The EU has no National Guard

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Well, then. They're out. The Brits are no longer Union citizens, the UK is no longer an EU member state. Foreign country from now on. On Wednesday in the European Parliament, the whole House sang Auld Lang Syne, tears were shed, and I must confess I welled up also, a bit. So this first month of this first year of this new decade ends with an event that definitely still belongs to the old one, the decade of the euro and the flight and migration crises, of the Trump election and the Brexit referendum, of the Turkey coup and the Syrian war and the AfD. What a fantastically shitty era that was…

Poland

To end it is the task of the new decade. One of the first big opportunities to do so will come in May 2020, when the next Polish president will be elected.

In 2015 the PiS had won the presidential elections before the parliamentary elections. This was decisive for the successful breaking of the back of the Polish constitution which ensued: The PiS guy in the presidential office, Andrzej Duda, was always ready when his boss Jarosław Kaczyński needed him, to swear in illegally elected and not swear in legally elected constitutional judges, to strategically veto and not veto unconstitutional laws, to make everyone believe that the head of state was a somewhat moderate and reasonable guy compared to the others. Without Duda and his help, the PiS could have done little.

In the polls, Duda is clearly ahead of all other candidates, so far. But this is not what counts. In a run-off vote against Małgorzata Kidawa-Błońska from the Civic Platform, both poll around 50%. This is winnable.

At the moment, Duda still has to decide on the so-called "muzzle law", a legal bludgeon to knock the heads of recalcitrant judges in, whether to veto it, to submit it to the (PiS-hearing) Constitutional Court or to wave it through. In a recent survey 49% of the Poles favour a veto. But this won't happen. In the beginning election campaign, Duda and the PiS are going full radical right: In a speech in Silesia last week, the head of state called out to the judiciary – and, by the way, explicitly to legal academia, too! – that their "resistance must be broken" and "the Polish house" must be "cleansed" of them.

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Cleansing the house, is it? This sounds a lot like right-wing extremist hate speech. I wonder how that sort of rabble-rousing rhetorics sits with the plain-vanilla conservative part of the PiS electorate who value law and order and might tend to find the current all-round de-legitimation of the rule of law a tad worrying. The PiS coalition itself is no monolith either: It comprises far-right firebrands and relatively moderate conserva-

tives, a spectrum held together by a bitter old man without whom they might quickly go for each other's throat. This is the dilemma of all authoritarian parties: they are awfully bad in handling diversity.

If there were a president unbeholden to Jarosław Kaczyński in Duda's place – that would change everything. Then it would become openly visible to everyone that the claim of the PiS that it embodies and represents the will of the "true Poles" and that pluralism and opposition are therefore inherently illegitimate, is nothing more than a hollow, unsubstantiated claim made by a bunch of resentful middle-aged guys.

Still Poland

Kaczyński and his Minister of Justice Zbigniev Ziobro, however, keep on escalating the conflict with everything they have. They won't back down, they just get ever more radical. In the showdown with the Supreme Court, they have now let their creature, the subjugated Constitutional Tribunal with its illegally elected "anti-judges", off the leash. The Constitutional Tribunal has declared to have "suspended" the Supreme Court's decision of last week (we hope to provide a post on this as soon as possible), and the decision has been drafted by the newly elected Judge Krystyna Pawłowicz, a rabidly radical PiS ex-MP who, to give you an example of her preferred style of argumentation, once called pro-EU anti-government protesters "traitors" who "reared their perfidious, anti-democratic heads outside the Sejm, putting their culture of barbarity on full display". At any rate, the "Mexican standoff" I mentioned last week now really seems to take place: one part of the constitutional state denies the other that it is part of the constitutional state, which means that the constitutional state as a whole ceases to be a constitutional state.

A fight against a political opponent who does not accept any legal ties can only be won politically. This conclusion could also be drawn from the conversation I had with FRANZ MAYER earlier this week. We talked about the question of what actually happens if the PiS keeps escalating the legal dispute with the EU to the extreme. According to Mayer, the European Court of Justice could indeed slap Poland with million-Euro fines – but if Poland refuses to pay, there is ultimately not much it could do about it:

> *The EU has no National Guard. Already the fact that it can impose fines is actually alien to the system, but at any rate it cannot collect them. And this is intentional. The EU is a legal community. People are together voluntarily. It's not a bug, it's a feature.*

This, of course, does not mean that the EU should not defend the rule of law with everything it has at its disposal – on the contrary. To pretend that this conflict can be resolved through dialogue and compromise like any other old conflict between equally legitimate interests in a pluralistic European Union – that would be the end of the pluralistic European Union. The members of the EU Commission who are in charge don't seem to be the issue: Věra Jourová, Didier Reynders, Frans Timmermans. The problem is their boss. Ursula von der Leyen, just like her Christian Democratic Party and just like her predecessor Jean-Claude Juncker, seems to be finding it terribly difficult to rid herself of the illusion that it is still possible to work reasonably with the PiS government in other areas if one doesn't push them too hard in this one.

There's no two ways about it: as soon as the "muzzle law" has been signed into law by President Duda and enters into force, the EU Commission must immediately initiate infringement proceedings before the ECJ and apply for a penalty payment of at least six figures for each day that the infringement continues. Commission Vice-President Jourová was in Warsaw this week and could see for herself who she was dealing with. Justice Minister Ziobro, a really incredibly dangerous man, tried to lure her onto the ice with a poisoned "compromise offer": What if Poland simply copied the German system where judges are elected by politicians, too? I gave an interview to the liberal daily Gazeta Wyborcza and explained why the Commission and the Polish public should not fall for this ruse.

What is often overlooked: Member States can initiate infringement proceedings, as well, although they hardly ever do in practice. If necessary, we should all demand this of our governments as powerfully as

we can. Including the German: after all, according to the Federal Constitutional in 2009, the federal government bears a special "responsibility for integration", does it not? The Federal Republic, unless I'm very much mistaken, may only participate in an EU that is committed to democratic principles, am I right? And I, as every German citizen, could file a constitutional complaint if it fails to live up to that constitutional expectation, on the basis of my individual enforceable right under Article 38 *Grundgesetz*, if I remember correctly? Which might also imply that I myself could sue the Federal Republic of Germany to do what is necessary and possible and take Poland to the ECJ under Article 259 TFEU, ain't that right? (Dear me, who would have thought what the jolly old Lisbon judgement could be good for one day…)

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CJEU President KOEN LENAERTS this week granted ANNA WÓJCIK a detailed interview, which was published in English on the Polish website Rule-oflaw.pl and on Verfassungsblog. He cannot go into anything specific about Poland, as several cases are still pending – but what he can say is clear enough:

> *Imagine you are in the alumni club of your university and certain members are disregarding the core values of the club. In such a situation, you would not like to be associated with those other members. The same is true within the EU. When a State is a member of the EU, it needs to be seen as having the same core values as the other Member States. It is not a matter of a power grab or of singling out any particular Member States for criticism. It is simply a matter of making the system work.*

The Polish judge at the CJEU, MAREK SAFJAN, is one of the most experienced and respected legal and judicial personalities in Europe. On the occasion of the presentation of his *Liber Amicorum* at the University of Warsaw, he recently delivered a speech of which we document the abridged English translation. The message of the long-standing President of the Polish Constitutional Court in days when it still deserved this name: Resistance may seem futile, but it is often the best thing a lawyer can do.

One person who needs not be told this twice is the jurist Wojciech Sadurski, a scholar of global renown, who faces several lawsuits in Poland for allegedly "insulting" the PiS or the PiS-subservient Polish state

television. However, the trials have been postponed for obscure reasons. JOHN MORIJN was on the spot and asked about the background.

Thanks to Ulrich Karpenstein for valuable input.

Hungary, Slovenia

Hungary, for its part, is facing new trouble before the European Court of Justice as well. The issue at stake is the notorious 2017 NGO law which puts financial pressure on human rights organisations that receive funding from abroad. Last week, the Advocate-General published his opinion on the matter. And if the Court follows this opinion, it will find that Hungary has violated the Charter of Fundamental Rights. PÉTRA BÁRD explains the background and analyses the opinion.

In **Slovenia**, after the collapse of the government, new elections may now take place – even though the Constitutional Court has declared the electoral law to be partially unconstitutional. Does this mean that the elections would be unconstitutional, too? MATEJ AVBELJ does not think so.

Germany

German authorities and governments are by no means beyond all doubt either when it comes to respect for justice and compliance with judgements. One example is the driving bans that should, but often won't be imposed on diesel cars in inner cities under EU environmental law, and when a court imposes a fine it is mostly a waste of time because the payer and the recipient are the one and the same. But now the Stuttgart Administrative Court has come up with an innovative idea on how to give the penalty payment some bite after all. JÖRG BERKEMANN, a former judge at the Federal Administrative Court, is full of praise for his colleagues in Stuttgart and points out that the decision does not rule out the possibility of coercive detention of officials as an *ultima ratio*.

The news that Turkey intends to open Turkish schools in Germany has recently caused quite a stir. FELIX HANSCHMANN's cool legal voice is mixed into the heated chorus of those who, quite understandably, point to the evil nature of the Erdogan regime and are accordingly alarmed. Hanschmann, for his part, sees valid political reasons to negotiate on an agreement with Turkey and reminds us that, depending on the form that cooperation will take, the German state authorities will remain responsible for school supervision.

This week, the Federal Administrative Court delivered its verdict on the Federal Home Office's ban of the left-wing media platform linksunten.indymedia.org. In the opinion of DAVID WERDERMANN and JOHN PHILIPP THURN, this verdict not only clears the way for massive federal inroads into state competences on media supervision, but also sets a worrying precedent on how to ban media by classifying the operators as "associations" and banning them as such.

Legal Science

Many of the German readers of this editorial will have passed at least one *Staatsexamen* in law and will therefore be able to relate to what MARIETTA AUER told me in an extraordinarily impressive interview conducted for the Wissenschaftskolleg with the designated director at the Frankfurt MPI for Legal History. She tells in a very personal and striking way what it was like to become a scholar and lawyer in Munich in the 1990s, about the experience of the *Staatsexamen* including the "inherent violation of human dignity, that you are told to the hundredth of a point how inadequate you are", about the "acid bath" anyone who wanted to be accepted into the academic world was expected to take. And last but not least about the experience of not being taken seriously as a woman by your male peers, no matter how good you are.

Speaking of which, recently an I-CON editorial, written by our Associate Editor Michaela Hailbronner, Marcela Prieto Rudolphy and Gráinne de Búrca, made abundantly clear how devastating the gender balance in the legal research landscape still is. Interestingly, articles written by women have a higher acceptance rate at I-CON than those written by men, and yet in the published journal only one in three is written by a woman. The problem may be less a female than a male one:

> *Many men have no qualms in writing to ask us to have their forthcoming books reviewed in I-CON, to ask to be nominated for a prize or to engage in other kinds of self-advocacy. We find that women do so much less often.*

That strikes me as highly plausible, from my *Verfassungsblog* experience.

By the way: DANA SCHMALZ's appeal last week to German law professors not to leave their doctoral theses uncorrected for months and years met an enormous response. Now, a newspaper has got in touch, looking for people who would tell their experiences under the protection of anonymity. If you are interested, please contact us and we will put you in touch.

Citizenship and City-zenship

The 75th anniversary of the liberation of Auschwitz was the dominant news topic in Germany this week (beside that virus in China) and the focus of a moving ceremony in the German Bundestag. The very next day, the German Parliament was once again confronted with the topic of Nazi terror, more precisely: with its consequences on millions of forcibly expatriated Jews and other victims. The German constitution, in Article 116 (2), gives those affected the right to be restored as German citizens, but there are large gaps in that provision, and tens of thousands of people who had lost their German citizenship as a result of Nazi persecution did not regain it after 1945 – one of the most shameful chapters in post-war German history.

Recently, there has been a marked, likely Brexit-related increase in applications for German citizenship. In August 2019, the Federal Home Office issued a decree instructing the federal authorities to exercise their discretion in these cases in favour of the applicants. But is that enough? Why discretion in the first place and not a straight legal claim? After the decrees of August, the CDU/CSU see no longer any practical need for action, which is why all motions of the opposition were rejected in the Bundestag on Thursday.

It's hard not to suspect another motive for this, though – the motive of keeping access to German citizenship under one's own control. Yes, of course you'll be returned your German citizenship, expatriated Nazi victims and their descendants, but not because we have to but because we want to. Not by your right, but by our decree. This is how the CDU/CSU and the Federal Home Office would prefer to deal with the British Jews who would be German Jews if right had prevailed. Those, however, don't accept that, and I can see why. (Fun fact: the AfD voted along with the rest of the opposition. It's about *Ius Sanguinis* somehow, and they like that.)

It's called citizenship, not statizenship, and cities are indeed becoming increasingly relevant as a third of the world population lives in cities, and cities demand a more prominent role for themselves in big global issues like migration and climate change. This week and last, we have hosted an online symposium organised by the Global Citizenship Observatory (GlobalCIT) at the European University Institute in Florence: Should cities define their own citizenship based on residence rather than nationality? RAINER BAUBÖCK starts with an ambivalent answer. The contributors to the discussion are AVNER DE SHALIT, NIR BARAK, PATTI TAMARA LENARD, JOSEPHINE VAN ZEBEN, WARREN MAGNUSSON, HARALD BAUDER, SANDRA SEUBERT, MONICA W. WARSANYI, ENRICO GARGIULO and LORENZO PICCOLI, JOHANNA HAASE, MAARTEN PRAK, LUICY PEDROZA, MARGARET KOHN, AVIGAIL EISENBERG, ALEXANDER ALEINIKOFF, BARBARA OOMEN, RAN HIRSCHL, HELMUT PHILIPP AUST, STEPHEN MINAS, WILLEM MAAS, KENNETH STAHL, LIAV ORGAD, and finally RAINER BAUBÖCK replies once again.

So, that's it for this week. By the way, in January we crossed the 100,000 visitors line for the first time since Verfassungsblog was created. Our stuff is important!

Oh, and can I ask you one more thing? You already know what comes next, don't you? Well, what can I say: 271 people are sponsoring us now on Steady. If you are one of them, our throbbing heart is entirely yours. If you're not, we still like you, of course, but, well, you know… we kind of feel that you could do more. Anyway, why don't you just click here, it's quick and it actually not costly at all.

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All the best, your
Max Steinbeis

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