Minority Power

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Parliamentary law is for German public law a bit what discus throwing is for Olympic sports: archetype of athletic virtue, a deeply venerable thing of great tradition which everybody knows and nobody ever watches, let alone practices, who doesn't have to for professional reasons. Next to the institutional and procedural rules of the *Bundestag*, even electoral law, which at least seems to have some attractiveness for a certain kind of math nerds, looks like a spectator sport. This lack of public esteem is, of course, very regrettable and a big mistake, and thus it is fortunate that both electoral and parliamentary law met in the most fascinating way this week in the German *Bundestag*.

A trilemma

A reform of the current electoral law is an extremely urgent matter in German federal legislation due to the fact that, as a result of certain bizarre features of the electoral system, the number of MPs might very well get completely out of hand after the next general elections in September 2021. The causes and possible solutions with their respective advantages and disadvantages have been discussed ad nauseam in recent years and months, so I will only give a brief outline here: In principle, it is undisputed that the *Bundestag* a) should be composed proportionally to the share of votes of the parties, b) should allow for regional representation by means of directly elected MPs within reasonably sized constituencies, and c) should not grow into completely grotesque dimensions. For the most part of German post-war history, this wasn't a problem, but now, in a situation where the largest parties get only 30+ percent but nevertheless keep sweeping up all the direct mandates as if they were still as dominant as they used to be, these three goals no longer add up: one of them must go. Whichever it is, it's bound to considered an outrage, highly undemocratic, an attack on the foundations of peaceful coexistence, constitutionally dubious and politically treacherous by one part or another, so it's not entirely surprising that the legislators' efforts to tackle that issue have, so far, amounted to exactly nothing.

Strictly speaking, that is not quite true. There is a draft law in Parliament which would fix the problem. Three of the four opposition factions have joined forces for this purpose, neither of which has to worry about winning a lot of constituencies directly and therefore, unsurprisingly, propose to resolve the trilemma at the expense of the number of direct mandates: instead of 299 constituencies, there would in future only be 250, and the ratio of list and direct mandates would shift from 50:50 to 60:40. This is the idea of the FDP, the Greens and the Left Party, and there has already been a hearing on it in the Committee on Internal Affairs in May.

It is not hard to see why this is such a tough nut to crack for the largest faction, Angela Merkel's CDU/CSU: 231 out of its 246 MPs are directly elected and feel little inclination to possibly make themselves redundant. This is particularly true of the CSU, whose 46 Bavarian MPs all owe their mandate to their relative majority in their constituencies. Good thing, one might naively think, that they possess, together with their coalition partner SPD, a majority in Parliament: That way, they can simply reject the opposition bill.

They haven't, though. Instead, the coalition is following a different tactic: The opposition bill is neither approved nor rejected. The majority in the interior affairs committee, in its last meeting before the summer break, found that there was still a need for more discussion and adjourned the topic. Without a recommendation for a decision by the committee, the plenary cannot vote on a bill, which is why the vote was unceremoniously taken off the agenda. This spared the coalition parties the embarrassment of having to take a position about what they are for and what they are against while they haven't even made up their minds yet about what they want at all.

Roll call vote

Formally, there is not much to say against this, at least if you follow the opinion of the Federal Constitutional Court: Two years ago, the Greens had tabled a draft to introduce the marriage for all, which also went nowhere because the committee kept adjourning the draft into oblivion. The Greens sued in Karlsruhe, but to no avail: The FCC showed no enthusiasm for getting drawn into these parliamentary squabbles and found that what happens or does not happen in a Parliamentary committee was at any rate merely a "preparatory action" within the legislative procedure. While it's true that the Bundestag's standing orders expressly state that the committees are obliged to "complete the tasks assigned to them within due time" (§ 62), this is merely "internal

parliamentary law" violations of which cannot be challenged in court. Instead, the FCC referred the opposition, among other things, to their right to demand a report from the committee after ten weeks of inactivity.

This is what they did, and the resulting report mirrors exactly what happened: nothing. But parliamentary law gives the opposition all kinds of possibilities, too, and I understand it was the FDP Group which came up with a creative idea: to have a debate on this report put on the agenda, plus a vote on proceeding in plenary with the deliberation of the draft without a committee decision, which requires a two-thirds majority. The trick: they asked to make that a roll-call vote, which can be denied only on very narrow grounds. This, the opposition hopes, would force the coalition MPs to declare, if not *what* they want, then at least on *what they do not* want. That is not nothing, on the contrary. That is exactly what the opposition is there for: to make the government take responsibility for what they do or don't, and as opposed to what.

Now, the CDU/CSU Group has only this week been able to agree internally on a proposal which – lo and behold – doesn't not look all that different from the opposition's draft: a reduction in the number of constituencies, if only by 19 instead of 49. The proposal includes in addition to keep seven surplus mandates (*Überhangmandate*) uncompensated for, but it is not unlikely that they will concede this point to their coalition partner SPD for a coalition compromise in return for dropping their demand to cap the number of mandates at 690 and, if necessary, to cut back surplus mandates. If the coalition parties agree on something like this over the summer, they will have a lot of explaining to do to their local party members, as many district chapters have already picked their direct candidates and may have to repeat this procedure in that case. But that will still be easier than selling the voters a *Bundestag* with possibly 800+ members, along with the admission of having voted against a model that would have avoided this outcome without having presented one of their own.

To some extent, the coalition parties have to be credited with not having torpedoed the roll-call vote. Rejecting this would hardly have been legally justifiable. But that does not excuse the fact that it is gradually becoming an established practice what the FCC in one of its earliest decisions already 68 years ago clearly marked as a danger to parliamentarianism:

> In the event of disloyal or improper treatment, a motion may be "buried" in committee, and the deliberation and decision-making by the plenum may be practically prevented.

It is precisely in such seemingly unspectacular and technical matters that we see how solid the foundations on which parliamentary democracy rests actually still are. In so many democracies around the world, these foundations have been exposed as utterly eroded – especially in the USA, where both sides of the aisle have for decades shown ever less self-restraint in using every procedural trick in the book to make the other's life as miserable as possible. The refusal of the Republican majority leader in the US Senate to even allow Obama's Supreme Court nominee Merrick Garland a hearing was the low point of this development.

This week on Verfassungsblog

... summarized by LENNART KOKOTT:

In recent weeks, the **Supreme Court of the United States** issued one remarkable decision after the other. With presidential election drawing closer, the decisions and their implications for the election are in the spotlight. A narrow decision allowing the President to dismiss senior officials for political reasons alone could prove to be a fatal blow against democratic checks and balances, writes DAVID M. DRIESEN. In Corona Constitutional #39, MAXIMILIAN STEINBEIS talks to STEPHEN F. ROSS about the recent abortion-related *June Medical* decision of the court and about the particular constellation that has led Chief Justice Roberts to join the majority opinion. SARAH KATHARINA STEIN warns that one should not be misled by the decision which, although at first glance seemingly securing reproductive rights, could nevertheless lead to a slow erosion of the extensive protection of those rights. Finally, LEAH LITMAN looks ahead to an upcoming decision in which the court will rule on whether states can oblige their electors, i.e. the members of the electoral college that actually elects the president, to abide by the election results in the general ballot. The court will probably allow this – with consequences for the upcoming presidential election.

Meanwhile in **Russia**, **far-reaching changes to the constitution** were rubber-stamped in a referendum. JOHANNES SOCHER presents the constitutional amendment process and its essential contents and notes serious legitimacy deficits, which make the changes appear as a prime example of abusive constitutionalism with the aim of securing power for the current president. The constitutional reform is meant to demoralize political opponents of the president whose position in the constitutional framework is again clearly strengthened, writes CAROLINE VON GALL. In addition, central elements of Putin's anti-liberal constitutional practice have been constitutionalized, she says. YULIA IOFFE and HEDI VITERBO point to elements of homophobia in the constitutional reform which, under the guise of protecting children's rights, has enshrined heteronormative family models in a way that served to mobilise the electorate for the referendum.

With regard to the current debate in Germany on the deletion of the concept of *Rasse* (race) from the *Grundgesetz*, PIERRE DE VOS writes that from a South African perspective such a move would be perplexing. With regard to the South African Constitution, such a proposal would be perceived as a retrograde **defence of white privilege**, he says.

The precarious and inhumane situation of **refugees on the Greek islands** has moved out of the focus of reporting in recent weeks. However, the situation has not improved. On the contrary, there has been an increase in illegal pushbacks during the pandemic and there hardly is any access to justice for refugees, NIKI GEORGIOU and ROBERT NESTLER of the NGO *Equal Rights Beyond Borders* report in an interview with MAXIMILIAN STEINBEIS in Corona Constitutional #41.

The **Covid-19 pandemic** continues to generate constitutional law problems. KRISTIN BERGTORA SANDVIK and JULIA KOEHLER-OLSEN analyse the disproportionate burdens that children had to bear in the pandemic and present alternatives for crisis management in conformity with childrens' rights against the backdrop of the Convention on the Rights of the Child and its implementation in Norwegian constitutional law. MIKA KNÖR looks at the entry ban for foreign nationals to Japan, which has been in force since April, and places it into the context of constitutional immigration discourse of Japan and the extremely conservative jurisprudence of the Supreme Court on immigration matters which might eventually shift if the entry ban will be challenged in court.

The pandemic has made it very clear that there is **no unity in the United Kingdom**, writes CATRIONA MULLAY, and looks at the centrifugal dynamics of the fight against the coronavirus, which the British government has done nothing to oppose.

Speaking of the UK, SERHII LASHYN says that now that **Brexit** is done, the British Advocate General at the European Court of Justice must leave the court. This is the uncomfortable but necessary consequence of the United Kingdom's withdrawal and also necessary in order not to put the independence of judges in a worse position than that of the Advocates General, he says.

Two decisions by German courts dealing with **discrimination on the basis of gender identity** have attracted attention this week. The Federal Constitutional Court has declared inadmissible a constitutional complaint of a woman who fought against being addressed as *Kunde* (a male customer) in her bank's printed forms. However, the court's more recent case law indicates that the court does not in principle rule out the recognition of a claim to gender-adequate language and could decide in this sense in cases to come, writes ISABEL LISCHEWSKI. LEONIE STEINL presents a decision of the Higher Regional Court of Cologne which found that hate speech against women can be a criminal act of incitement to hatred (*Volksverhetzung*). To take seriously gender-related dimensions of hate speech, particularly on the internet, has been long overdue and is an important signal in the criminal law debate regarding the topic, she says.

The Federal Home Office has severely attacked the author of a satirical **column critical of the police** in the daily newspaper TAZ and even threatened to file charges against her. This is not the first conspicuous case of disregard for free speech from the Ministry of the Interior, also known as the ministry in charge of protecting the constitution (*Verfassungsministerium*). In Corona Constitutional #40, MAXIMILIAN STEINBEIS spoke with the anthropologist WERNER SCHIFFAUER about the culture and internal workings of the ministry and discussed the understanding of state and society wich is cultivated there.

The **regulatory response to local Covid-19 outbreaks in Germany** keeps raising questions. ANDREA KIEßLING looks at the provisions of administrative law that are the basis for ordering mass quarantine in worker's shelters or entire apartment blocks and explains why the current practice of the German authorities is partly unconstitutional.

In view of the sharp rise of infections in the meat industry, demands have been made for companies to pay parts of the bill for containment measures. THORSTEN KOCH examines what legal means are available for this purpose and reaches the conclusion that the classic instruments of hazard prevention law are not tailored to the situation of a pandemic; rather, the legislator is now called upon to take action, he says. FRANCISKA ENGESER writes that the question of fair financial burden sharing also arises with regard to the coverage of test costs by the health insurance companies, as there is a danger that private health insurance companies will not be charged adequately.

MAXIMILIAN KOLTER finally deals from a legal theory point of view with the German draft of a new law on sanctions for law-breaking corporations, which calls itself **corporate criminal law**, he says, but gives away the expressive potential of such a law and does not even appear as a substantial threat to those addressed by the norm from the outside.

So much for this week. Please don't forget to support us on Steady or refrain from cancelling your support if it's up for renewal (please!), stay safe and be well! All best,

Max Steinbeis

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All the best, *Max Steinbeis*
