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ON MATTERS CONSTITUTIONAL

More Security for the Security Apparatus

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Thuringia wants to reduce the number of politically appointed positions in the civil service. However, the presidents of the Office for the Protection of the Constitution and the police are to remain so-called "political civil servants". This politicisation is particularly problematic: future governments could use them to deploy the security authorities against political opponents.

At the AfD state party conference in Thuringia in November, Björn Höcke presented a five-point plan for government participation in Thuringia. This immediate action programme also states that the AfD would like to replace the President of the Thuringian Office for the Protection of the Constitution, Stephan Kramer. It is the right of a new government and established custom to fill certain positions with people from its own ranks when taking office. The President of the Office for the Protection of the Constitution is one of these posts, as they are a so-called political civil servant in Thuringia according to the Civil Servant Status Act. They can therefore be temporarily retired by their employer, the minister, without giving reasons and replaced by someone of her choice. The same applies to the Chief of Police.



This distinguishes them from normal civil servants, for whom Article 33 of the Basic Law stipulates that they are to be selected solely on the basis of "aptitude, ability and professional performance" and the "traditional principles of the civil service". One of these principles is the so-called lifetime principle: civil servants cannot be dismissed or demoted without good reason, so that – at least ideally – they can apply the applicable laws correctly and without political influence in individual cases. The Basic Law thus provides for a kind of separation of powers within the executive: The ministers on the one hand, who can enforce the political programmes for which they are elected with their right to issue directives, while on the other hand the expert civil servants neutrally ensure the technical application of the law.

In almost all German states, the political civil servants act as an interface between the two: the minister needs a number of political confidants around her who act as a link to the authorities. Although they are civil servants, they can be dismissed at any time. The merit principle in appointments is also weakened in favour of political preferences. Trust trumps expertise.

However, the number of management positions in the authorities that are organised as such political civil servants has continued to grow in recent years. The Federal Constitutional Court expressed scepticism about this development back in 2008 and declared the appointment of political civil servants to be permissible only in a "narrowly defined circle" where "special political trust" is required. In the case of state secretaries, for example, or the government spokesperson. Otherwise, however, it upholds the political independence of the administration, which, apart from a few transformation offices, should serve the government but not allow itself to be instrumentalised for particular political interests.

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In Thuringia, the state government was already criticised in spring for appointing numerous political civil servants and selecting them in a particularly non-transparent manner. As a concession, a law is currently before the Thuringian state parliament's internal affairs committee, according to which several positions will in future be normal civil servants rather than political ones, including the integration commissioner and the head of the state administration office.

However, the amendment does not include the Chief of Police and the President of the Office for the Protection of the Constitution. It would be easy to exclude these two from the circle of political civil servants as well, now that the list is being revised anyway. This is already the case in Schleswig-Holstein, for example. Bavaria has even completely dispensed with political civil servants.

The management of the security authorities is not a transformational office like that of a state secretary who is supposed to come up with political solutions. The police have the task of preventing and prosecuting breaches of the law, initiating judicial proceedings and keeping encroachments on fundamental rights to a minimum. Here in particular, the top priority is to ensure that the authorities always adhere to the statutory duties and rules – even against orders from the ministry if in doubt. The responsibility for this lies first and foremost with the Chief of Police and, accordingly, the President of the Office for the Protection of the Constitution.

So far, this has hardly played a role in normal day-to-day business. So far, the appointment of a new head of the authority has rather served the political leaders to show their priorities and to spread a breath of fresh air in the authority. The demand to reduce the influence of democratically elected politicians in favour of traditional civil service principles can seem outdated, if not slightly authoritarian. It also means that a new minister may have to take on a head of authority disinclined to open the doors for the breath of fresh air promised during the election campaign.

The independence of the heads only becomes important in case their objection becomes eventually systemically relevant. The police and the Office for the Protection of the Constitution run a particular risk of being misused by a government with anti-democratic intentions to maintain its own power. This is not just a matter of preventing cronyism or attracting the best minds to the authorities. The security authorities have the strongest means at their disposal that the state monopoly on the use of force offers.

If, for example, the Ministry of the Interior instructs a newly elected government to take tougher action against certain opposition alliances or protest movements, the instructions go through the offices of the presidents of the police and the Office for the Protection of the Constitution. They have extensive possibilities to shift financial and personnel resources from one department to the other and thus shift the focus in the State Office of Criminal Investigation or the State Office for the Protection of the Constitution almost at will. In addition, they could even issue internal directives in individual cases to allow the plans of an activist group to suffice for an initial suspicion under criminal law or even an unconstitutional endeavour. These findings provide access to an arsenal of investigative measures such as house searches and mobile phone surveillance. The information obtained can be used to ban assemblies and organisations. Even if the courts subsequently determine that the suspicion was insufficient after all, a search, for example, can no longer be reversed.

If a government prioritises the preservation of its own power over the law, this shows the importance of

the head of the authorities who disagrees with it for a functioning constitutional state. If, on the other hand, the post is politically occupied, a government that does not respect the rule of law can turn the authority into its extended arm. It is no coincidence that in Slovakia, the authoritarian-populist president Robert Fico, who was re-elected in November, replaced the police chief as his first official act in order to get rid of troublesome corruption investigations against him.

Cutting the list of political officials in Thuringia is the right step. But it is not enough. In order to protect the rule of law and democracy, the police chief and the president of the Office for the Protection of the Constitution must also be removed from this list. This will cost future governments some of their room for manoeuvre. However, the gain in resilience of the security authorities in the face of their anti-democratic instrumentalisation more than makes up for this loss.

This article is part of the outcome of the Thuringia project and was first published on SPIEGEL online.

The Week on Verfassungsblog

… summarized by MORITZ SCHRAMM:

A vote on the controversial so-called **Rwanda Plan** was held in the **UK** this week. Contrary to a Supreme Court ruling in November, the Sunak government wants to declare Rwanda a safe third country in order to deport refugees there. Mind you, this also includes people who do not even come from Rwanda. ALICE DONALD and JOELLE GROGAN are not convinced.

In **Gaza**, **Israel's military** continues to act with hardly any less severity. In the meantime, Israel is facing accusations of genocide in The Hague. ITAMAR MANN believes that comprehensive 'provisional measures' are rather unlikely in view of the arguments presented at the Palais de la Paix.

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Even though the pandemic is fortunately behind us, many pressing questions from the strange time of lockdowns, contact restrictions and **triage** remain unanswered. However, it would be a big mistake not to take the lessons learned on board now. The next pandemic will take its revenge. NORBERT PAULO therefore calls for a new regulation of pandemic-related triage.

The aftermath of the Federal Constitutional Court's budget decision of last year continues to keep political Berlin on tenterhooks. PHILIPP SAUTER discusses the extent to which the interpretation of the '**debt brake**' by federal constitutional law is in tension

with Germany's obligations under international **climate protection** law.

Remarkable developments are taking place in the area of **sex crimes**. At European level, there are plans to harmonize the criminal offence of rape. Germany has opposed these plans in the Council. DILKEN ÇELEBI, LISA MARIE KOOP and LEOKADIA MELCHIOR take a detailed and critical look at the arguments put forward by the German government.

In **Belgium**, refugees, especially single men, are regularly excluded from access to social benefits. This has now led to massive problems with homelessness. SARAH GANTY and EVA SEVRIN with a critical analysis of the state of Belgian asylum law.

The European Union wants to become greener and more digital. To achieve both goals, Brussels has now passed the **Critical Raw Materials Act**, which regulates the mining and import of rare earths. IOANNIS KAMPOURAKIS is not convinced.

There is a nexus between **climate change** and **human rights protection**. But what exactly does it look like and to what extent is it justiciable? LENA RIEMER and LUCA SCHEID shed light on this question on a remarkable case before the Inter-American Court of Human Rights.

Is the mood changing? Will the **AfD** be **banned** after all? The times are dark and stormy, but the debate seems to be shifting slightly towards an AfD ban in view of the openly ethnocentric activities and Nazi-like deportation fantasies of high-ranking AfD cadres. ANDREAS FISCHER-LESCANO argues that the AfD should be banned.

An important intervention comes from YVES-J. MANZANZA LUMINGU and LENA RUDKOWSKI. The European Union is the master of rule-making – whether the always work as planned is another question. Initial practical experience with the **European Supply Chain Act** indicates that there are still massive enforcement difficulties in areas of fragile statehood.

As is well known, the General Data Protection Regulation applies (almost) everywhere. From the local bowling club to your email addresses in this newsletter, dear readers. The ECJ has now made it clear that even **parliamentary committees of inquiry** must comply with the principles set out in the GDPR. KEVIN FREDY HINTERBERGER explains the latest case law.

Farmers' protests are keeping Germany on edge. In the wake of what could be called a literal tractor siege, Agriculture Minister Cem Özdemir is now calling for an 'animal welfare levy'. TILL VALENTIN MEICKMANN, however, is skeptical in view of the constitutional and European legal hurdles.

Few things raise political blood pressure as reliably as debates about language, either in the service of **gender equality** or to protect **traditional language**. Some Länder want to promote 'gender-equitable' language, Bavaria wants to ban 'gendering'. But to what extent is the way we speak even amenable to legal regulation? YANNIK BREUER and MADELINE TRAPPMANN argue for legislators to have broad discretion – in both directions.

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