Verfassungsblog
ON MATTERS CONSTITUTIONAL

Why the AfD Takeover Could Begin Much Sooner Than Many Realize

Jelena von Achenbach & Maximilian Steinbeis

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What will happen if the AfD becomes the strongest party in Thuringia in next year's state elections? At the moment, it is polling at 34%, with a lead of 13% over the second strongest party, the CDU. In this constellation, many still consider it unlikely that the office of Minister President will be held by the AfD (although no one should be surprised if they do in the end, more on this below). However, it is anything but unlikely that the AfD will win a different presidential office that is much less talked about: that of President of Parliament. The damage that an authoritarian populist party could do to democracy in Thuringia and Germany as a whole with the help of this office is immense. And if the other parties do not agree on a way to avert that outcome in time, this damage may very soon become very real. In that case, there won't be much that can be done about it anymore at all.



The office of President of Parliament does not have a high political profile in Germany, so far. The holder of that office represents the interests of parliament, not those of her party and its voters. She has to ensure that parliament gets its work done. In principle, all parties have the same interest in being able to rely on the functioning of parliament, even when majorities change. All parties, that is, unless it is one that lives by the narrative that the elites should be replaced and that democracy does not work, and that does not derive its claim to power from the democratic procedures regulated in the constitution but from the fact that it equates itself with the people directly. Such a party does not necessarily share the common interest in a functioning parliament. This is the situation in which Thuringia finds itself at the moment.

How likely is it that the office of President of Parliament will fall into authoritarian-populist hands? The election of a new president is the first thing the new state parliament does after it convenes. The right to nominate someone for this office belongs to the strongest parliamentary group according to good parliamentary tradition and the rules of procedure of the *Landtag*. Being nominated, however, does not yet mean being elected; for that, the nominee needs a majority of the votes cast, and no one can force the MPs to agree to anyone who is put in front of them. On the other hand, the pressure is high for this election to succeed. Only when it has a President is parliament constituted and can begin its work, most of all electing a new head of government. It is easy to imagine how the AfD could exploit this situation to its own advantage by allowing one election round after another to fail, while parliamentary gridlock and paralysis prevail for the time being. The election is secret and takes place without a debate.

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Let's assume that the AfD candidate is elected after all: What can she then do? Firstly, what she can't do is what she wants. She cannot simply shape the agenda according to her will, favour AfD motions, discriminate against others, allow certain MPs to speak infinitely and others not at all. What is discussed when and what speaking time is allocated to whom is determined in practice by a committee in which all parliamentary groups are represented, the Council of Elders.

The President of Parliament, unless she is represented by one of her deputies, chairs the sessions and declares what the plenary has decided. One session that she will definitely chair herself is the one in which the election of the Minister President takes place. This election has rarely run smoothly in Thuringia in recent years, especially under the conditions of a minority government, which will most likely have to be formed after the next state election, too. An absolute majority is required in the first two ballots. But in the third ballot, according to the constitution, whoever has "the most votes" is elected. What exactly this means is unclear, and the current state parliament's attempt to resolve this ambiguity by amending the constitution has become bogged down in the minutiae of the political dispute between the governing coalition and the opposition CDU. So if only one candidate stands in the third round of voting, what does "the most votes" mean? More than those for the – non-existent – opposing candidates? More than votes against? There are good reasons for both. The person who ultimately determines whether the candidate has been elected or failed in the third ballot is the President of Parliament.

A paper by former SPD party manager Anja Zachow entitled "What nobody will have wanted" is currently circulating in the Thuringian capital Erfurt. Among other things, the paper plays out how the election of a state premier could take place under the leadership of a President of Parliament from the AfD. If AfD leader Björn Höcke stands in the third round of voting and the Left and CDU have not agreed to put forward a joint opposing candidate, then the President of Parliament could declare that Höcke has been elected with the votes of the AfD alone. Then a Nazi will wield the executive power of the Free State of Thuringia. No one need hope for interruptions to the session to negotiate how to avert this outcome. Because the one to allow such an interruption will be the President of Parliament.

In Thuringia, it is also the President of Parliament who issues and promulgates the laws – until now a mere formality. This is what most Poles thought until the authoritarian populist PiS government suddenly startet not to public certain judgements of the Constitutional Court in the official gazette. A mere formality, until then, but one without which the matter to be published does not become legally existent.

What the President of Parliament can also do: send the Director of Parliament into temporary retirement without giving reasons and replace him with someone more suitable for her purposes. The Director of Parliament is at the head of Parliament's administration. The parliamentary administration is hardly visible to the public. But the fact that it supports the MPs, and does so indiscriminately, is indispensable: to run smoothly, parliament needs a functioning, politically neutral administration. The administration distributes the documents that the MPs discuss and decide on, such as draft laws. It provides all the IT. Up to now, no MP has had to wonder who in the administration can read their business emails. Up to now, parliamentarians have been able to trust that the

Research Service would work with them independently and without distortion. In normal times, trust in the integrity of the administration is guaranteed by the fact that, in the end, nobody benefits if this trust is replaced by mistrust. These are not normal times.

Part of the state parliament building in Erfurt is a Nazi building from 1939, which also housed a Gestapo branch which organised the deportation of Thuringia's Jews from 1942 onwards. What happens to the memorial site that the state parliament has set up there is up to the President of Parliament.

The President of Parliament represents the parliament to the outside world. She is the representative of the people's representation. Receiving right-wing extremist delegations from Germany and all over the world as guests, hanging foyers and corridors full of ethnic German art and propaganda – these are all things she can do on behalf and under the seal of Parliament. For example, she could organise events with Viktor Orbán's Danube Institute, probably the most influential and best-equipped think tank of global authoritarian populism, hold big-time receptions and conferences with the hottest and wildest minds of the global right-wing authoritarian movement coming to Erfurt and give their incendiary and racist speeches about the "Great Replacement" of the autochthonous population by compliant migrants and the conspiracy of the rootless cosmopolitan elites.

The President of Parliament could go travelling herself. Visiting Donald Trump in Mar-a-Lago, Vladimir Putin in Moscow. She can start a kind of informal Thuringian side diplomacy. And without any political responsibility. She doesn't have to govern. Just represent. All informally, away from all procedures and institutions. She can represent the "actual people", in sharp contrast to the state government, which firstly has no foreign policy competences at all and secondly, due to the lack of a majority, has the greatest trouble in getting anything done in the first place.

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Couldn't the state parliament simply dismiss this president? It could. But according to the rules of procedure, it needs a two-thirds majority to do so. And if the AfD ends up with 34 per cent, as the polls are currently predicting, then there won't be a two-thirds majority available against the AfD.

What can be done? The matter must be fixed politically: The parliamentary groups of the so-called democratic spectrum, in particular the CDU and the Left Party, must agree quickly and reliably on a coordinated approach to the election of the President of Parliament. Both parliamentary groups must agree on a member of parliament whom they can both elect as *Landtag* president before the election process begins in the constituent session. Not after. That would be too late. Of course, the AfD could once again put itself on display as a marginalised victim of the establishment's machinations. But this debate is inescapable anyway. Avoiding it is not an option. It must be held, and it must be held now.

This article was previously published on SPIEGEL online.

The week on Verfassungsblog

… summarised by MAXIMILIAN STEINBEIS:

Another outcome of our Thuringia project: In Erfurt, the adoption of the budget and thus the continued existence of Bodo Ramelow's red-red-green minority government is still highly incalculable. In January, Ramelow could call a **confidence vote** in order to trigger early elections. To avert this, the state parliament could still elect a new Minister President – but would that require an absolute majority? If you read the constitution literally, the answer is no and the old minority Minister President could be replaced by a new one (Höcke?) in the third round of voting – which is why many want to interpret the constitution restrictively in order to keep this path to early elections open. ROBERT BÖTTNER, however, is of a different opinion.

Non-binding referendums a.k.a. plebiscites are an extremely dangerous instrument for democracy, which is the reason why Viktor Orbán likes them so much – as Hermann Heußner, Arne Pautsch and I recently wrote with a view to the Thuringian state elections. Now this question is suddenly becoming acute in the German capital Berlin: the Berlin CDU wants to organise such a plebiscite on the development of the legendary **Tempelhofer Feld**. HERMANN HEUßNER warns urgently against this idea.

How safe is the **Federal Constitutional Court** from being captured by an authoritarian-populist government? As readers of the Verfassungsblog will know, this topic has been very much on our minds for a long time, and now former Constitutional Court President Andreas Voßkuhle has issued a lengthy comment on that matter in an op-ed for DIE ZEIT. JULIEN BERGER takes a less relaxed view of the situation than Voßkuhle: continuing to leave such crucial issues as the number of chambers and judges and the legal force of constitutional court decisions to the ordinary simple majority is extremely dangerous, and now is a time as good as any to counter this danger by enshrining these matters in the constitution.

Just how difficult it is to bring a captured constitutional court back onto the path of the rule of law can currently be seen in Poland. However, the problem of politically **biased constitutional courts** is much more general. GERTRUDE LÜBBE-WOLFF notes a gap in the case law of both the ECJ and the ECtHR with regard to the systemic impartiality of constitutional courts and makes a suggestion as to how it could be filled.

According to Section 8 of the Climate Protection Act, the Federal Government is obliged to present an immediate **climate protection programme**. It has not done so, and this is not only unlawful, but has also been established as a breach of the law by a court. The Berlin-Brandenburg Higher Administrative Court has declared the action brought by *Deutsche Umwelthilfe* to be admissible and well-founded, and KONSTANTIN WELKER explains how, why and with what arguments.

The discussion about the Federal Constitutional Court's **debt brake judgement** continues, which is why we are now bundling the numerous contributions in an ad-hoc blog symposium. JAKOB HOHNERLEIN defends the judgement and sees the problem in the constitutional regulation itself, not in its interpretation by the Karlsruhe court. LENNART LAUDE and NICOLAS HARDING show the extent to which the judgement also affects the state level.

Can a **police commissioner** help to better control unlawful behaviour by the police? Eight states have already answered this question in the affirmative. Now a police commissioner is also being introduced at federal level. But the way the coalition government wants to organise this office will not work, says MARIUS KÜHNE.

In the **Netherlands**, the authoritarian populist Geert Wilders has won the parliamentary elections. A constitutional culture as based on informal conventions and consensus as the Dutch one – without an "eternity clause", without a constitutional court – is particularly ill-prepared for the scenario of an authoritarian-populist takeover, warns NIELS GRAAF.

Authoritarian Populists in power will sooner or later make the constitution its prey in order to immunise themselves against democratic competition – a phenomenon which can now also be seen in **Italy**. EDOARDO CATERINA examines a particular aspect of the Meloni government's plans, along with its plebiscitary-authoritarian implications: the majority bonus, which is intended to automatically turn a relative majority into an absolute one.

In **France**, President Emmanuel Macron wants to enshrine the right to abortion in the constitution. Unlike Baptiste Charvin last week, SARAH GEIGER is very much in favour of this plan.

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If and to the extent that Israel has violated human rights in its **bombardment of Gaza** – does Germany, for its part, violate its human rights obligations by its unwavering support for Israel? Indeed it does, according to KHALED EL MAHMOUD.

Finland has closed its border with Russia so that refugees can no longer apply for asylum there. Is this justified in view of Russia's policy of instrumentalising refugees to destabilise the EU? PEKKA POHJANKOSKI analyses the dilemma Finland faces between the principle of non-refoulement on the one hand and the protection of national security on the other.

In **Venezuela**, the opposition has nominated a new challenger to authoritarian President Nicolás Maduro, but she has been banned from holding any public office for years. SOFIA MARIA FÖLSCH STROH explains why this ban is highly problematic under constitutional and international law.

CAROLINA FERNÁNDEZ BLANCO and M. VICTORIA KRISTAN analyse what the election victory of presidential candidate Javier Milei a.k.a. "the madman" means for democracy, the rule of law and human rights in **Argentina** and what checks and balances the Argentinian constitutional system provides.

Is there an obligation under international law to guarantee the **right to strike**? The International Court of Justice must now answer this question in a legal opinion. It raises fundamental questions that go far beyond international labour law, which are discussed by CHRISTIAN TIETJE and DANIEL ULBER.

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