

Polexit. Myth and Reality

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Busy with everyday life, we often lose sight of the processes that take place around us, which can remain unnoticed and incomprehensible.¹ The events of “here and now” absorb our attention, which rarely goes beyond superficial interest and is limited to reading newspaper headlines. We live from news to news, losing the essence and meaning of the problem along the way, often without even reflecting on it. A single element obscures the whole. Focused on the *boat*, we forget about the *journey* and its destination. Meanwhile, only by combining dispersed elements can we understand the reality that surrounds us and the changes it is undergoing. Viewing the situation in Poland through the prism of in-

¹ I develop the themes and arguments presented here [*Filozofia*; “Unijny etos”]. The analysis below is based on the detailed considerations contained in these two studies, to which I refer. Acronyms: CMLR – Common Market Law Review; CJEU – Court of Justice of the European Union. Other acronyms are explained in the text or are commonly known.

dividual events is also the main reason (though not the only one) for the limited effectiveness of the European Commission² trying to enforce Poland's compliance with the European standards of the rule of law. The common denominator that escapes our attention is the collective term "unconstitutional capture of the state and its institutions." What has happened with the Constitutional Court, common courts, the National Council of the Judiciary, and the Supreme Court are only elements of this methodical capture of the state.³

Importantly, a "capture" is a process, not just a point in time and space. It has its deep roots in the crisis of the liberal narrative in the former states of the Eastern bloc [Burgaric 219], but not only.⁴ Liberalism and democracy – understood as something more than "statistical democracy," that is, the rule of the majority – cease to be those values that are treated as axioms of the legal systems of the EU member states. As a result of a capture, the principles of the rule of law, the separation of powers, the independence of the judiciary, the supremacy of the Constitution, the central place of the constitutional court that effectively controls the ruling majority are undermined.⁵ The "capture" stands for a gradual weakening of the guarantees that comprise the separation of

2 It took the Commission several years to finally start using the treaty's instruments to enforce the rule of law from Poland. Among the many critical analyses, see in particular [Scheppele, Pech 3] and the analyses of these authors published on *Verfassungsblog on Matters Constitutional*, <https://verfassungsblog.de/>.

3 See ["The Existential Jurisprudence"; "On the Rule of Law Turn on Kirchberg, Part I-II"; "The Politics of Resentment"; "Understanding"; "The Politics of Resentment"].

4 On these processes from a global perspective, see [Landau 189; Varol 1673; Tushnet 391; Sunstein; Huq and Ginsburg].

5 On "constitutional capture," see [Müller]. The author defines this concept as follows: "constitutional capture aims at systematically weakening checks and balances and, in the extreme case, making genuine changes in power exceedingly difficult."

power and moving away from the basic principle of the dispersion of powers between different institutions (to exclude the concentration of power in one center) towards mono-institutions that guard one official narrative, can do anything, and are not kept in check in any way. Such a capture undermines the basic assumption of the liberal state that there is not – and cannot be – one omnipotent institution. In a state of liberal democracy, each institution should be limited by law, and it can do only as much as it is allowed by the applicable law. Institutions must accept and bear the supervision exercised by other institutions operating within the legal system. In a democracy, it is the law that is sovereign.

Analyzing the processes accompanying the decay of democratic systems, the famous Spanish political scientist Juan Linz put forward the thesis that democracy is a consolidated system only when it can be said that it becomes “the only game in town”⁶ [Linz; Linz, Stefan 15–16]. For this, conditions must be met on three levels: behavioral – when all political actors accept the legitimacy of the system within which they operate; attitudes – when citizens identify with the existing constitutional order, and constitutional – when all actors of the political scene accept that any change in the existing legal status must take place within the framework of procedures and the binding constitutional order. From this perspective, when we talk about the values that unite us, we must remember that Polish liberal democracy after 1989 was never a consolidated democracy. If we talk about values and try to answer the question

6 For today's topology of these categories, see [Levitsky and Ziblatt].

of how to rebuild the rule of law, there are two possible perspectives. The first is the institutional perspective, the second is the civic perspective. How to translate text into context? How can you explain to citizens that the Constitution is more than a document comprised of dry text, but is also there to protect them? I call it the “Constitutional path” and it means moving from text to context.

It seems that in Poland, we forget how our internal dispute over basic values, disregard of the context, and ignorance of how the mechanisms of a democratic state ruled by law all translate into the situation in Europe. Few people remember that in the Treaty of Paris of 1951, the Community was based on one fundamental assumption: we unite because we assume that there are common and basic values, constitutional essentials that, despite our differences, make us want to live together. These common values were not about a text, but were rooted in a standard resulting, in turn, from the legal culture built up over generations.

Now Poland (and earlier Hungary) proposes a new understanding of the decision on integration: we, Europeans, differ in terms of our understanding of the constitutional essentials, because the rule of law in Poland means something different than elsewhere and there is no consensus in this regard at the level of a common understanding of, for example, the elements of judicial independence. The juxtaposition of values stabilized at the level of the European Union member states with our textual understanding of the community and values that comprise this community

leads to an inevitable collision. Why, however, after 2015, did the European Union act somewhat anemically in the case of Poland? The European Union was surprised by the constitutional crisis and the dispute over values because it had been founded on the premise that the community of states would be a celebration of liberal democracy.

The establishment of the first Community was accompanied by the presumption that none of the states would question its foundations and the common system of values that determined the shape of the post-war European consensus. The Communities were conceived as a celebration and triumph of liberal democracy. Today, however, we can see that the assumptions of this post-war constitutional order do not work in reality. We are dealing with a “constitutional design in error.”⁷ What is this error in the constitutional foundation of the European Union? The community cannot protect itself, the integrity of the EU legal order, and the citizens of the member states from their own states, because in 1951 no one predicted that the liberal foundations of the post-war European order would be called into question. Today, Hungary and Poland put this danger on the agenda. This, in turn, poses a new difficult question: how to rethink the assumption about common values in a situation where there are member states that, firstly, do not understand common values on the level of context, and secondly, propose their own vision of functioning in the community?

7 See [“The Democratic Backsliding”].

Joining the European Union in 2004 was just a moment in time. The accession to the Union, however, raised a question (which at that time was ignored): how to function in a community and how to navigate integration, which is a process? How to operationalize our participation by building standards? Here we suffer spectacular failures. In a sense, the basic paradigm of 1989 is broken – that we shall not turn back from liberalization and democratic changes. In 2015, this paradigm was undermined as the transition from one stage to another was reversed. We go back to square one and try to redefine our values. The biggest challenge is: how to build a constitutional context around common values, knowing that a large part of Polish society does not understand what provisions are contained in the Constitution? But building a constitutional context is a task that goes beyond and is much more difficult than adding new institutions and creating procedures. We cannot continue to focus only on the institutional aspect of Polish democratic consolidation, because we will make the same mistake we made in 1989. In 2020, we must be aware that Poland's membership in the Union entails also an obligation towards the community that Poland is co-creating. The jurisprudence of the Court of Justice on the so-called reforms of the justice system in Poland⁸ is a response to the first steps towards the so-called Polexit, that is, withdrawing Poland from the Union [“W Puszczy”]. Attacking the preliminary ruling procedure, which is a cornerstone

8 On the rejection of the authority of the CJEU by PiS and the response of the EU court to the “politics of resentment” in the form of “existential jurisprudence,” see [“The Politics of Resentment”; “Editorial Comments. About Brexit”; “Editorial Comments. 2019”; Pech and Platon; Rosas].

of European integration, and instituting disciplinary proceedings against the judges who apply European law, feigned gestures supposedly inhibiting the takeover of the Supreme Court, rejecting the Court's judgment of 19 November 2019, and now challenging the provisional decision of April 9, 2020, issued in the case of the Disciplinary Chamber – this is, unfortunately, already *Polexit*. In doing so, Poland puts itself outside the community and loses what remains of its “legal credibility.”⁹ There is one place for a state that wants to play only for itself and emphasizes its uniqueness against others: outside the community.

However, *Polexit* goes beyond that [“*POLEXIT*”].

Attacks on the CJEU not only marginalize Poland within the community and ultimately push it out of the EU, but also transform a Polish citizen back into a servant of the state and a second-class European citizen, deprived of the protection offered to citizens in other countries by European law and the court. It is a return to a world in which Kowalski has no chance – he is to shine with the reflected light of the state and obey its will. The citizen is supposed to live in the shadow of “a constitution of fear” [“*A Constitution of Fear*”].

Here we come to the point: what is the spirit of European law? Is it just a slick-sounding metaphor? Thanks to European law and the jurisdiction of the Court of Justice, a citizen lives “at the edge of systems” and no longer belongs exclusively to the territory delimited by the borders of “his/

9 See [Barcz].

her” state. Citizens get to make their own choices and decide where they want to work or buy a car. European law has survived for more than half a century precisely because it has been applied to individual citizens’ cases in the local courts of the member states. The spirit of integration, therefore, consists in liberating the citizen from the corset of the all-powerful state in whose shadow the citizen has lived so far, and in the strict observance of the judgments issued.

The contradiction between the European vision and ideal, and the doctrine that PiS (Law and Justice Party) lives and breathes, is therefore fundamental. While, according to PiS, the citizen is to live in the shadow of the “constitution of fear,” which allows the state to interfere with his or her rights and life unlimitedly, post-war Europe promotes a constitutional culture of restraint and moderation. While the “PiS state” strives at all costs to squeeze the citizen into the state framework, the Union frees us from this framework and opens up new opportunities. While European law gives one a chance to win with the powerful state (recovery of the excise tax by Polish importers of used cars is one of many examples), in the dispute between the “PiS state” and the citizen, the former would like to see its EU obligations as a worthless piece of paper. For PiS, a good citizen is a controlled citizen, convinced that the state’s decisions are always good for him or her and meekly accepting them.

The events of recent years, together with the latest announcements of retaliation (whatever they mean) against the EU court in the near future as part of the already open

conflict of the Minister of Justice with the Court of Justice, fully justify posing the following dramatic question: *Quo vadis Polonia?* What about your willingness to respect commitments, judgments, and procedures you entered into voluntarily?

Citizens who care about Europe and Poland in Europe cannot agree to the rejection of the fundamental core of the integration and European law. The legalistic autocrats¹⁰ of the PiS government, backed by the “authority” of the unlawful Constitutional Tribunal, show us how the taken-over state works. Today we can no longer deny that a spectacle is taking place in front of our eyes, in which everyone plays their role on the board of the political game called “How to manipulate law and institutions?” and “How to destroy law and institutions when they resist?”. It is scary to think what will happen when citizens buy (or have they already bought?) this politically filtered show.

This performance unfolds to the accompaniment of sovereign war rhetoric, and the soloists are representatives of the government, outdoing themselves in ignorance, judicial brawling, and tearful martyrdom scenes in the hope that their electorate will notice and appreciate it. This is a spectacle in which a pseudo-constitutional court speaks about the compliance of the preliminary ruling procedure with the Polish Constitution and adjudicating, creates the appearance of legality; meanwhile, the parliament continues legislative efforts

¹⁰ *Autocratic Legalism* [Scheppelle 545].

to take over the remnants of an independent judiciary and render the Polish courts asking questions to the Tribunal as pointless. From a tragicomedy, this performance turns into a drama of the rule of law and European liberal democracy, when the Deputy Minister of Justice fights against rebellious judges using an internet-media campaign.

On the ruins of the rule of law and, unfortunately, already heading towards the impending disaster of Polexit, it is the citizens who must ask about the far-reaching European consequences (for themselves) of PiS's paranoid policy, where everyone is our enemy plotting to hurt Poland – the chosen one among nations, a state that questions the foundations of the Union, rejects the authority of the courts and judicial decisions. Citizens must understand that electing a party that rejects the separation of powers and tolerance for others; that promotes chauvinism and divisions while elevating distrust, pettiness, and the desire for revenge to the rank of political “virtues” comes at a cost that will one day have to be paid. The Union does not impose anything on us. Being in a community means that its members voluntarily accept certain rules of conduct that bind everyone as a condition of living together. Diversity (the perspective of states – the members of the community) is constantly seeking compromise with the pursuit of uniformity (the perspective of the Union). Integration is a process, not a zero-sum game according to the antagonizing logic of “us – good vs. them – bad,” “sovereign states vs. a non-sovereign Union.”

When you become part of a community, benefits go hand in hand with responsibilities. If you do not respect the latter, the rest of the community may one day decide that they no longer want to play for the same team with you. At this point, you are relieved of your duties, but at the same time, you lose the benefits that the community guaranteed. The EU only enforces the terms of the contract we signed in 2004. The element of entrusting the courts as independent and impartial arbitrators to settle conflicts that the states would not be able to resolve among themselves has been, from the very beginning, the foundation of the EU contract.¹¹ The place of the Court of Justice in the EU legal system has been designed so that states would have a very limited possibility of interfering with its jurisprudence.¹² In the Union, all members follow the law equally and unconditionally, not only when they are comfortable with it, and as long as others follow it too. There is a peculiar egalitarianism in the courtroom: powerful Germany has one vote, just like little Luxembourg. In the courtroom, there is a language of rules and regulations, to which ad hoc politics yields – it is civilized and curbed by them. If you want to win, you have to convince others by the strength of your arguments, not the size of your jar. The latter may appeal to voters' emotions, but in the courtroom, it is laughable and discrediting. PiS is afraid of the Court of Justice because in the courtroom, it has to speak to it in the language of the court and follow the logic of the courtroom. Ultimately, it is the authority

11 Extensively discussed in [*Filozofia*].

12 The literature in this regard is enormous. From classical analyzes, see [Burley and Mattli]. From recent works, see [Sindbjerg Martinsen].

and force of arguments that prevail, and not arguments of force. When a state fails to fulfill its obligations, the others cannot unilaterally close their borders and block citizens or goods of the former. Instead, they must take the matter to a court of law, wait for a decision, and strictly comply with it, regardless of its content. This is because by joining the Union, the states concluded a contract with each other, one of the key points of which was to respect the competences of the Court of Justice, its jurisdiction, and the obligation to comply with any decision issued by the so-recognized court. For the obligation to be credible from the outset, it had to be respected not only *ex post* (when the judgment was delivered) but also *ex ante* (when the case is still pending). Only then do the common market and the political community make sense. The case-law of the Court must be read as constant exposure of the consequences of the Union's status as a community (union) based on the rule of law. Whenever the rule of law has been threatened, the Court, based on its role as a guardian of the treaties, has always been ready to make the necessary intervention.

In 2020, the Polish *raison d'état* needs a civic narrative, reflection, and a dispute over the future shape of Europe, in place of the current yammer and sewing lies that poison hearts and souls. It was Polish citizens who voted for accession. It is highly probable that the same citizens will soon have to vote in favor of our staying in the Union, given the unprecedented step and the “pseudo-constitutional court” undermining one of the cornerstones of

European integration in the form of the preliminary ruling procedure or the intimidation of judges who apply European law.

Who would have thought that sixteen years after Poland's accession to the EU, it would be necessary to remind us about the foundations of the EU legal order, to which we have committed ourselves voluntarily, and that such a discussion would take on existential importance in the face of impending Polesxit. When we reject the above-indicated foundations and the specific context in which the EU court functions, Polesxit ceases to be just a rhetorical figure... Today we live not only in a state devoid of any checks and balances. We live in a state in which the authorities can do virtually anything, all this in times of an epidemiological catastrophe, which is used as a "convenient" excuse to further consolidate power and curtail civil rights.¹³ The efforts of the last five years to take over independent institutions are falling in a ghastly logical whole at the worst possible moment for both Europe¹⁴ and our civic rights and liberties. While the financial crisis and Brexit are undoubtedly events that make us reflect on the future of the European Union and the optimal model of European integration, the crisis of values in the form of one member state of the EU undermining liberal democracy, the rule of law, and the rights of minorities as well as attacks on independent courts, strike at the

13 About this aspect of COVID-19 see the extensive and comprehensive study at <https://www.democratic-decay.org/covid-dem>.

14 See [Sanchez].

very axiological foundations of the Union and question its continuity.

Therefore, reminding us about the foundations becomes a key factor. We cannot take Poland's membership in the Union for granted and treat it as an element of our everyday life. The EU citizens' freedom to travel, work, shop in Berlin, holiday in Greece were not given to us once and for all just because Poland is the chosen nation that always deserves something. Have we forgotten that a border separated us from Europe only sixteen years ago and a passport was necessary for traveling? When we give up on the community and violate the obligations that define our commitment to the community, we must also be ready to give up the normative opening and all the opportunities and subjective rights that come with belonging to a community of law and common values. Reminding about it should be a civic response to the hateful poisoning of the hearts and souls of Poles by the narrative (laced with ignorance) of an evil Europe plotting against Poland, not appreciating our individuality, going after our sovereignty, *et cetera*. It is necessary to go beyond the micro-perspective dominating in Poland, determined by disputes "here and now," in favor of macro-reflections: "what is next?". The fundamental question is how this "here and now" will affect our lives and change it in the future.

Thinking and talking about Europe in terms of community and values that bind European states and nations

is of particular importance in Poland in A.D. 2020. The “Polish constitutional tragedy” of the last four years must be a constant warning against the civil *non possumus* and the disastrous consequences of turning away from Europe. Let us think about Europe, let us vote for Europe (and Poland in it), and let us understand the far-reaching and disastrous consequences of the current Polish politics.

When law and institutions begin to serve ruthless politics, instead of civilizing and constraining it, one of the foundations of the post-war European order is destroyed: the belief that any political power must be limited and controlled by institutions independent of it, above all, the courts. So, let us be aware of what is at stake in the uncompromising political game:¹⁵ our continuing stay in the European legal community, whose rules and principles we accepted voluntarily in 2004 and which had been the dream and aspiration of entire generations of Poles after 1945, or... a definitive Polesxit.

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¹⁵ Recent attempts to penalize Polish courts for the application of European law are only further evidence of the progressive radicalization of the process of taking over the independent judiciary in Poland. See [Strzembosz and Koncewicz; “Czy Polska jest gotowa?]. The situation is dynamic and, unfortunately, it changes for the worse almost daily.

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