

How to protect European Values in the Polish Constitutional Crisis

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Armin von Bogdandy Do 31 Mrz 2016

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The Polish crisis puts Europe to the test. It raises hard questions and requires fine answers. These are, in a nutshell, the points I made on the [panel at the Berlin-Brandenburg Academy of Sciences and Humanities on March 14](#):

Is the Polish Development ‘Our’ Business?

In her talk before the EU Parliament, the Polish prime minister stressed that Poland is a sovereign country. She called to respect the current government’s democratic mandate. Indeed, sovereignty and democracy are fundamental values. Any interference from outside Poland requires strong grounds. I want to make a normative and a functional argument to state that the Polish development may indeed concern us—us, that is, the European citizens and the European institutions we have set up.

The normative argument is that the European Union organizes a community of states that profess allegiance to a set of fundamental values—among others, democracy, the rule of law, and human rights. These values are open-ended but not indeterminate. The question the Polish legislation raises is whether disrespecting decisions by the constitutional court and dismantling the separation of powers is covered by these values. To me, this cannot be: ‘democracy through law’ is what we stand for; the legal identity of the European project is that of a ‘community of law’. Hence, our own self-understanding is at stake.

The functional reason is that the European legal space presupposes mutual trust. European law operates on the presumption that all institutions are law-abiding. Otherwise, the legal edifice crumbles. When the presumption is rebutted, a systemic deficiency in the rule of law emerges that threatens the very existence of European law and integration. If a country defies its own constitutional court at the cost of constitutional crisis, how can we expect European law to be respected when it does not suit the government?

II. What Are the Instruments?

However, there is no reason to despair. Though there is no silver bullet, many instruments can convince the Polish government to follow European values. These are the Holy See, the United Nations, the OSCE, NATO, the Council of Europe, the European Union, and other states, all of which have their own instruments. Very few have been deployed so far. Currently, the most important are the Council of Europe’s *Venice Commission opinion* and the European Union’s *rule of law framework*. They support a dialogue with the Polish government and a European public debate on what

went wrong and how to right the problem.

These instruments are not for the impatient. Of course, neither an opinion by the Venice Commission nor a recommendation of the EU Commission can force the Polish government to change its stance. Their potential also relies on the possibility of further steps, and much of the discussion is held up here. Many feel helpless because they view the Article 7 TEU mechanisms—including the freezing of payments—as totally impractical. Much of that is due to Manuel Barroso unwisely calling these mechanisms a ‘nuclear option’. That qualification stuck: today, anybody who proposes to use the Article 7 TEU mechanisms appears as irresponsible as someone who proposes to press the nuclear-weapons button. However, a sanction under Article 7 TEU does not devastate entire countries; actually, it supports basic values. It is an instrument like the others, legal and legitimate, an instrument that—as all others—needs to be deployed wisely.

Many also consider the Article 7 TEU mechanism impractical in the Polish case because its para 2 imposes a very high voting threshold. This position, however, overlooks at least two features. The first is that a first sanction falls under Article 7 para 1 TEU: the Council can make the determination by four fifths of its members, i.e., 22 Member States, that a Member State exhibits ‘a clear risk of a serious breach’. This determination is a sanction by itself; and this is why the Polish government wants to avoid it so much.

Moreover, even the threshold Article 7 para 2 TEU requires does not seem unrealistic. Of course, the leader of the Polish governing party is in close contact with the Hungarian prime minister. However, there is a big difference between the Hungarian and the Polish reforms: Hungary respected the formal rule of law, which is currently one of the core issues with Poland. Given the centrality of Europe being ‘a community of law’ and the help that the Hungarian governing party has received from its fellow members in the European People’s Party in the past, I see a realistic chance that even the current Hungarian government does not stand with the PiS government in undoing Europe; a possible abstention would not prevent a decision from being adopted.

III. How to Deploy the Instruments?

There are many instruments and many institutional actors. This can be a handicap because diverging strategies or uncoordinated statements may lead to reciprocal weakening. Here, inspiration can be taken from the 1990s when the Council of Europe and the European Union operated hand-in-hand in order to help the Central and Eastern European countries become constitutional democracies. The general division of labour, which proved successful, was that the Council of Europe (including its Venice Commission) set the substantive standards while the European Union added the compliance-‘pull’ through the prospect of membership. The Council of Europe is much less suspected of bullying, which provides legitimacy when it comes to formulating concrete standards on how to be a constitutional democracy.

For that reason, it seems important in the given case that all actors and in particular the EU rally behind the opinion of the Venice Commission of 11 March 2016. The EU does not need to define what is required from a Member State under Article 2 TEU, a very difficult exercise indeed, but can rely on what the Venice Commission asks for, in particular to respect the rule of law.

When deploying these instruments, it is important to do so in a dialogical way. One element of that is to stress that what is required is nothing other than to stand by Polish identity. The Polish constitution of 1791 is the first modern written constitution in Europe and a beacon of European constitutionalism. Though only 14 months in force, it proved an icon of Polish identity in the 123 years that Poland did not exist as a sovereign country, and was taught all those years by eminent scholars such as F. K. Kasperek or J. B. Oczapowski. They embedded constitutionalism deeply into Polish identity. Polish administrative law—the rule of law limiting the executive— was even taught in German prison camps during World War II, for example by J. S. Langrod or F. Longchamps de Bériet. Indeed, few have fought for those European values as much as the Poles have done and certainly will continue to do so in the future.

A German version has been published in the Frankfurter Allgemeine Zeitung on March 31. 2016



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All the best, *Max Steinbeis*

SUGGESTED CITATION von Bogdandy, Armin: *How to protect European Values in the Polish Constitutional Crisis*, *VerfBlog*, 2016/3/31, <https://verfassungsblog.de/how-to-protect-european-values-in-the-polish-constitutional-crisis/>, DOI:

<https://dx.doi.org/10.17176/20160331-132159>.

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