

How Poland is Drifting Away from Liberal Democracy

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The success of the right-wing, populist party Law and Justice (PiS) in winning an absolute majority in the parliamentary election in October 2015 in Poland came to many as a surprise. Poland had been rightly seen as an example of successful economic transformation and democratisation and as a country which had greatly benefited from integration within the European Union (EU). According to a new World Bank report, Poland belonged to those countries in the EU in which economic convergence (measured by GDP per capita in relation to the EU average) has advanced the most in the last 15 years.¹ Corruption, one of the key challenges in the post-communist societies, ceased to be a major concern many years ago. Moreover, liberal democratic institutions, free media and an independent judiciary seemed to be firmly anchored in the society and political system. Some prominent foreign observers predicted a new golden age for Poland² and the international press was full of praise for the “miracle”—the only EU country which did not suffer under the economic and financial crisis of 2008-2009.

Today the tone of foreign commentaries is different and Poland is seen as an awkward country within Europe, and indeed one of the EU’s key problems. In January 2016, just a few months after PiS came to power, the European Commission initiated a rule-of-law dialogue with the Polish government to investigate the nature of introduced changes to the functioning of the constitutional tribunal and public media. After months of fruitless negotiations, in December 2017 the Commission, which is the guardian of the EU’s legal framework, decided to officially ask the EU member states to declare that there was a severe risk of violation of the fundamental

¹ Cristobal Ridao-Cano and Christian Bodewig, “Growing United. Upgrading Europe’s Converging Machine,” World Bank’s report on the European Union, World Bank Group, 2018, <http://www.worldbank.org/en/region/eca/publication/europe-growing-united>.

² Guenter Verheugen, “Poland’s New Golden Age,” Project Syndicate, 4 November 2014, <https://www.project-syndicate.org/commentary/poland-reemergence-in-europe-by-g-nter-verheugen-2014-11?barrier=accessreg>.

principles of the EU (meaning: the rule-of-law) in Poland.³ While voting has not yet taken place, the conflict between the Polish government and the Commission as well as the criticism about the political developments in Poland in other EU countries make for an unprecedented crisis and have damaged the image of Poland as master of the post-1989 transformation.

To understand what has happened in Poland since 2015, a brief recapitulation of the time before this watershed election is needed. From 2007 to 2015 Poland was governed by the liberal-conservative and pro-European party Civic Platform, whose then leader and Prime Minister, Donald Tusk, is today the President of the European Council (the key decision-making body of the EU, a grouping of the heads of state and government of the member states). Tusk was a respected leader who stood for stability, good economic performance and the ambition of Poland to closely cooperate with Germany and France in the EU. He continued the path of liberal (both economic and political) transformation which Poland had embarked on in the 1990s after the end of communist rule. His election in 2007 followed a two-year period of PiS rule, which ended in chaos and a snap election. The confrontation between Civic Platform and PiS or indeed between their leaders—Tusk and Jaroslaw Kaczynski—has been the dominant feature of Polish politics since 2005. In a nutshell, the main point of contention has been the model of Polish transformation after 1989. Kaczynski has always questioned the utility of the liberal model for Poland's post-communist transformation, based on an imitation of the Western social and economic model. While he had been active in Polish political life since 1989 (or even before—in the democratic opposition), he played a marginal role and until 2005, he did not have a chance to carry out his programme in governmental policy. The year 2005 was a great year for him and his twin brother, Lech Kaczynski, who became the President of Poland. Jaroslaw's party won the parliamentary election and he himself became Prime Minister a year later. However, his government proved to be a disaster. Constant quarrels with the coalition partners (nationalists and populists) and scandals provoked by the government (including abuse of secret services) led to a snap election. Kaczynski lost against Donald Tusk, who promised to restore “normality” and stability after the years of chaos. This is how the Tusk era started—and from that time on Kaczynski had just one dream: to get back to power.

A key event on his road back to power happened in 2010: in an airplane crash near Smolensk in Russia, his beloved brother, Lech, died. The President of Poland and many other high-level politicians were travelling to a state ceremony in Katyn to mark the deaths of Polish officers who were killed by the Soviets in 1940. While bad weather conditions and technical mistakes were the reasons for the catastrophe, Kaczynski and his party accused Tusk of responsibility for this airplane crash,

³ European Commission, “Rule of Law: European Commission acts to defend judicial independence in Poland,” Press release, Brussels, 20 December 2017, http://europa.eu/rapid/press-release_IP-17-5367_en.htm.

alluded to his complicity with Putin, and launched the conspiracy theory of an assassination. This so-called “Smolensk myth” became one of the key tools to mobilise right-wing voters against the government and provided for a deep rift in the society and political life. It took five more years for Kaczynski to get back to power but his success in 2015 would have been much harder to achieve if not for the reckless instrumentalisation of the Smolensk crash.

The right-wing turn in 2015 also had other causes. Tusk’s promise of stability, his international credibility and his efficiency in using EU funds to further promote economic modernisation were the pillars of his popularity for a couple of years. However, in his second term in 2011-2015, his government was overshadowed by corruption scandals and other widely commented-on examples of government officials’ abusive behaviour. While those abuses of power led to a drastic decline in support for the liberals (and were welcome fuel for their political opponents), Tusk ultimately also misread the political sentiments in the society. While he once famously said that “warm tap water” was the only thing that people expected, he proved to be wrong. “Warm tap water” was a metaphor for stability, lack of big visions and projects which could only annoy or polarise the society. However, this kind of stability associated with Tusk looked more and more like a defence of the status quo and self-complacency. Also, the economic success of the two decades after 1989 and the promise of “catching up with the West” boosted people’s aspirations regarding living standards and wages. The young generation of well-educated (at least formally) people realised that the Polish labour market was not offering enough attractive opportunities. Around 2.5 million Poles emigrated for work, most notably to the United Kingdom (UK).⁴ Finally, the weaknesses of the Polish welfare state, social protection, and healthcare service were sources of frustration, especially among citizens living in the less-developed areas, who felt not only left behind but also deprived of dignity and became more and more resentful of the Warsaw elites. The liberals did not have much to offer when it came to addressing those grievances. His words of Poland as a “green island” (referring to good economic performance) were evoking anger rather than optimism, at least in a part of the society.

This all opened the way for Kaczynski’s return to power. He skilfully fuelled resentment in order to raise the credibility of his own narrative of Poland as a ruined country and build the foundations to support his idea of completely reorganising the state. He had picked up on the real and justified socio-economic worries of many citizens, but at the same time had also exploited and widened the existing divide between the liberal and conservative parts of society. Two things are key to properly understanding the nature and scope of his success. First, PiS is rightly portrayed as a populist party claiming to be the only representative of the “real people” and

⁴ See also the article in this journal on the UK and Brexit.

fighting against the establishment. However, in electoral terms it is not necessarily the party of the poor as well as globalisation (or transformation) losers. Kaczynski managed to reach out to almost all social groups and, most importantly, benefited more from the socio-cultural divide in the country than from the economic cleavage. As Jacek Kucharczyk, a leading Polish political analyst observes, the “driving forces of Poland’s populist upheaval are nativism, political Catholicism, and fear of Muslim refugees. Thus, the rise to power of authoritarian populists in Poland is better understood as a backlash against open society values and against parts of the political and cultural elites which are believed to represent these values.”⁵ Voting for PiS is more strongly correlated with strong views on issues of morality and identity, including religiosity, opposition to abortion and deeper European integration, than with the social or economic status of the voters.⁶ Kaczynski’s promise was one of community, strong identity, leadership, anchoring in the Polish tradition and restoring the dignity of people disorientated or concerned about the rapidly changing environment and uncertain future. An important element of this vision (the mere existence of which made Tusk’s technocratic management look bleak) was a generous social policy: children allowances and an increase of the minimum wage consolidated the support for PiS after the election.

Second, PiS’s success was hardly sweeping. It gained 39 percent of votes from a turnout of 50 percent, which means that less than 20 percent of eligible voters gave the party its support. It was both the very high mobilisation of the core electorate of PiS and the demobilisation of the liberal centrist voters which provided for Kaczynski’s triumph. Thanks to the low turnout (there is no precedent in Poland where trust in political parties was at a lower level) and the electoral system favouring the winning parties, PiS managed to secure the absolute majority and to form a single-party government. Thus, given the above figures, the party’s claim of representing the overwhelming majority of the Polish society and being thus entitled to perform an overhaul of the political system despite constitutional constraints is largely unfounded.

Like 2015, Kaczynski decided not to take up the position of Prime Minister. This was occupied first by Beata Szydło, and since the government’s reshuffle in December 2017, by Mateusz Morawiecki, a former banker and Kaczynski’s political protégé. Nevertheless, it has been Kaczynski (formally just a member of parliament without any governmental responsibility) who has been the unquestioned leader,

⁵ Jacek Kucharczyk, “It’s not the economy, stupid! Explaining the success of authoritarian populism in Poland,” 16 January 2018, <http://situationroom.dpart.org/index.php/blog/15-articles/poland/31-not-the-economy-stupid>.

⁶ The most compelling account of the motivations of PiS voters is to be found in Maciej Gdula et al., “Dobra zmiana w Miastku. Neoautorytaryzm w polskiej polityce z perspektywy małego miasta,” Warszawa 2018, <http://krytykapolityczna.pl/file/sites/4/2017/10/Dobra-zmiana-w-Miastku.pdf>.

having full control of the cabinet's strategic decisions. It is also Kaczynski's world-view which explains the political course of the party and government, and which brought about the most fundamental changes in Polish politics after the end of communism.

In his conviction, liberal democracy, famously fragile and vulnerable, is an outdated political structure in this globalised and complex world. Instead, he believes that what is needed is a strong government that acts efficiently on behalf of the democratic majority and, when necessary, is able to take drastic measures to carry out the majority's will without being permanently hobbled by the liberal system of "checks and balances". Victor Orbán of Hungary has demonstrated in his own country that such a model can operate quite successfully without liberal sticklers and other malcontents being able to provide an alternative.⁷ Erecting a "Budapest in Warsaw" has been Kaczynski's professed goal for a long time and he is now making great strides towards approaching this "ideal".

While Kaczynski has shown little interest in the economy or foreign policy, his focus is on issues of society, history, morality and culture. Foreign Minister Witold Waszczykowski's statements on the mix of races and cultures and on vegetarians and cyclists as a manifestation of a leftist-liberal opinion leadership in Western Europe,⁸ derided by many, are characteristic of Kaczynski's party and its core voters, especially when combined with a rhetoric about how these very things threaten the traditional foundations of the Polish state. They perceive the organic processes of liberalisation, secularisation and individualisation that brought major changes to European societies over the past few decades as ideological schemes imposed from above. It is their belief that a strong state requires a homogeneous, self-confident, community-oriented society that will only be able to ward off external threats if it does not surrender to the corrupting processes of the West.

Kaczynski's affirmative politics of memory and control of public media (PiS took over the public TV and radio by marginalising the constitutional bodies overseeing them and uses the public broadcasters as a tool of propaganda.⁹) are designed to ensure that the national community will be consolidated and based on these very values. In addition, a generous social policy correcting the "neoliberal excesses" of the previous government is supposed to strengthen social cohesion. Rejection of the "Western model" as the only possible option is also geared towards ending the politics of imitation and instead supports a policy of innovation that takes better ac-

⁷ See also the article in this journal on Hungary and Orbanism.

⁸ "Haben die Polen einen Vogel? BILD-Interview mit dem polnischen Aussenminister," 3 January 2016, <https://www.bild.de/politik/ausland/polen/hat-die-regierung-einen-vogel-44003034.bild.html>.

⁹ Wojciech Sadurski, "How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding," Sydney Law School Research Paper, No. 18/01, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3103491.

count of the Polish economy's specific national demands. Incidentally, most experts and politicians, even those not affiliated with the party, see the latter as a necessary precondition for Poland to escape the looming "middle-income trap". Finally, a late settling of accounts with "post-communist networks" that PiS perceives as having influence on political and economic developments is a constant feature of the party's rhetoric.

However, the most fundamental changes in the political system paving the way towards an illiberal model have been carried out in the realm of the judiciary. They violate the Polish constitution as well as the fundamental principle of the separation of powers. The assault on the independence of the judiciary has been carefully planned. The party leader, Jaroslaw Kaczynski, complained years ago about what he called "impossiblism" (related to the checks and balances in the liberal democratic system), which prevents the democratically legitimated majority in the parliament from fully carrying out its programme. The reforms are thus not corrections of an allegedly dysfunctional system but the cornerstones of a new, illiberal political system. As the Venice Commission put it, "some elements of the reform have a striking resemblance with the institutions which existed in the Soviet Union and its satellites."¹⁰

These reforms happened in many phases and despite their fundamental and systemic characters were not properly deliberated in parliament. This "salami tactic" (for example, the Act on the General Courts was changed and amended five times over 1.5 years) "harms the transparency of the legislative process, especially by hindering verification of the actual intent behind implemented changes."¹¹ Since December 2015, there has been no independent constitutional court, which—according to the Polish constitution—is required to assess the legality of acts adopted by the Polish parliament. The current President of the Court, Julia Przyłębska, was appointed by President Andrzej Duda (PiS) in an illegal way as were the three other judges of the court. The rulings of the constitutional court (in its former composition) stating the illegality of the procedures adopted by the PiS majority in the parliament were not officially published by then Prime Minister Szydło (despite the constitutional obligation to do so) and ignored by the ruling party and the President. The constitutional court controlled by PiS political appointees does not perform its role as the guardian of the constitution any longer, representing in its sentences mostly the government's line.

¹⁰ Venice Commission, Opinion No. 904 / 2017m Strasbourg, 11 December 2017, [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2017\)031-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)031-e).

¹¹ "Report of the Stefan Batory Foundation Legal Expert Group on the impact of the judiciary reform in Poland in 2015-2018," http://www.batory.org.pl/upload/files/Programy%20operacyjne/Odpowiedzialne%20Panstwo/Batory%20Foundation_Report%20on%20the%20judiciary%20reform%20in%20Poland.pdf.

The Minister of Justice (who is the General Prosecutor at the same time) has been vested with far-reaching and discretionary powers in appointing judges, removing them from office, and controlling their careers. “Under the Law on Organisation of Common Courts, which entered into force in September 2017, Ziobro had a six-month window in which he could dismiss presidents of courts and appoint new ones, without consultation. Despite protests by some judges, almost 150 court presidents and vice presidents were replaced.”¹² According to the new law the Minister of Justice preserves broad competences in staffing of common courts: he/she will be able to remove presidents and vice-presidents of the courts (the corresponding decisions can be blocked only by a two-thirds majority in the National Judiciary Council, which is fully controlled by the PiS). He is also equipped with the power of control over the appointment of bodies responsible for conducting disciplinary proceedings against judges and for prosecuting in these cases, as well as the capacity to directly influence any disciplinary case.¹³ This is a disproportionate influence of the executive power over courts which is already being abused.¹⁴

The Supreme Court, which is also the highest appealation court and has the power, among others, to control the validity of election, has been subject to an unconstitutional assault on its independence and structure. PiS introduced a new retirement age (65) with an immediate effect (without interim provisions) which will lead to the termination of the terms of office of the President of the Court (whose five-year term is defined by the constitution) and 28 other members of the court on the day when the new law enters into force (3 July 2018). The new members of the Court (and its new President) will be elected in a procedure controlled by the ruling party. Also, the new law introduces a new, largely independent from the President of the Court, Chamber of Extraordinary Control and Public Affairs which has jurisdiction over cases of extreme importance for the political system, such as certifying the validity of elections and referenda, and other cases under public law, and reviewing electoral protests and complaints about unreasonable delays in trials before common courts and military courts. It is also responsible for dealing with the newly introduced “extraordinary appeals”, a process whereby any court ruling considered final to date can be challenged if it is deemed necessary for ensuring the

¹² Adam Bodnar, “Europe can save Poland from darkness,” *Politico*, 9 April 2018, <https://www.politico.eu/article/poland-judiciary-rule-of-law-europe-must-intervene/>.

¹³ “Report of the Stefan Batory Foundation,” *op. cit.*

¹⁴ As Bodnar writes, “Last month, Ziobro [Minister of Justice] announced that judges should face disciplinary measures for applying the Polish constitution directly in their judgments. Instead, they should ask the Constitutional Tribunal for its opinion. The alternative, he said, would be legal anarchy.” Given the disciplinary measures the minister is equipped with, this threat can have a chilling effect on the judges. Bodnar, *op. cit.*

rule of law and social justice. Even cases ruled up to 20 years ago can be reopened under the interim provisions.

It is striking that the overhaul of the checks and balances, having such a fundamental importance for a liberal democracy, comes hand-in-hand with the above-mentioned criticism of the Western European model of society and political culture. While Europeanisation was the concept that the Polish transformation in the 1990s conformed with, it is the reverse process which set in when PiS came to power. To be sure, Poland is not on the course towards a “Polexit”; support for EU membership is constantly at a very high level (above 80 percent) and neither the ruling party nor any other meaningful political force is advocating to follow the British example of “Brexit”. Poland has greatly benefited from EU integration and the value of EU membership is indisputable in the society and in the political elite. However, the ruling party does not frame Europe—in terms of the European integration process and the European model of society—as an opportunity for Poland only. It sees it as a risk as well. Moreover, there is a growing conviction that the expected further development of the EU—be it the integration of the Eurozone, changes in the functioning of the EU internal market, EU defence or migration policy—is increasingly at odds with Polish interests.¹⁵

When the party came to power in autumn 2015, the concepts of strengthening the nation state, renationalising the economy, opposing deeper EU integration, and criticising liberal democracy were on the rise across Europe. In a way, PiS’s decision to move away from the Europeanisation paradigm seemed to reflect PiS’s conviction that the party was at the vanguard of Europe’s transformation. The populist revolt—not least as a reaction to the migration crisis—against the establishment seemed even to validate PiS’s claim that popular sentiment across the EU was on their side. The conviction that the EU in its current institutional setup and political framework was doomed to fail chimed with the new Polish government’s belief that its ideas for the EU’s renewal would gather momentum. PiS believed that it was not an outlier, as it was often portrayed in the foreign press, but rather the vanguard of the political transformation in the EU. This political climate provided the opportunity for Poland to align itself with partners which would help push the EU towards a reform in line with the sovereigntist agenda and vision of “Europe of nation states.”¹⁶

It should come as no surprise that this re-consideration has resulted in a re-definition of the country’s relationship with Germany, previously its number one

¹⁵ See Piotr Buras, “Polen und Europa: Neue EU-Skepsis,” *Aus Politik und Zeitgeschichte*, Heft 10-11. 2018, 2 March 2018, <http://www.bpb.de/apuz/265505/polen-und-europa-neue-eu-skepsis?p=all>.

¹⁶ For the Polish vision of EU reform, see the interview of the minister for EU affairs Konrad Szymanski: “Polska chce uzdrowić Unię Europejską,” *Rzeczpospolita*, 24 August 2016, <http://www.rp.pl/Rozmowyczwartkowe/308249904-Konrad-Szymanski-Polska-chce-uzdrowic-Unie-Europejska.html?template=restricted>.

partner and the “gate to Europe”, as it was framed in Polish discourse during the 1990s. The PiS government has rejected this course, calling it a “policy on the knees” and claiming that the desire to be part of the EU mainstream has not benefited Poland. The refugee issue has become the key driver of Warsaw’s criticism of Berlin. Instead Poland declared the United Kingdom as its new key ally in the European Union—it was a logical step as London could indeed be a strong partner in pushing the integration process in a different direction than that advanced by the Franco-German axis.

However, in hindsight, these assumptions proved to be wrong. In June 2016, the UK decided to leave the EU and thus the key new ally of PiS was no longer able to shape the integration process. Also, the anti-establishment revolt across Europe was at least preliminarily halted by Emmanuel Macron’s success in France as well as by Germany continuing to be governed by a centrist government after the Bundestag election in 2017. The situation in Europe remains fragile but PiS’s renationalisation agenda does not enjoy sufficient support. Rather, Poland’s influence in the EU has significantly diminished. The proposal of the new EU budget presented by the EU Commission in May 2018 containing the concept of linking EU subsidies (still a very important driver of Poland’s economic growth) to full respect for rule-of-law principles is directly provoked by the “Polish problem”.

Poland has arrived at a crossroads of its post-1989 transformation. The local elections in November 2017, the elections for the European Parliament in spring 2019 and, finally, the national elections in autumn 2019 will determine the further course of the country: deepening its “urbanisation” or paving the way for the restoration of liberal democratic principles. The latter is still possible as the opposition in Poland is stronger than in Hungary, the media landscape still pluralistic (even after the capture of the public media by the government), the political corruption much less of a problem and the country—because of its much larger size (38 million inhabitants)—much more difficult to control. There is no simple road back to the past and a new vision of a modern and progressive Poland is required to fend off the populist or reactionary ideas.

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