

# Changing Perspectives

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Hannah Birkenkötter

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Max Steinbeis already announced [last week](#) that you'd still get mail this week, and you're getting mail today, from us. We have organized the coming week, which at first glance will be like any other – and yet, it will be different. Us, that's two of Verfassungsblog's editors and one associate editor. We have many things in common: we are lawyers, we work in international law, we are affiliated with Verfassungsblog. And there's one more thing we have in common: all three of us have heard that question more than once. "Where are you *really* from?"

For weeks now, there has been a debate in the United States about how deeply racism is rooted in society. For weeks now, there has been a debate about racist structures in Germany, too. One question that has come up in Germany over and over is this: to what extent are US debates limited to the US? We've asked ourselves at Verfassungsblog what to do, and several people suggested that we should take up the debate surrounding the "Black Lives Matter" protests on the blog as well. From this, the idea was born: for one week, we'll have only authors of color on the blog. While Verfassungsblog tries to provide a platform for a diverse author- and readership, it is not uncommon that we post only white authors for a week. Our guess is that only a few people would actually notice this. But a week with only people of color – that doesn't just happen. It needs to be organized. And we wanted to be upfront about it. That's why we've taken over this week's editorial. Otherwise, it'll be business as usual: we'll have posts commenting on current events, people will be presenting their research, we'll add to ongoing debates. While we've asked some authors to write on specific topics, we've ultimately left it to the authors what they wanted to write about. And although we have gathered contributions for the coming week, we are – as always – happy to receive text suggestions and spontaneous submissions.

In doing so, we have chosen a different approach than, for example, [EJIL:Talk!](#), which has organized a symposium specifically on Black Lives Matter and international law. We did not want to organise a special week on racism only. None of us is working primarily in this area. Nevertheless, this editorial deals with racism – as do many of next week's texts, in one way or another. This has probably as much to do with the context of an anti-racist movement from which this week originated, as it does with our personal experiences, which have shaped our views on public law.

## Not Black and White

I can't breathe. When Amy Cooper performatively showed the world how aware the white majority society in the USA is of the presence and lethality of racism, when George Floyd was just one day after that murdered by a policeman in front of running cameras, many POC in Germany, like me, were reliving the memories of our own experiences of racism.

I am Black and I am German. Racism has been present my whole life. At the train station, the police checks my identity without any reason; on the street, I am insulted with the n-word; in primary school, it was completely clear to everyone who's who when playing the game of "Who is afraid of the black man"; I am threatened by men on the local train with explicit tattoos and white laces on black boots; I never fall asleep on the subway on my way home, too dangerous. Like many other Black women, I straighten my hair before job interviews. In academia, I'm "exotic". At parties, people ask again and again where I come from; often followed up with, "Where are you really from? Originally." (If you want to know how to play this game successfully, click [here](#)). If I say that I don't like the question, because I feel excluded, I have to justify myself. People ask why they are not allowed to be "curious" and how else to ask where someone comes from. I could tell you so much more, but like many POC, I am tired of this kind of "soul striptease".

Racism exists in Germany, too. Not only amongst the special forces, not only in Saxony and Thuringia, but also in everyday life, in school and at work. And I haven't forgotten Hanau, Halle, the "national socialist underground" (NSU), Oury Jalloh, Mölln and Solingen – killings or attempted killings targeting specifically people of color in Germany, over the past decades. In 2019, the [Criminal Investigation Department for Politically Motivated Crime recorded a total of 22,337 offences](#) with a right-wing extremist background. After the police was [attacked by a group of young men in Stuttgart](#) a few weeks ago, the police now wants to investigate the [family trees of suspects](#), while the Federal [Minister of the Interior cancels a study proposed by the European Commission on racial profiling by the police force](#) for ludicrous reasons.

Racism has different forms. It is institutionalised, it happens everyday, it is subtle, it is subconscious.

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Am I a person of color? Who belongs to this group? The internet tells me: the term is self-chosen. But I don't really use it in daily life. So does the current debate affect me? Sure, I've been asked about my background more than once, also in a professional context. People who only know my name, not my face, are often surprised when I show up (this happens less since Google came along). Sure, I've also been asked whether I eat dog or monkey brains. And when, on the 25th anniversary of German Unity, I was strolling through Berlin, someone yelled 'ching chang chong' at me. But I'm not affected by racial profiling. I haven't been disadvantaged in my professional career because of my background.

In the US, there has been a debate on racism in academia over the past weeks, in addition to the broader debate on structural racism. Many Black researchers have [posted about their experience](#) under the hashtag [#BlackInTheIvory](#): experiences of how they are rarely [identified as academics, but rather as handymen](#), experiences of people [leaving academia because they never felt they were a good "fit"](#), how the hashtag itself would only reveal "filtered" realities, of [those who stayed, telling those stories that feel safe enough to tell](#). There is no comparable debate in Germany. In law, this might be because there are simply almost no Blacks in the ivory. This is

true also for other visible migration stories: At German law schools, perhaps half a dozen people of color occupy public law chairs (and as far as I can see, there are no Turkish names amongst them). Perhaps then, it's time for some solidarity. Maybe it's time to be upfront about my background, even if I'm afraid of exposing myself and being reduced to my appearance, a feature that ostensibly hasn't played much of a role in the past. And perhaps, my background is actually more important than I want to admit, as it influences how I move through the academe. How much I try to adapt, not least because somehow I always stick out.

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I am German and rather white. Or that's what I think. Other white Germans don't seem to think so: "Where are you from?" "Greece." "Italy." "Turkey." "Israel." Whichever one of these countries I choose as an answer, I get an affirmative nod. If I say I'm from Germany, I will receive the follow-up question. The affirmative nod won't come until the other person knows where my parents are from. In this dialogue – which is actually a monologue – I merely serve as a projection surface for a prevalent idea of what Germans do not look like and what no German name sounds like. The perfect non-white screen. I'll admit that there are far worse things. I am lucky not to be insulted or spat at just because of my appearance (there are still places I avoid). But this question, which I'm being asked again and again, suggests that I do not belong here. And therefore I do not belong anywhere. Because I am not Greek. I am not Italian. Not Turkish. Not Israeli.

Such self- and external attributions, however, rarely play a role in my everyday life, and since the beginning of my studies they have, in my perception, done so less and less. Instead, other groups have become more visible. [Whether someone successfully completes their law studies in Germany is significantly linked to the educational background of their parents](#) (p. 25). At the same time, in families with a migration background [the proportion of parents with lower qualifications levels is well above average](#) (p. 23). So much for the statistics. But what does this mean for students whose [academic success](#) is statistically less likely? They are exceptional. In many ways. They stand out. They look different. They have a name that hardly anyone can pronounce, let alone spell. They study and work against the odds. Being average means failure. And if they are successful, they serve as an example that the system works and does not discriminate and that anyone can make it. But they are the exceptions, and as such they confirm the rule.

## Being exposed

A look at German law faculties seems to prove the statistics right: "Visible migration history" – not taking into account the educational background of the parents, which is, of course, not visible – is rare. This is another reason why this week had to be organised. This hasn't been easy. Not only did we have to think about who could contribute to this week, we then found ourselves in the odd situation of approaching people because we were assuming that they would be classified as "non-white". Should we then write to people addressing them as persons of color? Not everyone identifies as such or wants to be identified as such. And not everyone wants to

expose themselves in an explicitly non-white framework. The reasons for this are as manifold as are the experiences of people who are visibly or less visibly non-white.

We are aware that one might criticize the approach we have chosen for this week, and probably for good reasons, too. Too exposing, maybe even essentializing. We believe that if we manage to at least initiate a debate on why German legal academia is predominantly and largely white (and [German](#)), then it will be worth it. Because one thing has become clear to us during the organization: Our identity, or the identity attributed to us, is not irrelevant in the academe. It may play a greater role in the life of one person than in that of another, but it seems hardly possible not to be confronted with it at some point.

## The week on Verfassungsblog

... summarized by LENNART KOKOTT:

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The **police**, both in terms of how it works and as a sociological complex, has been the subject of public debate in Germany for weeks. In [Corona Constitutional #43](#), CHARLOTTE HEPPNER and TOBIAS SINGELNSTEIN discuss a case that shows why this is a necessity: Based on the announcement by the Stuttgart police that it will investigate whether the suspects of a nightly incident in the city that has seen the demolition of shops as well as assaults on police officers have a *Migrationshintergrund* (a personal history of migration), they deal with the question of which legal requirements such research must meet, whether it is of any use criminologically and how the conduct of the police shows a need for reform.

**Police reform** is also something the *Bremische Bürgerschaft* (the state parliament of Bremen) will decide on following a proposal of the center-left coalition for a new police law. CATHARINA PIA CONRAD, JULIA GELHAAR, ANDREAS GUTMANN, GIANNA M. SCHLICHTE and TORE VETTER [present the impact of the proposed law on the competences of the Bremen police](#) and state a moderate expansion. [At the same time, the draft partially expands the possibilities of control of police action](#) – but this does not justify the polemical criticism of the opposition, which sees the proposal as an anti-police law, they say.

Our **current online debate** is dedicated to the discussion about gender parity laws for parliaments, which has gained momentum well beyond the legal academia in Germany with this week's ruling by the Thuringian Constitutional Court, which declared unconstitutional such a law regarding the state parliament of Thuringia. [MICHAELA HAILBRONNER and RUTH RUBIO MARÍN](#) introduce the topic, which concerns fundamental questions of the relationship between law and politics. [CHRISTINE HOHMANN-DENNHARDT](#) formulates a vehement contradiction to the above-mentioned ruling of the Thuringian Constitutional Court, because it shows that the number of reasons put forward against equal political participation is almost inexhaustible – and that decisions based on fundamental values are disregarded, she says.

For **the future of democracy and the rule of law in Poland**, the victory of the PiS candidate in the run-off of the presidential elections does not give hope for improvement. MAX STEINBEIS spoke with WOJCIECH SADURSKI in [Corona Constitutional #44](#) about the election result, which leaves the PiS government at liberty to pursue its authoritarian plans. One should therefore not be misled by the supposedly conciliatory rhetoric of the election winner, Sadurski says.

What problems does an authoritarian shift pose for constitutional legal scholarship? [ANDRÁS JAKAB](#) identifies moral dilemmas and sets out the options available to constitutional lawyers who want to abstain from party and day-to-day politics. [WOJCIECH SADURSKI](#) contradicts this postulate of political neutrality, which he sees as positivistic in tendency, and emphasizes that constitutional lawyers in particular could become politically active against the erosion of the rule of law.

Such erosion can currently be seen in many places. In **Turkey**, [BERTIL EMRAH ODER](#) writes, the bar associations are now facing attacks by the government that serve to weaken civil society and are part of a politics of distraction that makes it appear that the regime is trying to rally its voters around it, possibly considering holding snap elections. [TEODORA PETROVA](#) looks to **Bulgaria**, where a manifest constitutional scandal is unfolding as the General Prosecutor takes unconstitutional action against the President, thus weakening the institutional order in a way that shows contempt for constitutional procedures. In **India**, a threat to the rule of law unfolds in a different dynamic, as [SAKSHAM SHRIVASTAV und ADESH SHARMA](#) show: The government allows police violence to be unleashed, which has led to extrajudicial killings by the police – and many citizens support this development.

A domestic remedy of those hostile to the rule of law is to exert pressure on courts, especially on constitutional courts. But that does not necessarily mean that every reform proposal has a populist spin, write [BOJAN BUGARIC and MARK TUSHNET](#), who, with regard to proposals for reform of the **United States Supreme Court**, argue that context is crucial and that reforms could be useful to set limits to unfettered constitutional courts and to strengthen the political process. For the court in its present form, [MATHIAS HONG](#) asks whether all judges now practice textualism and thus methodically follow in the footsteps of the late Justice Antonin Scalia. The answer is ambiguous: Although the Supreme Court has opened Scalia's method to unexpected applications, it does so inconsistently, and, moreover, it is to be feared that in future the result could be a dismantling of equal freedoms, he says.

VINCENT PIEGSA presents a decision of the **European Court of Justice** which closes a gap in the European system of judicial remedies and illustrates the conditions under which the ECJ is prepared to grant new remedies by way of interpreting the Treaties. [GENNA CHURCHES and MONIKA ZALNIERIUTE](#) look at the ECJ's *Schrems II* decision on the Privacy Shield Agreement, which makes it clear that the ECJ sees it as its task to maintain the central role of data protection in the European legal order.

Questions of data protection law are also being discussed around the expansion of the mobile phone standard 5G, especially regarding a possible participation of the Chinese company Huawei. [IOANNIS GLIVANOS](#) highlights the possibilities of

national governments to prevent Huawei from doing so and points out investment protection law consequences.

In view of current political debates in Germany on the practice of **hacking back**, i.e. the active reaction to cyber attacks by means of a counter-attack, [HENNING LAHMANN](#) deals with legal problems of such a procedure, which in particular raise doubts about its feasibility in conformity with international law.

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