Having the Pudding and Eating It

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24.03.2018 doi: 10.17176/20180326-143537

Dear Friends of Verfassungsblog,

"I didn't do it!" wails little Jarosław. His mouth is all smudgy and he still holds the spoon clutched in his fist. No, he hasn't secretly emptied the pudding bowl, he cries with all the offended passion of persecuted innocence. The *corpus delicti*, the empty bowl, is not at hand, since he has hidden it. All right, he finally says, when all the crying, screaming and clamouring doesn't help. Here is a compromise. As a gesture of good will, he will turn over the empty bowl. In return, however, he expects the scandalous accusations that he ate the pudding to end.

That sort of strategy was displayed this week by the Polish ruling party PiS in the dispute with the EU Commission over the so-called "judicial reform" – i.e. the brutal subjugation of the Polish judiciary under the "will of the people" represented by the PiS. The PiS has announced a number of amendments to its judicial laws: The previously unpublished judgments of the Constitutional Tribunal are to be published at last. The Minister of Justice Zbigniew Ziobro will no longer be able to fire court presidents at his own whim but will need the approval of the National Council of the Judiciary. And the compulsive retirement age for judges will no longer discriminate between men and women. This allegedly intends to smooth Europe's ruffled feathers after the previous "White Paper" full of flimsy justifications blatantly failed in this respect, and the deadline set by the Commission to pay heed to its rule of law recommendations had expired without result.

The fact that Ziobro will have to involve the National Council of the Judiciary in his efforts to teach obedience to the courts would gain considerable weight as an element of checks and balances if that body wasn't in the process of being quite effectively taught obedience itself. In general, the PiS seems once again to be trying to learn from its Hungarian Fidesz friends how to make finely measured concessions to the EU that allow you to look reasonable and accommodating and still get everything that is important to you.

A real howler, however, is the announcement to publish the unpublished judgments of the Constitutional Tribunal. Let's recall what that was all about: In March 2016, the Polish Constitutional Tribunal nullified for the first time the PiS dominated legislature's attempt to manipulate its own procedural basis and effectively paralyse it. Then, the legislature enacted pretty much the same rules once more, and in August 2016 the Constitutional Tribunal declared those unconstitutional all over again. These two decisions (and another from November 2016) have never been recognized by the Polish government which simply refused to publish them in the official gazette.

Politically, it is no longer dangerous for the PiS to make up for this omission now. The versions of the law these judgments referred to are obsolete, and the Tribunal's bench has been thoroughly reformed in a way that makes further decisions with the potential to furrow any PiS brows highly unlikely.

The PiS government's refusal to publish the judgments was based on the argument (if you will) that the judgments were in fact none. The Constitutional Tribunal had not ruled in the composition considered correct by PiS and had not followed the procedural law (unconstitutionally) designed by PiS, and therefore, according to PiS, its decisions were nothing more than an expression of opinion by certain judges which did not legally oblige anyone to anything.

Whether this argument has ever convinced anyone is as doubtful as it is futile: even the pretext of an argument implies, in any case, the concession that an argument is needed. It concedes that saying "because we can" won't do, that at least some sorry excuse for a reason, no matter how cynical and see-

through, must be given why power is not just exercised, but rightly exercised.

Oh, the PiS says, it doesn't matter much now, does it? Let's publish these stupid judgments if it's so bloody important to the Commission. With this "compromise offer", however, its last and flimsiest pretext of a reason is dispensed with. All that's left is: because we can. We have no justification for the way we have brought the Constitutional Tribunal under our control, other than: because we can. If proof was still needed that Poland under its current government poses exactly the threat to the rule of law in the EU that the Commission claims – there it were.

Drop those legalistic pieties, some hard-boiled realist might snarl: As if justification still mattered in the tough power play currently being fought out between the EU and Poland. Fine, I'd say. Maybe that this is precisely why the Article 7 TEU procedure to brand Poland as a threat to the rule of law is in such dire straits now – because a blocking minority of six out of 27 member states might come to the conclusion that such a statement would not be in the interests of their political power.

However, the EU is more than just a club of states that enter and leave international legal obligations as fits their political interest. It is a community based on the rule of law. And as such, it cannot come to terms with Poland in its current constitutional state. A state that justifies its power only by saying "because we can" may still be useful as a political partner, but as a member of a legal community it is absolutely incompatible. No German, Italian, Portuguese or Swedish judge will be able to recognise its laws, judgments, arrest warrants and other legal acts as binding.

It's these judges that matter. That is why last week's referral decision by the Irish High Court was such a seminal event. Every Austrian, Bulgarian, Finnish and Maltese judge who has to decide on a case that hinges on any legal act from Poland should follow the Irish example and examine if it merits a referral to Luxembourg, so that the CJEU gets a solid basis of cases to determine the limits of the principle of mutual recognition in the EU. To find itself beyond that limit: That will teach the PiS that you can't have the pudding and eat it.

What belongs and what doesn't

In **Germany**, the CSU under its chief and *Heimatminister* Horst Seehofer is currently shouting its lungs out that Islam "does not belong to Germany" to give no AfD-seduceable voter in the run-up to the state elections next year a reason to feel *heimatlos* in christian-social Bavaria. RALF MICHAELS draws a link to Ernst-Wolfgang Böckenförde's proverbial dictum on the "prerequisites" of the liberal secular state and the relative homogeneity of society the latter requires – an idea more in line with Seehofer's than the pluralistic liberals among Böckenförde's admirers may be comfortable to admit (German).

The law of intelligence is a burgeoning field of research in **Germany**, and a recent conference on this subject in Berlin prompts BENJAMIN RUSTEBERG to raise some critical questions, such as whether jurisprudence functions as a fig leaf for security services and their efforts to have cast in legal form what they had been doing all the time anyway (German).

In **Austria**, the Constitutional Court has caused quite a stir by ruling that asylum seekers and refugees must not be discriminated against in terms of access to social aid. KEVIN HINTERBERGER explains what this is all about (German).

In **Thailand** it can be seen that, if you root for constitutionalism, the Constitutional Court is by no means necessarily the one you'll cheer for. KHEMTHONG TONSAKULRUNGRUANG impressively describes the ham-fisted way in which the Thai Constitutional Court deals with its critics and their freedom of opinion.

In the People's Republic of **China**, the constitution may not overly relevant as a source of law but all the more as an object of ceremony, as could be seen during the swearing-in of President Xi Jinping, which prompts MING-SUNG KUO, following Claude Lefort, to reflect on the empty place of the constitution in China.

DILEK KURBAN's post on the ECtHR decision on pre-trial detention for journalists in **Turkey** wasn't finished yet at the time of this writing, due to some

unforeseen delays. I hope to upload it over the weekend, and I am sure it will be worth every minute waiting for it.

Elsewhere

SABINE BERGHAHN observes movement in the current struggle on Islamic headscarves in public service in the German state of **Berlin** (German).

STEVE PEERS tells the tale of his own childhood as a son of immigrants in Canada to raise sympathy with the post-Brexit fate of Britons in the EU and Union citizens in the **UK**.

SOPHIE WALKER predicts increasing numbers of deportation prisoners in the **UK**.

PATRICIA RRAPI explains the decision of the **French** Constitutional Council on house arrest as a tool to fight terrorism (French).

EDUARD ROIG MOLÉS asks about the place of *rebelión* as a criminal offence in the constitutional order of secession-afflicted **Spain** (Spanish).

PIETER CANNOOT welcomes the new law in **Belgium** recognizing the right of trans persons to determine their gender and reports on the current constitutional court proceedings on the third option.

In a two-part blog post, ELVINA POTHELET examines whether **Israel's** practice of demolishing terrorist homes can be stopped under international law.

So much for this week. Next weekend I will take a break to celebrate Easter and get some rest. See you all in April, all the best and happy holidays to you!

Max Steinbeis

P.S. one more thing: As you might have noticed, I sometimes include CfAs, CfPs and other notifications in this editorial/newsletter. We offer this to our cooperation partners, but also to others for a moderate fee that helps us keeping Verfassungsblog afloat and free of obnoxious advertising. If you find that sort of thing useful for yourself or your institution, please don't hesitate to contact me.

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SUGGESTED CITATION

Steinbeis, Maximilian: Having the Pudding and Eating It, Verfassungsblog, 24.03.2018, doi: 10.17176/20180326-143537.

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Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20180326-143537.