

Adam Bodnar

"Towards "Polexit"? The Rule of Law Crisis in Poland and the Existential Crisis of the European Union"?

Introduction

I would like to thank Professor Daniel Naurin for the invitation to deliver this prestigious lecture. Its idea is to talk about the value of European integration. I think that in normal circumstances I should provide a vision how the European Union should develop, how we should shape the European identity, how we should cooperate for that purpose. Looking at names of previous speakers, it should be the tone of a speech of any ARENA lecturer. The ARENA centre had a great impact on development of European thinking. I remember that 15 years ago, when writing my Ph.D. on multilevel citizenship, I was extensively using your papers, prepared by such big names as Andreas Follesdal, Morten Egeberg, Erik Oddvar Eriksen, Johan Olsen.

However, in 2021 we are in a completely different moment. We are observing that the European Union is changing dramatically. On the one hand, there are growing non-democratic trends. On the other hand, the European Union is contemplating and debating its future, in the context of the on-going conference on the future of Europe. It looks as if the two trains are going but in the opposite direction. However, if we think strategically, we can combine these directions. In fact, it is impossible to talk about the rule of law crisis, without addressing the future of the European integration.

Rule of law crisis origins

Since 2015 the ruling party in Poland has been dismantling the rule of law. In 2012, Jarosław Kaczyński promised to build "Budapest in Warsaw". After winning the elections in October 2015 he has delivered on this promise. A number of institutional reforms have been implemented. The most important one concerned the Constitutional Court. As a result of series of legislative acts and packing-in the Court with loyal judges, the Constitutional Court became an institution politically subordinated to the ruling majority. As a consequence,

starting from 2017 the Constitutional Court could no longer exercise the independent judicial review of legislative acts. Moreover, the role of the Parliament was marginalized, since there was no state institution that could independently review the quality of legislative process.

The take-over of the Constitutional Court affected the operation of other state institutions. In 2016, reforms were adopted by the Parliament to create an effective control over: (1) public media, (2) the prosecutor's office, (3) civil service, and (4) secret services. Control over public media allowed to break with the traditional independent and pluralistic operation of state media. Public radio and television became an instrument of governmental propaganda, without any access for independent voices. The control over the prosecutor's office enabled and started the process of non-accountability for any violations of law by state authorities (or its close affiliates). The Minister of Justice, being at the same time the Prosecutor General, could influence any investigation.

In 2017 the reform of the judiciary started. Attack on judicial independence consisted of numerous legislative changes. But despite many hurdles and judicial protests, the current situation looks as follows:

- The National Council of Judiciary, major state organ responsible for judicial nominations and promotions, is controlled indirectly by the ruling majority. The NCJ has been recently expelled from the European Network of Councils of Judiciaries;
- The Minister of Justice has a significant influence on promotion of court presidents in all common courts;
- The Supreme Court is packed in with a group of loyal judges, including the First President of the Supreme Court;
- There are two new chambers in the Supreme Court, elected by the National Council of Judiciary in a new composition;
- The system of disciplinary responsibility, controlled indirectly by the Minister of Justice, is in full operation, intimidating number of judges;
- The system of "new power" within the judiciary is becoming stronger and stronger, due to pressure, political support and numerous new judicial appointments.

According to the recent ranking by the World Justice Project, Poland is classified at 36 position in the world as regards rule of law standards (which is one of the lowest scores in the EU). According to the Reporters without Borders Poland is classified at 64. position. In V-Dem's latest Liberal Democracy Index, Poland has fallen to 63rd place. Poland was regarded as "most autocratizing country".

Judicial response

From the beginning of the crisis, there have been different social, legal and political responses to defend rule of law and democracy. Poland was a place of numerous massive demonstrations against changes. There were important statements, positions, recommendations and warnings coming from international organizations and NGOs. I would like, however, to concentrate on the response by top judicial institutions.

Polish civil society and judicial associations responded with strategic litigation of cases. They started to bring cases to the Court of Justice of the European Union and the European Court of Human Rights. There were a number of detailed questions asked in those cases. One may summarize them as follows: *Are those changes in compliance with the right to court and rule of law standards, as guaranteed by EU law and the European Convention on Human Rights?*

When we look back, Polish lawyers have won before the CJEU and ECHR practically all the cases concerning attacks on judicial independence. With respect to the CJEU, judgments concerned the decrease of retirement age of judges, the status of new judicial nominations and the National Council of Judiciary, powers of the Disciplinary Chamber of the Supreme Court, moving judges between divisions in their courts. With respect to the ECtHR, they concerned the status of “double judges” in the Constitutional Court, adjudication by the Disciplinary Chamber of the Supreme Court, powers of the NCJ. It seems the most important judgment concerned the status of persons adjudicating in the Constitutional Court. Three of them were appointed to positions filled in by previous Parliament. That is why the Strasbourg Court claims that the Constitutional Court adjudicating cases with their participation is not the “court” within the meaning of the Convention.

Only once did the Polish authorities agree with those judgments. It was after the European Court of Justice issued interim measures in October 2018. In its order the Court requested the return to adjudication of 20 judges of the Polish Supreme Court, who had been previously sent for earlier mandatory retirement. With respect to all the other judgments, the message of the government has been clear: *we will not implement them, because judgments constitute a violation of our sovereign powers and are ultra vires – i.e the ECJ has issued judgments in areas where it does not have jurisdiction.*

The Polish government is able to do almost everything that was possible to strengthen such a position, but also to gain time for further deepening of reforms. We should mention here especially the following actions:

- Individual judges who refer to the EU law in their decisions, or make preliminary references to the European Court of Justice, are targeted with disciplinary charges or proceedings aim to lift their judicial independence;
- Poland held up the future EU budget, claiming that the EU does not have a right to adopt the so-called “conditionality regulation” – which would allow the EU institutions to suspend the transfer of EU funds to MS which do not respect the principles of the rule of law
- Thanks to an alliance with Hungary, the Polish government has managed to block any rule of law procedure under Article 7 TUE – which could allow the EU to suspend of some Poland’s membership rights;
- Poland ignored regular Rule of Law Reports of the European Commission;
- Resisting judges have been personally attacked with the use of governmentally friendly media, hate speech campaigns orchestrated by the government, but judges were also targeted with specific legal cases.

Due to such pressure, we have learned such notions like:

- Chilling effect – judges are afraid to adjudicate independently on cases (or to use EU law) due to individual pressure and possible sanctions;
- Discriminatory legalism – government allies may be unaccountable for violations of law, while governmental friends could be targeted with different proceedings.

The rule of law crisis entered into new phase in 2021, because Poland refused to comply with judgments of the EU Court of Justice and the European Court of Human Rights. The Polish Constitutional Court issued on 7 October 2021 an important verdict on the primacy of the Polish Constitution over EU law (K 3/21). It stated that the EU Treaty cannot provide for supremacy of EU law as regards judicial independence in the Member States. According to the Polish Constitutional Court, the CJEU acted *ultra vires* (outside its jurisdiction) in its cases concerning Polish judicial independence. The judgment of the Polish Constitutional Court provoked a number of interpretations. What is more, this Court acted here purely in a political way, showing its full loyalty to the ruling party, being an active player in the process of dismantling rule of law.

Interestingly, there is another case pending before the Constitutional Court. On 24 November the Constitutional Court is going to adjudicate on compliance of

Article 6 ECHR with the Polish Constitution. This time the Court is going to undermine the Strasbourg jurisprudence on judicial independence in Poland.

Is it “Polexit”?

The big question is whether all those changes, and especially resistance to comply with the CJEU judgments, could be regarded as “Polexit”, namely Poland leaving the European Union. I think that we cannot interpret the judgment of the Polish Constitutional Court, as a declaration under Article 50 TEU (the EU exit procedure). Nevertheless, this highly political judgment has certain consequences.

First, it is a strong message sent to the EU institutions. It is an attempt to move the discussion from political space to the legal room. The Polish government compares extensively the work done by Poland’s Constitutional Court to its counterparts in Germany or France. Such an approach makes interpretation of events more difficult. Moreover, this judgment may be politically used whenever needed. It is like a rifle on the wall. It may fire at any time.

Second, the judgment is a strong instrument to intimidate Polish judges. They could be subject of disciplinary proceedings at any time. There are already a few judges that have been suspended on the basis of it, with the use of short-track procedure. The law gives the possibility to the Minister of Justice to suspend any judge for just one month.

Third, and most importantly, this judgment has external consequences that make the principle of mutual trust more and more empty and hollow. The whole concept of the judicial cooperation is based on mutual trust. But courts of other Member States (And of states that have close judicial cooperation with the EU like Norway) may not trust Polish authorities any longer. We see this growing distrust already, for example in Norway – recently the District Court in Vestfold refused to surrender a Polish national on the basis of the European Arrest Warrant, because the Court considered that such surrender would be in breach of human rights. This case shows that changes in Poland do not concern only Poland-EU relationship. Poland is bound with Norway via number of special arrangements, including belongingness of Norway to the European Economic Area and the special surrender agreement concerning the European Arrest Warrant. That is why any rule of law changes in Poland should be subject of special attention here in Norway.

The judgment (of the Polish constitutional tribunal) may also start a trajectory of changes. Step after step Polish citizens start to be accommodated with a new vision of Polish development. There is a growing discourse in Poland about whether EU membership is really needed, questions are asked the costs and benefits of membership, while some critical voices claim that the EU is exercising undue influence on Polish matters.

Reaction of the European Union

The European Union has reacted to changes in Poland with the use of different political and legal measures. It should be underlined that the EU did not have sufficiently good machinery to make a proper, surgical reaction. The specific procedure of Article 7 TEU (which can be used in case of systemic violation of the EU founding values) proved to be insufficient, especially in its most radical version (suspension of voting rights). Other instruments were in fact construed over years, such as the rule of law jurisprudence of the Commission and CJEU, rule of law report or conditionality mechanism.

We are at the stage when legal means simply do not work, due to resistance by Polish authorities. It is hard to put any pressure, when the other party does not respect rules of the game, namely, when it does not enforce judgments. *It's a bit like playing chess. One side says "Checkmate" and the other side says "There is no checkmate because my king is moving two squares."*

That is why the political instrument has been used, which is the suspension of funds from the EU Recovery Plan. Moreover, the conditionality regulation may soon be used too, once its legality is cleared by the CJEU. It means that the EU may use financial sanctions, but the big dilemma is: what next? What if the government of Poland still refuses to comply with the CJEU jurisprudence? What if the government decides to set off any financial sanctions with its EU budget's contribution?

In my opinion, the Polish government may use its strategies to continue the conflict. It may

- seek loopholes in a legal argumentation on the part of the Commission and the CJEU;
- try to find weak points in European agenda, taking advantage of divisions within the EU itself, its different political and economic interests – most probably it is the reason why the European Council is relatively silent on the issue;

- abuse the Polish-Belarusian crisis at the border to take political advantage out of it – “we protect external borders of the EU, and you try to interfere into our internal, domestic affairs”. I don’t claim that borders should not be protected, but two issues should not be mixed with each other.

To put it simply, any weakness on part of the EU partners, and any argument on part of the Polish government, will be used to take a time, to continue with its judicial reforms, to intimidate judges and to escape from the necessity to enforce CJEU judgments. Moreover, the use of the EU Recovery Plan money could be instrumental to achieve major political goal.

The primary political objective is to win the next parliamentary elections and to cement the current political system. Just like Victor Orban did in Hungary. What is still needed to achieve this? Full control over media (look at “LexTVN”), disabling remaining checks and balances institutions (such as the Supreme Audit Chamber) and regaining control over the Senate of the Republic of Poland (now controlled by the opposition).

Poland could be second to Hungary non-democratic state. It is *per se* contrary to European values, as the EU should be based on democracy, human rights and rule of law. But more importantly, the whole European project is based on community of laws. Therefore, the EU cannot allow itself to undermine European values. Without the rule of law, the EU may collapse. Just imagine what kind of other measures you would require to supplement, replace or by-pass the mutual trust principle. And this principle applies not only to the European Arrest Warrant, but also to recognition of judgments.

But the EU is also about stability for investments. LexTVN shows that this stability is lacking. Please note that during the summer of 2021, the Parliament debated the law aimed to regulate ownership status of private televisions. It was obvious that the law was directed against major independent TV network, TVN, owned by American corporation Discovery. Only due to the pressure from the US Department of State, the ruling party resigned from this law. Moreover, growing power of state-owned entities, coupled with political subordination of regulatory mechanisms, makes fair competition more and more difficult. There are already examples of abusing the “imperium” power of the state within “dominium”. This process will simply continue, thus threatening international investors and the Single Market principles. As Norway is integrated in the Single market, all these developments will affect Norwegian investors in Poland too.

Similar approach of populist governments may be imported by other Member States, taking advantage of EU weaknesses. So, I claim that the current crisis is also existential for the European Union.

What to do?

There is no easy answer to this question, as the situation is very dynamic and unfolds in unexpected directions. But in my opinion, when there is no clear road map, one should at least adjust to certain principles, assumptions and factors.

1. The current policy of the government is not overwhelmingly supported by the whole nation. There are strong political groups that would like Poland to become leader of the European integration, not the backbencher. Moreover, there is also a vertical division – between the central government and most local governments, who are predominantly pro-European Union.

2. One should look beyond the actual crisis, but think deeply about the very purpose of the European integration: peace, prevention of war, union of people of Europe, sense of European identity, protection of people that exercised free movement rights. The protection of the European Union should be a value in itself. And now, due to the threat coming from Russia and China it should be even more important.

3. There is a strong civil society in Poland and resistance by judges, who became heroes of our times. Such judges like Tuleya, Żurek, Juszczyzyn, Morawiec and others became symbolic figures for the European integration. Their devotion to rule of law and pressure on them is studied by Łukasz Bojarski of the University of Oslo, under direction of Professor Hans Petter Graver.

4. Despite the pressure on independent media, the take-over of some private media, political abuse of public media, there is still pluralism of discussion on numerous issues. It gives a chance that parliamentary elections in 2023 will be fair.

5. Economic ties between EU member states and EEA countries like Norway may develop steadily only in a rule of law compliant environment. Those economic ties are interrelated with consequences of free movement of people and their legal situation, including consequences for private and family life.

6. The illiberal trend in Poland and Hungary is not necessarily aimed to achieve implementation of certain conservative values (such as tradition, religion and family). Rather traditional values are used as an easy cover up for building non-democratic state, without any accountability for corruption and cronyism. I agree here with Jan Werner Mueller and his point.

7. Without rule of law it is impossible to protect human rights, especially rights of women and vulnerable minorities, such as LGBT+ community. That is why it should be the primary interest of the European Union to address strongly rule of law concerns.

Those factors should be taken into account when thinking about future EU policies towards Poland. It seems one of the most important aspect is the centralization of the distribution of EU funds in Poland. Maybe it is the time for the EU (and EEA states like Norway) to reflect on the position of local governments and their access to those funds. Certainly, it might be a legal challenge to change the way of distributing funds, but otherwise there is a risk of supporting non-democratic trends in Poland.

Another issue is accountability – I have proposed with Professor Maciej Taborowski a necessity to join the European Public Prosecution Office by Poland. But this call was neglected by the government, due to unwillingness to have any control whatsoever on the distribution of any funds. The recent story concerning abuse of the Justice Fund by the Ministry of Justice (as denounced by the Supreme Audit of Chamber) shows how important is the supervision over the spending of funds.

And finally, the European Union should take the rule of law issue seriously as a whole. We see a lot of energy on part of the European Commission, CJEU, the European Parliament. But, as Professor Christophe Hillion suggests, the European Council should consider use of Article 7 (2) TEU procedure, allowing to discuss rule of law in a more strategic manner. This procedure allows to find “existence of a serious and persistent breach by a Member State of the values referred to in Article 2 TUE” and requires strong political engagement of the European Council. EUCO, due to political considerations, should not escape this topic.

Rule of law and future

The current crisis is indicative of much deeper problems that we ever thought. The relative easiness of judicial independence destruction shows how vulnerable is our judiciaries to national populism threats. Let's look beyond Warsaw and Budapest. It was relatively easy for Boris Johnson to attack British Supreme Court judges for their decision on the promulgation bill. In the United States, we have observed an attack on the US Congress, supported by key political figures. The reaction of societies was not always strong enough. It seems that many of us take rule of law guarantees for granted, as always present in our lives. However, in times of disinformation, emergence of social media, and polarization, independent institutions cannot always protect themselves.

I claim that the non-democratic disease may spread, but not only because of strong leaders, but because of similar methods used by them – attacking independent institutions, using strong governmental propaganda mechanisms, undermining free speech.

The question is whether the European Union is prepared for this? Not really. The EU does not have good instruments to guarantee freedom of speech conditions and to counteract shrinking space for civil society. The EU Values Fund, modelled on EEA Funds, just have started its operations, but still local distributors have not yet been found.

Second, there is no sufficient consideration in particular Member States about the need to protect independent institutions.

Therefore, it is our Polish lesson to Europe – you have to take special care about independent institutions, even if right now they do not suffer. Upon non-democratic pressure and national populism, their independence may fall. That is why the March of 1000 Gowns was so important. In January 2020 judges representing more than 20 EU states (but also Norway) participated in a significant demonstration to defend the rule of law in Poland.

Rule of law and new generations

When we talk about the future of the rule of law, we should also take in consideration that new generations take rights for granted. Even in Poland, most of the people participating in protests were rather in their 50s and 60s.

We need to find a way how to make the young generation see the importance of all those concerns. In my opinion it is only possible by empowering the youth,

by talking to them about the need for new rights. One of such proposals is the manifesto by Ferdinand von Schirach, to extend the EU Charter of Fundamental Rights by six additional rights about (1) climate, (2) profiling, (3) algorithms, (4) disinformation by public officials, (5) human rights' compliance in chain of supply and (6) access to European courts. It is an interesting and highly provoking initiative, opening our eyes that it has already more than 20 years lapsed since the adoption of the EU Charter.

Personally, I would add to this list the right of access to internet. And after the pandemic – the equal protection of social rights (especially right to health) in the whole Europe. The European Union should have, as its identity feature, the equal social status of all EU citizens, as Ulrike Guerot has suggested. We can achieve it in 2040-2050.

Therefore, in order to protect basic guarantees (such as the rule of law), we cannot ignore the future. We have to indicate how the rule of law is in fact coupled with the need to protect rights connected with the current trends, why the state should be powerful to protect our rights, especially vis-à-vis corporations, and thus creating identity and economic alternative to other superpowers in the world. Only this way we can show that European integration is relevant to the young generation.

Barack Obama had a saying *“When they go low, we should go high”*. That is my point. We have to defend the rule of law as much as we can. But we should at the same time respond to the future, in order to make the whole model of European integration relevant to young generation and responding to their needs and expectations.