When It Happens

Halfway Through the Judicial Resilience Project

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25.07.2025 doi: 10.59704/f9697ce6e4f2a343

This year, we set out to explore how vulnerable to authoritarian populist's strategies the independent and impartial judiciary of the Federal German Republic might be . "Let's develop scenarios for what could be coming", we said. "Let's do it before those scenarios become reality. Let's anticipate the future. Let's use the room for manoeuvre to devise counterstrategies – while the room still exists. So that we are prepared. When it happens."

A little more than half the year has passed. We're in the thick of the research phase. We've conducted more than 50 intensive and in-depth interviews with a wide range of stakeholders in the judiciary and public administration across all 16 *Länder*. We've immersed ourselves in the most intricate details of court staffing and organisational law. We've identified a whole range of scenarios through which, given the opportunity, the authoritarian-populist strategy could pounce on the judiciary to tighten its grip. Toward the end of the year, we will publish a book summarising our findings for the public.

Meanwhile, reality seems to be confirming our suspicion that something is closing in – something that our seemingly well-protected constitutional state may not be prepared for, and to which we must urgently respond. More than that: what if this is no longer simply about anticipating the future? What if things have already moved further along? What if it's no longer simply about the if – but about the fact that it is already happening?

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Before anything can happen, public consciousness must first be primed with the idea that something *must* happen. That something is wrong with these so-called "elitist judges" and their independence. That things simply cannot go on as they are. This idea needs to be widely accepted as fact. Creating the very conditions for this is central to the authoritarian-populist strategy. In Poland, Jarosław Kaczyński and his PiS party spent years spreading the claim that the judiciary was riddled with corrupt, post-communist elites conspiring to prevent the "true Polish people" from realising their will. Every court case they lost was presented as proof of that claim. This replicable strategy can be witnessed in the United States, Mexico, Israel and

many other countries, too. Defaming and delegitimising the independent judiciary is often the first step towards reshaping it – with the aim of stripping it of its role as a constitutional check on power, and moulding it into an authoritarian tool of government.

Against this backdrop, the orchestrated campaign by right-wing fringe and micro-media outlets as well as social media accounts, targeting the SPD's current nominations for the Federal Constitutional Court, reveals itself to be not merely malicious – but a deliberate part of this very strategy. And one for which no well-meaning legalist "resilience reform" offers a remedy. It was claimed that Frauke Brosius-Gersdorf and Ann-Katrin Kaufhold held egregious views concerning abortion, mandatory vaccination, and "climate dictatorship", and also were charged with accusations of plagiarism. Whether any of it is true is almost irrelevant. The mere fact that Brosius-Gersdorf and Kaufhold and their supporters fought back against such treatment is useful enough to those pursuing the strategy. It lends apparent evidence to the claim that these individuals are far too polarising, too controversial, too politically compromised to be appointed to Germany's highest judicial office. And if, in the end, no two-thirds majority can be found for their appointment – then something must be done. Then, the two-thirds rule ought to be abolished, so that henceforth the governing majority can decide unilaterally who sits in Karlsruhe to rule on its laws.

Against this backdrop, the policy of turning asylum seekers away at Germany's borders, pursued by Federal Interior Minister Alexander Dobrindt since taking office, takes on a distinctly strategic sheen. Everyone knows this practice violates European law – and the Berlin Administrative Court ruled accordingly. What followed was a media campaign against the court. The presiding judge found himself faced not with legal rebuttals, but political accusations. The narrative: a "left-wing judge" supposedly placing himself above the law. Tellingly, the judgement's legal reasoning was not the focus – but rather the judge's party membership.

Of course, in a democratic constitutional state, judicial decisions must remain open to criticism – including robust criticism. But what we are witnessing here goes well beyond that. It is an attack on the judiciary's authority as an institution for restraining power. In the last weeks, we've had numerous conversations with judges. In none of these discussions was it suggested that the judiciary should be exempt from substantive criticism or from the need to defend its authority through legal reasoning. On the contrary: in every interview, we encountered a judiciary that was self-reflective and actively striving to create more transparency through better communication about their work. But it also became clear: the judiciary cannot defend itself alone. It lacks effective instruments of enforcement. It depends on other branches of government to respect and publicly uphold its decisions.

That Interior Minister Dobrindt disagreed with his defeat in the administrative court – fair enough. That he then publicly declared the ruling a mere "one-off decision" and announced that the practice would continue – is already a cause for concern. Yes, a court ruling initially only applies *inter partes* – between the parties involved. But our administrative and constitutional state functions precisely because the state, acting in good faith, continually asks itself whether a judgement in a particular case might have implications for the general legality of its practices. If it fails to do so, it risks pushing the rule of law to the brink.

Even more concerning is Dobrindt's long silence in response to the media attacks on the court. As Minister for Internal, and therefore also Constitutional Affairs, he should have publicly and unequivocally defended the court from the outset – but for far too long, he did not.

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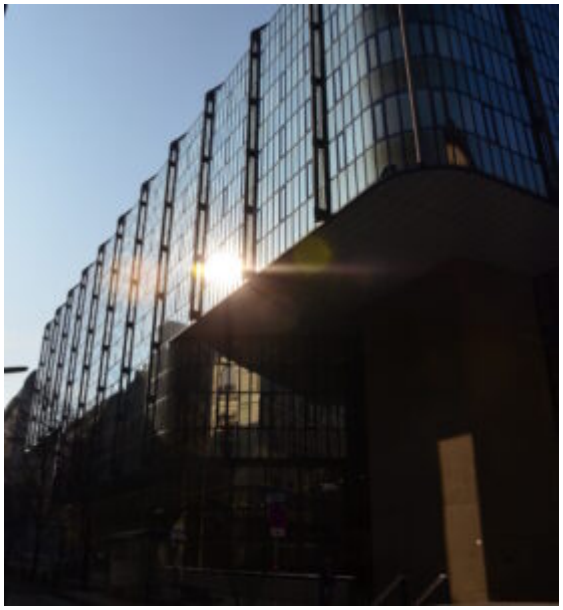

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The strategic aim behind the defamation and delegitimisation of independent judges is to prepare the ground for future authoritarian "judicial reforms" – to eliminate the supposed problem that one has first manufactured and established as a "fact" in the public eye. This is where our Judicial Resilience Project comes in: we are investigating what these "reforms" might look like and what harm they could cause – especially since they often appear in the form of highly technical, very minor, seemingly harmless proposals. Concerning, for example, court funding. Or IT infrastructure. Or the modalities of judicial appointments. Or the jurisdiction of particular chambers. Such proposals would be difficult to scandalise, easy to overlook. But once enacted, they are extremely difficult to reverse.

That is our mission. We want to be prepared. So we can recognise what we're dealing with when the next step is taken – assuming the required majorities are in place at federal and state level. And we want to share this knowledge with the wider public. If all goes to plan, we'll be ready by autumn. We'll keep you posted.

In the meantime, please continue to support our work. A regular donation of €50 per month makes an invaluable contribution to our financial stability and independence. Less is fine too. More is always welcome.

With that, the Verfassungsblog editorial team signs off for the summer break. We'll be back on 12 September – hopefully well rested and ready for what lies ahead. Until then, keep your chin up, all the best – and don't forget the sun cream!

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Editor's Pick

by EVA MARIA BREDLER



Photo: Eva Maria Bredler

Over the past few days, I've felt a bit lost in Berlin. I worked, met people, had coffee – the usual. It was all pleasant enough, but I was just going through the motions. Then I stumbled across *On Connection* by Kae Tempest at BuchHafen in Neukölln (highly recommend!). Tempest writes about writing, about how creativity – "the ability to feel wonder and the desire to respond" – creates connection, "the feeling of landing in the present tense", weaving in Carl Jung, William Blake and a 2017 study which found that audience members' hearts in sync during a play. But how do we find that connection outside the theatre? Tempest suggests selflessness: "Let go of yourself. Tune in to other people." As I sat in Körnerpark reading, it suddenly hit me: I'd been too caught up in myself. Just then, a young woman walked past with her son and gave me a warm smile.

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The Week on Verfassungsblog

summarised by EVA MARIA BREDLER

Since October 2023 – the month in which Hamas launched its brutal attacks on Israel – a group of eminent Israeli international law scholars has written numerous letters and memos expressing **concerns over many aspects of the Gaza war** from the perspective of international law. These documents, largely unpublished so far, were addressed to Israel's Attorney General, the Military Advocate General, the Minister of Defence, other politicians, media representatives, and Israel's Supreme Court. They address, among other issues, the total blockade of humanitarian aid, rulings of the International Court of Justice, incitement to genocide, and the mistreatment and deaths of Palestinian detainees. To date, none of these communications have received a reply. KAI AMBOS (ENG) has systematically analysed the documents. According to Ambos, they demonstrate not only an unconditional commitment to (humanitarian) international law, but also that any boycott of legal colleagues in Israel is counterproductive – doing a disservice to the rule of law in Israel and at the international level.

HENNING LAHMANN (ENG) argues that Merz and Steinmeier have likewise done a disservice to international law – more precisely: to **Germany's credibility as a proponent of international law.** It is not the violation of international law per se that threatens normative stability, but rather how the international community responds.

The Federal Constitutional Court last week rejected international legal responsibility of Germany in the case of US drone operations from the **Ramstein** Air Base. Despite certain methodological shortcomings, SUÉ GONZÁLEZ HAUCK and JENS T. THEILEN (GER) regard the ruling as still significant, especially with regard to the contentious arms deliveries to Israel.

Germany has also shirked its responsibility towards **refugees from Gaza**: for 18 months, the BAMF froze decisions on applications from the Gaza Strip due to the supposedly "uncertain situation" there. Now, the Federal Office has announced it will resume processing cases – an overdue step, says MARK NIKLAS CUNO (GER). In many instances, not only subsidiary protection but also refugee status or *ipso facto* protection may be warranted.

A recent shift in migration law has sparked controversy: § 62d of the German Residence Act, which made legal representation mandatory upon the initiation of **deportation detention**, only came into force in February 2024 – but is now slated for abolition. JARA AL-ALI and HANNAH FRANZ (GER) criticises the

legislative rationale, arguing that fundamental freedoms and the rule of law must not be sacrificed for political aims such as faster deportations.

Another U-turn happened in Berlin, which may soon become **car-free**: After the Senate had blocked the "*Berlin autofrei*" citizens' initiative, the Berlin Constitutional Court has now cleared the way, finding no interference with fundamental rights in the first place. JAKOB HOHNERLEIN (GER) welcomes the decision but notes that recognising the interfering nature of the initiative would have been more compelling.

Berlin may become not only car-free but also free from pins and buttons – at least in the Bundestag, if its president has her way: Julia Klöckner has expressed remarkable concern for **"neutrality"**, banning the wearing of a Keffiyeh and the flying of the rainbow flag for Pride events. But what does "neutrality" actually mean in this context? GÜNTER FRANKENBERG (GER) investigates the idea of parliamentary neutrality.

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Meanwhile in the **US**, lower courts continue to push back against the Trump administration. After the Supreme Court in *Trump v. CASA* deemed a federal injunction against birthright citizenship executive orders invalid, a New Hampshire judge has now launched a new challenge via a class-action suit. SUZETTE MALVEAUX (ENG) outlines the distinctions and how the Supreme Court may now also target the class-action mechanism.

Last week, the US Congress voted to revoke funding for development cooperation and **public broadcasting** – a move unprecedented in the six decades of US public broadcasting history. JANE KIRTLEY (ENG) explores what this means for the First Amendment by considering the peculiar history of public broadcasting in the United States.

DAVID SUPER (ENG) shows how the cuts reveal **Congress** is increasingly surrendering its constitutional power of the purse – and, with it, its institutional identity in relation to the presidency.

Shortly before, the US Congress passed the highly controversial "One Big, Beautiful Bill". The legislation includes a provision barring Medicaid reimbursements to **Planned Parenthood** for one year. Building on Medina v. Planned Parenthood, it marks what AZIZA AHMED (ENG) calls a deepening (judicial) attack on civil rights and access to healthcare for the poor.

There is better news on reproductive health from **England and Wales**: last month, the MPs voted to decriminalise abortion entirely – for pregnant individuals, though not for good faith actors who provide abortion, or support others in getting access. RUTH FLETCHER (ENG) warns that this threatens to criminalise poverty and restrict protest rights, and explains what a holistic legal approach to reproductive freedom ought to look like.

Sweden, on the other hand, aims for a holistic approach to sexual autonomy – by outlawing sex work online. But at what cost? THOMAS JOYCE (ENG) cautions that the new law risks punishing autonomy, curbing privacy, and eroding digital freedoms – without actually protecting anyone.

German legislators also wrestle with autonomy: although the Federal Constitutional Court recognised a right to a **self-determined death** in 2020, the Bundestag could not settle on a statute yet. England and France have enacted legislation this year. THOMAS WEIGEND (GER) presents the regulations and draws lessons for the German debate.

Whether the **UK and France** may serve as role models in asylum law remains debatable: last week, they agreed on a "one in, one out" pilot scheme, under which the UK will return small boat arrivals to France

while accepting asylum seekers selected from France who can demonstrate family ties in Britain. The agreement signals a *sui generis* evolution in European migration control. For the first time, rather than pushing asylum seekers back to third countries to avoid legal responsibilities under EU and international law, an EU Member State is directly preventing departures from its own territory, as AGOSTINA PIRRELLO and SILVIA BARTOLINI (ENG) explain.

Taiwan, too, is seeing creative political responses.Confronted with lawmakers they themselves elected just eighteen months ago, Taiwanese citizens have creatively repurposed the antiquated mechanism of "recall" as a last-resort check on a runaway legislature, sparked by a year of legislative overreach and erosion of constitutional checks. YOU-HAO LAI (ENG) describes this unprecedented campaign and what it reveals about Taiwan's constitutional culture.

Also revealing: the EU's newly announced "ambitious" **climate goals**. International carbon credits are set to play a key role. INGO VENZKE (ENG) explains the problem behind carbon credits – and traces the telling history of greater flexibilities in climate law and politics.

With that flexibility possibly coming to an end, July brought two historic rulings in international law on the climate crisis. You might have encountered one of them in our symposium "**Human Rights Protection in the Climate Emergency: The Inter-American Court of Human Rights' Advisory Opinion No. 32**" (ENG): it is the first time an international court recognises a human right to a healthy climate. VERENA KAHL and JOSÉ DANIEL RODRÍGUEZ-ORÚE trace the emergence of this new right and highlight its most transformative elements for theory and practice. SARAH DORMAN, MONICA IYER KELSEY and JOST-CREEGAN unpack the IACtHR's holdings and innovations as related to business and human rights. ARMANDO ROCHA, MARIA ANTONIA TIGRE and MIRIAM COHEN address reparations, loss and damage in the advisory opinion.

The second historical decision is the subject of our new symposium in collaboration with the Sabin Center for Climate Change Law: "**The ICJ's Advisory Opinion on Climate Change**" (ENG). "An existential threat" – this is how the ICJ characterised climate change in its long-awaited advisory opinion on the obligations of States with respect to climate change. MARIA ANTONIA TIGRE, MAXIM BÖNNEMANN and ANTOINE DE SPIEGELEIR kick off the joint blog symposium by summarising the numerous obligations the ICJ outlined that could significantly shape the contours of international environmental law and global climate governance. Stay tuned – but unfortunately, we will not keep you posted on the next contributions of this stellar symposium: we'll be off enjoying the sun for a while. We hope you do the same – but please make sure to check our website in the meantime. We don't live on Vitamin D alone.

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Take care and all the best!

Yours,

the Verfassungsblog Team

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SUGGESTED CITATION

Brandau, Anna-Mira; Steinbeis, Maximilian: When It Happens: Halfway Through the Judicial Resilience Project , Verfassungsblog, 25.07.2025, doi: 10.59704/f9697ce6e4f2a343.

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Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20250726-143145-0.