Cakes that Speak

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Dear Friends of Verfassungsblog,

Cake as Indicator and Catalyst of Progress in Anti-Discrimination Law: One day, I am sure, some eager young legal historian will sit down and write her PhD thesis on this fascinating subject. This week, the UK Supreme Court has caught up with its US counterpart in terms of cake jurisdiction and handed down a ruling of its own on how to deal with the cake as a dessertified discriminatory statement. Dyspepsia definitely seems to be part of the answer.

Last June, if you remember, the US Supreme Court gave its verdict in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*. That case was about a cake that a Christian baker refused to bake because it was a same-sex couple that had ordered it for their wedding. Is there a right for homophobes to discriminate against sexual minorities by invoking their right to freedom of expression and their religious beliefs? To the dismay of the right-wing hardliners in- and outside of the US Supreme Court, there was no majority for that (which may have changed by now with Justice Kennedy being replaced by Justice Kavanaugh), and what the Supreme Court finally came up with instead was a rather flimsy compromise that exonerated the baker without postulating a conscientious exception of that sort.

The case *Lee v. Ashers Baking Company* decided by the UK Supreme Court was somewhat different: The cake that the gay customer ordered and the Christian baker refused to bake was not a wedding cake, but intended for a party held by an LGBT organisation from Belfast, and it was to carry a specific message: *Support Gay Marriage*. The lord judges decided in favour of the baker, as well: He refused to bake the cake, writes Lady Hale for the court, not because of the sexual orientation of the buyer, but because of the statement he would have had to make by baking that cake. "The objection was to the message, not the messenger." Anyone, straight or gay, would have been refused that service. Therefore, no discrimination on the grounds of sexual orientation took place. Discrimination based on political opinion? Possibly – but this is where the baker's own rights come into play: he must not be compelled to write "Support Gay Marriage" on the icing if he in fact totally disagrees with that statement.

++++++++*A Note from Universität Hamburg*+++++++++

The research project Reclaiming Constituent Power? Emerging Counter-Narratives of EU Constitutionalisation will co-host an international workshop on "Transnational Partisanship and Constituent Power in the European Union" at the University of Amsterdam, Nov. 15.-16., 2018

Details at https://www.wiso.uni-hamburg.de/fachbereich-sowi/professuren/niesen/archiv/workshop-program-tpcp.pdf

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Cakes that speak: But what do they say? Both Supreme Courts play through all sorts of hypothetical alternatives to get to the bottom of the cake's message and its discriminatory content. What if a straight guy had ordered a pro-gay-marriage cake? What if he ordered a *Homosexuality=Sin* cake? What if a straight person had ordered a cake for a gay wedding? What if a gay person had ordered a cake for a straight wedding? How to decide that case, it seems, is basically a matter of choosing the right comparator.

But what does the cake say? Had it been baked, in that I agree with Neil Gorsuch, it would of course say: Support Gay Marriage! When two people get married, that is a happy event which should be celebrated, with whipped cream and sugar and colourful icing. Congratulations! That is the message of the cake, and that would have been the statement the baker would have made, had he baked it.

A statement, too

But he hasn't. And that too is a statement. Just like the cake, had it been baked, would have been a statement of the gay customer and his like's right to marry a beloved person like everyone else, the unbaked cake is a statement against exactly that.

The baker is no hermit who does his prayers at some remote place in silence, nor is he someone you ask for a favor when you order a cake from him. Selling cakes is his business. He sells cakes, that's what he does, and he is open for business for everyone who may find him- or herself in want of a cake. If he isn't, however, if he doesn't want to sell *certain* cakes to *certain* customers, he is free do that. But then that's a distinction that he makes and nobody else. For which distinction he owes justification to those he distinguishes. And if he cannot deliver that without discrimination – well, then that's a discrimination, isn't it?

The baker, however, does not want to take responsibility for his statement. He does not want to justify himself. He does not want to give reasons to convince the other. Instead he says: homosexuality is a sin! That is his faith. It's what he believes in, against reason and evidence. Faith is not something you can do or not. This is a matter of identity. He mustn't be forced to renounce his faith. He cannot help it. It's just what he is.

In that way, the baker resembles the alt right troll who sprays crazy stuff about Muslims and immigrants all over the Internet and, if he's asked to justify that, starts squeaking about freedom of speech instead. He draws a circle around himself and his convictions and says: from here on all my statements are a matter of identity. Whoever comes to criticize me and demand justification violates my rights. I, harasser of minorities, am now the harassed minority myself. You think you have rights, but, suck on that, you perverts: these are now mine too!

They mustn't get away with that. Fundamental rights are no darkroom in which one can blissfully discriminate away, unbothered, unseen and unaccountable. The right are trying to rededicate fundamental rights for precisely this purpose all over the place. That is not the least of the dangers to which constitutionalism is exposed in these dark days.

Exposed

Meanwhile in **Germany**, the far-right AfD party takes pleasure in the idea of encouraging parents and students to pillory teachers on the Internet if they make AfD-critical remarks in the classroom. JOSEF FRANZ LINDNER shows that this is a violation of public schooling law of which the authorities should not be allowed to rid themselves by privatizing the matter as a problem of the teachers alone.

Speaking of discrimination: the Bundestag has begun to debate the draft law on the third option, on which occasion BERIT VÖLZMANN asks the fundamental question why the legislator still uses "gender" as a legal category in the first place.

In the CDU/CSU party, mostly in its youth organisation JU, term limits for the *Kanzlerin* have become a thing in the 13th year of Angela Merkel's reign, and former CJEU advocate general and CDU MP CARL OTTO LENZ finds that not a bad idea at all.

In **Bavaria**, elections will take place this weekend, and it looks as if the CSU, for all its pushed and clumsy efforts to present themselves as the *Alternative zur Alternative für Deutschland*, will suffer from the hands of the *Krampf*-averse Bavarian electorate exactly the fate I wished for some months ago. However, ROMAN KAISER has taken a look at the Bavarian electoral law and shows that the intricate way votes are counted and translated into mandates make the already difficult projection about possible majorities even trickier (all German).

In **Bosnia-Herzegovina**, elections took place last Sunday, but the untenable constitutional situation in the country, with three constitutive ethnic groups to the detriment of all others, remains as unchangeable as before, as CONSTANCE GREWE, a long-standing constitutional judge in Bosnia, explains.

Iran, in its the dispute with the USA over the resumption of sanctions and the nuclear agreement, has obtained an interim victory before the International Court of Justice – which may prove pyrrhic, according to EBRAHIM AFSAH.

In **Belgium** it is forbidden to wear headgear in the courtroom. But this can't be a pretext to force Muslim women to take off their *hijab*, the European Court of Human Rights has ruled – its first decision in favour of the Muslim veil. SHINO IBOLD reports (German).

This week, the Parliamentary Assembly of the Council of Europe (PACE) has held an extraordinarily dramatic and momentous session. Since the annexation of the Crimea in 2014, **Russia's** voting rights have been suspended, which is why Russia no longer pays contributions and PACE is plunging into serious financial difficulties. SILVIA STEINIGER reports whether and how the parliament of the European human rights system has found its way out of this dilemma.

KENNETH ARMSTRONG analyses a referral decision of the **Scottish** Court of Sessions to the European Court of Justice, which is to answer the question whether and how the Brexit decision according to Art. 50 TEU would be revoked if necessary.

In **Poland** there is still nominally a constitutional court, believe it or not. TOMASZ KONCEWICZ takes a sad look at what is left of this once so shining institution today.

In **Turkey**, a questionable judicial institution is blocking access to the European Court of Human Rights for the victims of the government's clampdown. LEIGHANN SPENCER examines the situation.

The **EU** concludes free trade agreements, but not necessarily alone. LUCA PRETE analyses how the so-called "mixed" agreements will proceed after the recent ECJ case law.

Elsewhere

MARK TUSHNET demands that the **US** Supreme Court be abolished in its current form. ILYA SOMIN is worried that Democrats may sooner or later try break open the now rock-solid Republican majority at the Court with some sort of a court-packing scheme, which JIM LINDGREN proposes to prevent by locking the nine-headedness of the SCOTUS bench by means of a constitutional amendment (a Project Waterproof from the right, who'd have guessed...). ERIC SEGALL writes a fictive letter to his granddaughter in 2045 to help her understand what constitutional law was before everything turned bad in 2018. And JACK BALKIN notes that constitutional rot has now infested the woodwork at the Supreme Court.

FREDERIC FERREAU shakes his head over the latest entry in the *chronique scandaleuse* of the **German** federal internal intelligence service – the practice of influencing media coverage by sending "legal requests for correction" (German).

DIRK VOORHOOF points to a new ruling from Strasbourg in a **Russian** case that raises the freedom of bloggers to criticise the police to a very high level.

DANIEL SARMIENTO is amazed at the ECJ, which – in this case vis-à-vis **France** – has for the first time declared the failure of a referral in Luxembourg by a national supreme court a treaty infringement.

BASAK CALI warns against taking lightly the pushes in **Turkey** towards the reintroduction of the death penalty and the associated "Trexit" from the European Convention on Human Rights and the EU accession process.

So much for this week. All the best, and take care,
Max Steinbeis

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