Verfassungsblog
ON MATTERS CONSTITUTIONAL

# Strangers, Adversaries, Enemies

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14.01.2017 doi: 10.17176/20170116-164609

Dear Friends of Verfassungsblog,

next Tuesday, the German Federal Constitutional Court will deliver its judgment on the ban of the right-wing extremist National Democratic Party (NPD), requested by the States that wield police power in Germany's federal system. That case is of huge importance not just for Germany as it raises a number of questions that many liberal democracies have to face these days: At which point will a liberal democracy have to unleash repressive force against those who appear bent on killing off liberal democracy itself? How do you distinguish enemies from mere political adversaries? Is it a matter of their militancy? Is it a matter of the nastiness of their ideas? Is it a matter of the amount of power they have or are likely to get access to in the future?

These are questions the Karlsruhe court will have to answer, with many in Europe looking on with curiosity and alarm, and some in the US, too. RUSS MILLER has forgotten more about German constitutionalism than most Germans will ever know. Last March, he has been sitting through all three days of the public hearing about the NPD party ban. His thoughts, combining a distinctly American perspective with a deep understanding of the German political and constitutional system, can be found here.

## Meanwhile, in Poland…

Should you think that now, as the battle on the Constitutional Tribunal in Poland is lost and over, we can turn our attention to gladder tidings be advised: That story is far from finished yet. The ruling party PiS, in their attempt to neutralize the court as a potential adversary (enemy?), has deliberately thrown the procedural law of the Constitutional Tribunal into disarray, and one might be tempted to feel gratified as the judges now in control there get hopelessly entangled in the mess, as MARCIN MATCZAK reports. Of course, the whole matter is far too serious for such snide sentiments, particularly since there is no obvious way to hold them to account for their blunders.

Since then the story has further evolved: The latest news from Warsaw is that the PiS Minister of Justice Ziobro has filed a motion to the Constitutional Tribunal to review the appointments of three "old" judges elected by now-opposition Civic Platform back in 2010. If he gets his way – and with the change of control at the court there is fair reason to believe he will – that would free another three posts for PiS to fill. What is more: when the opposition last year tried to bring a motion to the Tribunal to review the appointment of the three so-called "anti-judges" they heard from PiS that the court has no jurisdiction whatsoever in such cases. These things change quickly these days.

Whether the battle on the Constitutional Tribunal was a political or a legal one is examined in a thoughtful piece by ANNA MROZEK and ANNA SLEDZINSKA, with a side glance to the German Federal Constitutional Court. In their view, even in Germany with its extremely well-developed culture of constitutional review it would be chiefly a political question to hold on to it or not, rather than a legal one.

## Defending the Nation from Europe, and vice versa

In Hungary, the submission of the Constitutional Court by the government majority has taken place years ago, and GÁBOR HALMAI shows how useful a tool such a court can be if your attempt to call on the "people" – as Victor Orbán tried with his refugee referendum – fails. That the German Constitutional Court's idea of controlling the nation's "constitutional identity" has unintentionally delivered the cue for Orbán's strategy might give some of the judges of Karlsruhe something to think about.

Central and Eastern Europe has mostly become a hotbed of anti-integration nationalism, but there is

hope. From the Slovenian capital Lubljana comes a most welcome initiative to constitutionally reboot the European Union, as announced by one of its initiators, the EU law professor and frequent Verfassungsblog contributor MATEJ AVBELJ.

## How to dress well as a Muslima

In Germany, the decades-old debate over Muslim headscarfs on public servants had received a new boost after a trainee judge in the Bavarian city of Augsburg won a case on her right to be admitted to the bench without taking her hijab off. A number of state governments have subsequently announced legislative action to further restrict headscarfs on judges and prosecutors. The plaintiff in the Augsburg case, young constitutional law scholar AQILAH SADHU, in a highly recommended essay (in German) takes issue with the claim that the state needs to keep up an "appearance of neutrality" in the court room.

In Strasbourg, the European Court of Human Rights has rejected the claim of Muslim parents to exempt their daughters from taking obligatory co-ed swimming lessons in school on grounds of freedom of religion. Some interested parties were quick to celebrate that judgment as a token of resilience against the islamization of the occident. Others, like BJÖRNSTJERN BAADE (in German), see that decision rather as a measure of conflict resolution and point to the "technological fix" the court has recommended, a piece of garment very much controversial in its own right: the child could stay faithful to Islam *and* learn how to swim by wearing a Burkini.

## Elsewhere

- Since the Christmas Market attack in Berlin, there is much talk in Germany about preemptively jailing dangerous foreigners that cannot be deported for legal reasons. Criminal law professor MICHAEL KUBICIEL jumps into the fray with a vigorous defense of such proposals and calls for preemptive custody for all terrorists-to-be foreign or not, while PHILIPP SCHULTE skillfully deconstructs Kubiciel's reasoning with arguments of constitutional law (both in German),
- PIETER BOELES examines on the occasion of a pending case before the ECJ how the EU Qualification Directive can be reconciled with the prohibition of refoulement,
- CHRISTINA LIENEN looks into the impact of the ECtHR's recent *Magyar Helsinki Bizottság* decision on common law constitutional rights in the UK,
- the venerable I*CONnect blog starts a new op-ed column with TOM GERALD DALY passionately calling for an end of complacency towards democratic decay,
- ARGELIA QUERALT analyzes the *historia interminable* of Spanish-Catalan relations (in Spanish),
- MIGUEL PRESNO criticizes a decision by the Spanish Constitutional Tribunal that obliges disgruntled party members to keep their mouths shut in public (in Spanish),
- STEVE VLADECK points to four pending cases before the US Supreme Court that hold some hope to provide clarification about the extent of constitutional protection of non-citizens in the US in these times of Trump,
- DAVID POST draws our attention to another attempt by a self-proclaimed tech titan to silence a critical media outlet, represented by the same LA lawyer that helped Hulk Hogan and his financier Peter Thiel kill off Gawker, and EUGENE VOLOKH seconds by finding the case of the alleged "inventor of e-mail" against the tech blog "Techdirt" pretty weak,
- ADAM McLEOD relates what happens when a constitutional lawyer gets handed an undeserved traffic ticket, a riveting story of law-in-practice squalor and relentless perseverance in the pursuit of individual liberty, gently mocked and partially contested as legal argument by ORIN KERR.

Next week brings us, besides the afore-mentioned NPD judgment by the German Constitutional Court, some noteworthy decisions by the Strasbourg Court of

Human Rights: on the rights of Filipino slave workers to protection when their holders bring them to a vacation in Austria, on the rights of Roma in Hungary to remain unexposed to racist abuse during right-wing demonstrations in their home towns, on the right of US citizens to adopt Russian orphans without being caught up in diplomatic retaliation schemes, and on the right of a Greek journalist to call an actress favoured by the Ministry of Culture "completely unknown" with impunity. If you might be tempted to write a blog post about these or any other interesting matters constitutional, please feel warmly encouraged to do so.

All best, and take care,
Max Steinbeis

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SUGGESTED CITATION

Steinbeis, Maximilian: Strangers, Adversaries, Enemies, Verfassungsblog, 14.01.2017, doi: 10.17176/20170116-164609.

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Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20170116-164609.