# Heroes of our Time

**Maximilian Steinbeis**

05.11.2021 doi: 10.17176/20211106-011526-0

The Polish Supreme Court is not (yet) on the same abject level as the body formerly called "Constitutional Tribunal". 52 of its 94 judges are appointed in a way that leaves no doubt about their rightful power to adjudicate on the Poles' civil, criminal and labour law conflicts in the last instance. They have been nominated for their office by the National Judicial Council, which, according to the Polish Constitution, is in charge of selecting judges (Art. 179), protects the independence of courts and judges (Art. 186) and consists of a majority of representatives of the judiciary (Art. 187). Since early 2018, this institution is defunct. All judges appointed since then have been nominated by a committee of hand-picked friends, minions and loyalists of the PiS justice minister and his government, which has little more than the name in common with the "National Council of Justice" prescribed by the constitution.

This applies not only to hundreds of judges in the lower courts, but also to 42 judges of the Supreme Court. Most of them are members of the newly established chambers for disciplinary cases and for "extraordinary control and public affairs". But there have also been new appointments in the other chambers. However, many impeccably appointed judges refuse to pretend that these new appointees are authorised to adjudicate in chamber with them just as if they were normal colleagues. This is a huge problem. Justice is blocked, cases are stuck, the judiciary is indeed in danger of becoming more and more dysfunctional.

Now the PiS government is planning to complete the job, as the Polish newspaper Rzeczpospolita reports: All 94 judges of the Supreme Court are to declare whether they want to stay in office. If they don't: no problem at all. Those who have been in office for more than 10 years can retire with full pay. Those who prefer to continue will undergo an evaluation by the "National Council of the Judiciary" (i.e. the body of those who follow the orders of the Minister of Justice). This body will then make recommendations to President Andrzej Duda whom to assign to the two chambers of the Supreme Court, one for private law and one for public law, which will replace the current five chambers. Those who do not receive a recommendation can also retire on full pay and henceforth adorn themselves with the title "former judge of the Supreme Court".

The PiS government apparently hopes that this is an offer that the 52 irreproachably appointed judges cannot refuse. The mixture of personal advantage, fatigue, despair over the blockage of justice and well-grounded fear of the gentleman who currently holds the office of both Minister of Justice and Prosecutor General is supposed to help them over the threshold of their self-respect, so that they can either bend their knee or find their way out peacefully on their own, and the problem with the legally appointed judges at the Supreme Court will be solved by the simple fact that there are none any more.

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Didn't the EU Commission demand that the disciplinary chamber at the Supreme Court be abolished? And isn't that what is happening now? I would presume it would be very convenient for the PiS government if the news were received in this way in Brussels. But firstly, this plan would be completely unsuitable to this end, as far as the disciplinary system as such remains untouched. And secondly, to take this as a signal of compromise seems hardly plausible at all, even if the content of the plan allowed it. This, like almost everything the PiS government does, is motivated by domestic politics. In the game of chicken that Justice Minister Żiobro and Prime Minister Morawiecki are playing for the succession of the aged PiS chairman Kaczyński, neither of them can afford to engage in any ultimate or conciliatory dialogue with Brussels.

For many months, Poland's rule of law has depended on the tenacity and endurance of a few dozen judges who, at immense legal, financial, and personal risk, uphold the claim that Poles are being tried according to the law – suffering hardships that we can hardly imagine. This becomes more difficult every day. The people who allow themselves to be appointed and promoted by Żiobro's body of minions are not necessarily bad people or bad judges. There are many capable, well-trained jurists who just want to do their work and pursue their careers under the government that is in power at the moment. The plaintiffs and defendants are also not too keen to dwell forever on the question of the correct composition of the bench, but want to have their cases decided. All this, in addition to the prospect of disciplinary trouble and even the loss of their jobs and livelihoods, weighs heavily on the shoulders of these judges, whom we should admire and support all the more as real heroes of our time. As long as they carry this burden, Poland is still a state under the rule of law – a badly damaged one, but still.

*Thanks to Stanisław Biernat for valuable input.*

## The Week on Verfassungsblog

Meanwhile, Europe continues to wonder how to respond to the previous stage of escalation in the conflict between the EU and its member state Poland, the ruling of the Polish "Constitutional Tribunal" of 7 October 2021 on the alleged incompatibility of ECJ case law on the independence of the judiciary and its primacy over Polish law. MARTIN NETTESHEIM considers the strategy of the supranational institutions of the EU to force Poland back onto the path of virtue by legal means to be unpromising. In the end, it is up to the member states to decide whether they want to remain in a contractual relationship with Poland. If not, there are ways under **international law** to oust their fellow club member.

The historian MORTEN RASMUSSEN confirms the finding that the **constitutionalisation** and federalisation of the EU, postulated and promoted by the supranational institutions, has never really been accepted by the member states, contrary to what many EU law experts like to think. For them, the reproach of the rule of law is not so decisive, unlike the fear, felt particularly by the "frugal" Northern Europeans, of fattening up corrupt authoritarian regimes in a transfer union, and above all the fear that the European internal market will be endangered because Poland no longer abides by the rules.

The October European Council (EUCO) was the first opportunity to react to the declaration of the Polish "Constitutional Tribunal". However, there was not a word in the **EUCO** conclusions about the looming constitutional crisis. There may be various reasons for this reticence. CHRISTOPHE HILLION reminds us that the Council has no competence to call into question

the fundamental obligations of the member states – which include securing effective legal remedies under Article 19 TEU.

One pillar of European integration that Poland is shaking is the principle of mutual recognition. Arrest warrants from one member state usually must be executed by the authorities of another without further scrutiny. With respect to Poland, the CJEU in 2018 insisted on a two-step test: before extradition can be refused, there must not only be structural concerns about the rule of law standards there, but also concrete reasons to believe that the extradited person will be mistreated. Now a district court in **Norway** has questioned this line, as EIRIK HOLMØYVIK reports: The problem is, the court argues referring to the case law of the ECtHR and ECJ since 2018, that in Poland, one can no longer rely on being brought before the lawful judge. If that is the case, the Norwegian court concluded, then no one can be extradited there.

It is not only in Poland that unpopular judges are subjected to disciplinary proceedings. In the case of the **Bulgarian** judge Miroslava Todorova, the ECtHR recently handed down its judgement. RADOSVETA VASSILEVA complains that the Strasbourg Court, while partially deciding in favour of the judge who as president of a judges' association had persistently pointed out abuses in the Bulgarian judiciary, had turned a blind eye to these abuses themselves.

Meanwhile, the Bulgarian Constitutional Court has ruled that the term "**sex**" in Bulgarian law is to be understood exclusively in biological terms. TEODORA PETROVA criticises the court for not arguing in legal terms, but for using concepts that are otherwise found in the realm of political populism and nationalism.

In 2014, the European Commission established a **rule of law framework** and the European Parliament has repeatedly proposed to extend this procedure to an annual monitoring cycle for democracy, rule of law and fundamental rights. A similar procedure has already existed for almost 30 years in the Council of Europe under the responsibility of the Parliamentary Assembly. MIHAELA ANCA AILINCAI examines the reasons and interests that led to such a competition between the two European organisations.

The child benefit scandal has shown that there are also deficits in the rule of law in the **Netherlands** with horrific consequences. The Venice Commission of the Council of Europe recently named a number of them: a lack of parliamentary control, a disturbed flow of information in the administration and the need for a constitutional review of laws. EMMA SCHULTE thinks the opinion is an important nudge, but too vague and hesitant.

In the **UK**, the succession of one of the most important political journalists at the BBC is being debated, and with it the question of whether the independence of journalism is sufficiently protected from the Tory government. RICHARD DANBURY thinks it is generally problematic that the government of the day decides who sits on the oversight board of the BBC.

The post-Brexit fishing dispute between London and Paris keeps dragging on: As recently as May this year, French and British warships confronted each other off the Channel Island of Jersey. After the arrest of a British fishing boat in Le Havre, the conflict threatened to escalate again last week. ROMY KLIMKE criticises the sabre-rattling on both sides. The dispute over access licences obscures the fact that it is ultimately a rather specific bureaucratic issue.

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The climate summit in Glasgow lends particular topicality to the issue of **climate camps**: under the motto "We will stay until you act", Fridays for Future organises such camps throughout Germany, whose permanent presence in public space is intended to draw attention to the urgency of the climate crisis. It is not so much the wintry weather that causes difficulties

for the camps, but the authorities and courts. JOSCHKA SELINGER, VIVIAN KUBE, TAMMO EILTS, ENNIO FRIEDEMANN and LIV HAGMANN discuss whether and to what extent assembly infrastructures are protected by Article 8 of the German Constitution.

**Facebook** processes personal data to display behavioural advertising. SUZANNE VERGNOLLE analyses the draft decision of the Irish Data Protection Commissioner, which is based on the fact that a "reasonable user" would know that Facebook's real service is to produce personalised advertising.

The German agency **Schufa**, which provides scores on consumers' creditworthiness, is also not particularly popular among data protection circles. Through a referral order by the Wiesbaden Regional Administrative Court, the ECJ has now the opportunity to concretise data protection requirements for scoring and, at the same time, to comment on the question of the extent to which the national legislature has any leeway at all under the GDPR in the area of scoring – for Section 31 of the BDSG. TRISTAN RADTKE examines the implications.

In the Corona pandemic, many countries are desperately short of **vaccine**. Should Germany give up its resistance to suspending vaccine patent protection? INGO VENZKE thinks it should.

In **Brazil**, a Senate investigative committee has presented its report on President Bolsonaro's numerous, sometimes criminal, misdeeds in the Corona pandemic. EMILIO PELUSO NEDER MEYER and THOMAS BUSTAMANTE report on the damning material the committee has collected.

Elections are coming up in **Nicaragua** and shortly before, the Permanent Council of the Organisation of American States sent a final warning to its member state. In Resolution 1182, it makes it clear that it is not enough to hold elections if they violate democratic principles. ALINA MARIA RIPPLINGER and FLORIAN KRIENER report on the ongoing challenges to the OAS from member states that systematically disregard their core human rights, democracy and rule of law obligations.

The recent coup d'état in Sudan is the fourth completed military takeover on the African continent in 2021, after Mali, Chad and Guinea, and is a blow not only to democratic aspirations in these countries, but also to the African Union (AU), which has invested a lot of prestige in its zero-tolerance policy on coups d'état and has received much praise for it, says ELIN HELLQUIST.

Lastly, I would like to draw your kind attention to the second 9/11 Symposium that has started this week: It is about the traces left by 9/11 in migration, asylum law and citizenship. Contributions by FERDINAND WEBER and LUICY PEDROZA have already been published, more will follow in the coming week.

So much for this week. All the best to you, stay safe and healthy, please support us on Steady and/or Paypal, and see you next week!

Max Steinbeis

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SUGGESTED CITATION

Steinbeis, Maximilian: Heroes of our Time, Verfassungsblog, 05.11.2021, doi: 10.17176/20211106-011526-0.

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Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20211106-011526-0.