"Only a Vigilant Democracy Can Be a Resilient Democracy"

Five Questions to Kyrill-Alexander Schwarz

Kyrill-Alexander Schwarz & Eva Maria Bredler

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Since 2021, Germany's domestic intelligence service (BfV) had classified the far-right Alternative for Germany (AfD) as a suspected extremist organisation. Now, the BfV has escalated its assessment, designating the party as a "confirmed right-wing extremist endeavour". Germany's new Justice Minister, Stefanie Hubig, has announced she will soon convene the cabinet to discuss how to respond. We spoke with Professor Kyrill-Alexander Schwarz, a professor for public law at the University of Würzburg, who last year co-authored a legal opinion on the potential banning of the AfD.

1. The BfV has designated the AfD as "confirmed right-wing extremist", but refuses to release its 1,108-page report. On Wednesday, *FragDenStaat* published a 17-page excerpt, and *Der Spiegel* shared an analysis of the report. What legitimate reasons could justify continued secrecy?

Aside from the possible need to protect sources, in a transparent constitutional state there is no convincing justification for withholding the report. If a political party is accused of pursuing anti-constitutional aims, the public has a right to understand why such a serious interference with democratic participation is being made – especially to ensure public scrutiny, including in potential court proceedings. Only a vigilant democracy can be a resilient democracy. The public also deserves to know why the publication occurred at this particular time. Was it ordered by or perhaps released without the knowledge of the former Minister of the Interior? How independent is the BfV in practice, given that it is a subordinate agency within the Interior Ministry and subject to its instructions? These are legitimate questions whose answers are vital to ensuring the fairness of the political process – even when dealing with extremists. Transparency from the outset helps prevent the AfD from framing itself once again as a victim of "the system" in its political narrative.

2. Since the classification was made public, there has been increasing debate over whether the AfD should be banned. Legally, the Bundestag, Bundesrat, or Federal Government "may" file such a request, and the Federal Constitutional Court refers to both "discretionary" and "political" discretion in this context. How might the BfV's classification influence that discretion?

The BfV's classification does not trigger any automatic legal consequences. It is a statutory assessment grounded in a reality-based analysis of the AfD's actions and rhetoric. The BfV then evaluates the extent of the party's hostility to the constitution and the potential threat it poses to the liberal democratic order which can justify the classification. Nevertheless, the decision whether to seek a party ban remains with the potential applicants – Bundestag, Bundesrat, and the Federal Government – and involves weighing not only the underlying facts and legal standards, but also political considerations. However, if we take the principle of a *wehrhafte Demokratie* (militant democracy) seriously, then the scope for discretion narrows as evidence of anti-constitutional behaviour grows. At a certain point, there may be a duty to act in defence of the constitutional order. This duty, however, is political rather than enforceable in court. Regardless, the Federal Constitutional Court would have to form its own view on whether the stringent legal criteria for a ban are met.

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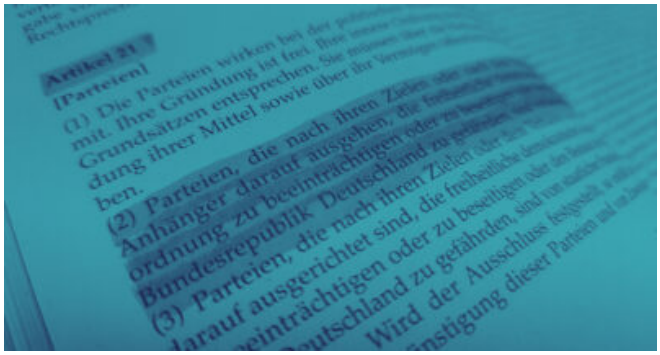

ALLE REDEN DRÜBER – WIR WOLLEN ES WISSEN!

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3. Art. 21 of the Basic Law also allows for parties to be excluded from public financing, under similar conditions to those for a ban. But what about the AfD-aligned Desiderius Erasmus Foundation? How might the BfV's classification affect its funding, and what role does the principle of equal treatment play here?

It's important to clarify a common misconception: exclusion from public funding essentially requires the same conditions as a party ban. Only with regard to the requirement of an "aggressive, combative attitude" is the threshold slightly higher for a full ban. Simply pointing to financial penalties as a more palatable alternative to a ban risks ignoring these constitutional standards.

The situation is different when it comes to political foundations. Here, state funding requires a positive commitment to the liberal democratic order – something akin to the loyalty expected of civil servants or of organisations granted charitable status. Here, the constitutional state demands more than passive neutrality: it expects active affirmation of democratic values. That's justified, since political foundations – though party-affiliated – are not themselves political parties and therefore do not benefit from the Basic Law's special protections for parties.

So, there is no violation of equal treatment if public authorities assess that the Desiderius Erasmus Foundation fails to meet these standards – perhaps because it promotes a political ideology that itself is anti-constitutional.

4. As civil servants, AfD members are required to demonstrate loyalty to the liberal democratic order – an order fundamentally incompatible with the AfD's "predominant ethnic-nationalist conception of the people", as the BfV report says. What does this mean for AfD members in positions of state responsibility, such as in the judiciary, police, or education system?

Again, the BfV's assessment does not in itself have direct legal effect. Each case must be individually examined to determine whether a public servant's conduct justifies disciplinary action, up to and including dismissal. Mere membership in a party, even one deemed extremist, cannot be the sole basis for sanction as long as the party remains legal.

However, this does not prevent leaders of the party who do not sufficiently distance themselves from such statements, or other party members who share and spread extremist content on social media, from being held legally accountable for their conduct on a case-by-case basis. This shows that administrative law already offers a range of tools to address extremism in public service, without needing to rely solely on the double-edged sword of a party ban.

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5. The AfD is now pursuing legal action against its classification as a "confirmed right-wing extremist" group. On what do the prospects of success depend, and what might the proceedings imply?

The AfD, like any party or citizen, has the right to challenge state actions it deems unlawful. Whether its legal arguments hold water is for the courts to decide under the rule of law. I won't speculate on the chances of success, especially since the full BfV report has yet to be made public.

However, the BfV's current commitment to refrain from publicly using the classification during the legal proceedings – removing the respective press release from its website, for example – is a standard administrative practice aimed at easing court dockets. It says nothing about the likely legal outcome. The BfV took a similar approach when it first labelled the AfD a "suspected case", and still prevailed in court, both at the Cologne Administrative Court and the Higher Administrative Court in Münster. What we are witnessing is simply the rule-of-law normality: that state action is subject to judicial review by administrative courts. This is not an exception – it is the everyday functioning of a constitutional democracy.

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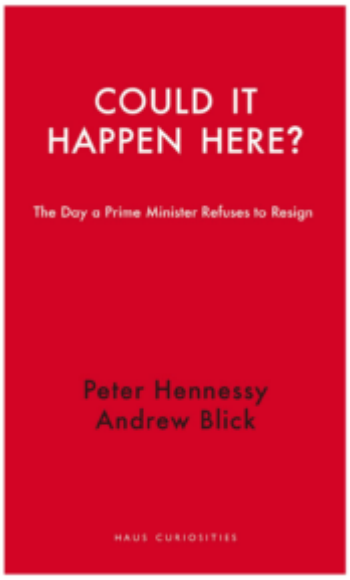
Editor's Pick

by MAXIMILIAN STEINBEIS



Could it happen here? Seven years ago, Cass Sunstein answered the troubling question for his country, the USA, in the affirmative. "Full-blown authoritarianism" seemed, while unlikely, definitely possible to the legal scholar in 2018. In 2025, it seems a reality.

The question of what happens when "it" happens is being asked with increasing urgency in many democracies, not least by the *Verfassungsblog*. But what exactly is "it"? The answers differ in interesting ways: In Germany, it would be the government stopping to obey the courts. In the U.S., it would be the president using his executive power to break free of all institutional constraints. In the UK, it's the Prime Minister, despite lacking a parliamentary majority, refusing to resign.

For this scenario, two historians have just published a slim volume which I greatly recommend. One of the authors, Peter Hennessy, is the creator of the famous "good chap theory of government": The British constitution, unlike any other, is based not on norms, procedures, and institutions, but on the trust that those in power will somehow always know to behave themselves. That trust has greatly suffered since the 2014 Brexit referendum, and even his fans might hesitate to call the grinning Nigel Farage a "good chap."

So, it's high time for scenario-building – and on top of being a good read, this book offers a wealth of fascinating insights into the inner workings of the British constitution.

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The Week on Verfassungsblog

summarised by EVA MARIA BREDLER

Yesterday, Berlin commemorated 80 years since the liberation from National Socialism and the end of the Second World War in Europe with a one-time public holiday. Even without official commemoration, the current political climate offers no shortage of reasons to reflect on the violent tyranny of the Nazi regime. Many are looking to contemporaries of that era for answers. Those trying to make sense of the democratic decay in the US routinely invoke Carl Schmitt, the infamous legal theorist of authoritarianism. Others are now turning to Ernst Fraenkel, a socialist jurist and sharp critic of Schmitt. His theory of the *"dual state"* – in which a rule-bound *Normenstaat* coexists with a discretionary *Maßnahmenstaat* – seems like a precise description of **Trump 2.0**. But WILLIAM E. SCHEUERMAN (ENG) remains sceptical whether Fraenkel's underlying assumptions hold true.

On 8 May, the German domestic intelligence service (*Bundesamt für Verfassungsschutz*) also pledged to hold off on classifying the **AfD** as "confirmed rightwing extremist force" before the Cologne Administrative Court. The press release issued just days earlier has since been removed from the agency's website. Yet the legal and political controversy (explored in conversation with KYRILL-ALEXANDER SCHWARZ above) is, of course, far from over. FOROUD SHIRVANI (GER) observes that much of the public discussion fails to distinguish between the legal thresholds for classifying a party as extremist and the much higher bar required for an outright ban. He unpacks what one might imply for the other – and what it might not necessarily entail.

THEO RUST (GER) reminds us that national law is only part of the story. Should a ban on the AfD ever materialise, the party would almost certainly lodge a complaint under Article 34 of the European Convention on Human Rights. Any such move would subject German **constitutional** processes to international human rights scrutiny – a scenario worth anticipating now, not later.

Parliament, too, paused for reflection, with a commemorative session in the Bundestag marking 8 May – symbolism of the kind one expects. But symbols can also divide the nation's highest chamber. A more controversial moment came during the inaugural sitting of the new Bundestag, when a Left Party MP wore a Kufiya. What does Germany's Basic Law have to say about the use of **symbols** in the plenary chamber? Very little, conclude ADIL DEMIRKOL and BENJAMIN RASIDOVIC (GER), who call for a more fundamental engagement with the legal methodology of interpreting symbols.

Ambiguity does not end with symbolism. It extends to the way law handles political concepts. The newly added Article 143h of the Basic Law empowers the federal government to create a special fund for "additional investments to achieve climate neutrality by 2045." Yet what precisely constitutes "**climate neutrality**"? It's a policy concept with no singular legal definition – and one that courts and lawmakers are interpreting in very different ways.

This uncertainty prompts OLIVER GEDEN and ALEXANDER PROELSS (GER) to reflect on the relationship between climate science and climate policy in legal reasoning.

The 8th May also marks a day to think about migration and citizenship. In this context, the ECJ's ruling in ***Commission v Malta*** sparked considerable debate – and a sort of ad-hoc symposium on our blog

with five pieces only this week. In its ruling, the Grand Chamber held that Malta's investor citizenship scheme, which grants Maltese nationality in exchange for predetermined payments or investments, was contrary to EU law. The Court establishes, amongst other things, that Union citizenship is based on the principle of mutual trust. MARTIJN VAN DEN BRINK (ENG) criticises that the decision does not offer any substantive legal justification for this expansionary reading of EU citizenship and unpacks the dangers of a thinly argued landmark decision. Not so fast, says LUKE DIMITRIOS SPIEKER (ENG). He argues that the Court did not necessarily make bad law in resolving what was a very hard case and reminds us that many of the Court's "great" judgments have left room for interpretation.

In striking down Malta's citizenship for investment scheme, the CJEU cast **EU citizenship** as a "relationship of solidarity and good faith." For RUAIRI O'NEILL (ENG), this does demonstrate that the EU principle of mutual trust has constitutional character and is normatively capable of challenging national administrative mechanisms incompatible with the values in Art. 2 TEU. ANJA BOSSOW (ENG) maps the perils and potential promise of the Court's embrace of such a thick-ish conception of citizenship which implies that the bond of EU citizenship is not only legal in nature but requires some other connection between a person and the state according to the "solidarity and good faith" test. DIMITRY VLADIMIROVICH KOCHENOV (ENG) reflects on the dangers of adding an extra-legal element to Union citizenship and the EU's illiberal turn.

Another potentially far-reaching ruling from Luxembourg is expected in the joined cases *Alace* and *Canpelli*. The cases deal with the powers of Italy (and, by extension, other EU Member States) to legislate on what constitutes a "**safe third country**" and a "safe country of origin" – powers crucial to the implementation of the Italy-Albania protocol which externalises asylum procedures for people from safe countries. But how safe is "safe"? Advocate General de la Tour now suggested in his Advisory Opinion that "generally" safe is safe enough, even if some groups might be at risk. MATILDE ROCCA (ENG) explains why this approach may put human rights at risk.

Human rights might also be put at risk by the EU's likely withdrawal of the Proposal for an **Artificial Intelligence Liability Directive** that sought to strengthen procedural protection for plaintiffs against AI providers and users. CRISTINA FRATTONE (ENG) highlights the Directive's main merits and argues that, despite its flaws, it would have been crucial for the protection of victims of AI-related harm.

This week, we've launched a symposium on "**Ongoing Controversies over Methods in EU Law – Towards a Reflexive Turn**" (ENG). VINCENT RÉVEILLÈRE kicks off by showing how, since the publication of last year's symposium "Controversies over Methods in EU Law", the ongoing controversies are influenced by multiple crises in the European Union. PÄIVI JOHANNA NEUVONEN observes that the downside of the growing interest in being critical as an EU law scholar is that the idea of critique itself is in danger of becoming inflated. LAURE CLÉMENT-WILZ emphasizes the human factor as a critical method of analysis for legal scholars specialising in EU law. JENNIFER ORLANDO-SALLING shows how decolonial approaches can bridge the gap between history, theory, and action, offering practical and alternative solutions for reconciliation.

Commemoration days invite us to explore exactly that intricate relationship between history, theory, and action: to ask what happened, why and how it happened – and what it demands of us, here and now. German captures these questions in a single word: "*Vergangenheitsbewältigung*", coming to terms with the past, an ever-unfolding process that is, as author Max Czollek noted, not even limited to the past: "*Gegenwartsbewältigung*" – coming to terms with the present – is our responsibility, too. We are glad that *Verfassungsblog* can offer a space for both, thanks to our authors, and thanks to you.

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Take care and all the best!
Yours,
the Verfassungsblog Team

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