

DEMOCRACY IN CENTRAL AND EASTERN EUROPE: RENEWING THE PROMISE OF DEMOCRATIC TRANSITIONS

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FOR (www.for.org.pl) is a non-profit think tank based in Poland promoting and, if necessary, defending economic freedom, rule of law, individual liberties, private property, entrepreneurial activities, and the idea of limited government. FOR was founded in 2007 by Professor Leszek Balcerowicz.

1. Assessment of democracy in Poland:

For many years Poland has been presented as a success story of peaceful economic and political transition. Thanks to the initial free market reforms and continuation of the pro-reform path we observed a rapid and stable rate of economic growth in Poland which led to the highest increase of GDP per capita in the region. Ukraine had a slightly higher GDP per capita in 1990 than Poland but we see today how the lack of successful economic and political transition has led to a huge divergence between these two countries.

During this period, different political parties from left-wing social democrats to right-wing conservatives were present in the governments with a rather smooth and peaceful transition of power following elections. There were no significant legislative attacks on the foundations of the 1997 Polish Constitution by the mainstream political parties either. **And overall, institutional framework has significantly improved thanks to domestic efforts and external incentives such as EU and NATO admissions.** As I will later focus mostly on rule of law and the judiciary it is important to emphasize that independence of judges from politics was also an important institutional improvement achieved after the fall of communism.

Past progress is not a guarantee of future success. From history we know many examples of institutional reversals or bad transitions: from democracy, rule of law, and economic freedom, to the importance of entrepreneurial activity, and the quality of other institutions.

Democracies can be taken advantage of by undemocratic leadership. A. Lukashenko, V. Putin, R. Erdogan as well as a few Latin American leaders all won democratic elections and later weakened democratic systems or abolished democracy completely. V. Orban in Hungary won constitutional majority and used his powers to limit political competition through changes in the electoral system, media, and rule of law. Moreover, Orban famously announced the formation of “illiberal democracy” in Hungary in 2014. Jaroslaw Kaczynski, the leader of the ruling Law and Justice party in Poland, stated already in 2011 the following: *“I am deeply convinced that the day of success will come and we will have Budapest in Warsaw.”* We now observe many similarities between policies in Hungary and Poland, **though the Polish government does not have a constitutional majority.** Nevertheless, the government seems to act as if it does.

There is no doubt that the ruling Law and Justice party won democratic elections (after a very populist electoral campaign) and Poland is still a democracy, despite the harsh rhetoric we often hear

these days. Personally, I think it should be reserved for more difficult times – which will hopefully never come – as exaggerations can sometimes backfire. **However, instead of strengthening democracy, including rule of law, the governing party is pushing Poland in the opposite direction.**

On Monday, President of Poland Andrzej Duda stepped in to announce that he plans to **veto two out of three controversial legal acts in the area of the justice system** which will slow down this process. Nevertheless, most of the challenges mentioned in the Declaration asserting the crucial role of democratic values and free market principles prepared by CIPE and its regional partners are currently very present in Poland.

Many people in Poland now believe that winning elections and having a majority (37% of the vote in case of Poland) means that the winner can do anything. The ruling party's promises and slogans have certainly fed this belief. As a consequence, there is a lack of commitment to checks and balances and separation of powers as well as less respect for minority rights among significant part of the society. This is not a healthy democracy and there may be some serious long-term consequences to the current state of affairs as a result. Fortunately, recent protests that led to the presidential vetoes show that there is also part of the society committed to democratic values and it should grow in the future. Hopefully, recent events in Poland will strengthening the latter.

2. Stating the problems/democratic challenges – future of rule of law as a key challenge in Poland:

The ruling Law and Justice party has not yet addressed many of the country's challenges, including many key economic concerns. Quite to the contrary, they have actually made some of these concerns even worse, for example through expanding unsustainable welfare spending and decreasing the retirement age despite Poland's rapidly ageing population. While major concerns, **what is now a key challenge in Poland is the future of the rule of law.**

As the US Department of State asserted in their most recent press statement "*the Polish government has continued to pursue legislation that appears to undermine judicial independence and weaken the rule of law in Poland*". We have observed that the following acts contributed to this process the most:

- **Constitutional Tribunal:** The ruling party nominated some judges in an unconstitutional way and took political control over the Tribunal. This poses a risk for the implementation of other unconstitutional legislation supported by the Law and Justice Party in the future.
- **Law on organization of courts:** The law would empower the Minister of Justice (who is at the same time the Prosecutor General) to dismiss all heads of courts in an arbitrary way within six months of its adoption and appoint their successors without binding consultation with the National Council of Judiciary as required in the past.
- The ruling party supported two other legal acts that were a major threat to independence of judiciary and the rule of law: on the National Council of Judiciary and on the Supreme Court. **These two controversial laws stimulated protests in Poland and prompted international reaction which have pushed the President to announce his plan to veto them.**
- Professor Marcin Matczak, University of Warsaw warned, before presidential vetoes, "*If the mechanism to use the Constitutional Tribunal as a tool in the political battle is repeated in the case of the Supreme Court and common courts, the outlook will be bleak for justice in Poland.*"

- **Rapid legislative process:** Much of this recent legislation has been passed in a very rapid manner, without any public consultation or debate with citizens, experts or NGOs. The government has thus violated various provisions to safeguard the quality of the legislative process in Poland.

Summing up, the model of the judiciary proposed by the ruling party resembles the model known from the past when the communist party of Poland controlled all the legislative, executive, and judiciary powers. In his recent speech in Warsaw, even the President of the United States said: “*As long as we know our history, we will know how to build our future*”. We in Poland know where this model of concentration of power lacking any checks and balances led the Polish society and economy. It is why more and more Poles have been in the streets demanding that President Andrzej Duda vetoes the most recent judiciary reform. Two out of three vetoes were good decision by the President and a major success of this part of the Polish civil society committed to democratic values.

What else?

- **Media:** The government is already debating the limitation of foreign ownership in the media sector – which carries a risk of nationalization and greater political control over some media outlets (after taking control of public media right after the latest elections).
- **NGOs:** Parliament is discussing the law on the “National Center for Civil Society Development” – which carries the risk of directing state funds to “friendly NGOs” and cutting access to grants for NGOs critical of the government. There is also a risk of possible adoption of Hungarian or Russian style of foreign agent laws on NGOs.
- **Economy:** Without a functioning Constitutional Tribunal and independent judiciary (prosecution is already under direct control of Justice Minister) there are risks to long-term investments and also business owners’ freedom to disagree with the government.
- **Justice system:** President Andrzej Duda announced his administration will work on the reform.

3. Solutions:

Short-term:

- Fact-checking and watchdog activities by NGOs, media, and civil society using **efficient communication tools**. There are many who know what is wrong or what is false but they need to improve their communication to reach wider audiences.
- **More dialogue and better cooperation** of civil society, NGOs, business-support organizations and political parties – with NGOs and civil society acting as mediators.
- **Increased engagement of the business community** – business should not only support NGOs with resources but also speak up about the future of democracy in Poland.

Long-term:

- **Offer alternative proposals for justice reform** – improving what does not work (e.g. lengthy proceedings, excessive formalism) while strengthening the system’s independence. The latest reforms however need to be reversed first. This may require another constitutional reform for which a constitutional majority would need to be secured.

- As the President of Poland announced his administration would work on the justice system reform after recent vetoes it is essential to **monitor this work and provide high quality feedback**.
- **Improving the quality of the legislative process** to ensure genuine inclusive public debate and expert assessment of proposed laws.
- **Education focused more on civic engagement and economic literacy**, e.g. practical lessons of democracy that delivers, including in economic terms.

4. Conclusions:

Polish civil society is a key player in advancing democracy in Poland. The European Union and our other Western partners should not be expected to solve our problems. That, however, does not mean that they should remain silent or turn a blind eye to what's happening in the country right now. Quite to the contrary. All friends of Poland can certainly help by sharing their knowledge, expertise and resources as well as by providing moral support to those committed democrats in Poland who found courage to seize the opportunity that the present crisis provides. I therefore particularly appreciate the role of CIPE in this regard, supporting their local partners, drafting the Declaration of renewed commitment to democratic values in the CEE countries and hosting us in the US on the occasion of this briefing.

Last but not least, it needs to be reiterated that democracy and economic prosperity in Poland and other CEE countries are essential to the mutually beneficial transatlantic partnership. Additionally, Poland has a historic potential to be an inspiration for societies east of Vienna (e.g. Belarus, Ukraine, and Russia) and the Balkans looking for higher quality of life and greater individual freedom. The strength of Polish democracy should continue to serve as an example for the regions. To preserve the foundations of international stability, it is therefore our joint responsibility to act whenever democracy is in jeopardy.

5. Additional information in English:

Two laws vetoed by the President of Poland:

- **Law on the National Council of Judiciary:** This Council appoints and promotes judges and was previously appointed by the Judiciary. The new law would end the terms of a majority of its members. The parliament would now have the power to directly appoint the members and politicians would have a much stronger voice in the Council contrary to the expert opinion of the Council of Europe, according to which: *"These institutions are often composed of a majority of members of the judiciary which is an essential guarantee of their independence"*. By the introduction of this new law, the ruling party would create tools to weaken this independence through political appointments.
- **Law on the Supreme Court:** It would enable all the judges to retire, except those accepted by the current government and would change the organizational structure of the Court.

Recommended additional reading materials:

- Marek Tatala – Which of Orban’s policies in Hungary are inspiring Kaczynski in Poland?, <http://www.epicenternetwork.eu/blog/which-of-orbans-policies-in-hungary-are-inspiring-kaczynski-in-poland/>
- Marcin Matczak, Professor of Law from University of Warsaw – Who’s next? On the Future of the Rule of Law in Poland, and why President Duda will not save it, <http://verfassungsblog.de/whos-next-on-the-future-of-the-rule-of-law-in-poland-and-why-president-duda-will-not-save-it/>
- Dalibor Rohac, American Enterprise Institute – What just happened in Poland?, <http://www.aei.org/publication/what-did-just-happen-in-poland/>
- US Department of State – Poland: Independence of the Judiciary, <https://www.state.gov/r/pa/prs/ps/2017/07/272791.htm>