When Law Fails Us

Anja Bossow

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Last week the United Kingdom's Supreme Court declared the government's Rwanda policy – a political agreement to transfer asylum seekers from the UK to Rwanda to have their claims processed and granted there – unlawful. It did so on the narrowest and most solid of legal grounds imaginable: the prohibition of refoulement, ie the return of individuals to a state where they are likely to face torture, cruel, inhuman or degrading treatment or other irreparable harm. This norm is foundational to the international legal regime regulating human migration and universally agreed upon. It was also so obviously breached by the agreement that it felt almost insulting the Court had to spell it out. But it did. And so what? In response, the UK government has declared it will simply legislate the policy's illegality away by declaring Rwanda a safe third country and/or by exiting various international treaties that oblige it to respect the refoulement principle. To hell with the law and its pesky demands.

Perhaps Sunak's statements might just be political posturing ahead of his country's upcoming election. After all, immigration control has been a – if not the – political hot-button issue of our time, and it has proven a successful electoral strategy to stoke xenophobic fears while providing no real solutions to the challenges that migration raises. Others might say that there is nothing inherently new about this type of intentional illegality. Governments of liberal-democratic constitutional orders have long displayed a considerable degree of hypocrisy, at times blatantly and other times more subtly breaching the very norms, values and rules they proclaim to subscribe to and supposedly consider themselves bound by. This has been especially the case where they deal with individuals they decide for themselves to be rightfully excluded from their legal systems and normative ideals.

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However, at least in the recent past, this hypocrisy was accompanied by a continued (though likely always shaky) insistence that the law's limiting force still mattered. While the law has always been tested, bent and shaped, its principles stretched, deformed and (ab)used, within the post WWII liberal legal orders there remained an underlying belief that what the law said, what it permitted and forbade, ultimately remained significant and that it had an indispensable role to play both in how we govern ourselves and treat

others. Crucially, this role was not reduced to being an instrument of exercising governmental power but also an instrument for determining the legitimate bounds thereof, in order to ensure our polities' adherence to certain hard-won moral ideals.

I do not think that this dual vision of the law's role still exists amongst some of our democratically elected political elites, let alone those that elect them. Instead, the law's regulating and restraining role appears to be viewed increasingly as an obstacle to good government, not a necessary and indispensable ingredient thereof. At least this is the case within the realm of immigration control where legal restraints on governmental power are increasingly either breached or legislated out of existence. Indeed, Sunak finds himself in good company. Italy's government has also displayed a considerable degree of enthusiasm for ignoring the law's limits and responds with equal fury when Courts try to assert them. To some degree the EU has also begun to play the same game: each time long-standing legal principles are legislated out of existence through new Directives, the law's regulatory authority is weakened.

This repudiation of the law as not just an instrument of power but as a regulatory ideal and limiting force thereof appears to result, not least, from how 'good' government has come to be defined in the context of immigration control. Within a liberal constitutional framework, 'good' government cannot and should not be reduced to a criterion of efficiency or convenience, nor can it entail whatever governmental end a majority considers desirable. Rather, we insist on governmental aims and practices to be in line with and thus limited by normative ideals of equality, of human dignity and of freedom. That is the standard against which we measure or rather should measure the desirability or goodness of any governmental practice and its underlying end.

Perhaps it is necessary to point out that we did not pick these values willy-nilly: whatever hypocrisy may inhere in liberal legal orders and their flawed political implementation, we carved these values into our constitutional fabrics because we learned the hard way what destruction and human suffering follows when we both concentrate political power in the hands of a majority and simultaneously deregulate it.

Yet, the pursuit of universal equality and human dignity is certainly not what 'good' governance means in the realm of immigration control anymore: instead, what is good is that which serves "us," where the us is defined in a way that not only denies the cultural, ethnic, and religious richness and diversity that characterize our political communities but considers it a threat. And government is not only to serve 'us' – it is to serve us *at any cost*. It does not matter whether this cost takes the form of countless human lives or a more abstract toll on the principles we chose to govern ourselves by. This cost is, after all, the necessary price to pay to preserve what is good, and what is good is what serves us, not abstract ideals of equal human dignity anymore.

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Likely, this kind of ethnonationalist thinking has never disappeared from the post-World War II political and legal landscape. Instead, it has been there all along, always lurking in the background, waiting for an opportune moment to make its way back into our collective political imagination. Ever since the first European migration crisis was declared, this moment appears to have come. Since then, it has certainly become more visible, more daring, more unabashed in the governmental demands it makes. And with it we have seen the emergence of a new type of intentional illegality, of a repudiation of the law, understood not

just as an instrument of political power but as a regulatory ideal thereof.

The inhumanity and human suffering this logic produces is clearly visible in Trump's recently unveiled immigration agenda. Trump's dedication to not just bring back but expand family separation policies, Muslim bans, mass deportations, militarized borders and giant mass detention camps goes hand in hand with his well-known denunciation of the law as a limiting force on governmental authority.

Germany has sadly not proven immune to the dangers of this logic either. Its Chancellor recently proclaimed that we must "finally deport in grand style," and that a "certain degree of toughness does not render us inhumane." Perhaps. But to ensure that inhumanity does not become the paradigm of Germany's approach to immigration control, Scholz would do well to embrace the law not just as a tool for policy-making but also as a limiting force, even or rather especially when it proscribes the very toughness he seeks to deploy.

The week on Verfassungsblog

… summarised by MAXIMILIAN STEINBEIS

Following the judgement of the Federal Constitutional Court on the budget and climate policy of the traffic light coalition, the debate has turned to the constitution itself: was it a mistake to enshrine the **debt brake** in the Basic Law? LUKAS MÄRTIN and CARL MÜHLBACH believe that the way the Court has drawn its contours is a "death blow for political thinking in long-term contexts" and disagree with the view that it could hardly have decided otherwise. LENNART STARKE complains that the judges "missed the opportunity to further develop the dogmatics of budgetary constitutional law in connection with the climate decision … and to formulate guidelines for the relationship between climate protection and the budgetary constitution".

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*The **Institute for European Policymaking** @ Bocconi University, Milan invites applications for a **post-doc position in EU Law.***

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Job details and application form are available here.

*Deadline **9 January 2024***

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Is a school allowed to note in the report that a pupil's spelling performance was not assessed due to their **dyslexia**? The Federal Constitutional Court has made an ambivalent decision on this, which ISABEL LISCHEWSKI comments on critically.

In future, the *Bundeswehr* will be able to dismiss **anti-constitutional soldiers** from service more quickly, namely by administrative act and not only at the end of lengthy and risky disciplinary proceedings. KATHRIN GROH suspects that the legislator wants more than is constitutionally allowed.

In Hesse, the future CDU/SPD coalition wants to ban the use of asterisks and other special characters by authorities, as well as schools, universities and broadcasters, when it comes to **gender-neutral language**. "No matter what your personal stance on gender-neutral language may be," says ULRIKE LEMBKE, "discrimination against women and gender minorities as a form of politics is a threat to the democratic constitutional state".

The *Bundestag* is debating the **Self-Determination Act**, which is intended to make it easier to change

one's legally assigned gender. However, BETTINA RENTSCH believes that the fact that you have to give up your first name and adopt a name assigned to your new gender reveals how difficult it still is for legislators to abandon the state ascription of gender.

CATHRYN COSTELLO and CATHERINE BRIDDICK celebrate the British Supreme Court's judgement that the Sunak government's **Rwanda plan** is unlawful as impeccably argued "supreme judgecraft", in sharp contrast to the government's reaction to it. DAVID OWEN observes a conflict within the ruling Conservative Party between the PM Sunak's "socially liberal technocratic nationalism" and the "illiberal 'culture war' nationalism" of his Home Affairs Minister Braverman, who was sacked immediately before the judgement, and suspects that the judgement will raise the stakes in this conflict by providing ammunition for the Braverman camp – although the audience of this conflict, the British electorate, has long had enough of the whole farce and only hopes that the curtain will fall as soon as possible on the disaster of Tory rule since 2015.

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This volume presents the distinctive Italian approach to the most significant current constitutional issues*: separation of powers, protection of rights, constitutional adjudication, democracy and pluralism, constitutional identity vis à vis the EU. It is both a handbook for students seeking an advanced explanation of the Italian system; and a comprehensive attempt at placing a major European post-war democracy within the coordinates of comparative and transnational doctrinal discourse.*

Available here.

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The constitutional crisis in **Turkey**, triggered by the disobedience of the Court of Cassation towards the Constitutional Court on the issue of the release of imprisoned opposition politician Can Atalay, could lead to a drastic curtailment of constitutional protection, if not the end of Turkish constitutionalism altogether. EMRE TURKUT and ALI YILDIZ reconstruct the history of this tragedy.

Greece's constitution contains a rarely observed but all the more curious norm that protects the text of the Holy Scriptures from unauthorised translations – but only the "official", i.e. authorised, text. SOTIRIS MITRALEXIS explains what this curious circular non-normative norm is all about.

In Banja Luka, the capital of **Republika Srpska**, a grandiose memorial is being erected to the soldiers who took part in the genocide during the Bosnian civil war. CARNA PISTAN investigates why this is legally and constitutionally possible.

The union treaty between **Australia and Tuvalu** has attracted a lot of attention because it opens up a way for the inhabitants of the Tuvalu archipelago, which is acutely threatened by rising sea levels, to relocate to Australia. SZYMON KUCHARSKI explains why this should not be over-simplified as "special visas for climate refugees" and what else the treaty contains.

A recent case from Australia, which JULIA DEHM analyses, shows how **international investment protection law** stands in the way of the energy transition that is so urgently needed to save the climate.

ABOUT THE AUTHOR

Anja Bossow

Anja Bossow ist Research Assistant Professor of Law und Fellow am Karsh Center for Law and Democracy an der University of Virginia School of Law.Anja Bossow is a Research Assistant Professor of Law and Fellow at the Karsh Center for Law and Democracy at the University of Virginia School of Law.

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