Verfassungsblog
ON MATTERS CONSTITUTIONAL

Now let him enforce it

Maximilian Steinbeis

01.09.2018 doi: 10.17176/20180901-151911-1

In the 1820s and 30s, the US State of Georgia made great efforts to drive the Cherokee tribe off their land in the northwest of the state. The state legislators assumed sovereignty over the Cherokee land and abolished its government, its courts and its laws. The Cherokee turned to the US Supreme Court, initially in vain. But in 1832, the Supreme Court gave them a great victory: In the judgment of *Worcester v Georgia*, Chief Justice John Marshall confirmed the status of the Cherokee as a sovereign nation and denied the State of Georgia the competence to legislate on them. The beleaguered Cherokee, however, did not profit at all of this decision, as Georgia simply ignored the verdict and US President Andrew Jackson (Donald Trump's great role model) did not even think about unleashing his executive powers against Georgia to assert the Cherokee's rights: "John Marshall has made his decision", the President apocryphally said. "Now let him enforce it."

I was reminded of these words when I heard earlier this week of the statements made by the Deputy Prime Minister of Poland, Jaroslaw Gowin: Poland will "certainly ignore" the decision of the European Court of Justice on the compulsory retirement of members of the Polish Supreme Court if the ECJ confirms the suspension of this regulation and/or "contradicts the Treaty of Lisbon and the whole spirit of European integration". If that happens, the PiS government would turn Poland's national constitutional crisis into a European one.

What if they just don't pay?

What happens when a Member State persistently refuses to remedy an infringement stated by the Court? The procedure is clear (Article 260 TFEU): If the ECJ finds that the compulsory retirement of judges violates Poland's contractual obligations, Poland will first be given a deadline to stop their unrighteous ways, and if that expires without result, the Commission will ask the ECJ to impose a penalty payment. The price can be steep: Italy, for example, in a 2014 case of illegal waste disposal was sentenced to pay a lump sum of EUR 40 million plus a further EUR 42.8 million every six months until the dumps were removed.

But what if Poland still doesn't come around and simply refuses to pay the fine? What if they find it strategically useful to set a precedent that, yes, a member state can in fact bend European law to his "sovereign" will and get away with it? Can the Commission then simply go and seize Poland's assets? How do you enforce a judgment against a member state that stubbornly refuses to comply? I spoke about this on Friday with Ingolf Pernice, a towering figure of European Law and emeritus professor at the Humboldt University in Berlin.

++++++++++*A Note from MPIL*++++++++++

On Friday the 14th September 2018, the Max Planck Institute for Comparative Public Law and International Law will open its doors as part of the Max Planck Society's (MPG's) nationwide Max Planck Day. Inspired by the motto 'Research is curiosity – #whatareyoulooking-for', everyone interested is invited to come to the institute to find out about our history and our personnel, to discover our unique library and the work that we do, and to explore the role that research and researchers play in our societies.

++++++++++++++++++++++++++++++++

Under Article 280 TFEU, judgments of the ECJ are enforced in the same way as legal acts of the Council, the Commission and the ECB, which means that, under Article 299 TFEU, enforcement vis-à-vis states is expressly excluded. This makes sense, says Pernice: The European Union, unlike Andrew Jackson's USA, has no armed forces to dispatch to an unruly member state to restore the authority of the law (as US President Eisenhower did in the 1950s with *Brown v Board*

of Education and school desegregation in Arkansas). The EU exists because and as far as the member states want it, not because they have subjected themselves to a higher power. Making a member state pay by force implies a power that Andrew Jackson possessed and John Marshall did not: the power to execute. The EU is, for the time being, not a state. It does not execute.

The obvious way to have Poland make amends would be to simply withhold the corresponding amount of transfer payments from the Structural Funds. Offsetting liabilities against claims is matter of law of obligations, not of foreclosure. It's not force that is applied, just cool and sober arithmetics.

Nevertheless: the European Union isn't a bourse, either. It is not about private persons entirely disinterested in each other except for the quantities of mutually owed money. The parts and the whole of the EU owe each other a lot more than just arithmetically offsetable sums.

The EU Treaties expressly provide for a procedure to force a Member State that went astray back to the path of the rule of law. That procedure is Article 7 TEU, Barroso's so-called "nuclear option", one of the worst misnomers of recent European history: Article 7 is emphatically not about throwing nuclear bombs to annihilate an enemy. It is about insulating and protecting the Union from a member state which jeopardizes the very legal foundation the entire Union is built upon. And if the Union is afraid to make use of it and instead turns to supposedly easier alternatives, then at some point it may come to regret it.

According to paragraph 2, the Council must unanimously state that Poland's conduct violates the fundamental values of the EU under Article 2 TEU in a "serious and persistent" manner. Unanimity is a problem because Hungary has promised to have Poland's back, no matter what. It remains to be seen, however, whether this still applies if Poland blatantly and unabashedly ignores an entire infringement procedure, including the fines imposed by the Court. If the Council states Poland's violation unanimously, it may, acting by a qualified majority, suspend "certain of the rights" granted to the Member State (Article 7(3) TEU), including its vote in the Council and other rights such as transfer funds.

In any case, however, the Council can at least first state a "clear risk of a serious breach" of the fundamental values (Article 7(1) TEU), as the Commission has already proposed. That statement requires a four-fifths majority and would at least show that Poland and its allies, if it still has any then, are isolated in the EU. Even after all the disillusionment of recent months, I cannot imagine that cannot be achieved, particularly in a scenario of Poland ignoring the ECJ – if the member states, particularly France and Germany, finally decide to throw their diplomatic weight behind it.

Which is, granted, still a big if. The European People's Party would most likely first have to kick out Viktor Orbán's Fidesz party, a thing which so far they couldn't muster the resolve to do. And, what's more, Orbán's chum Manfred Weber, the EPP's most likely *Spitzenkandidat*, would better not have become President of the Commission.

Speaking of Orbán: On 12 September, the European Parliament will decide about initiating an Article 7 procedure against Hungary, as requested by the Legal Affairs Committee on the basis of the detailed report by Dutch Green MEP Judith Sargentini. Fingers crossed!

Clogged ears

That politics tells the judiciary to just go f*** themselves happens elsewhere, too, and with increasing frequency, it seems. That includes **Germany**: The pretty Hessian town of Wetzlar, for example, the seat of the *Reichskammergericht* back in the olden days, chose to disregard an injunction by the Federal Constitutional Court to grant a far-right party access to the town hall, which forced the aghast Karlsruhe Court to write a letter to the supervision authorities to "encourage" a reprimand. The affair of Sami A. I wrote about last week, the Islamist preacher who was deported in defiance of a court injunction, may be another example.

In the Free State of Bavaria, the Administrative Court of Appeals has now lost its temper in a most

spectacular way in the face of the persistently clogged ears of state and local governments with regard to the calls of their legal duty to finally draw up air pollution plans which might lead to driving bans for diesel cars. The Court has announced that it considers submitting to the ECJ the question of whether European law allows or even demands coercive detention against Prime Minister Markus Söder and other members of the Bavarian government or administration. Putting the head of government behind bars? That would be a most Bavarian way of judicially answering to Andrew Jackson's challenge. WALTHER MICHL tells the whole story with a lot of empathy for Bavaria being Bavarian, if not for the legal position of the regional government (German).

++++++++++*A Note from Verfassungsblog*+++++++++

You like what we do? Please support us on Steady or RiffReporter, so that we can grow and remain independent. Thank you very much!

++++++++++++++++++++++++++++++++++++

Meanwhile, in **Poland**, the PiS government seems to have come up with another innovative idea to explore the boundaries of the rule of law. Lyudmyla Kozlovska, the founder of the PiS-critical NGO Open Dialog Foundation and a Ukrainian citizen, learned on a lecture tour to Brussels that she had been flagged as a security risk in the Schengen Information System. She was swiftly deported to Kiev by the Belgian authorities and is now barred from entering the entire Schengen area. EVELIEN BROUWER examines the legal side of the case.

In **South Africa**, the Constitutional Court this week held a hearing on the matter of the Southern African Development Community (SADC) Tribunal, an international court which recently had its wings cut by a protocol signed by the 14 member including South Africa. The South African High Court, which already had declared the South African withdrawal from the International Criminal Court unconstitutional a year ago, had done the same with respect to the SADC tribunal in March 2018, once again raining massively on the government's foreign policy parade. FELIX LANGE reports.

Turkey has on the other hand, likes to throw judges the government doesn't like in jail, which it also did to Judge Aydın Sefa Akay although he enjoyed diplomatic immunity as a judge at an international court. BILGE ERSON ASAR is investigating whether this was legal.

The fact that there is no proper access to the courts for the pupils of European schools in **Germany** if this intergovernmental institution decides to increase their tuition fees was for nine years the subject of proceedings before the Federal Constitutional Court of Germany. Now the decision has been handed down. FRANZ MAYER shared his first impressions of this decision (German) in a new format we are experimenting with: *VB vom Blatt* (VB sight-reading), to give experts the opportunity to share their first tentative thoughts on current events in a transparent way and to help readers forming a better informed opinion about what is going on at a time when they still pay attention, as opposed to days or weeks after when the demand has ebbed. We expect a lot from this format and hope that our esteemed authors will make active use of it.

The planned European popular initiative on **British** expats' post-Brexit rights shows a bizarre legal loophole analyzed by SÉBASTIEN PLATON: British citizens in France can participate in the initiative neither in their place of residence in France under French law nor in their land of citizenship UK under British law.

MARK GRABER has, together with Sandy Levinson and Mark Tushnet, just published a most remarkable book with OUP entitled *Constitutional Democracy in Crisis?,* and presents the core findings on Verfassungsblog.

Elsewhere

MICHAEL ROSSI considers the **Serbian** and **Kosovo** governments' plan to get rid of their respective ethnic minorities by means of territorial exchange a dangerous move. ANDREA LORENZO CAPUSSELA is a little less sceptical.

MASSIMO FRIGO examines the legal side of the Italian affair surrounding the "Diciotti" ship anchored

in Catania and the refugees on board who were not allowed ashore by the far-right Interior Minister Salvini.

PIERRE DE VOS tells of his childhood in the Free State during the apartheid era on the occasion of the agitated debate about land reform in South Africa.

MARY McCORD is horrified at the idea that firearms produced on 3D printers at home could be freely available to everyone in the USA.

JULIANO ZAIDEN BENVINDO puzzles over the paradox that Brazil, while politically turning to the right, is at the same time discussing the decriminalisation of abortion.

That's all for this week. The next will bring, among other and more important things, my 48th birthday. Presents? Oh, you know, no big deal at all, awfully nice of you to ask. But, since you've mentioned it: A subscription on Steady or RiffReporter would be really, really cool.

All the best, and take care,

Max Steinbeis

ABOUT THE AUTHOR

Maximilian Steinbeis

Maximilian Steinbeis is a legal journalist and writer and the founder and director of Verfassungsblog.

SUGGESTED CITATION

Steinbeis, Maximilian: Now let him enforce it, Verfassungsblog, 01.09.2018, doi: 10.17176/20180901-151911-1.

Licensed under CC BY-SA 4.0.

Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20180901-151911-1.