On the rubble of the rule of law

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In Poland, a weak democratic culture collides with unfamiliarity with the historical values of the European Union. Rebuilding the rule of law means explaining to citizens that the constitution is there to protect them. The alternative may be Polexit.

The limited success of the EU’s and its institutions’ attempts to ensure that Poland complies with Europe’s legal standards can be put down first to a lack of political imagination and a will to defend the core of European integration; and second to a tendency to view the Polish situation as a series of unconnected events. Yet there is a common factor: the constitutional capture of the state and its institutions. What has happened to the Polish Constitutional Tribunal, to the common courts, to the National Council of the Judiciary and to the Supreme Court are aspects of a systematic takeover of the state by the executive.

This capture is a process rooted in the crisis of the liberal narrative in former communist countries. [1] In some eastern European member states, liberalism and democracy have ceased to be viewed as the foundations of the legal system. As the capture of the state progresses, the liberal understanding of the rule of law is undermined along with the separation of powers, judicial independence and the primacy of the Constitution.

Constitutional capture implies a move away from the basic principle of a division of competences between different institutions, preventing concentration of power, towards the formation of ‘mono-institutions’ that act as guardians of a single official narrative and are accountable to no one. A takeover of this kind undermines the liberal premise that no institution should ever be all-powerful. In a liberal democracy, every institution is bound by law and accept controls imposed on it by other institutions, which must likewise act within the framework of the law. This principle must remain sovereign in any democratic state.

The battle lines on the domestic front have been clearly drawn. The most recent attempt by the Polish executive to undermine the foundations of the European legal order by turning yet again to the discredited cohort formerly known as ‘the Constitutional Court’, and the ‘decision’ by the latter that basically declares Poland’s unwillingness to continue as an EU member state, speak volumes about how far the new doctrine has come since 2015 and how powerful a justification it provides.
With all this a point of no return might have been reached.

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**From text to context**

The Spanish political philosopher Juan Linz wrote over forty years ago that democracy is not consolidated until it becomes ‘the only game in town’. [2] For this to be so, conditions have to be met at three different levels: behaviourally – when every political actor accepts the legitimacy of the system; attitudinally – when citizens identify with the existing constitutional order; and constitutionally – when any change to the existing order can take place only through due process and within a binding framework.

When we consider the values that unite people in Poland, we need to remind ourselves that, after 1989, the country never became a consolidated democracy. A large proportion of the Polish population is unaware of what the 1997 constitution actually contains.

For Poland, the question of how to function in a community of countries moving towards integration was by no means straightforward. Our failure to use our membership to raise standards led to the breakdown of the paradigm that had shaped the revolutions of 1989: the idea that liberalization and democratization were irreversible. Consequently, in 2015, we went into reverse.

If we talk about how to rebuild the rule of law, we can take an institutional perspective. But if we continue to focus exclusively on the institutional consolidation of Polish democracy, we will repeat the error made in 1989. Generating a constitutional context requires far more than adding a few institutions or creating new procedures. We therefore also need a civic perspective. This means explaining to citizens that the Constitution is more than a document comprised of dry text, but is also there to protect them. I call it the ‘constitutional path’ of moving from text to the constitution as a lived experience.

**EU to the rescue?**

In Poland, we seem to have forgotten how our internal debate about fundamental values translates into the European setting. We also have a tendency to underestimate our unfamiliarity with the way rule of law functions in other democratically governed states. Few remember that, when the Paris Treaty was signed in 1951, the notion of a community of European states was underpinned by the shared assumption of certain constitutional essentials. These were what had led the signatories to unite, despite differences. They were not expressed in the form of a text, but were instead tenets emerging from a legal culture shaken to its core by the experience of totalitarianism and total war. But now Poland is claiming that ‘the rule of law’ means something different to it and that reaching an understanding with Europe on the independence of the judiciary is therefore impossible.

Combining core principles established by other EU member states with a ‘Polish definition’ of the Union and its values was bound to lead to a clash. Why, then, has the EU
only now begun to penalize Poland’s behaviour since 2015, when the PiS returned to power?

The European Coal and Steel Community, and the European institutions that grew from it, all acclaimed the triumph of liberal democracy. In 1951, no one could have predicted that any individual country might call into question the liberal foundations of the post-war European order. Now, Poland does so on a daily basis. The premise on which the post-war European order was built is failing to stand the test of time.

We appear to be dealing with a fatal ‘constitutional design error’. The error becomes dangerously combustible when coupled with the lack of imagination and spinelessness of the European leaders when facing (or rather refusing to face) the emerging autocracy in their midst. Short term political gains and calculations take over the long-term commitment to the European project. Today the European constitutional tragedy sees the Commission becoming part of the problem, rather than a solution. Unable to defend the rule of law, it is slowly losing its own credibility as the ‘Guardian of the Treaties’. This is how and when domestic Polexit meets supranational E(U)exit. The Union stands hollowed out and bereft of any guiding principles other than the internal market. Welcome to EU politics in 2021 A.D.

Of all the European institutions, it was the EU Court of Justice that has clearly understood that we are dealing here not with yet another crisis of governance, but with the crisis of very essentials that brought and keep member states together. The ECJ ruling on Poland’s judicial ‘reforms’ of 19 November 2019 and 8 April 2020 (to name but two) were a response to attacks on the preliminary ruling procedure, the process by which the ECJ hands down rulings to member states and a bedrock of European integration; to disciplinary proceedings against judges who implement European law at home; and to gestures purporting to protect the sovereignty of the Polish Supreme Court. More recently, the blatant and continuous refusal by Poland to comply with the interim decisions of the ECJ, left the latter no choice but to impose unprecedented penalty payments.

All of this may represent the beginnings of Polexit. Poland is placing itself outside the Union and losing whatever little ‘legal credibility’ it has left. There can be just one place for a country that wants to play only for itself and underlines its uniqueness in relation to others, and that is outside the Community. Formally speaking, Poland remains in, since there is no procedure in place to expel a Member State that violates the foundations of the EU law. But in the real world, its membership and the presence in the EU has already been relegated to a non-factor.

The price of division

Attacks on the ECJ marginalize Poland in the Union and may ultimately push the country out. If that were to happen, Polish citizens would once again become second-class citizens in Europe, deprived of the protection that European law and the Court of Justice give to nationals of other member countries. Polexit would mean a return to a world in which Polish citizens bathe in the reflected glory of the state, while remaining obedient to its will. European law places the citizens of Europe in the overlaps between two systems. They no longer belong exclusively to territories delineated by the borders of their own
nation state. The spirit of European integration liberates EU citizens from constrictions imposed by an all-powerful national state, but it is also necessarily based on compliance with rulings issued by the ECJ.

There is a fundamental contradiction between the European vision and the doctrine by which Poland’s ruling Law and Justice party lives. Europe promotes a culture of restraint; Law and Justice holds that citizens must live in the shadow of a constitution of fear. The EU opens up new possibilities; Law and Justice pushes citizens into the confines of a state structure. European law offers a real chance of challenging the state, Law and Justice would prefer to see its EU commitments as a worthless bit of paper. For Law and Justice, a ‘good’ citizen is one who can be controlled; one who is docile and utterly trusting of the state.

Polish citizens who care about Europe, and about Poland within Europe, must not allow the basic underpinning of European integration and law to be thrown away. The autocratic legalism of Law and Justice has shown us how a captured state works. Today there can be no doubt that we are watching a calculated staging of ‘how to manipulate the law and institutions’ and ‘how to destroy the law and institutions when they resist’.

The spectacle is being accompanied by rhetoric of national sovereignty that might be appropriate in wartime. Government representatives perform their roles, competing for the attention of the electorate in ways that are often crude and tasteless, pontificating on legal issues, or tearfully recounting stories about national martyrdom. It’s an act featuring a pseudo-constitutional court that queries whether the European preliminary ruling procedure complies with the Polish Constitution and undermines some of the most cherished tenets of the European legal order. Meanwhile, parliament is making new efforts to take over what is left of judicial independence and to frustrate efforts by Polish courts to appeal to the ECJ.

Poland’s voters are stumbling over the rubble of the rule of law. They should reflect on the far-reaching consequences of government policy for themselves and for Europe. In the paranoid narrative of Law and Justice party, Poland is the chosen nation besieged by enemies hatching plots against the country. But the propagation of chauvinism and division, alongside suspicion, pettiness and vengefulness, carries a price. Belonging to a community means accepting rules that apply to everyone. Ways must be found to balance diversity and uniformity. Integration is a process, not an equation that presupposes a conflict between sovereign states and a subordinating Union.

The language matters here. The EU is not forcing Poland to do anything. It is merely implementing the provisions of the Accession Treaty that entered into force in 2004 and which Poland has voluntarily accepted to be bound by. The European courts are independent and impartial arbiters that help settle disputes that individual states are unable to resolve for themselves. Confidence in this process has been a condition of Poland’s membership of the Union from the start. Within the EU’s legal system, the rulings of the ECJ are protected, to an unusually high degree, from interference by individual member states.

All countries are bound by European law equally and unconditionally, not just when it suits them. The European Court is an unusually egalitarian space: Germany has a single
vote, as does Luxemburg. Those present in it are required to use a language based on legal precepts, which controls impulses to promote political interests. The ECJ makes Law and Justice party nervous because it expects language and behaviour appropriate to a courtroom, where it is assumed that the power of argument will prevail, rather than simply arguments of power. This shift was always emblematic of the post-war settlement. The dream of the Founding Fathers was that law not war would become the device to reconcile and frame the diverse interests of Member States and ensure that 'never again' would be etched in the fabric of the European continent.

When one member country fails to fulfil its obligations, the others are not permitted to take unilateral action. They cannot close their borders and refuse entry to the maverick state’s citizens or its goods. Instead, member states must follow due process, wait for a ruling and then adhere to it. This is because, when joining the Union, all prospective member states sign an agreement with key stipulations concerning recognition of the ECJ’s competences and its jurisdiction.

Another key point of the agreement is a commitment to implement any ruling the Court makes. For this commitment to be credible, it is stipulated that implementation should take place not only ex post (after the judgement has been delivered) but also ex ante (while it is still assumed and predicted). Only then does the common market and the political community make sense.

Decision time

Who would have imagined that, sixteen years after Poland’s accession, people would need to be reminded of these things? As we reject the basic principles of the Union, and the context in which the ECJ works, Polexit becomes far more than a turn of phrase. Today we are living in a country without checks and balances, in which the state can do anything. We are also dealing with an epidemiological crisis which is being exploited by the government to further consolidate power and limit civil rights. Its policies are bearing fruit at the worst possible moment for Europe, ourselves and our freedoms.

Poland’s membership of the Union is no certainty. The freedoms that membership still gives us to travel, work, shop or take holidays may not be ours indefinitely. We must stop thinking of ourselves as an entitled, chosen nation. Or have we really forgotten that as little as sixteen years ago we needed a visa to enter the EU? If we turn our backs on the Community and the obligations of membership, we must also expect to lose opportunities and rights that come with it.

My argument here represents a Polish citizen’s response to the poisoning of hearts and minds by uninformed narratives about a nefarious Europe said to be conspiring against Poland, threatening its sovereignty, and showing disrespect for its distinct identity. It is vital for Polish voters to rise above a perspective in which the 'here and now' predominates, without asking how the 'here and now' will affect and change their lives in years to come.

In Poland, public discussion on Europe as a community of nations, and on the values which the peoples and states of the continent share, must become an urgent priority. The constitutional tragedy that we have witnessed over the past five years must serve as a
warning about failure to take civic action. Let us reflect seriously on Europe. Let us vote for it and for Poland’s contribution to it. Above all, let us understand the dire and far-reaching consequences of current government’s actions.

When laws and institutions come to serve politics, rather than holding power in check, a cornerstone of the post-war European order is lost. Let us be mindful of what could be at stake. Do we stay in a European system governed by the rule of law, to which generations aspired after WWII, and thereby recognize the precepts we accepted in 2004? Or do we opt for Polexit – with no going back? The choice is ours.

Footnotes


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