Verfassungsblog
ON MATTERS CONSTITUTIONAL

Law Rules!

Maximilian Steinbeis

24.11.2018 doi: 10.17176/20181130-084844-0

It's hard to believe, I know. But PiS actually seems to have buckled. Certainly, it's a tactical retreat, it's just a partial success, and Poland is far from being out of the woods yet. But at least the Polish Supreme Court seems to be safe for the time being from the assault of the PiS government. According to the reform of the "reform" that has been passed in the Senate on Friday night, the forced retirement of the Supreme Court justices, including Chief Justice Małgorzata Gersdorf's, is void and all judges can now officially continue in their original function. The suspicion notwithstanding that this whole forced retirement business was a piece of deadweight destined to be thrown off board when things get rough with the EU in order to get away with other more important things: I do believe that this is a reason to celebrate. This success was procured by EU law. EU law rules!

What happened? The EU Commission had started an infringement procedure because of the planned subjugation of the Supreme Court, and the ECJ had ordered Poland to freeze the situation at the Supreme Court until the final judgement. This order would not have required a new law at all, as the forced retirement had never become legally effective due to the lack of countersignature by the Prime Minister. But of course, I get it: The PiS wanted to demonstrate its ability to act and in it's usual manner, within hours and without much consideration about procedure and transparency, pieced together what passes for a law nowadays in Poland. But ok, let's not be picky. Less nice is the fact that the PiS-dominated National Council of the Judiciary (more about this) apparently seems to keep on hiring new judges for the Supreme Court for the time being, for whatever will become of them.

Of course, it would be naive to believe that the PiS has seen the light all of a sudden. Next year there will be European elections, and the ECJ ruling is likely to deliver a painful defeat to PiS right in the middle of the hot phase of the election campaign, so it's rational for PiS to dampen the blow in advance. The PiS chairman of the Legal Affairs Committee has openly admitted on a clerical fascist radio programm that this is a "tactical evasion manoeuvre". Many in the PiS are obviously of the opinion that the commission should withdraw its complaint altogether now that they have behaved so nicely. Of course, the Commission will do no such thing if, as guardian of the Treaties, it makes any claim to be taken seriously. The infringement of the Treaty that is the subject of the proceedings is not going to disappear just because Poland suddenly decides to play the choirboy for a while.

But there is more news from Poland this week: the Supreme Administrative Court has asked the ECJ whether the National Council of the Judiciary meets the EU requirements for an independent judiciary. That's an explosive one. The NCJ had been subjugated by PiS in order to be able to steer the replacement of retired judges at the Supreme Court in their favour. A number of judges loyal to the constitution had thrown in their applications in order to be able to sue the NCJ in the expected event of their defeat. Sue they did, which now gives the Supreme Administrative Court the opportunity to refer the NCJ problem to the European Court of Justice in Luxembourg. If the body that selects the judges isn't independent, then the judges aren't either. And if the national judiciary, on whose implementation of European law the whole community of law depends, isn't independent, then, as we have known since *Associação Sindical*, that is a matter of fundamental concern for EU law.

But that is not all. Meanwhile, the NCJ has not been idle either and has asked the Polish Constitutional Tribunal to attest to the fact that the way the PiS filled the NCJ with its minions is completely above reproach under Polish constitutional law. One PiS-subservient organ calls another PiS-subservient organ

to certify its non-subservience to PiS? That won't fly. As long as there are three anti-judges at the Constitutional Tribunal who sit in positions already occupied by others, its judgments have no legal effect anyway. It remains to be hoped that the process will only strengthen the EU Commission's resolve to take action against the NCJ and the Constitutional Tribunal, now as the Supreme Court work is mostly done. Either way, the way the PiS keeps wrecking and splintering Poland's legal and judicial system as if it were the scene of a Bud Spencer and Terence Hill movie is as scandalizing a spectacle as ever.

Thanks to Patryk Wachowiec for valuable input!

Rule of Lawlessness

Speaking of the ECJ and of disrespect for the judiciary: the Administrative Court of Appeal (*Verwaltungsgerichtshof*) of the magnificent Free State of Bavaria recently also sent a case to Luxembourg, truly a tough one as well. It is about the persistently excessive nitric oxide pollution in the inner city of Munich and the ban on diesel cars that it triggers under EU environmental law – a ban which the Bavarian authorities stubbornly refuse to impose, despite a legally binding court decision demanding it as an inevitable consequence under European law.

What does an administrative court do when the state simply, and with a broad grin on its face, tells it to bugger off? It can impose a fine, but in the end the state pays that fine into its own pocket, so that's useless. Can it also impose coercive detention? Can it throw the responsible officials behind bars until they agree to comply?

This question was referred to the European Court of Justice by the Bavarian *Verwaltungsgerichtshof* a few days ago. The Bavarian government may find the driving bans disproportionate, the supreme administrative judges of Bavaria write with palpable indignation, and is is "free to express this opinion; however, its obligation to comply with legally binding court decisions (…) remains unaffected by this. (…) A procedure which is designed from the outset to exclude the inclusion of traffic bans for diesel vehicles in a continuation of the clean air plan for Munich does not constitute fulfilment of the judicial decisions to be enforced" (RNr. 67, 70).

What the Bavarian state government is doing here is not only an insolence, but also a breach of the constitution. This is not just about diesel cars, this is about the rule of law. Here the VGH is very clear. "The (…) deliberate disregard of legally binding judicial decisions by the executive power is unacceptable." (RNr. 119).

The possibility of coercive detention, which the VGH wants to have confirmed by the ECJ, is delicate because under German constitutional law any deprivation of liberty requires a formal act of Parliament. The VGH considers however "these concerns not insurmountable" (RNr. 153). EU law prevails, and coercive detention would not come out of the blue, must be announced and can be avoided by fulfilling the legal obligation.

And whom does the VGH want to arrest? First the officials in the district government of Upper Bavaria who are directly in charge of clean air plan, up to the *Regierungspräsident* (RNr. 162). Those answer to instructions from above, however, so that officials of the Bavarian Ministry of Environment up to the Minister himself also would have to turn themselves in (RNr. 163ff.). As far as he has exercised its constitutional guiding authority, the circle of the office bearers considered incarcerate-able by the VGH would also cover the Prime Minister himself, the Right Honorable Mr Loathsomeness-Impersonated Markus Söder (RNr. 172ff.).

From which we learn two things. Firstly: we Germans, or rather: we Bavarians should not roll our eyes too complacently about the plight of the Poles. And secondly: in these times of populist temptation for those in government, the European Court of Justice is more urgently needed than ever. The rule of law depends on it. Everything depends on it.

A whiff of Trump

RÉNATA UITZ comments on the events in **Poland** and a constitutional court decision from **Hungary**, which at first glance might also give cause for hope. She considers the forced retirement of Supreme Court

judges to be a feint planned from the outset, therefore sees little cause for enthusiasm and at any rate considers one thing (totally correctly, in my view) to be an obvious failure: the "rule of law dialogue".

In **Germany**, the CDU revenant Friedrich Merz has caused quite a stir when he suddenly enriched the current debate on refugees with a piece of asylum policy rhetoric from the 1990s and suggested scrapping the individual right to political asylum in Article 16a of the Basic Law. KLAUS FERDINAND GÄRDITZ doesn't have much trouble proving that Merz doesn't know what he's talking about at best or does know but goes ahead anyway at worst (German). Either way, a whiff of Trump could be smelled in the streets of Germany this week. Luckily, Merz is currently lagging in the polls about the CDU chairmanship election behind general secretary Annegret Kramp-Karrenbauer (isn't that name a gem of German gutturality! Better start practise now, you'll most likely need to pronounce it more often in the future).

Also in **Germany**, the Federal Constitutional Court issued a ruling on the question of what administrative courts should do if science fails them. A troubled and troublesome decision that is, and my attempt to make sense of it can be found here (German).

Russia is threatening to leave the European Convention on Human Rights, but whether or not it will actually pull that off is very much uncertain, argues DMITRY KURNOSOV.

In the **Maldives**, the Supreme Court has not given in to President Abdullah Yameen's attempt to have his ousting at the recent presidential elections invalidated, but on highly questionable grounds, as AHMED NAZEER complains.

Elsewhere

JOHN MORIJN lists four more "less bad" developments in the rule of law in Europe.

EVELYN MERCKX criticises on the occasion of the **German** *Fröhlich* case the inconsistencies of the ECHR jurisdiction regarding the right to know one's biological ancestry.

VINCENT DELHOMME and LUCIE LARRIPA analyse the ruling of the ECJ on Conseil d'État judgments as treaty infringements at the hands of **France**.

THIBAUT GUILLY takes a closer look at the Brexit Agreement between the EU and **Great Britain** (French).

IGNACIO MOLINA believes it is possible that in view of the **Spanish** last-minute resistance, Theresa May with her Brexit plan could still shipwreck at the rock of Gibraltar (Spanish).

GERRIE LODDER reports on new ECJ rulings on integration tests in the **Netherlands**.

KEVIN JON HELLER is appalled by the life-in-prison conviction of the British academic Matthew Hedges as an alleged spy in the **United Arab Emirates** as an unprecedented attack on the freedom of science.

ANNE PETERS sees the intransparency of the way in which the **UN** migration pact was negotiated as partly to blame for the current global strife about its ratification.

So much for last week. This Sunday, all eyes are on **Switzerland**, where the "self-determination initiative" will be put to vote – the latest attempt of the right-wing SVP to position national self-determination against human rights under the slogan "Swiss law instead of foreign judges". At the moment, the polls do not seem to indicate that the attempt will be successful. We will know more on Sunday evening.

Have a good week, and all the best,

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: Law Rules!, Verfassungsblog, 24.11.2018, doi: 10.17176/20181130-084844-0.

Licensed under CC BY-SA 4.0.

Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20181130-084844-0.