



# Poland: Europe's new enfant terrible?

by Agata Gostyńska-Jakubowska

Poland's Law and Justice (PiS) party has never hidden its admiration for the Fidesz government in neighbouring Hungary. "I am convinced that one day we will have Budapest in Warsaw," said Jarosław Kaczyński, the party's leader in 2011, when PiS lost the parliamentary elections.

Today, Kaczyński can realise his dream: PiS has a parliamentary majority and it is free to copy Fidesz policies. But while Viktor Orbán, the Hungarian prime minister, managed to get away with most of his 'illiberal' reforms, the Polish authorities may not be so lucky. On January 13<sup>th</sup> the European Commission decided to assess whether the rule of law is under threat in Poland.

Neither Orbán nor Kaczyński like being criticised, whether by the media or the courts. When Orbán won the parliamentary elections in 2010, he quickly turned the public media, which were often critical of him, into a government mouthpiece. The current Polish government has also pushed through legal changes enabling it to replace the top management in public radio and TV with supporters of PiS.

When the Hungarian constitutional court questioned some of Orbán's laws, Fidesz (which until 2015 had a 'super-majority' in parliament) simply amended the Hungarian constitution. But PiS cannot do this: it lacks a constitutional majority. It can however amend laws. In December 2015 it changed the act governing the Constitutional Tribunal (Court) to make it

more difficult for the Tribunal to challenge new legislation. The new law obliges the Tribunal to rule on cases in the order it receives them, rather than deciding for itself which cases are more important and should be moved to the front of the queue. As a result, it will be some time before the Tribunal has the opportunity to assess the constitutionality of PiS measures.

The EU institutions worry that Budapest and Warsaw are deliberately trying to weaken democratic checks and balances. The European Parliament regularly summoned the Hungarian prime minister to Strasbourg to explain his 'illiberal' policies; and the Commission took Hungary to the European Court of Justice for violating EU law by, among other things, forcing the country's 274 judges to retire. The Commission did not, however, activate article 7 of the Treaty on European Union (TEU) against Hungary. This article – regarded as a 'nuclear option' – is designed to address a serious and persistent threat to democratic values in a member-state and can lead to the suspension of EU voting rights. EU leaders (minus the one concerned) must agree unanimously to impose sanctions under article 7 – something that would

be hard to achieve even if the governments of Warsaw and Budapest did not protect each other.

Rather than making a vain attempt to use article 7 against Poland, the Commission activated the 'rule of law framework' – an instrument it adopted in 2014 to fill the gap between purely diplomatic pressure, infringement procedures and article 7. The framework enables the Commission to assess 'systemic threats' to the rule of law in EU member-states which, if not addressed, could endanger the EU's democratic values. This mechanism builds on a dialogue with the member-state but the Commission may recommend changes to disputed policies. If the Commission is not satisfied with the outcome of the dialogue or the implementation of its recommendations, it can propose that article 7 be activated.

The Commission seems to be treating the Polish government more harshly than the Hungarian one. Why?

First, Orbán conducted most of his controversial reforms between 2010 and 2012 when the EU was preoccupied with the euro crisis. The Barroso Commission had little time to worry about the rule of law in Hungary. The EU still faces many crises but the new Commission is more assertive vis-à-vis member-states and sees protecting the rule of law within the EU as a higher priority than its predecessor did.

In this area, as in many others, the Juncker Commission reflects the priorities of the European Parliament. The social democrats and liberals in the Parliament have long called for tighter EU supervision of democracy in member-states. President Juncker, who needs the Parliament's support to pass his legislative programme, has asked Frans Timmermans, his first vice-president, to address their concerns.

Second, Orbán has more influential allies than Kaczyński has. Fidesz belongs to the European People's Party (EPP), the biggest political group in the European Parliament. Fourteen EU commissioners are affiliated with the EPP. Joseph Daull, the EPP president, once admitted that Orbán is the EPP's *enfant terrible*. But the EPP, which only has 30 seats more than the Socialists & Democrats in the Parliament, wants to hold onto the 12 votes of Fidesz.

Law and Justice is less lucky. It sits with the British Tories in the European Conservatives and Reformists (ECR) group, which is only the third largest group in the Parliament. PiS may have thought that an alliance with David Cameron's party would be enough to block EU

action against Warsaw. But Cameron has more important things to worry about. Although the British government views the rule of law framework as an undesirable power grab by the Commission, it is unlikely to be a vocal opponent of action against Poland. Cameron is renegotiating Britain's membership of the EU. Warsaw is his close ally but Cameron also needs the support of other member-states, including those which worry about the rule of law in Poland or Hungary; and he does not want to draw attention to the fact that the Commission has such a tool, lest eurosceptics argue that it is another reason to vote to leave the Union.

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Third, the Commission has drawn lessons from its earlier, unsuccessful attempts to use infringement procedures to address Hungary's actions. The Commission hoped that it would bring Orbán to heel by taking Hungary to the European Court of Justice. But when in 2012 the Court ruled that the early retirement of the country's 274 judges (whom Orbán replaced with party loyalists) violated EU law, Orbán compensated the judges instead of reinstating them, thus complying with the letter but not the intention of the ruling. The new mechanism is designed to make the Commission's actions more efficient.

Finally, Poland is one of the most pro-European nations in the EU. According to the latest Eurobarometer report, 55 per cent of Poles view the EU positively. This compares to 39 per cent in Hungary and an EU average of 37 per cent. The Commission may hope that while citizens of most member-states would have seen its action as an unnecessary intervention in domestic matters, Poles might react differently.

If the Commission is right, Poles will see the decision to trigger the rule of law framework as a sign that Poland is losing influence in the EU and hold it against PiS. Support for PiS would then fall, causing the government to reconsider its 'illiberal' intentions. But if the Commission is wrong, it risks antagonising one of the few member-states that still sees the EU as beneficial rather than a problem. Let's hope for the former.

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