

# Not to play along

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Maximilian Steinbeis Sa 22 Jul 2017

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Dear Friends of Verfassungsblog,

In Poland, there will soon perhaps still be independent judges, but no independent judiciary. Poland can no longer be regarded a trustworthy state under the rule of law. This finding is delivered and substantiated by [TOMASZ KONCEWICZ](#), by [MATEUSZ MAZZINI](#) and by [MARCIN MATCZAK](#) in their respective posts on Verfassungsblog this week, and for those who hope for President Duda to come forward and save the constitution, MATCZAK's post is a highly recommended, yet unedifying read: he shows that Duda's alleged "veto" is mostly a sham. In Brussels and Berlin, in the meantime, there is a lot of hand-wringing and hair-tearing and indignant-tweets-tweeting. Vice President Timmermans exclaims that the EU Commission is now "very close" to triggering Article 7 against Poland. None of that will change much in the short run. Decisions by the Polish judiciary no longer deserve the trust necessary for the functioning of the legal community. That's just how it's going to be.

How do we deal with that? I see three possibilities.

The first could be called the Merkel method: We don't do much at all. We wait and see. Maybe it will not be all that bad. This is what we did with Hungary, didn't we? Sure, it's not great, but by and large, we manage. There hasn't been a properly independent judiciary in Hungary for years now, and the EU is still standing, isn't it?

It will come as no surprise to the readers in this blog that I'd find this a terrible solution. Firstly, there are good reasons for the assumption that it was only possible to get as bad in Poland because we had previously allowed Hungary to get away with the same deed. Most of all, the whole legal system of the EU would be infected with authoritarianism. Of course, Polish courts will continue to work as well or as badly as before in the vast majority of bread-and-butter cases. They usually do in authoritarian states. In Spain under Franco in the sixties, you would have had no trouble to find professional judges to help you assert your rights against a contracting party or a tortfeasor or whatever. But that is not what counts. The test case for the rule of law is whether you can sue a person in power and actually expect to win. I suppose no one in Spain in the 60s in his right mind would have dared take a *Guardia Civil* colonel to court. Which is why Spain could only become an EU member after 1975 when that had changed.

The second possibility would be coercion. We impose some kind of sanction against Poland, e.g. block their share of structural funds or something, until they change their nasty ways. Force is the language an authoritarian regime understands, after all. The problem is obvious: this is precisely not the language of the EU, or else we could as well drop the whole thing. Rather, that is the language an authoritarian regime not just understands but *speaks* – and at that, not just in the active but in the passive form: authoritarian regimes like to suffer from threat of force even more than exert it themselves, because that is how they give plausibility to the designation of the enemy their whole language-game is built upon. Viktor Orbán has acquired great mastery in accumulating political capital by defending the proud people of the Magyars against sinister interfering supra- or international powers, and his Polish friends of the PiS have also become quite good at it. For us, it would be stupid to play along in that game.

Which takes us to the third possibility: not to play along. To say: alright, do what you have to do. It's on you. But be aware that certain things then just will not work anymore. Don't expect us to work with a judiciary whose independence we cannot trust. We will have to suspend judicial cooperation with you. No Polish place of jurisdiction is recognized by us any more, no Polish EU arrest warrant, no Polish sentence is enforced by us. Do you think this is against the law? Find out. Take us to court. In Luxembourg, you will meet some independent judges to sort that out for you. But that is not where this ends: if your government is no longer properly legitimized, for example because its compliance to your constitution is no longer controlled by independent courts, then we cannot allow it to take a seat at the EU Council's table and vote on matters of our European

common good. Then we would expect your vote to be suspended by means of what is often and misleadingly called the "sanction procedure" of Article 7 TEU, the very thing the EU Commission seems to be unable to find the resolve to trigger, so far.

This is all pretty much uncharted territory. We do not know how this really works. Let's find out. The Polish crisis offers the opportunity for the European legal system to develop a kind of immune system that makes it more robust against constitutional dysfunctions on the member state level. As appropriate for a non-superstate EU, this self-defense does not work by hierarchy, command, or constraint, but rather by isolating and neutralizing the aggressor and minimizing the damage caused by it. The debate how this works has but barely begun. I am very curious about the results.

## Looking for trouble

While all Europe looks to Poland, a further constitutional crisis of dramatic proportions is emerging at the other end of the continent: in Spain. The Catalan legislature is about to establish a transitional constitutional regime with its "Self-Determination Referendum" on October 1st: the draft bill on the referendum proclaims Catalonia as a sovereign state and the Catalan Parliament as a representative of the sovereign people – and without a qualified majority and in blatant contradiction to the existing Spanish Constitutional framework. The [horrible mess this will produce for Catalonia and Spain and the EU after October 1st is analyzed](#) by JOSÉ LUIS MARTÍ.

Speaking of referenda: there has been ample evidence recently to prove the fact that national referenda are not a bit less manipulation-prone and dangerous than elections, and yet international law provides minimum standards only for elections but not for referenda – a defect that KRISZTA KOVÁCS [believes should be urgently addressed](#).

The European Court of Justice, like every institution, seems to show particularly great weakness when it decides on its own cases – as it did this week in *Breyer*, where the Luxembourg judges showed no inclination to introduce more transparency into the EU judicial process, [very much to the annoyance](#) of BERNHARD WEGENER (in German).

In Germany, we are confronted with the question how to get the newly introduced and highly controversial online surveillance tools re-examined before the constitutional court in Karlsruhe, a question to which DENNIS-KENJI KIPKER and VINCENT MITTAG [provide answers](#) (in German).

## Elsewhere

Just to show that proposal of the most radical kind are already on the table about Poland and the European immune system: DANIEL SARMIENTO [suggests that the ECJ should stop recognizing the Polish judiciary as "courts" as in Article 267 TFEU](#) and thus exclude them from the dialogue of the European courts by way of the referral procedure.

MARTIN TRAUSSNIGG has constitutional concerns about the [new criminal offense of being part of an "anti-state movement" in Austria](#).

JEAN-PHILIPPE DEROSIER shows sympathy for the announcement of France's President Macron to [convoke a kind of constitutional convention to revise the Constitution of the Fourth Republic \(in French\)](#).

In the next week, I am looking forward to a small online symposium we have organized on the occasion of a jubilee: the notorious *Esra* decision of the Federal Constitutional Court is ten years old this summer – a judgment in which Karlsruhe tried to establish legal standards for how close literature can come to reality before the privacy rights of the literarily depicted warrant a ban of the book in question. How well did this – already in its day highly controversial – decision age? We expect contributions from literature (by the writer, former publisher and lawyer GEORG M. OSWALD and by the original plaintiff Maxim Biller's publisher HELGE MALCHOW) as well as and from legal science (by SOPHIE SCHÖNBERGER, EVA INÈS OBERGFELL, SANDRA WESTPHAL, RUSS MILLER and by the former FCC President HANS-JÜRGEN PAPIER, who was among the original majority

judges in the *Ezra* decision). I am very excited about this.

In the meantime, all best and take care,

Max Steinbeis

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