Hercules or Sisyphus? On the legacy of statutory lawlessness in post-autocratic Poland

Wojciech Sadurski 2024-04-12T18:33:07

There are various metaphors which can be used to describe the Polish state as it has emerged from Law and Justice party (PiS) rule 2015-2023. One is “minefield”. Another may refer to “traps” or “ambushes”. The most popular word, in Polish, is the adjective “*zabetonowany*” which translates as “concreted” but perhaps “cemented” or “hardened” sound better. They all are meant to capture the situation in Poland in which alternation of power is not a regular transition from one government to another. Rather, it occurs in a situation of deep entrenchment – largely by statutory means, but not open to easy statutory changes – of the remnants of the *ancien régime*.

In turn, the tasks that the new government, presided over by Donald Tusk faces, evoke familiar figures of Greek mythology. A heroic-positive prefiguration of Hercules performing his fifth labor: cleaning up the Augean stables. A dispirited and pessimistic analogy would be to Sisyphus. Either way, it’s a hard job, so spare a thought for the indefatigable Minister of Justice, Adam Bodnar, and take your pick.

Three types of traps

The Polish transition is unlike any regular transfer of power within democratic rules of alternation after regular elections. It is not an instance of “transitional constitutionalism”, as in post-communist and other post-authoritarian regime changes. It is not the latter because the challenge is not to “invent” a new system replacing the bad old regime. But neither is it the former (regular transfer of power) because of the “minefield”, “traps” or – to put it more legally – various entrenchments of remnants of the authoritarian period: remnants which disable the new government from effective reforms within the existing constitutional framework.

Those entrenchments have been established by statutes – PiS had not enjoyed, in contrast to Orban’s Fidesz in Hungary, a supermajority which would allow it to change the text of the Constitution. But with PiS’s anointed President Andrzej Duda, in office until late 2025 (the end of his second term, with no right to seek reelection), having the power to veto statutes, those statutory “traps” are *de facto* entrenched with near-constitutional force. The Presidential vetoes of statutes are overridable by a supermajority which the democratic coalition currently does not have. In addition, the President and parliamentarians of PiS may use the “Constitutional Tribunal” (inverted comas deliberate, for reasons explained below) which, staffed entirely with PiS nominees, will invalidate any statute the PiS minority in Parliament does not like.

The “landmines” are multiple and basically infect (to change the metaphor) almost every important aspect of the governance of Poland. To simplify, I will divide them into three categories, though I should warn that the taxonomy is far from comprehensive, and characterization of any given “trap” as one or another category is arbitrary: each can be represented as, at the same time, “institutional”, “personnel” or “procedural”. But such a classification may clarify the picture. In order to save space, I will provide only one representative example for each category, but with the provison that they are a legion:

1. *Institutional traps*. The central body of the system of justice, the National Council of Judiciary (Polish acronym: KRS), crucial in all decisions concerning appointments, promotions, demotions and discharges of judges, was restructured in 2017 so as to guarantee the PiS majority exclusive control over 23 out of 25 members of the Council. With a term of office statutorily guaranteed until 2026, the KRS (or, as its critics call it, neo-KRS) can keep maintaining the PiS-established erosion of judicial independence by resisting any attempts to undo any nominations and appointments for PiS loyalists in the judiciary.
2. *Procedural traps*. The second-most important official in the public prosecution system (the first being the Prosecutor General, ex officio the Minister of Justice) is the National Prosecutor (*Prokurator Krajowy*). Under a PiS-enacted statute of 2016 the National Prosecutor is appointed by the Prime Minister on the recommendation of the Minister of Justice/Prosecutor General, and with consideration of the (non-binding) opinion of the President. However, President Duda maintains, consideration of his opinion is a prerequisite for a valid appointment, and abstains from issuing any opinion.

3. *Personnel traps*. Court-packing of the top courts, mainly in the Constitutional Tribunal and the Supreme Court (and, to a lesser degree, the National Administrative Court), is the clearest example of this type of landmine. With judicial appointments notoriously difficult to revoke (as they normally should be), these apex courts have been "cemented" or "concreted" with PiS loyalists. They now include 100 percent of the membership of the constitutional court and just over 50 percent of the supreme court.

Remember: these are just single representative instances of legal landmines: the field is full of them. Taken together, they render the position of the new government particularly unpalatable. To respect the laws promulgated by the old government establishing these traps would make any significant steps forward virtually impossible. To ignore them, exposes the government to the predictable objection that it engages in the same rule of law violations as the currently ruling politicians accused their predecessors of, in 2015-2023. After all, can you restore the rule of law system while violating the very rule of law you profess?

Radbruch's legacy

In 1946, the great German legal scholar Gustav Radbruch published an article which became canonical for post-authoritarian thinking about the rule of law, on the rift between statutory lawlessness (gesetzliches Unrecht) and supra-statutory law (übergesetzliches Recht). I am far from comparing the "statutory lawlessness" of the Third Reich to that of the PiS regime. But, *toutes proportions gardées*, the idea that a statute may not be the last word on which law is legitimate and should be considered valid, is ubiquitous and confronts us in any context in which the powers that be use formally legal means in an arbitrary, uncontrolled and repressive manner.

"Positivism", Radbruch argued, "with its principle that 'law is law', has in fact rendered the German legal profession defenceless against statutes that are arbitrary and criminal". This type of positivism is being marshalled in Poland these days to accuse the government of breaching the rule of law. But if the rule of law is properly viewed as the rule of "supra-statutory law", as Radbruch wisely urged, the substance of the rules to follow is determined by the Polish Constitution and European law, rather than by those statutes which were enacted precisely with the aim of incapacitating the democratic successors of authoritarians. The Polish Constitution contains sufficient resources to set aside those legal traps: Article 8 provides for supremacy and direct effect of the Constitution. This idea, more generally, is reflected in the very title of an article by two Polish legal scholars of a younger generation, Maciej Bernatt and Micha# Zió#kowski: "Statutory anti-constitutionalism". Statutes may be an instrument of anti-constitutional revisions when the main institutional guardian is de-activated.

Die Fachhochschule für Verwaltung und Dienstleistung in Schleswig-Holstein (FHVD) sucht zum nächstmöglichen Zeitpunkt für den Fachbereich Allgemeine Verwaltung eine/n ***Hochschullehrer/-in*** *(m/w/d) für Öffentliches Recht, insbesondere* ***Ordnungsrecht*** *Wertigkeit bis BesGr. A 15 SHBesG / EG 15 TVöD-VKA, in Teil- oder Vollzeit, (Lehrverpflichtung Vollzeit: 18 LVS / Woche)*

Auf Ihre Bewerbung freuen wir uns bis zum 17 April 2024.

Weitere Informationen entnehmen Sie bitte unserer Homepage unter www.azv-sh.de.

Die Stellenausschreibungen finden Sie hier: Ausbildungszentrum für Verwaltung AZV (azv-sh.de)

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

Which brings us to the problem of the Constitutional Tribunal, which is the mother of all legal landmines in Poland: with the complete colonization of the Tribunal by PiS, no impartial institutional arbiter exists in a system, originally designed with a Kelsenian constitutional court at its epicenter. I have long argued – also in this blog – that Polish decision-makers should bite the bullet and extinguish the Tribunal as it now exists because it has lost any pretense to legitimacy. I will not rehearse my arguments here – nor evoke the counterarguments by my critics, whom I respect but with whom I obviously disagree. What I need to emphasize, though, is that without such extinguishment (or, at the very least, without creation of a tight cordon sanitaire around the Tribunal, with principled non-compliance with its judgments), the government and the legislative majority will keep falling victim to the multiple traps, ambushes and landmines set deliberately by their predecessors.

The rule-of-law dilemma

“Pursuing the rule of law system while violating legal rules” is a maxim which sounds unwholesome. “Obeying the rule of the constitution while violating individual statutory provisions” is a more palatable proposition, especially if we incorporate the EU treaties and the European Convention of Human Rights into the meaning of the constitution, as we should. Giving effect to a constitution without a constitutional court is not a contradiction in terms. It simply draws a necessary conclusion from the de facto non-existence of a constitutional court, and places the constitutional responsibility on the lawmakers, the elected government and regular courts.

As John Morijn has recently admitted in this portal, “[T]he infuriating reality is that entrenchment [in Poland] has occurred and often cannot be easily undone overnight except through draconian measures that may themselves (…) be in strong tension with the rule of law that needs saving”. Infuriating indeed. But antithetical to the rule of law? A state such as Poland post-15 October 2023 does not have the luxury of restoring the system of democracy and the rule of law while faithfully following the letter of statutes enacted by the autocrats. Rather, something like Andras Sajó’s “militant rule of law” may be needed. Making sure that it will not become self-perpetuating will be the main challenge for the democratic reformers. But that is not the problem that Polish democrats face right now; not just yet.

*

The Week on Verfassungsblog

On March 28, 2024, the ICJ issued its third provisional measures order in *South Africa v Israel.* The Court ordered Israel to ensure the provision of **humanitarian aid throughout Gaza**. TAL MIMRAN examines the provisional measures from a procedural point of view, investigating whether the right to be heard during the proceedings has been sufficiently guaranteed. He concludes that the ICJ based its decision on international reports that were not provided, known, or considered by either of the parties.

A detained former vice president, a strained diplomatic relationship, and a continent in turmoil: The raid of the **Mexican embassy** in the Ecuadorian capital, Quito, has not only caused political tensions but will also occupy the International Court of Justice. MANUEL BRUNNER and ERICK GUAPIZACA explain the international legal background.

In **Bosnia and Herzegovina**, the High Representative Christian Schmidt strikes again. In March 2024, he once again used his “Bonn powers” under the Dayton Peace Agreement and imposed a long-due reform concerning transparency and depoliticization of the electoral process. MAJA SAHADŽI# explains the underlying complex context, showing how this desirable political reform, overcoming political stalemate in the complex multi-ethnic country, concurrently creates further political cleavages.

Die Fachhochschule für Verwaltung und Dienstleistung in Schleswig-Holstein (FHVD) sucht zum nächstmöglichen Zeitpunkt für den Fachbereich Allgemeine Verwaltung ***eine/n Hochschullehrer/-in*** *(m/w/d) für Öffentliches Recht, insbesondere* ***Kommunalrecht*** *Wertigkeit bis BesGr. A 15 SHBesG / EG 15 TVöD-VKA, in Teil- oder Vollzeit, (Lehrverpflichtung Vollzeit: 18 LVS / Woche)*

Auf Ihre Bewerbung freuen wir uns bis zum 17 April 2024.

Weitere Informationen entnehmen Sie bitte unserer Homepage unter www.azv-sh.de.

Die Stellenausschreibungen finden Sie hier: Ausbildungszentrum für Verwaltung AZV (azv-sh.de)

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

This week we had quite a few digital topics. We started with FRANZISKA KATHARINA MAURITZ, who explored the question of what rules actually determine what is 'illegal' on **social media**. Not so easy in the newly created DSA regime, whose definition of what is illegal is extremely broad. The result: a somewhat chaotic collision of norms.

Something is happening when the grandees of German Staatsrechtslehre turn their attention to **Brussels' digital policy**. Perhaps MARTIN NETTESHEIM's text will one day be seen as the one that brought about a big debate on the meaning, form and legitimacy of European integration among motivated European data protection advocates. As in other areas of law and politics (keywords here include the ECB, antitrust law and climate protection), digital policy is increasingly becoming a vehicle for advancing all kinds of social and economic policies.

It continued with a welcome intervention from antitrust lawyers DANIEL ZIMMER and JAN-FREDERIK GÖHSL. As much as European public law scholars are currently talking about the Digital Services Act, the Commission is quickly putting the **competition rules** set out in the Digital Markets Act into action with the most sensitive investigations. Perhaps the sharpest sword is not Europe's supposed 'digital constitution', but going after digital corporations' wallets?

Furthermore, the discussion about more **resilient constitutional courts** is moving forward. RAVEN KIRCHNER draws attention to an aspect that has so far been neglected: compliance with decisions of the Federal Constitutional Court. Not only a look abroad shows that there are dangers at this point. The author explain how to better ensure that Federal Constitutional Court decisions are enforced and complied with.

Using the example of the **Thuringian Constitutional Court**, FABIAN WITTRECK and JULIANA TALG discuss how obstructions to the election of judges can be resolved. Their proposal has the advantage that it takes into account all three weak spots – protection of pluralism, avoidance of blockades and democratic legitimation.

As a last resort, they discuss the option of the Federal Constitutional Court jumping in.

FLORIAN SLOGSNAT contributes to the ongoing **discussion surrounding the concept of force** ('Gewalt') within the scope of the offense of coercion. He defends the stance of the German jurisprudence, which holds individuals criminally accountable for engaging in a sit-in blockade that obstructs the passage of vehicles. This position contradicts the argument presented by Siegmar Lengauer in a recent contribution on Verfassungsblog, where Lengauer, from an Austrian perspective, rejected the principles of German jurisprudence.

Unions and climate activism – can they go hand in hand? According to some, the strike led by the alliance of the German union ver.di and Fridays for Future constitutes a prohibited **political strike**. Reason enough to revisit history and justification of the ban on political strikes in Germany. THERESA TSCHENKER rereads the tale of the separation between collective bargaining agreements and politics.

Another win for environmental law occured in **Peru**: The first Peruvian court acknowledged the legal personhood of a river, the Marañón. FRANCA EMILIA LORBER unpicks what Western legal systems can learn from the strategies of the indigenous Kukama claimants.

BERNHARD WEGENER takes a clear stand against the "sugary illusion of climate justice" on the occasion of the **climate cases** before the European Court of Human Rights.

UMBERTO LATTANZI shows how the **first Italian climate case** has fared and provides for an assessment within the broader transnational movement carrying high social expectations and at the same time legal limitations.

++++++++++*Advertisement*++++++++

Hier geht's zur Stellenausschreibung.

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

In a spectacular and far-reaching decision, the **European Court of Human Rights** has ruled for the first time that weak protection against climate change violates human rights. The court upheld the complaint of the Swiss KlimaSeniorinnen Association, while rejecting the complaints of Portuguese youth and a mayor of a French municipality. We discuss what the judgments say, what they mean, and what the future holds for climate protection in Europe in a blog symposium together with the Sabin Center for Climate Change Law at Columbia University. This week started with contributions from MAXIM BÖNNEMANN and MARIA ANTONIA TIGRE, SANDRA ARNTZ and JASPER KROMMENDIJK, CHRIS HILSON and ARMANDO ROCHA. Many more will follow.

Not less exciting is our second blog symposium, which we also launched this week. 10 years of BJP government under Narendra Modi in **India** have left their mark – on society, institutions, and the law. Our blog symposium on "Indian Constitutionalism in the Last Decade" explores how Indian constitutionalism has changed since 2014. It kicks off with articles by ANMOL JAIN and TANJA HERKLOTZ, INDIRA JAISING, LOUISE TILLIN, MAANSI VERMA, FARRAH AHMED, ABHINAV SEKHRI, and RATNA KAPUR.

In the latest episode of our blog symposium on **party bans in Germany** and Europe, ANDREW O'DONOHUE and CEM TECIMER use the example of the Turkish AKP to illustrate why party banning procedures can backfire. KATHARINA HÖLZEN and NINA ALIZADEH MARANDI shed light on the constant call for a strong civil society – and hold the government accountable to protect and promote democracy. CENGIZ BARSKANMAZ argues that the ongoing discussion about an AfD ban externalises the racism of the so-called center.

*

That's all for this week. Take care and all the best,

the Verfassungsblog Editorial Team
