Itching Wigs, Fallen Masks

At the End of a Historic Week

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What if we find ourselves forced to admit that we all are in the entirely wrong movie? What if it turns out that time has passed us by with our human rights convention and our rule of law? What if we are nothing more than remnants of a bygone submerged *Ancien Régime* after all, standing around in confusion, scratching our wigs and fiddling with our breeches buckles – still full of strong opinions about Bourbon versus Orléans and ever ready to deliver the finest state-theological discourse – while out there, the Bonapartes are pushing through their plebiscites wherever you look? What if we have nothing left to say to or about the world around us, a world we no longer understand? What then?

Doubts of this kind, I suspect, are not entirely unfamiliar to most of us constitutional lawyers in these dark days. The normative distinctions we are used to working with seem so feeble now. When even conservatives don't seem to care much any longer whether what they demand is lawful or not – who is supposed to care at all?

Last Wednesday, with resolution DS 20/14698, CDU leader Friedrich Merz secured a parliamentary majority in the German Bundestag between the CDU/CSU, FDP, and the right-wing extremist AfD. This was more than just showmanship and symbolism: it was a majority that articulated a shared legislative will. This majority declared that stopping all migrants from entering the country was a suitable and necessary measure to protect children from being stabbed. It defined migrants not only as people who pose administrative, distributional, integration, and financial challenges but as individuals who must be kept away from Germany for the sake of our physical safety. That is the shared will of the CDU/CSU, FDP, and AfD. That is a fact now. And if they already share this will, why should I believe the CDU when they insist they do not also want to execute it? On what, then, is their supposed deep disgust for the AfD founded – the very disgust that is supposed to reassure me they would never form a governing coalition with them? On the fact that the AfD allegedly harms Germany as a business location and seeks to leave the euro?

The objective of this shared will is, in all likelihood, unlawful. Even the unescapable former FCC President Hans-Jürgen Papier, while claiming the opposite, concedes that European law "in the view of many legal experts... quite clearly" opposes the rejection of migrants at EU internal borders. However, Papier argues that European law "cannot and must not impose such a rigorous restriction on German sovereignty" and, the retired one-man constitutional court impersonation that he still is in the eyes of much of the media in Germany, waves the wand of identity control to simply make the primacy of European law in this matter disappear. A nice enough argument, of course, but hardly apt to convince anyone not already inclined to believe that EU, international, and constitutional law are all just a lot of terribly bothersome bollocks.

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CDU chancellor candidate Friedrich Merz apparently believes he can realise his aims without breaking the law by means of the emergency clause in Article 72 of the TFEU. During the actual refugee and migration crisis of 2015, Germany chose not to press this button. Expecting that, ten years later, with significantly lower numbers of arrivals, the European Court of Justice could be convinced that Germany is facing such an emergency seems like a risky assumption, to say the least. One might almost suspect – what a shocking thought – that conservatives are once again invoking a state of emergency as a means to the end of getting rid of normative constraints, as opposed to the other way round.

In the United States, Donald Trump simply erases the wording of the 14th Amendment to the Constitution via executive order. He mustn't – but he does it anyway. In Italy, post-fascist PM Giorgia Meloni, after two court rulings telling her not to do it, is now simply flying asylum seekers to Albania for a third time. "*Legal, illegal, scheißegal?* How Herbert Kickl wants to override the law", was the cover story of Austria's Profil magazine this week. Sovereignly disregarding the law is becoming ever more common, ever more normal – and ever more popular. It signals strength and decisiveness. That, apparently, is what people want to see in these uncertain times.

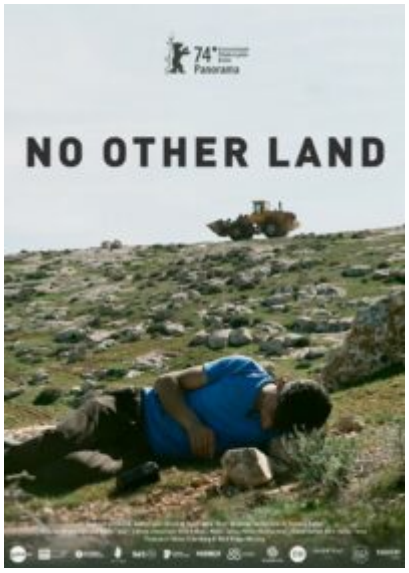
This may feel like a new epoch, a tectonic shift in all normative foundations, making everything we know and value about the law seem like obsolete, dusty *Ancien Régime* relics. But that is not true. The way we collectively bind ourselves to rules, how we argue over their scope and meaning, and how and when we make collectively binding decisions about changing them — all of this remains politically contestable and changeable. And as long as that is the case, knowledge of the institutions in which such contest and change occurs remains necessary and relevant. That only ceases to be true when the authoritarian logic of emergency and exception gets its way, suspending these institutions indefinitely through an endless cycle of new conflicts, new enemies, and new violence. At that point, clutching one's constitutional pearls becomes useless. Then, only resistance remains.

But we are not there yet. As I write this on this historic day at the end of this historic week, the Bundestag is once again debating what should apply in migration law in this country. Unlike on Wednesday, this time it is about actual legislation, not just a resolution. And lo and behold: the shared will of the CDU/CSU, FDP, and AfD has already deflated again, just two days later. Friedrich Merz wanted to be an authoritarian bully for once – a guy who drives horse-and-carriage through all the rules, takes no heed of others, and simply acts without asking questions, just like Donald Trump and all the others who seem to have such a splendid time and such endless success at it. But it did not work out. What Donald knows, and Friedrich apparently doesn't, is this: the one thing an authoritarian bully must never do is lose. The CDU bears the damage. For now, German democracy has escaped with a black eye.

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Editor's Pick

by JASPER NEBEL



Source: Berlinale

This week I want to recommend "No Other Land". I, too, would have preferred something more uplifting, given the current omnipresent *Weltschmerz* mood, who wouldn't? But trust me: This documentary is worth it.

At its premiere at the last Berlinale, the attending directors faced accusations of anti-Semitism, a topic already concisely commented on. Amidst this, the film itself should not be forgotten. It follows Israeli journalist Yuval Abraham and Palestinian Basel Adra as they document the brutal realities of living in the West Bank. As a viewer, I felt incredibly close to the suffering and misery; when demolition teams – accompanied by the Israeli military – destroy Palestinian homes and schools; when heavily armed militant settlers raid Palestinian villages and kill residents. The images speak for themselves, no explanations needed.

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The Week on Verfassungsblog

...summarised by EVA MARIA BREDLER

All is fair in war and love – as Napoleon is said to have known. Some believe the same holds true for election campaigns. And thus, Friedrich Merz pushed a **motion on migration** through the Bundestag with the votes of the far-right AfD, just hours before the Bundestag debated if a procedure to ban that very party should be initiated (see above). The proposal, titled "Five Points for Secure Borders and the End of Illegal Migration", calls for the rejection of asylum seekers at the borders, among other things. WINFRIED KLUTH (GER) shows that the motion not only disregards historical principles but also the law.

A preview of Merz's governing style? He has already announced that, on his first day as Chancellor, he would "instruct" the Ministry of the Interior to impose border controls, using his **executive authority**. That brings to mind the style of a certain American businessman who kept us particularly busy last week. Yet things are not that simple, as JANNIS LENNARTZ (GER) explains.

While Merz's firewall melts in the heat of his will to power, leaving behind a black-and-blue puddle, TAREK MAHMALAT (GER) examines the colours of the upcoming **German chancellor's TV debate**: Two parties – the AfD and the Greens – have been excluded from the televised duel, despite polling at least as well as (or better than) the Social Democrats. This raises concerns about equal opportunities for political parties. TV debates, Mahmalat argues, work well with a full colour palette – not just black and red.

From debate culture to protest culture: Three weeks ago, massive counterdemonstrations took place at the AfD's national party congress in Riesa, Saxony, prompting a large-scale police operation. Reports suggest numerous incidents of excessive force, including allegations that a police officer knocked Saxon state parliament member Nam Duy Nguyen unconscious. JONATHAN SCHRAMM (GER) thus reflects on the legal position of parliamentarians acting as "**parliamentary observers**" at demonstrations, where private and professional spheres merge.

Spheres also merged in a Bavarian law passed last summer, which requires universities to cooperate with the German military. According to JANINA REIMANN (GER), this law infringes on **universities' autonomy** and undermines the constitutional separation of civilian and military spheres.

Meanwhile, the Berlin-Brandenburg State Labour Court had to separate direct from indirect discrimination – in yet another case of a **hijab ban** in the workplace. What made this case unique is that the court found discrimination even though the hijab-wearing applicant had voluntarily declined the job. For ADIL

DEMIRKOL (GER), this decision demonstrates that the EU's multi-level system of fundamental rights protection is working.

Discrimination is not only an issue in private relationships but also in state institutions. CLARA WELLHÄUSSER (GER) uses the ongoing debate on the detention of trans individuals as an opportunity to reflect more broadly on **gender self-determination in prisons**. She considers the outdated principle of strictly separating men and women in detention – combined with government inaction – particularly problematic combined with government inaction.

Austria, too, sticks to legislative inaction on LGBTQ+ rights. Clear legal regulations for changing gender markers for trans and inter people are missing to this day. So far, only the highest courts and the ECtHR offer protection. But even that might be changing. A recent ruling by the Austrian Administrative Court marks a step backward: It sets out that a person's gender must be officially recorded, and that biological sex is the primary determining factor. ELISABETH GREIF (GER) explores just how precarious the rights of trans and inter people are in Austria.

Better news from Strasbourg: In two recently published rulings, the ECtHR recognized **Greece**'s long-standing pushback practices as human rights violations. ISABEL KIENZLE and MELINA RIEMER (GER) analyse the evidentiary implications of the rulings and highlight missed opportunities.

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We wanted to spare you (and ourselves) Trump-related content this week – but alas, that proved impossible. After the US Supreme Court upheld the **TikTok ban**, Trump issued one of his countless executive orders to temporarily suspend enforcement of the judgment. URS SAXER and ROMAN KOLLENBERG (EN) take a closer look at the Court's reasoning, while the ban's long-term implications remain uncertain.

The autocratic playbook has been studied in detail, except for one crucial chapter: economic policy. Yet Trump's electoral victories have shown that economic governance is often a central factor in authoritarian success. KATI CSERES and YORK ALBRECHT (EN) fill this gap by examining Hungary as a case study of authoritarian market interference.

A crucial chapter of the **autocratic playbook** concerns the judiciary. After the ECJ clarified selection requirements for national judges, it ruled last year on the requirements for appointing EU General Court judges in *Valančius*. SOPHIE-CHARLOTTE LEMMER and MARLEEN KAPPÉ (EN) warn that the judgment effectively gives Member States free rein to shape the national phase of the selection process as they see fit.

This week, CAROLYN MOSER and LAURIDS HEMPEL (EN) continued our symposium "**Musk, Power, and the EU: Can EU Law Tackle the Challenges of Unchecked Plutocracy?**" They consider Musk's interference in European elections a geopolitical wake-up call. If the EU wants to set norms rather than just follow them, it must strengthen its defences against foreign influence – and quickly.

Finally, we launched the symposium "**The Omnipresence of Divergent Historical Narratives in Law and Politics**" (EN), edited by ANGELIKA NUSSBERGER and PAULA RHEIN-FISCHER. The project engages with the pressing feeling that the past is ever-present: Wars are justified in the name of history, and political struggles revolve around collective memory. The symposium explores how authoritarianism and foreign policy intersect in the digital age. ANGELIKA NUSSBERGER and PAULA RHEIN-FISCHER open the

debate by examining historical narratives in law and politics. ANDRII NEKOLIAK, PAULA RHEIN-FISCHER, MIROSŁAW M. SADOWSKI and DOVILĖ SAGATIENĖ discuss the many faces of European memory culture and the challenges posed by its various national approaches. ULADZISLAU BELAVUSAU analyses the Dutch approach, while ALEKSANDRA GLISZCZYŃSKA-GRABIAS dissects Poland's in detail.

Von Clausewitz once wrote: "All of war presupposes human weakness and seeks to exploit it." Perhaps he was closer to the truth than Napoleon – when it comes to war, elections (and love?) alike.

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That's all for this week.

Take care and all the best!

Yours,

the Verfassungsblog Team

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