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party*

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Europe's Autocracy Problem

Polish Democracy's Final Days?

By R. Daniel Kelemen and Mitchell A. Orenstein



Winter has come to Europe, but it seems to be springtime for the continent's autocrats. Following the example of the Hungarian Prime Minister Viktor Orbán and his Fidesz Party, Poland's new government, led by the nationalist-populist [Law and Justice party](#) (PiS), has launched assaults on the country's judiciary and public media, putting Polish democracy and the rule of law at risk. In December, tens of thousands of Poles demonstrated against the [government's illiberal actions](#); European Commission officials, meanwhile, have promised to investigate

whether the developments in Poland constitute a “systemic threat” to the rule of law there. Unsurprisingly, Jaroslaw Kaczynski, the leader of the PiS, has dismissed the protestors as traitors and rejected criticism from abroad.

Poland's constitutional order is locked in a standoff.

In Poland's political crisis, the European Union is reaping the consequences of its inaction against [Hungary's drift toward authoritarianism](#) over the past five years. By failing to aggressively counter Orbán's grab for power, the European Union signaled to aspiring autocrats across the continent that they could commit similar attacks on democracy and the rule of law without facing meaningful consequences. Clearly, Poland's PiS took note and has acted accordingly. If the European Union allows a second, much larger state to turn away from pluralist democracy and the rule of law, then the EU's standing as a union of democracies and a beacon for liberty in the region will be damaged irreparably. European Union leaders need to act quickly and forcefully to help preserve liberal democracy in Poland by making it clear that the country could face costly sanctions, including the suspension of EU funding, if the PiS-led government does not respect democratic principles.

A CONSTITUTIONAL CRISIS

The current crisis began with an illegal move by Poland's previous government, led by the liberal Civic Platform party, to exert influence over the Constitutional Court, a 15-member body that judges the constitutionality of legislation passed by Poland's parliament. Not content with only appointing replacements for three Constitutional Court judges who retired in November, the outgoing government also sought to appoint replacements for two judges who were set to retire after their terms expired in December, by which point a new government would have taken office. On December 3, the Constitutional Court struck down the latter two appointments, but held that the three judges appointed in November should take their seats on the Court.



An anti-government demonstration in front of the Constitutional Court in Warsaw, December 2015.

The story could have ended there, with the swearing in of three judges appointed by the Civic Platform in November and the selection of two other judges by the new PiS government. But by the time PiS took power in mid-November, it was in a combative mood. Throughout November, the PiS-backed President Andrzej Duda refused to swear in judges appointed by the previous Civic Platform government, blocking them from taking office. Rather than waiting for the Constitutional Court to rule on the validity of the appointments, the PiS-led parliament declared all five appointments invalid and appointed five replacement judges of its own. Then, the night before the Constitutional Court was set to rule on the validity of the originally appointed judges, Duda hurriedly swore in PiS' replacements. (Rejecting this brazen defiance of its authority, the Constitutional Court has refused to hear cases together with the PiS' illegitimate replacement judges.) Finally, in late-December, parliament passed a law designed to further hamstring the court, requiring, among other provisions, that at least 13 of its 15 judges be present to hear most of cases. Because there are only ten uncontested judges on the Court today, the law effectively precludes the body from hearing cases until it accepts the new government's replacement judges.

Poland's constitutional order is thus locked in a standoff, pitting the parliament and the president against the Constitutional Court: parliament has appointed five judges that the Constitutional Court does not recognize, whereas the Court recognizes three judges legitimately appointed by the previous government, whom the president and parliament refuse to recognize in turn. Kaczynski has made no secret of the agenda behind PiS' attack on the Court: [at a mid-December rally](#), he stated plainly that he viewed the Court as a potential impediment to PiS delivering on its electoral promises, which include popular economic measures that will increase family benefits and lower the retirement age. But the deeper goals behind the party's attack on the Court are likely more far-reaching and worrisome: to prepare the ground for a raft of legislation that will curtail individual rights and distort democratic institutions, making it difficult to unseat PiS from power.

BUDAPEST IN WARSAW

By defying the Constitutional Court, weakening its mandate, and attempting to pack it with party loyalists, Kaczynski and the Law and Justice Party are following the example set by [Hungary's Orbán and his Fidesz party](#), which transformed Hungary into a semi-authoritarian state under the nose of the [European Union](#). After Fidesz swept to power in 2010, Orbán's government launched a constitutional revolution to eliminate independent checks on its power and consolidate Fidesz's rule for years to come. Hungary's powerful Constitutional Court, like Poland's, posed a threat to this agenda, and it became one of Orbán's first targets. In 2010, the Orbán government changed the procedure for appointing judges to allow the governing majority to make appointments without consulting the opposition. The next year, in 2011, the government adopted a new constitution that expanded the Constitutional Court from 11 to 15 judges, enabling Orbán to pack it with Fidesz loyalists. When the Court nevertheless continued to declare some of the Orbán's most egregious acts unconstitutional—among them, a law criminalizing homelessness and another requiring churches to secure official recognition through a vote in parliament—his government responded by amending the Constitution in 2013 so as to further limit the Court's power, granting constitutional status to a number of the laws the

Court had declared unconstitutional, nullifying more than 20 years of the Court's case law, and further entrenching the control over the judiciary of the politically appointed head of Hungary's National Judicial Office.



Jarosław Kaczyński speaks with Polish President Andrzej Duda at the presidential palace in Warsaw, November 2015.

But Orbán didn't stop with the courts. He also asserted control over independent public bodies that might check the government's power, reorganizing and replacing the heads of the Supreme Court, the ombudsman for data protection, the National Election Commission, and the National Media Board; asserted political control over public and private media; attacked civil society organizations, including churches and NGOs critical of his government; and overhauled Hungary's electoral system so that it would favor Fidesz. Although the European Commission, the European Parliament, and the Council of Europe have challenged a number of the Orbán government's actions, EU institutions have so far failed to stop Hungary's drift toward authoritarianism.

PiS' recent record suggests that it has Hungary in mind. (On January 6, Kaczyński and Orbán [met privately](#) in southern Poland for around six hours.) In addition to attacking the Constitutional Court, Poland's government has also passed a number of laws that will

strengthen the PiS' hold on power and undermine the country's democracy. On December 30, parliament passed a bill, denounced by the European Union and media rights organizations, which will sack the current heads of the state television and radio stations and allow the government to appoint new ones. Another piece of legislation introduced by PiS lawmakers is designed to allow the government to fire civil servants at will. Polish lawmakers have also introduced amendments to a law on the police and special security services that will significantly increase the government's ability to wiretap and spy on Polish citizens. That is especially worrisome under a government led by PiS, which has historically led politicized witch-hunts to cast its opponents as spies or communists.

Poland's relatively young democracy has survived numerous challenges since the 1990s—from illiberal presidential candidates to constitutional reforms—and its adherence to democratic principles has secured the country [a privileged place in the West](#) and in the European Union, bringing about a period of sustained [peace and prosperity](#) rarely seen in the country's history. PiS' subjugation of the Constitutional Court and its disregard for the rule of law put all of that at risk.

“THE WORST SORT OF POLES”

PiS won Poland's October election in large part because it convinced Poles that, once in power, it would not be as extreme or combative as it was during its last period in government, from 2005 to 2007. At the time, PiS allied with extreme nationalist and populist parties in parliament and undertook a controversial witch-hunt to “de-communize” Poland by rooting out people (mostly opponents of PiS) who had allegedly collaborated with the former communist-era secret police, dramatically expanding domestic wiretapping to support its investigations.

Those moderate Poles who voted for PiS expecting that it would govern with greater restraint this time around were fooled. Public opinion polls show that many of these moderate voters have already changed their minds about PiS: [56 percent of Poles](#) now believe that democracy is under threat in their country. Indeed, it is possible that PiS is gearing up for a four-year campaign against corrupt officials and perceived enemies of the state. PiS believes that the communists are at the root of most of Poland's ills, and it wants to remove communist-era secret police collaborators from government and most other areas of public life, from universities and the media to the military and public companies. With Antoni Macierewicz, an ardent anti-communist, as minister of defense,

the inquisitions could be intense and protracted. Some of the language PiS has recently used to describe its opponents points in such a direction: Kaczynski has referred to his opponents as traitors, Gestapo agents, and “the worst sort of Poles” (*najgorszy sort Polakow*), a phrase that has become a popular t-shirt slogan and an Internet meme.

PiS’ targets may not be limited to alleged former communists. The party wants to re-open an investigation into the death of Kaczynski’s brother, former Polish President Lech Kaczynski, in a 2010 plane crash at a Russian military airport in Smolensk, which PiS claims was orchestrated by Russia and covered up by Poland’s then-liberal government under Prime Minister Donald Tusk, who is now the president of the European Council. If the PiS investigates Tusk, it will effectively put the European Union itself on trial.

DEFENDING DEMOCRACY

Given the number of daunting challenges Europe faces—a potential British exit from the European Union; the arrival of large numbers of refugees and migrants; and the slowly festering eurozone crisis among them—it would be easy for European leaders to overlook Poland’s internal battle over constitutional politics. Doing so, however, would be a profound mistake. If the European Union fails to defend democracy and the rule of law in Poland, as it did in Hungary, it will lose credibility as a union of pluralist democracies and risk encouraging a wave of democratic backsliding in other member states.

Of course, as the European Union’s flawed record in Hungary has shown, protecting democracy in Poland will not be easy. This is mostly because the Union lacks adequate legal tools to address democratic backsliding. Article 7 of the Lisbon Treaty does enable EU member governments, acting unanimously, to strip another state of EU voting rights for serious and persistent violations of the EU’s fundamental values including democracy, the rule of law, and respect for human rights—but with Poland and Hungary both drifting toward authoritarianism, Article 7 proceedings against either state would surely fail, as each country would shield the other from a unanimous vote. What is more, because European Council President Donald Tusk is a former Polish prime minister and longstanding enemy of Kaczynski, the PiS would have an easy time characterizing EU action against Poland as an opportunistic play by its domestic rivals.

Nevertheless, the European Union is not powerless to bring about change in Poland. Indeed, many of the political obstacles to EU action against Hungary do not exist with

respect to Poland. Some leaders of the powerful European People's Party (EPP), a pan-European coalition of center-right parties of which Fidesz is a member, for example, [have shielded Orbán from criticism](#) within the European Union. But PiS does not have the same advantage—the party is not a member of the EPP, and Kaczynski has fewer supporters in foreign capitals than Orbán does. That should make it easier for EU leaders to agree to act in the Polish case.

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What is more, despite its failure to prevent the drift toward authoritarianism in Hungary, the European Union has shown elsewhere that it can protect democracy and the rule of law in member states. During [Romania's](#) 2012 constitutional crisis, for example, the EU quickly threatened the country with serious sanctions—including blocking its accession to the Schengen free movement zone—and successfully pressured Romanian Prime Minister Victor Ponta to back down from his attacks on the country's Constitutional Court and his efforts to impeach his rival, Romanian President Traian Basescu. The European Union should act just as quickly and forcefully against Poland's current government—before PiS consolidates its grip on power.

The European Commission should begin by deploying its so far untested Rule of Law Mechanism, which provides for an escalating series of warnings in preparation for a vote on Article 7 of the Lisbon Treaty. But given the difficulty of stripping Poland of EU voting rights under Article 7, this will not be enough. EU leaders also need to consider suspending the flow of EU structural funds to Poland, currently Europe's largest recipient, unless the PiS government respects the requirements of EU membership. The United States should likewise pressure the Polish government, which is keen to strengthen NATO's presence in Poland and is set to host a NATO summit this year, by making it clear that it expects its ally to adhere to democratic values.

More broadly, if the European Union is to halt democratic backsliding and attacks on the rule of law in Poland and Hungary, the leaders of other EU member states will need to summon the political courage to speak out in defense of the EU's core values. Silence

implies consent, and there has been too much silence in European capitals as democracy has eroded in Budapest and Warsaw. It is time for European leaders to signal to governments and citizens in both countries that a failure to respect the conditions of EU membership, above all pluralist democracy and the rule of law, will have real consequences. 🌐

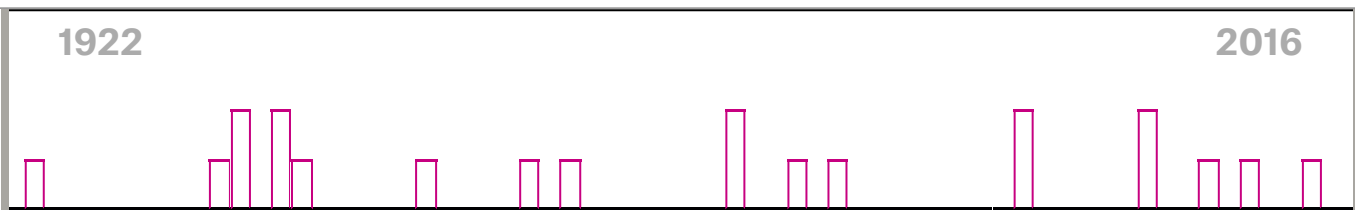
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