Constitutional Courts - imagine them gone

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Dear friends of Verfassungsblog,

For a few years, we felt pretty good about ourselves here in Germany. We were trail-blazers, sort of. We were exemplary, even. We had our Federal Constitutional Court, initially belittled by many as scarlet-clad impostors sixty years back, but now wielding a long-established and largely uncontested authority in a vast range of legal questions, protecting the powerless and holding the powerful in check, our pride and joy, token and keeper of the rule of law in Germany and symbol of our ascent from rags to riches, in short: The Federal Constitutional Court stood for everything good about Germany. And what is more: we had what all others wanted. In the 90s, the Eastern Europeans were crazy for our model, and in the 00s even the French seemed to have realized that they lack something important. The US Supreme Court, politicized to the core and hardly interested in interconstitutional dialogue, had lost much of its lustre. If you want to know how to do constitutional review, we thought smugly, come to us.

Is that over? I was in Karlsruhe this week to attend the yearly press reception at the Federal Constitutional Court. It was a disturbed and unsettled atmosphere I found there. Poland and Hungary, once the model students in terms of constitutional jurisdiction: over and done with. The Czechs seem to have some problems, too (I will try to find out more about it). In Spain, the Constitutional Court groans under burden of having to avert Catalan secession and, on top of it, is threatened by party politization. In the UK, the judiciary, just as it developed something like constitutional control of the government, became the target of unprecedented public outrage. A growing number of Europeans seems to perceive judicial checks on political power not as an asset but a liability, an encroachment upon the "will of the people". What does that mean for constitutional review in Germany? One moment exemplary model, the next an endangered species?

Last Wednesday, I had the opportunity to talk at length with Justice Peter Müller of the Second Senate of the Constitutional Court. Two things I would like to emphasize from the interview: firstly, Müller interprets the distress of constitutional jurisdiction as part of a more general "erosion process of rule of law and democracy" for which he holds responsible not only the rise of populism, but also the "legal obliviousness" ("Rechtsvergessenheit", a hard-to-translate term with connotations of malice) of governments in the refugee and Euro crises. Secondly, as for Germany Müller sees the authority of the Federal Constitutional Court, with all the political resistance it met in the last years, not in danger. Even in the case of a populist majority rising to power a Poland scenario would be unthinkable in his view: The Court is so firmly anchored in the German society that anyone who tried to tilt it over would just throw his back out.

Talking of the Judiciary

Meanwhile in Poland the subjugation of the judiciary by the PiS-controlled government is taking its course, and the Constitutional Tribunal is by no means its only target. PIOTR MIKULI describes the Minister of Justice's plan to get the National Council of the Judiciary under control, exchange its membership and widen the range of possibilities of the President to pick judges to his and thereby PiS's liking. Unconstitutional? Possibly, but now with the Constitutional Tribunal in its current state it does not matter much anymore, does it?

TOMASZ KONCEWICZ, on the other hand, wonders in a two-part article to which extent the Polish judiciary can be expected to fill the gap left by the neutralized Constitutional Tribunal and hold the government and the parliamentary majority account-

able for the constitutionality of their deeds. Conclusion: the judiciary in Poland had been squandering the trust invested in it for years and would now have a chance to gain it back.

The German Minister of the Interior and his state colleagues want to reform deportation. JOHANNES EICHENHOFER and CARSTEN HÖRICH have taken a closer look at the draft and find much to dislike: All in all the reform plan amounts to little more than legally problematic actionism at the expense of aliens without proper legal status.

Transfer of aliens within the Dublin system, and the role of human rights in it, was the subject of an important judgment of the European Court of Justice which CONSTANTIN HRUSCHKA interprets as a welcome convergence of the jurisdiction of the Luxembourg and Strasbourg Courts. ANNA LÜBBE explains why it is important to distinguish whether the human rights issues arise from the circumstances of the deportation itself or from the circumstances in the country where the person is supposed to be deported to.

In Brussels there is, largely unnoticed, a thing of potentially great consequence going on: the reform of the so-called comitology. The number of those able to explain in detail what that actually is probably ranges somewhere in the medium double- digits, but one thing is certain: If comitology works then the EU works. The reform plans would put an end to the blame game between the Commission and the member states, rejoices MARIA WEIMER, while MERIJN CHAMON strongly dislikes the Commission's idea to pin the responsibility for regulation to the member states.

Elsewhere

- MANUEL MÜLLER finds the comitology proposal unworthy of a "political commission" and sees a "fearful technocracy" at work that prefers to leave important matters rather to the national governments,
- ANASTASIA KARATZIA analyzes a judgment by the General Court of the European Court of Justice whereby the Commission must not refuse without giving reasons to register a European Citizens' Initiative,
- ASLI BÂLI finds parallels between Erdoğan's Turkey and Trump's USA,
- ERIC POSNER thinks that Trump's new immigration order will not change much, while SANFORD LEVINSON compares it to the Fugitive Slave Law of 1793,
- MARKO MILANOVIC comments on the circumstances of the murder of North Corea dictator Kim Jong Eun's brother with the impious words: „The night is dark and full of terrors. But sometimes the terrors are just too damn funny" (and he is right about that),
- DAVID SIMONS welcomes the ECtHR decision Lashmankin v. Russia as an „important new star on the Article 11 firmament" (freedom of assembly),
- MARK ELLIOTT examines the latest turn in the legal struggle about Brexit, an opinion by three of the most prominent European lawyers of the UK that argues that theEU (Notification of Withdrawal) Bill presently before Parliament does in fact not authorise Brexit after all – very well, Elliott says, but then the Miller decision by the Supreme Court must be wrong as one cannot have the cake and eat it,
- constitutional law professors DENIS BARANGER, OLIVIER BEAUD, JEAN-MARIE DENQUIN, OLIVIER JOUANJAN and PATRICK WACHSMANN state that the judicial inquiry against the conservative Presidential candidate François Fillon is no "institutional coup d'état" (as another group of constitutional lawyers had claimed before).

So much for this week. To all those who celebrate Carneval, have lots of fun!

All the best, and take care,
Max Steinbeis

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