibliothek Stuttgart zu der ***Vortragsreihe*** *„Ukraine?!- Völkerrecht am Ende?" ein. Am* ***03.04.2023, 18h****, spricht* ***Prof. Dr. Roman Petrov*** *zum Thema* ***„The impact of the war in Ukraine on the EU Accession"****.*

Informationen zum Programm und zur Teilnahme in der WLB hier. Link zur Online-Teilnahme hier.

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And yet, the law fulfils various functions, as Frederik Orlowski pointed out: It can be the subject of political scandals as well as an instrument for apprehending them. In addition, law. can offer protection against scandals – a "law of the political scandal", however, does not exist. Perhaps that is a good thing. Does the law have to regulate everything? Apart from "legal procedures with inherent scandal references" (Julian Krüper mentions the party ban, Article 21 (4) Basic Law, the forfeiture of fundamental rights, Article 18 Basic Law, and the impeachment procedures in Articles 61, 98 (2) Basic Law), the political scandal may be much better off in the other arenas. Hence, jurisprudence need not concern itself with the political scandal. Even if it is fun.

However, open questions remain: Where is the dividing line between the office and the person when the political scandal repeatedly renders it absurd? Does this distinction even make sense? How does the political scandal work in autocracies? Not at all? What power structures is the political scandal subject to? And what does this mean for democratic legitimacy issues and decision-making mechanisms? How do multiple online publics and artificial intelligence change the political scandal?

The most emotional and personal contribution in Düsseldorf came from Anthony Glees, professor emeritus at the University of Buckingham, who threw the spotlight on England's scandal culture: "The situation is serious." Of course, the topic was Boris Johnson – in many ways Trump's little brother, especially in his natural way of breaking the rules and using scandals to his advantage. Currently, one of his many scandals is being reviewed. Did Johnson lie to Parliament, the heart chamber of democracy? It is about "Partygate" when parties were held at 10 Downing Street at the beginning of the pandemic, in violation of the lockdown guidelines at the time. Johnson had assured Parliament in December 2021 that those guidelines had been followed. Now he has to answer to an investigative committee, which, mind you, is made up

predominantly of his own party. If the committee finds Johnson's statements to be a lie, he faces suspension, which could cost him his parliamentary seat.

And if not? Then Boris Johnson will have overcome the next, perhaps his most serious scandal. If that happens, Glees said, Parliament, the institution itself, will be tainted. And that is the real scandal, Boris Johnson undermining parliamentary democracy: "Then England will be Weimar." Stephan Malinowski had previously impressively shown how national conservative forces instrumentalised the Barmat and Sklarek scandals to undermine the young Weimar democracy, which eventually benefited the rise of the NSDAP.

Perhaps jurisprudence should study the phenomenon of political scandal more intensively after all. Düsseldorf got off to a good start.

The week on Verfassungsblog

… summarised by PAULA SCHMIETA:

ELEONORA BOTTINI explains the constitutional mechanism (Art. 49.3) which enabled the **French** government to bypass the National Assembly and pass its **law on retirement**. Proceeding this way is 'perhaps' constitutional, but is it also democratic? 'Not so much' finds Bottini.

AEYAL GROSS assesses the status quo of the **Israeli constitutional crises** after the government's announcement to suspend the legislative process. Gross reckons that "it remains too early to know whether we are in the spring of hope or in the winter of despair" and calls for a battle "for the democracy we aspire to become".

With regard to the electoral law reform for the Bundestag, EDOARDO D'ALFONSO MASARIÉ argues that **territorial parties** – i.e., those not operating nationwide, such as the CSU – would have to be adequately taken into account **in the electoral law** as per the constitution: "The legislator is free to decide *how*, but not *whether*, territorial parties should also be assessed under electoral law".

JAN-LOUIS WIEDMANN sheds light on the announced **amendment to the Federal Climate Protection Act** (KSG). According to Wiedmann, the reform proposal "abandons one of the crucial climate policy achievements of the KSG" and is constitutionally doubtful.

The latest decision of the **ECJ** in the Volkswagen emissions scandal fundamentally challenges the previous assessment of the case by German courts. According to JOHANNES HERB, this is due to the (**German**) **understanding of private law**, which "from a European perspective […] can only be bewildering".

Last week, the ECJ pronounced a judgement on the limitations of the***ne bis in idem*** **principle** – the prohibition of double jeopardy. Looking ahead at a pending Volkswagen emissions scandal case, LAURA NEUMANN examines in what ways **inter state cases** differ from intra state cases and what criteria might apply to the former when it comes to the *ne bis in idem* principle.

Should the minimum age of **criminal responsibility** for **children** be lowered? EKKEHARD STRAUSS warns against it. A lower minimum age would be unhelpful and would violate Germany's international obligations.

What is the relationship between **the EU's conditionality regime and fundamental rights**, specifically academic freedom? OLGA CERAN & YLENIA GUERRA tackle this question against the background of the suspended EU budgetary commitments towards Hungary.

Where are the limits of artistic freedom? NINA KELLER-KEMMERER and HANS-JÜRGEN PAPIER take stands on **anti-Semitic art at the *documenta fifteen***. While Keller-Kemmerer warns against simple and generalising legal approaches, Papier believes it is time to "rethink the relationship between the state and culture in general" instead of leaving the state-financed cultural sector "to a legal vacuum or to escape into a web of private-law agreements".

KAI AMBOS reviews Benjamin Lahusen's monograph "Der Dienstbetrieb ist nicht gestört. Die Deutschen und ihre Justiz 1943-1948", in which Lahusen explores whether the **German administration of justice** came to a standstill **between 1943 and 1948**. Ambos' conclusion: Lahusen's book is elegantly

written and – despite the subject matter – is a "pleasure to read".

Furthermore, our blog debate **50 Years On: Ireland and the UK In and Out of the EU** continued this week, featuring contributions from IYIOLA SOLANKE, JANINE SILGA, FEDERICO FABBRINI and ELAINE FAHEY.

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Now, this really is the last editorial before the Easter break until 14 April. Happy Easter!

Editor's Note: Regarding the parliament's investigation committee and the US prosecutor's office, small mistakes were corrected retrospectively.

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