Poland's Constitutional Crisis

How the Law and Justice Party is Threatening Democracy

By R. Daniel Kelemen, FOREIGN AFFAIRS, August 25, 2016

After simmering for nine months, the tension between Poland’s ruling Law and Justice (PiS) party and the country’s highest court, the Constitutional Tribunal, is coming to a boil. The PiS government is attempting an unconstitutional takeover of the tribunal—ignoring its rulings, trying to pack it with new judges, and, most recently, threatening the head judge with prosecution. At stake are the survival of constitutional democracy and the rule of law in Poland.

On July 27, the European Commission, which has been pressing the PiS to change course for months, called on the government to remedy the situation within three months or risk facing disciplinary proceedings that could lead to sanctions. Jaroslaw Kaczynski, chair of the PiS and puppet master behind Prime Minister Beata Szydło’s government, responded that he was “amused” by Brussels’ warning. In the weeks since then, the PiS has pressed on with its attacks.

The PiS is determined to defeat the Constitutional Tribunal because it is a major impediment to Kaczynski’s plan to introduce a populist electoral autocracy in Poland along the lines of Viktor Orban’s in Hungary. When Orban became prime minister, in 2010, he had a parliamentary majority large enough to legally rewrite Hungary’s constitution to help cement his grip on power. But in Poland, where the procedures for amending the constitution are more demanding, the PiS does not have that option, and many of its initiatives—including laws designed to control the media, limit civil liberties, politicize the civil service, and attack judicial independence—risk being declared unconstitutional. As a result, the government is engaged in a blatantly illegal effort to subjugate the Constitutional Tribunal. So far, the judges have held firm, ruling unconstitutional the very laws that the government has passed to attack them, such as its December 2015 law that sought to cripple the court by changing the rules governing its operations. But the PiS is growing more crude and aggressive, and its recent threat to prosecute the Tribunal’s top judge suggests that it may take more forceful action to crush judicial independence before too long.

European leaders, meanwhile, are beset by crises—from Brexit to the refugees to continued economic weakness in the eurozone—and many may be tempted to avoid conflict with Warsaw. Yet the EU has no excuse for inaction. In the case of Hungary, EU leaders may have been caught unawares by Orban’s assaults on democracy. But Kaczynski and his PiS colleagues are hardly subtle about their intentions. Allowing them to stamp out constitutional democracy in one of Europe’s largest and most strategically important member states would mean the end of the EU’s “union of values” and would further damage its battered reputation.

LAW AND DISORDER

The roots of the current constitutional crisis lie, ironically, with the centrist Civic Platform (PO) party, which governed Poland from 2007 to 2015. In its last month in office, the outgoing
government appointed three judges to the Constitutional Tribunal to replace three who were retiring. That was perfectly legal. But the PO sought to further stack the deck by appointing replacements for two additional judges set to retire in December 2015, after the new PiS government would take office. The PiS-affiliated president, Andrzej Duda, refused to swear in any of the five judges, even after the Constitutional Tribunal ruled that only two had been nominated illegally. Instead, Duda swore in a slate of five different judges named by the new PiS-led parliament. The tribunal refused to hear cases together with the illegitimate replacement judges and a standoff with the government ensued.

Since then, the PiS has passed laws designed to curtail the tribunal’s authority and make it subservient to the current parliamentary majority. The tribunal has judged the new laws unconstitutional, but the government has in turn refused to recognize those judgments. Quite simply, the democratic constitutional order in Poland has broken down. Quite simply, the democratic constitutional order in Poland has broken down.

In January of this year, the EU intervened. For the first time ever, the European Commission announced that it would be assessing the threat to the rule of law in Poland by activating the so-called Rule of Law Framework, which had been established in March 2014 in response to the erosion of the rule of law in Hungary and the EU’s failure to confront it. Before then, the EU’s main disciplinary tool—Article Seven of the Treaty on European Union—was viewed by many as an impractical nuclear option: it allowed the EU to suspend voting rights and impose other sanctions on a member state, but only after other governments agreed unanimously that the state in question was in “serious and persistent breach” of the EU’s fundamental values. The Rule of Law Framework was conceived as a precursor to Article Seven—a means to gradually ramp up pressure on a member government.

On June 1, 2016, after months of failed negotiations, the commission finally issued a formal Rule of Law Opinion expressing concerns over the appointment of new judges, the laws passed by the government concerning the functioning of the Constitutional Tribunal, the government’s non-implementation of the tribunal’s rulings, and the effectiveness of constitutional review in the country more generally.
Andrzej Duda celebrates victory in the Polish presidential election, May 2015.

International pressure on the Polish government, including from the Obama administration, continued to mount in the run-up to the July NATO summit in Warsaw. On the eve of the summit, the Polish parliament rushed through a new law on the Constitutional Tribunal, which it claimed responded to EU and international criticism. But the European Commission made it clear that it saw these reforms as wholly inadequate, with First Vice-President Frans Timmermans declaring that “the main issues which threaten the rule of law in Poland that have not been resolved.” On July 27, the commission launched the next step in the Rule of Law Mechanism—issuing a Rule of Law Recommendation to Poland, which asked the PiS government to publish and implement recent Constitutional Tribunal rulings and assure that any further legal reforms would respect the tribunal’s judgments. The Commission warned that if Poland failed to act on these recommendations within three months, it might trigger Article Seven.
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The EU’s failure to stand up to Orban in Hungary, however, does not inspire confidence about how it will act in Poland. But the situations in the two countries differ enough that Brussels may be able to do more this time. First, whereas Orban’s Fidesz party was able to entrench its hold on power through legal constitutional amendments, PiS is blatantly violating the Polish constitution and crushing the high court that is trying to defend it. This makes it much harder for European leaders to sit back in silence.

Second, Kaczynski’s PiS has fewer friends in Brussels—and throughout Europe—than does Orban’s Fidesz. Fidesz is a member of the center-right European People’s Party (EPP) group in the European Parliament, and most EPP leaders have backed it throughout the deterioration of democracy in Hungary. The EPP has been willing to defend Orban out of partisan loyalty and because his party delivers the votes they need to dominate law-making in the parliament. The PiS, which belongs to the much smaller European Conservatives and Reformists (ECR) group, is in a considerably weaker position.

This weakness was on display recently, when members of the European Parliament (MEPs) voted overwhelmingly (513 to 142 with 30 abstentions) for a resolution calling on the Polish government to respect democratic principles and the rule of law. The PiS’ political position is further damaged by the prospect of Brexit, since the largest party in the ECR, and one of the PiS’ staunchest defenders, is the British Conservative Party.

But the Polish government still has an ace up its sleeve in Orban, who has explicitly pledged to block Article Seven sanctions against Poland. And therein lies a profound flaw in the EU’s approach to defending the rule of law and other democratic values. The threat looming behind the Rule of Law Framework is Article Seven, but the sanctions stage of Article Seven can only be triggered after there is unanimity among member governments. So long as the EU tolerates one autocrat—Orban—he can protect others of his ilk.

STANDING UP

The Polish government can count on the protection of Orban—as well as perhaps the leaders of the other Visegrad countries (Czech Republic and Slovakia)—and knows that ultimately Article Seven sanctions are unlikely to be imposed. But that is no reason not to trigger an Article Seven vote anyway. It is time for Europe’s leaders to stand up and be counted.

Although the European Parliament has adopted resolutions criticizing developments in Hungary and Poland, most national leaders in the EU have remained silent about democratic backsliding. Often, Washington has been more critical than European capitals. Angela Merkel, who has played a powerful leadership role in so many other areas, has had little to say about attacks on constitutional democracy in Hungary and Poland. But if European governments want to condone blatant attacks on the rule of law in Poland, they should be forced to go on the record with a vote.

Even a vote that fails to secure the unanimity needed for sanctions could be a galvanizing event, helping Europe’s democratic leaders remember what they and their union stand for. In the wake
of such a vote, the EPP might finally eject and denounce Fidesz, a party that has not only undermined pluralist democracy but has eagerly stoked xenophobia. Talk among members of the European Parliament of cutting off EU funding to countries that flout European values is increasing, and even the failure of a vote against the Polish government might finally push leaders to get serious about using the power of the purse to deny autocrats the EU funds they use to prop up their regimes.