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The EU's role in policing the rule of law: reflections on recent Polish experience

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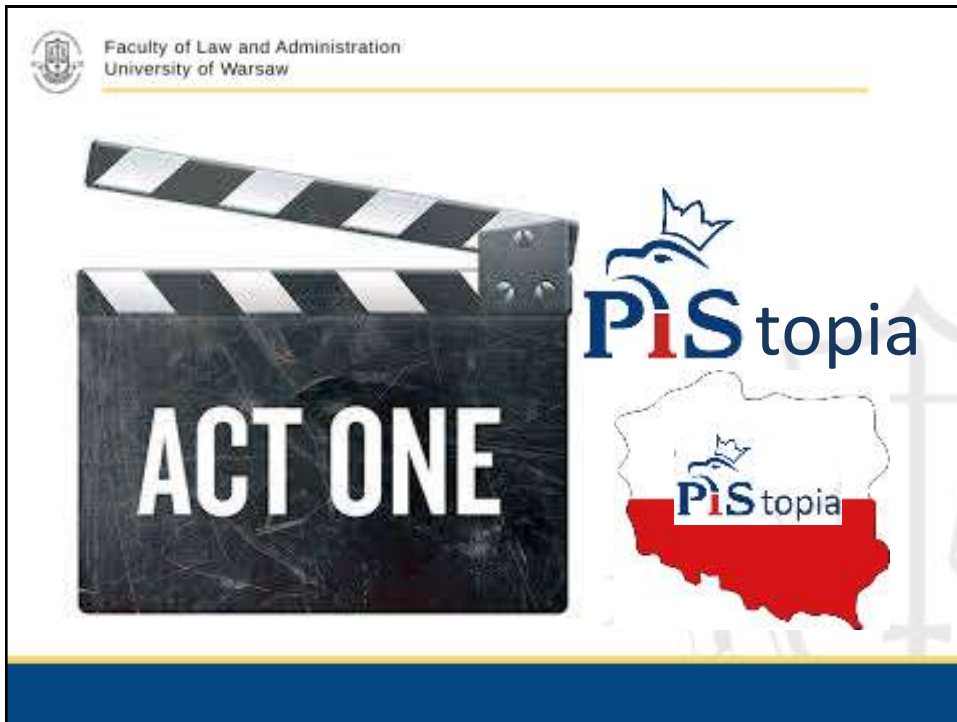


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Hitting a moving target





1. The legal and factual situation in Poland is very fluid.
2. Much has happened – this presentation is not comprehensive. Some simplification is required.
3. Much still remains unknown – the story has not finished yet.



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Polish elections 2015

 Andrzej Duda ("PiS" – "Law & Justice") wins Presidential elections with 51.5% support.

 50% of Poles *do not* vote

PiS wins Parliamentary elections with 37.6% of the vote

51% majority in Parliament (Sejm) - a majority of four MPs.

Creates Poland's first post-communist single-party government.

The slide features a blue header bar at the top with the Faculty of Law and Administration logo and name. Below the header is the title 'Polish elections 2015'. The main content includes a portrait of Andrzej Duda, the PiS logo, and several lines of text describing the election results. A faint background image of a scale of justice is visible on the right side. The slide has a blue footer bar at the bottom.



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Changes to Prosecutor General: “2 become 1”



Minister
of Justice



Minister of Justice *and*
Prosecutor General

Managerial and disciplinary powers

Can create special investigation
teams

Can prevent Constitutional Tribunal
from continuing with hearing



Prosecutor
General



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Capture of national media



Head of Polish National TV (TVP)

Jacek Kurski (former PiS Minister)




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Constitutional Tribunal Reforms




- Redu... ce.
- Appl...
- Allow...
- CT ju... resident.
- Judge... made
- [NB. Ar... by a ma...
- Plena...
- CT's docket must be organised according to the date of receipt. (i.e. no discretion to prioritise important cases).



**KEEP
CALM
AND
VACATIO
LEGIS**

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Constitutional Tribunal Judges

Pre-2015 elections	Post-2015 elections	CT decision on judges
		
<p>Appointed 5 CT judges to replace those whose mandates would expire post-election. ("October judges")</p>	<p>Replaced the 5 October judges with 5 "December judges"</p> <p>President Duda swore in all 5 "December judges".</p>	<p>2 of the "October judges" were invalidly appointed.</p> <p>President was obliged to swear in the other 3 "October judges".</p>



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Constitutional Tribunal Judgment

- **Numerous irregularities in Parliament**
e.g. introducing far-reaching amendments just prior to the vote, with no debate
e.g. failure to consult draft legislation with relevant bodies
- **Violates independence of the judiciary**
e.g. allowing MoJ/Parliament to dismiss or discipline CT judges
- **Hampers the effectiveness of the CT**
e.g. prohibiting the “admission” of cases
e.g. creating 13 judges
e.g. creating 2/3 majority requirement



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Reaction to CT judgment

Jaroslaw Kaczynski



This was not a CT “judgment”. It was merely the “opinion of some CT judges in a private meeting” and had “legal defects”.

President Duda



Accepted oaths of “December judges” hours before CT judgment.

Says CT is “full” so he cannot accept the oaths of any “October judges”.

PM Beata Szydlo



Refused to publish the CT judgment.

It would be unconstitutional to publish an unlawful “opinion”

Polish Constitution Art 190(2): Judgments of the Constitutional Tribunal... shall be required to be immediately published



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Reaction of Prosecutor General

MoJ Zbigniew Ziobro



General Supervisor of investigations into potential offences regarding the CT judgment

CT President Rzeplinski



Investigated for having exceeded the scope of his statutory powers (by refusing to allow all 5 "December judges" to sit as CT judges)

PM Beata Szydlo



Over 100 private notifications of a potential crime – non-fulfilment of statutory duties (not publishing CT judgment).

Criminal Code, Art. 231(1): Any public officer who fails to fulfil (or exceeds the scope of) their statutory obligations, commits an offence.



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Constitutional Tribunal – new President

Julia Przyłębska



One of the "December judges".

Appointed to organise the election of the new CT President [NB. This was previously done by the CT Vice-President]

Organised ballots on the election of CT President, with procedural irregularities:

- e.g. ballots held *without requisite quorum*
- e.g. combining *2 separate ballots into one vote*

She was elected CT President.

The legality of her nomination was challenged.

1 day before challenge was heard, CT declared the relevant provisions unconstitutional



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Constitutional Tribunal in chains

J.Kaczynski: "CT was a political organ which would have blocked our plans"

Constitutional review in Poland has become a fiction.



While the cat's away, the mice will play

PiS prepares and implements a wide range of legislation which raise rule-of-law concerns



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Other legislation adopted by Sejm



Reform of Common Courts

- MoJ can "retire" and "replace" any common court President or V-P. No consultations/explanations required.
- Court Presidents can "move" judges to different departments w/out their consent
- Court Presidents can influence composition of judicial panels
- MoJ decides whether a retirement-age judge may continue in office
- NB. The EU Commission noted the existence of discrimination in the statutory retirement ages of women (60) and men (65)



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Other legislation adopted by Sejm



Supreme Court

- All judges to be “retired” (unless chosen to “stay” by MoJ. No criteria exist for the MoJ decision)
- MoJ nominates Heads of Divisions (e.g. Civil, Criminal etc.)
- MoJ creates internal regulations (number of judges, competences, *discipline* etc.)
- SC will no longer be able to provide “abstract” legal opinions on legislation – opinions will only be binding in the current case (i.e. no precedent whatsoever)
- Other SC members will be chosen by **National Council of the Judiciary** (controlled by politicians)



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Other legislation adopted by Sejm



National Council of the Judiciary:

- Very important role in judicial appointments and disciplinary matters (President cannot accept a judge who was not nominated by Council).
- Intended to “guard the independence of the courts and judges” (Constitution: Art 186[1])
- 15 members of 21 members are chosen by judges (Constitution: Art 187[1]).
- Period of office is 4 years (Constitution (Art 187[3])
- **Reforms to remedy Poland’s “judicial elite” and establish “democratic control”**
 - All members to be “retired”
 - New members will be chosen by Sejm
- 2-tier structure (1. political; 2. judicial) – political tier essentially chooses judges



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Shock Presidential intervention...



1. Reform of Supreme Court
2. Reform of National College of Judiciary
3. Reform of Common Courts

Signed (entered into force 12/8/2017)

“Presidential version” of statutes 1-2 will be published on Monday 25/9/17

Ctrl+F (Find) “Minister of Justice” and Ctrl+V (Replace) “President” ???



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Meanwhile...

Sędziowie SO wrazili dezaprobatę wobec decyzji Zbigniewa Ziobry ws. odwołania wiceprezesów sądu



- MoJ dismisses 3 Vice-Presidents of Poland’s largest regional court (and the largest in the EU)



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Right to protest:

Priority given to
“cyclical” gatherings
and church
gatherings



Media (proposal):

“Repolonisation”
of media – limiting
the scope of
foreign capital in
media companies
to 15-20%.



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Don't worry – it's
shorter!



vs.





The Commission's Rule of Law Framework

legitimacy

If **Art 7** was intended to be preceded by Commission dialogue (inc. opinions and recommendations), why doesn't it say that?

Does the Commission's role as "guardian of the Treaties" role justify the creation of the Framework? (Note how *Art 258* and *Articles 121-126* are very differently worded)

Would we accept the legitimacy of other/multiple "Frameworks" created by the other potential initiators of Article 7:

(i) EP;

(ii) *one third of the Member States* (Frameworks x 3?)

Transparency concerns

*"there has been a **clear request from the public at large** for the EU, and notably for the Commission, to take action.."*



The Commission's Rule of Law Framework

Efficacy

Does the **New Framework** procedure work?

Can you really have a "constructive dialogue" with a government working towards constitutional capture?

If the Commission initiates the Framework, does this not simply delay Art 7 being initiated by the Commission (or EP or 1/3 of Member States)?

Uncertainty whether Council will support the Commission if Art 7 is launched.



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Art 7 as the solution?



Art 7(1): Is Poland likely to follow Council recommendations?

Do any *real* consequences flow from a Council decision that Poland demonstrates a “clear risk of a serious breach of [Art 2]”?

Art 7(2): Would the required *unanimity* be achieved?

Would the credibility of the EU be damaged if the Commission initiated Art 7 but it proved ineffective?

Is the “*core meaning*” of the RoL (identified by the Commission) sufficiently clear to ensure consistent application of **Art 7**? Is the “devil in the detail” problematic?



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UK as a threat to the rule of law?

- Unelected head of state. Courts have no jurisdiction over Monarch
- Judges cannot declare Parliamentary legislation unconstitutional or inapplicable. Parliament can *prevent* judges asking if legislation complies with ECHR.
- Ministers can adopt secondary legislation which changes primary legislation
- No “*right to a court*”
- No automatic “*right of appeal*”
- Over 90% of criminal cases are decided in the absence of a qualified judge
- *Until recently...*
- All judges are (in practice) appointed by the government.
- The most senior judge is also a government Minister and controls debates in Parliament.



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Conclusions

- The EU's current response to rule of law crises is ineffective.
- Alternatives responses for the future include:
 - (i) **Unilateral nuclear disarmament** (resign from **Art 7** and/or the **New Framework**); *or*
 - (ii) **Nuclear proliferation** (expand on EU's existing nuclear arsenal);
 - (iii) **Reliance upon *existing* conventional weapons** (Art 258/259);
 - (iv) **Developing *new* conventional weapons** (via legislative/judicial intervention).
 - (v) **Supporting national NGO's and civic society movements**



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The only successes so far...



December 2016
"Free media protest" prevents restrictions on media access to Sejm



March 2017
"Black Protest" prevents complete prohibition of abortion



July 2017
"Free Courts protest" supports independence of Supreme Ct

"The established elites, trying to protect their privileges"





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**KEEP
CALM
BECAUSE
THIS IS NOT
THE END**

This is
my
thank you
dance!

