



# Commentary

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## Is there a way out of the Polish pickle?

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Poland is making headline news again. This time, however, not in a role of Central European Wunderkind surfing the economic crisis, but for reasons to be less proud of. Ever since the Prawo and Sprawiedliwość (PiS, a member of European Conservatives and Reformists group in the European Parliament) government took power after the elections in November, Poland has experienced political turmoil and is now facing accusations that the rule of law is in danger. This constitutes a major challenge for the European Union and for its other member states, which are looking for ways to deal with a recalcitrant state that makes a rapid U-turn on democratic fundamentals and takes any criticism hysterically. This is not the first time that the organisation has had to deal with such a case, yet solutions have not yet been found. Hungary is a case in point. And now Polish leaders too seem convinced about the virtues of the concept of illiberal democracy. Which prescription should the EU use to buck the trend and what are the potential side-effects?

### Between bad taste and the rule of law

To begin with, Poland is facing an anomalous period where neither the head of state, nor the prime minister hold real power. It no secret that the centre of governance resides with Jarosław Kaczyński. While he has many unique skills, good and rational governance are alas not among them. Staying away from official posts allows Kaczyński to avoid any formal responsibility and, above all, puts him in a very comfortable position outside of Poland.

This lack of accountability is the first difficulty that the EU institutions and the other member states (sans Hungary) need to confront. In the months to come, Poland is likely to engage in Potemkin politics, whereby the president and the prime minister are going to be involved in a puppet show that many will find difficult to trust. One should not be fooled by an empty-worded article in the Financial Times published by President Andrzej Duda on 18 January 2016. Such an internal arrangement with Mr Kaczyński driving from the back seat may be a political anomaly, yet, it is an autonomous political decision taken by the Polish MPs loyal to Mr Kaczyński. This is not a rule-of-law issue but a matter of bad political taste. If the voters give preference to a puppet show than to a real political theatre, then let be it. The same applies to ministers of the Polish Government who eagerly compare German criticism of their actions to Nazism and claim that riding a bike or being a vegetarian is not a Polish virtue. Such reactions make them pariahs but this is where it ends, again, this is not a rule-of-law matter. Although a fast-track course of diplomacy would be recommended, their actions and plain rudeness in direct communication with the European interlocutors does not have to be looked at through the rule-of-law lens.

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What is worrying, however, are the most recent changes to the domestic legislation which, according to their authors, are an important ingredient to build a better Poland. For others, they constitute a threat to the democratic foundations of contemporary Poland. Some of these laws were already passed by the Parliament, signed without a blink of an eye by the President and entered into force on the day of publication. Other pieces of legislation are still pending, but their adoption is a mere formality. The key question that the European Commission should answer is whether these amendments to domestic legislation endanger the rule of law.

### **Is the rule of law in danger?**

The first institution targeted by the new legislation was the Constitutional Tribunal, which quickly became the centre of the emerging crisis. The newly adopted legislation makes a number of changes that will make the work of judges difficult, if not impossible. To begin with, the Constitutional Tribunal – as a matter of principle – has to proceed as a full court and judgments require the backing from a majority of 2/3 of judges. This will certainly slow down the pace of adjudication. Furthermore, the Tribunal has lost the freedom to choose which cases deserve priority treatment. As per new legislation, cases have to be dealt with in the order of their submission to the Tribunal. The new rules also allow the governing majority to appoint judges of their liking and to have them sworn in by the President with an immediate effect (even in the middle of the night). At the same time the President is refusing to have the judges appointed by the previous Parliament to be sworn in. Furthermore, the disciplinary proceedings against the judges of the Constitutional Tribunal may now be initiated by the Polish President or the Minister of Justice. All in all, the changes deny the Constitutional Court the possibility to swiftly declare the newly adopted laws unconstitutional. This was probably the *raison d'être* behind the legislation. PiS does not have sufficiently large parliamentary majority to change the Polish Constitution. By blocking the Constitutional Tribunal it effectively neutered the one state institution that could effectively oppose the government and quash legislation that is in breach of the Constitution. As such, an important institution guaranteeing checks and balances is thus eliminated.

The second in the line of legislative fire have been the public media. With a lot of independent journalists fired on the spot and replaced by yea-sayers, Jarosław Kaczyński has gained a propaganda outlet that is unlikely to criticise the ruling party. The aim is to keep the perception of public support high by presenting mirages of reality on the TV screens and on the radio.

The next steps are attacks on the civil service and a merger of two crucial posts: the Minister of Justice and the General Prosecutor. This will allow Kaczyński and his cronies to re-politicise the public administration and also, perhaps in the long run, facilitate politically motivated trials. All these changes are considered by many a threat to the rule of law and should be checked accordingly.

### **What can the EU do?**

The EU itself is undoubtedly in a pickle since whatever it does may backfire. The formal and informal options are, for the time being, limited. One thing is certain, the stakes are high and the European Union has to act for internal and external reasons. If Article 2 TEU, listing the foundations of the EU, is to mean anything, then the EU institutions must not allow the member states to adopt legislation in breach of the rule of law. It would also compromise the EU's position vis-à-vis candidates for membership as well as some of the ENP countries that are subject to rule-of-law conditionality. If the EU allows its own member states to adopt rules of dubious democratic credentials, it has no legitimacy to demand them from its neighbours. Something has to be done.

First, the President of the European Commission, as well as his fellow Polish Commissioner, Elzbieta Bieńkowska, seem to be inclined to go for a softer option and to maintain the dialogue with Warsaw. This scenario comes at a price, however. As argued above, this dialogue is with the wrong people who happen to hold two key posts in the country but do not effectively hold the reins to power in Poland. It is questionable whether J.C. Juncker's strategy to emancipate his Polish interlocutors from its powerful backbencher will work.

The second option is to go for a head-on collision and trigger the ‘nuclear option’ of Article 7 TEU. This requires an initiative of the Commission, one-third of the member states or the European Parliament. The latter is particularly well-suited in this respect, bearing in mind it is the only EU institution with a democratic mandate. The debate with the Polish prime minister did not turn into the anticipated carnage, yet it shows that the European Parliament is willing to use its muscles.

Pursuing the Article 7 TEU path, however, would not happen overnight. One has to remember that a formal suspension of voting rights would require a unanimous decision of the European Council (minus Poland). This option will be definitely blocked by Hungary. Still, however, employing the first stage of this procedure will exert growing pressure on the authorities in Warsaw.

As a third option one could also consider bringing back to the table the kind of political sanctions that were imposed on Austria back in 2000 when a coalition government was formed with the extreme right wing ÖVP party of Jörg Haider. This, par excellence, political tool could potentially prove effective. It would be particularly painful if it came from the wider international community. One can imagine the reputational damage that cancelling NATO's Warsaw summit would make.

Fourth, initiating Court proceedings is most likely going to be of little use, unless actions of the Polish Government breach EU legislation proper. The latter may happen, for instance, if independence of state institutions, including the central bank or a data protection authority is affected by future legislation.

## Conclusion

A continuation of a dialogue will be important but only on the condition that it is merit-based, the argumentation raised by the European Union and its institutions is bullet proof and bluffs of the Polish side are immediately exposed. The EU should avoid engaging in meaningless political ping-pong at all costs as it can alienate the Polish side, politicians and public alike. At the same time, it has to explain to the members of the Polish public that it is pursuing a procedure that can be employed if one of the members of the club acts in breach of the rules on which the club is based. In the meantime, the Polish Government will be pushing its populist economic agenda that may alienate foreign investors and lead to a further worsening of the country's credit rating. This may open the eyes of Polish commercial actors and some voters, particularly those on the more liberal side of the equation. They may also see the reputational damage the current Polish administration has managed to make in such a short fraction of time. For the future, the European Union may consider creating a mechanism allowing the freezing of the structural funds and payments from the Common Agriculture Policy when a member state is in breach of fundamental values on which the Union is based.

Either way, the European Union should take a firm stance and try to stop the anti-democratic blitz. History will tell if this current chapter will be remembered as a single episode or one drawn from an autocrat's textbook “how to dismantle democracy in 80 days”.