Verfassungsblog
ON MATTERS CONSTITUTIONAL

Break from the Break

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21.07.2018 doi: 10.17176/20180723-110333-0

Dear Friends of Verfassungsblog,

as I announced in my last post, this column was supposed to take a summer break for a few weeks. But the times do not allow it just yet. Today I met with WOJCIECH SADURSKI, who is currently in Berlin, and interviewed him about the constitutional referendum announced by Poland's President Duda (we will publish the interview next week). In addition to that, Wojciech has brought me up to date on the current state of affairs in the fight for the Polish Supreme Court, and I want to share some of these insights with you (mistakes are mine, of course). It won't come as a surprise to followers of this column, but it can't be stressed enough how immensely high the stakes in this fight are, not only for Poland, but for Europe. And it seems that, if anyone can still decide this fight in favour of democracy and the rule of law, it is the European Court of Justice in Luxembourg.

Yesterday, Małgorzata Gersdorf, Chief Justice of the besieged Polish Supreme Court, delivered a speech in Karlsruhe at the invitation of her German counterpart Bettina Limperg. Chief Justice Gersdorf is in compulsorily retirement since 4 July, as far as the PiS government and PiS President Andrzej Duda are concerned, but as that termination of her presidency is an unmitigated breach of the constitution which provides for a six years term for the Chief Justice, she so far keeps withstanding the pressure to yield her post, supported by most of her colleagues in the Court, and insists on the completion of her full term. I can't even begin to say how much I admire that woman.

Why is PiS so eager to get rid of Gersdorf?

Why, indeed? Part of the answer is, of course, that after the subjugation of the Constitutional Tribunal all eyes are now on the Supreme Court as its quasi-replacement in holding the PiS constitutionally accountable. But that is not the whole story. The Chief Justice is *ex officio* also President of the Court of the State, which is in charge of impeachment procedures against the President, members of the government and of parliament under the Constitution. This has never become practical, so far, but may well turn exceedingly important all of a sudden if the PiS loses its majority one day. In that case, it is not unlikely that President Duda, former Prime Minister Beata Szydło and other PiS politicians who are accused of massive constitutional violations may face justice before that Court, so, from the PiS perspective, it makes a lot of sense to make sure that the Chief Justice presiding in that Court is one of their own.

Up until recently, the PiS was very confident that it could have its way with the Supreme Court and its President just as it did with the Constitutional Court and the National Judicial Council: squeeze out the incumbents and replace them with its own partisans. Trusting in this, the PiS majority had set the threshold for the election of the Chief Justice extremely high: 110 of the 120 members of the Supreme Court must vote for a candidate to be elected. The effect: if this majority is not achieved, the office remains formally vacant and the President can appoint someone to his liking as acting Chief Justice without openly and formally interfering with the Court's independence.

That did not work out, however. Among the Supreme Court justices who had survived the forced-retirement scheme, no-one was willing to take Gersdorf's place and be appointed acting Chief Justice. This forced the PiS government to change its strategy, and that happened in unprecedented haste on Friday.

According to a new law adopted on Friday morning, a two-thirds majority of 80 judges instead of 110 will suffice to elect a new Chief Justice. The requirements for applications to become a member of the Supreme Court were drastically lowered. Basically, if you are a judge at some court or a prosecutor with a

certain amount of professional experience, you are welcome to submit your application for Minister of Justice Ziobro and his subservient National Council of Justice to consider. If you are rejected, you can complain before an administrative court, but your motion will no longer have suspensive effect. If your application was rejected for "formal reasons", you cannot longer complain at all – and no one knows what is meant by that. Kafka would have been proud of that idea: You file your application, get rejected for "formal reasons", and if you want to find out what is formally amiss with your file, there is no court you can turn to. Welcome to administrative law according to PiS.

What's the rush?

The bill was chased through parliament in one night. Members' speaking time was drastically reduced, in some cases to 30 seconds per speaker. The bill was tabled by a member of parliament instead of the Ministry of Justice which had drafted it, to avoid consultations and expert hearings. The calculation behind that sort of haste is rather obvious. The government wants to create facts as quickly as possible before the European Court of Justice in Luxembourg can intervene. The European Commission has recently opened infringement proceedings against Poland before the European Court of Justice over the Supreme Court case.

Once again, the model PiS seems to follow is Hungary: There, all judges over 62 had been compulsorily retired back in 2011, which the European Court of Justice ruled in November 2012 as a discrimination. Which did not mean that the fired judges got their jobs back, however. They were compensated, but their successors chosen by the Fidesz government remained in office. In 2014, the ECJ found Hungary once again in breach of EU law in the case of the independent data protection commissioner, whose term of office had been shortened prematurely. He didn't get his job back, either. The fired President of the Hungarian Supreme Court, András Baka, won a great victory before the Strasbourg Court of Human Rights in 2016 when the European Court of Human Rights certified that the early termination of his mandate had violated his right to a fair trial and his freedom of expression. He too has been morally and financially compensated, but his post is taken by someone else.

There is yet another reason why the PiS pursues its "judicial reform" with such relentless vigour. The Supreme Court is to be enlarged by two additional chambers, which it can completely pack with its own people. One will be in charge for disciplinary matters, but the second, dealing with "extraordinary appeals and public affairs", is a real beauty: It will be entrusted with the judicial supervision of elections. In 2019, there will parliamentary elections, in 2020 elections for the office of President of the Republic. If things get tight and the PiS might feel the temptation to actively boost its chances of success at the polling booth a little, then control of this chamber will certainly come in handy.

So, these seem to be the stakes. The fact that Małgorzata Gersdorf gave her speech in Germany of all places was immediately chastised by the right-wing press in Poland. The tone she struck was rather resignative, though. Here are her concluding passages *verbatim*, along with the expression of my regret not to be able to give you a more optimistic message for your summer holiday:

> *„Damage is regrettably extensive and there seems to be no hope for remedy in the near future. The independence of the Polish constitutional court has been destroyed, its judiciary panels manipulated in response to expectations of the governing party. The Minister of Justice is also Prosecutor General. He now holds all instruments allowing real impact on all judicial proceedings, under criminal law in particular. Court presidents report to him; to add insult to injury, he has staffed over one-half of the National Council of the Judiciary with people without constitutional mandates, who now owe him everything. The party machine can crown or destroy anyone and everyone at the whim and will of those in rule. The Supreme Court has undergone a cleansing masked by a retrospect change to the retirement age. The content of vital judiciary-related legislation changes incessantly, within a*

few days as of the motion date, with no consultations or opinion seeking exercise. What can a president of the supreme judiciary instance do? All she is left with are words. And yet she cannot remain "apolitical", since constitutional compliance has become a political matter, par excellence. Such are Polish circumstances today – may they not be Germany's tomorrow!Secondly, as a Polish judge I would like to use this opportunity to appeal for more Europe within Europe. We are grateful to the European Commission, and to its First Vice-President Timmermans in particular for his vehement defence of rule of law principles. Yet the mandate of European institutions is definitely too weak, especially in the face of authoritarian and nationalistic tendencies we have been witnessing, not only on European territory, although regrettably on our continent as well. I am well aware that some member state governments (albeit I believe that Germany is not among them) have displayed inclinations to consider the so-called reform of the Polish judiciary as an in-house concern, one should not excessively interfere with. And yet it remains a priority, an investment in our common future! Once the European Union and her members pass in a rule of law-related dispute, the Union's trademark – respect for human and fundamental rights – may soon dwindle into a distressing memory."

In the judiciary we trust - or, do we?

Speaking of the European Union: Next week, Luxembourg will deliver its eagerly awaited judgment in the *Celmer* case, which has already been mentioned here on several occasions – the Irish High Court's question of whether the **Polish** judiciary is still independent and trustworthy enough to have its EU arrest warrants executed without questioning. If the Opinion of the Advocate General is any indication, it is not very likely that the ECJ will use this case to squeeze Poland's testicles. Together with ARMIN VON BOGDANDY and colleagues, we will discuss the verdict in an online symposium for which MATTEO BONELLI, MATEJ AVBELJ, AGNIESKA FRACKOWIAK-ADAMSKA, CATHERINE DUPRÉ, KIM SCHEPPELE and MATTIAS WENDEL have promised contributions.

In **Turkey**, the disintegration of democracy and the rule of law has progressed much further than in Poland and Hungary. LEIGHANN SPENCER sums up the rather helpless way the European Court of Human Rights has been dealing with the wave of human rights violations in Turkey in recent months. CEM TECIMER draws our attention to Article 299 of the Turkish Criminal Code, which penalizes the insult to the President and is interpreted and practised by the Turkish judiciary in a way that mocks all the provisions of the Strasbourg Court.

In **Spain**, the Supreme Court has taken the government to task for its inadequate implementation of the refugee quota decision in the EU Council – a judgment which, in the opinion of DAVID MOYA, could become exemplary for the judiciary in other countries as well and a key to achieving a legally enforceable responsibility sharing in Europe, at last.

In **Germany**, the Federal Constitutional Court has declared the funding of the public broadcasting system to be constitutional, although its reasoning appears not overly convincing to SIMON KEMPNY. The five-year case of the NSU neonazi terrorists in Germany has finally been concluded with a verdict of life in prison for the defendant Beate Zschäpe, but a great number of questions and doubts about the investigative prowess of the German authorities remain unresolved, to an extent that FIN-JASPER LANGMACK believes the European Court of Human Rights in Strasbourg should take a look at the case. DAVID BILCHITZ calls on Germany, in light of its history, to throw its weight behind an international treaty on corporate liability for human rights violations.

In **India**, the Supreme Court has held a hearing on the constitutionality of Article 377 of the Criminal Code, a remnant from colonial times that criminalizes same-sex intercourse. ADEEL HUSSAIN reports.

In **Austria**, Federal President Alexander Van der Bellen has suspended ratification of the CETA Agreement, and MARKUS BEHAM examines whether that was constitutional.

And Glossator FABIAN STEINHAUER is struggling and commentating his way through texts by Rudolf Jhering and Roger Caillois.

Elsewhere

DANIEL SARMIENTO is amazed how quickly and with what intensity questions of religious freedom have suddenly become central to the case-law of the European Court of Justice.

JORDI NIEVA-FENOLL considers the **Spanish** investigating judge's decision to withdraw the EU arrest warrant against former Catalan President Puigdemont to be the worst of all options.

SANDY LEVINSON compares Trump to Hitler.

MARKO MILANOVIC analyses two ECtHR judgments on **Russia's** responsibility for human rights violations in territories controlled by Russia-friendly separatists.

GAUTAM BHATIA reports of a hearing of the **Indian** Supreme Court on the prohibition for women to enter the Hindu temple of Sabarimala during their menstruation and the question whether this is compatible with the prohibition of "untouchability" in Art. 17 of the Indian constitution.

GERARD MAGLIOCCA notes that **Russia's** President Putin apparently follows legal blogs.

MEG RUSSELL draws conclusions from the failure of the Italian constitutional reform for the bicameralism in general and the **British** House of Lords in particular.

ANDRÉS DEL RÍO and JULIANA CESARIO ALVIM GOMES criticize the intervention of the **Brazilian** central state in Rio de Janeiro as a sign of the militarization of justice and society.

Okay, then. I'll be back in September, unless something else occurs to force me back my desk again. A quiet and relaxing summer, in spite of everything, to all of us!

Max Steinbeis

This article originally contained an error about the date of the parliamentary elections which has been corrected.

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SUGGESTED CITATION
Steinbeis, Maximilian: Break from the Break, Verfassungsblog, 21.07.2018, doi: 10.17176/20180723-110333-0.

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Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20180723-110333-0.