

## Europe's Polish Question

by Riccardo Perissich

European history has on several occasions been confronted with a "Polish question". It did not always end well, especially for Poland. This time around, the issue that has placed the Polish government led by the populist Law and Justice party (PiS), the institutions of the EU and most of its member states at loggerheads is unlikely to end in bloodshed, but it nevertheless remains dangerous.

The Commission and the European Court of Justice (ECJ) have established that recent reforms to the Polish judiciary undermine the independence of the courts and the principle of a separation of powers; among them the creation of a disciplinary body under political control that can censure Polish judges. The Polish Supreme Court, conversely, has responded that such ruling is incompatible with the country's constitution. What makes the question particularly complicated is that it is tri-dimensional.

First, there is the legal dimension.

The supremacy of EU law over national law is an accepted cornerstone of the European system. Without it, the single market would be deprived of legal certitude and the EU would be just like other international organisations. This principle implies that decisions by the ECJ cannot be challenged by national courts. Does this make the issue clear? Not completely, because it does not clarify what happens if the perceived conflict is between European law and the constitution of a member state.

EU member states are, after all, sovereign nations and the constitution is their supreme law that knows no greater authority. Yet, the treaty that embodies the principle of the primacy of European law has been ratified according to each country's constitutional procedures and is therefore deemed to be compatible with their constitution. What if the institutions overstep their powers? The

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EU is not a federation with a clearly defined division of powers; the powers enjoyed by its institutions are derived from the member states. However, the only body entitled to determine if EU institutions have overstepped their powers is the ECJ.

In practice a conflict between European law and a national constitution, should it occur, would therefore inevitably take the form of a conflict between the ECJ and a national constitutional court. Some constitutional courts, in Germany, Italy, France and others, have developed a doctrine (the Italian court calls it "counterlimits") according to which, while the primacy principle is accepted, ECJ decisions can still be challenged if they are deemed to contradict a fundamental principle embodied in the national constitution.

The German Supreme Constitutional Court (Bundesverfassungsgericht, or BVerfG) has gone some way towards confrontation, but has until now refrained from open conflict with the ECJ. More generally, such a situation has been avoided with a useful degree of dialogue between the courts. More importantly, conflicts are avoided because, as liberal democracies, our constitutional orders are supposed to be based on the same principles; the same is true for the European treaty. To make the link even more powerful, the European Charter of Fundamental Rights has been embodied in the EU treaty.

The Poles maintain that they are not alone and that they are not challenging the primacy of European law, but specific actions by European institutions that

have infringed on Polish sovereignty and its constitution. Sounds familiar? Not really. First, the Polish Court does not only challenge some decisions, but states that entire articles of the European treaty are incompatible with the Polish constitution. No other national court, including the BVerfG, has dared to go that far. Secondly and to make matters worse, it has acted upon the request and with the backing of the Polish government.

By doing so, Poland has crossed a dangerous line and made a compromise more difficult. Third, what really complicates the issue is that it is not only about sovereignty, but about respect for fundamental principles of the rule of law that are supposed to be at the basis of the entire system, European as well as national.

This takes us into the second dimension, that of fundamental values.

The pragmatic and "functional" way in which the EU has developed makes values largely implicit; they are legally enforceable only insofar as they are specifically relevant for some EU policies. For instance, the right of individuals under the treaty or the misuse of European funds. The deeper issue here is that not only the present Polish government but also other governments in central and eastern Europe, deviate in their behaviour from values that most member states regard as fundamental; the legal problem is therefore compounded by a political one.

The EU is not only based on common rules, but also on mutual solidarity.

Irrespective of the legal ambiguity present in the system, it is inevitable that this obligation of solidarity is undermined if the public opinion in some member states believe that other countries deviate from these common basic values. What is a question of sovereignty for one country, in this case Poland, for others is a question of values. The issue risks becoming an existential one because the problem with fundamental values is that, unlike interests, they are not negotiable.

More importantly, the problem does not only affect one country in eastern Europe, but several, starting with Hungary. A further complication is that while the treaty provides for procedures that can be used by countries that want to leave the EU, as was the case for Brexit, it does not include any provision that would allow the expulsion of a member. Article 7 of the EU Treaty provides for the suspension of certain important rights, but requires unanimity against the guilty member; a condition impossible to fulfil in this case because Poland would be supported at least by Hungary if not by others. In other words, while the EU is largely perceived as a political entity, its fragile and incomplete legal and institutional system lacks the powers to function accordingly.

Before going further, we must consider the third dimension, which is geopolitical.

The fact that this potential conflict on values is with certain new members in central and eastern Europe is dramatically important. The eastern enlargement took place after the fall

of the Soviet Union was not only the fulfilment of the dream of a "Europe whole and free"; it had also the crucial geopolitical function to stabilise the EU's eastern frontier with Russia. A frontier that has become even more critical since Putin's Russia betrayed the expectation of becoming a western style liberal democracy; instead, Russia developed an increasingly autocratic form of government internally while pursuing aggressive nationalism externally. A nationalism whose principal motivation is to re-establish Moscow's previous sphere of influence in eastern Europe.

The question is not whether the enlargement was misguided or wrong. It was necessary and has been an economic success; in itself no small achievement. Yet, its implications were grossly underestimated. The general expectation that soviet-imposed communism was the only force that prevented these countries from joining the west and its democratic values has proven to be an oversimplification. They are all unquestionably European, but in recent centuries we have not exactly shared the same history.

While the western part of our continent turned to the high seas, to the scientific and industrial revolution and then to the troubled development of democratic freedoms, the east was torn between the Ottoman, Russian, Austrian and later German empires. Both major tragedies that nearly destroyed Europe in the last century had their roots in the "arc of instability" that runs from the Baltic to the Adriatic and most of the horrors happened there. Then there were forty years of communist rule. The countries

that emerged from it had little or no democratic traditions, nor did they have the opportunity to go through the painful self-examination on the ills of nationalism that had been undertaken in western Europe.

The concept that to share sovereignty can be a way to increase it, which is the very foundation of the EU, was not immediately evident to countries that were enjoying a newly acquired independence from oppression. This, together with the fragility of their new democratic institutions, makes them more vulnerable than their western partners to waves of populism that are the product of the multiple socio-economic and technological transformations happening all over Europe. It can be argued that we should have approached eastern enlargement with clearer eyes and analysis; even more, that the existing members should have strengthened the structures of the EU before engaging in it. However, today the question is not that one; it is what we can usefully do to deal with it.

### The case for strategic patience

Each of the three dimensions described above has generated a constituency. They do not coincide, they overlap to some extent and are moved by different priorities and constraints. The "fundamental values" one is predictably the most militant and motivates several governments, particularly in northern Europe as well as the European Parliament. It also enjoys widespread support in the public opinion at large. The difficulty is that, as we have seen, the powers to constrain deviant members are limited and there is a risk

that lack of results will turn against the credibility of the EU.

Some also fear that the populism and sovereignty of Poland, Hungary and other eastern members could fuel similar tendencies in some vulnerable countries in western Europe like France or Italy. The danger exists and French and Italian populist leaders have already expressed their support for Poland. However, the similarities are limited; western populism has its own motivations and will succeed or be defeated regardless of what happens in the east. Populism is no doubt a pan-European phenomenon, but since nationalism is its main component, it cannot become a common project other than in a negative sense. Even in the east, the much-advertised unity of the Visegrád Group is overstated. Poland, Hungary and the others are willing to show mutual support against the authority of Brussels, but have little else in common. For some like Poland defence from Russia is an overwhelming priority, others like Hungary are open to Russian influence.

The "geopolitical" constituency's main priority is the unity of the EU. Its main champion is Germany and particularly Angela Merkel. It is hard to challenge the wisdom of this position. This is an issue for which the concept of "strategic patience" is particularly well adapted. However, patience should not come at the expense of an effective strategy. The dividing line between wisdom and complacency is sometimes rather thin, as it has been the case with other instances of Merkel's cult of compromise.



Those that rightly consider Poland's behaviour unacceptable, at some point will want to see results. As a consequence, it was predictable and wise that the European Council would send the ball back to the "primacy of European law" constituency, in practice mainly to the Commission and the Court of Justice. The Commission's task is delicate. Its objective is to protect the law, which means that it could not possibly act outside it. The path is narrow, but it exists. It mainly consists in applying the "rule of law" clause introduced in the EU's big recovery programme; a clause that would allow the Commission to deny members that deviate from the rule of law access to financial support. It is a move that the Commission will have to consider with great care and always with the support of the Court of Justice.

The analysis has been enlarged from the "Polish question" to a wider eastern European one. However, in this game and particularly from a geopolitical point of view, Poland is the main prize. Even independently from the historical meaning of the Polish question for Germany and Europe as a whole, Poland is the biggest and strategically most important among the eastern members. It is not by accident that the recently published blueprint for the programme of the next German "red-yellow-green" coalition, mentions among its foreign policy priorities, together with NATO and the Franco-German axis, the much less known "Weimar triangle" that includes France, Germany and Poland. It is tempting to interpret it as a message of continuity with Merkel's cautious approach.

Some have interpreted the decision of the Polish Court as a step towards Polesxit. The similarities with the process that led to Brexit are undeniable; the core of the Brexit campaign was sovereignty and especially the rejection of the authority of the European Court of Justice. However, the big difference is that, unlike the UK, the overwhelming majority of the Polish population actively support the membership of the EU whose economic as well as political benefits are obvious to all.

Financial pressure, if applied lawfully, could be effective because support from the EU is vital for the prosperity of the country. In addition, Poland is a complex country in rapid development, but divided culturally and socially. The PiS party enjoys power at present, but the liberal pro-European opposition has won elections in the past. Nationalism is strong, but equally strong is the desire to fully share European values. The way the Polish Supreme Court framed its decision was a mistake that should have been avoided. There are signs that the PiS government is willing to compromise, including in the contentious case of the disciplinary body that would undermine the independence of Polish judges.

This would be a good step forward. However, this is not a dispute that can be settled easily or rapidly. At the end of the day, the gap that exists at present between Poland and the EU can only be filled by the Polish people. What the EU and its member states can do is to behave with patience and determination, being consistent in the policies that we implement and applying whatever lawful pressure is

deemed useful in a way that can be communicated to the pro-European Polish majority and does not play into the hands of the nationalists.

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