

Contemporary
Issues

Poland's Constitutional Crisis: Facts and interpretations

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Policy Brief

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Executive Summary

This policy brief presents the crucial events of 'the Polish constitutional crisis', and what has been widely described as a backsliding on the part of Poland into authoritarianism.

It attempts to explain the nature and possible causes of the crisis, offering three explanations: (1) historical, originating from the smooth, non-punitive nature of the post-Communist transition; (2) legal, relating to the excessive formalism of Polish legal culture; and (3) sociological, as a crisis of liberalism and of political identification among the youth and across society at large.



Poland's Constitutional Crisis:

Facts and interpretations

Introduction

The Polish constitutional crisis began in November 2015, just after Poland's governing party Prawo i Sprawiedliwość (which translates as Law and Justice and is commonly abbreviated to PiS) won the country's parliamentary elections, and is characterized by two principal phases. The first stage consisted in cancelling the earlier appointment of five Constitutional Tribunal judges and packing the Constitutional Tribunal with new judges, as well as in a series of attempts to commandeer the Constitutional Tribunal by enacting six bills intended to paralyse its operations. This first stage ended in December 2016, when the new head of the Constitutional Tribunal was appointed by the President of the Republic.

The second stage of the crisis started at the beginning of 2017 and consisted in the political takeover of the National Council of the Judiciary, a constitutional body responsible for protecting the independence of judges, and for their appointment and promotion, as well as in commandeering the Supreme Court.

Stage I: Legislative offensive against the Constitutional Tribunal

The first crucial event of the Crisis came when the newly elected Parliament, in which PiS gained a majority, cancelled the appointment of the five Constitutional Tribunal judges made by the previous Parliament. Just after this, the new Parliament appointed five new Constitutional Tribunal judges. In fact, the previous Parliament had overstepped its constitutional rights, as it only had the right to appoint three, not five judges to the Constitutional Tribunal. However, the new Parliament's response was both premature and disproportionate, and constituted a clear example of court-packing. The

response was premature because a constitutional review of the previous appointments was already underway, and it was disproportionate because three out of five of the previous appointments were absolutely compliant with the Polish Constitution.

Some of the events that took place at the beginning of December 2015 would not seem out of place in a political thriller. In a late-night sitting just before the Constitutional Tribunal was to assess the constitutionality of the appointments, the lower House of Parliament (the Sejm) cancelled the appointments of the judges elected by the previous Parliament and appointed five new ones. The newly appointed judges rushed to the presidential palace to be sworn in by the President later that night, and then rushed from the palace to the Constitutional Tribunal building to take on their duties. The newly appointed judges were accompanied by the agents of the Government Protection Bureau into the Constitutional Tribunal building and given office space, despite the doubts concerning the legality of their appointments.

The following day, the Constitutional Tribunal issued its awaited verdict confirming that three out of the five previous appointments were entirely constitutional. It was against such a verdict that the Parliament had taken such extraordinary eleventh-hour measures. Despite the positive verdict, the President refused to swear in the previously appointed judges on the grounds that all fifteen places in the Constitutional Tribunal were now already occupied, thanks to the late-night appointments. This resulted in a legal limbo: three legally appointed judges could not take their places in the Constitutional Tribunal, and meanwhile the President of the Constitutional Tribunal, Andrzej Rzepliński, did not assign cases to the three pseudo-judges with whom PiS had packed the court.

The months that followed were marked by a permanent conflict between the Parliament and the PiS government on the one side and the Constitutional Tribunal on the other. The government refused to publish the critical Constitutional Tribunal verdict and neglected others. They also made six attempts to paralyse the operation of the Constitutional Tribunal by legislative enactments.

The key moment of the Crisis took place in March 2016, when the Constitutional Tribunal heard the case concerning the constitutional review of the PiS government's amendment to the Constitutional Tribunal law. The Constitutional Tribunal operated without the three pseudo-judges in the panel and refused to base their operations on the procedure stipulated by the new law while assessing it. Instead, the Constitutional Tribunal based its proceedings directly on the Polish Constitution. The Constitutional Tribunal's objective was to avoid a Catch-22 situation: if it were to base its proceedings on the new rules and then find them unconstitutional, the legal validity of that very verdict would be undermined.

The Constitutional Tribunal's verdict was to strike down the amendments proposed by the government. However, its decision not to apply the new law when simultaneously assessing it provided the Prime Minister, who claimed that the verdict was procedurally flawed, with a justification for not publishing it. This claim was made with little regard for the fact that the verdicts of the Polish Constitutional Tribunal are final and irreversible by any authority, including a hostile head of government.

Andrzej Rzepliński, the Head of the Polish Constitutional Tribunal, played a crucial role during this first year of the crisis. Not only did he bar the pseudo-judges from sitting on the Constitutional Tribunal panels, he also strongly criticized the PiS government for undermining the rule of law. Rzepliński's term of office ended in December 2016, and with it ended the first stage of the Crisis.

Stage II: Assault on the independence of the judiciary

The next stage of the Crisis, comprising the commandeering of the National Council of the

Judiciary and the Supreme Court, began in January 2017. After Rzepliński's retirement, the Constitutional Tribunal was fully taken over by PiS with their appointment of a new head, Julia Przylebska, and deputy head, who was one of the pseudo-judges. This raised significant constitutional doubts, not least because Rzepliński's Deputy, Judge Biernat, should have replaced him after his retirement.

Predictably, the first decision of the new head of the Constitutional Tribunal was to allow the three pseudo-judges to sit on its panels. Somewhat less predictably, several weeks later, the new head suspended three judges appointed in 2010 in response to the Minister of Justice questioning the legality of their appointment. In a further move to clear the decks, Ms Przylebska forced Judge Biernat to take leave from his duties.

The result of these three actions was that the Constitutional Tribunal operated with eleven judges, six of whom were appointed by the PiS government. Such a configuration allowed for the setting up of new panels or changing the previously set panels (the latter with no legal basis) in a way which ensured a majority of the judges elected by PiS on each one.

The commandeering of the Constitutional Tribunal allowed the PiS government not only to remove an obstacle to promoting their often-unconstitutional policies but to actively use the Constitutional Tribunal for political ends. A particularly shocking example of this – and the next step in undermining the rule of law — took place on 20 June 2017, when the Tribunal heard a case concerning the election of the National Council of the Judiciary of Poland. This constitutionally enshrined body is responsible for preserving the autonomy of Poland's courts and the independence of its judiciary; its main power is to appoint new judges and make decisions regarding the promotion of currently serving ones.

The Constitutional Tribunal decided that certain provisions of the Act governing the National Council of the Judiciary were unconstitutional. By doing so, the Tribunal conceded to the motion of the Minister of Justice, who had questioned those provisions in the course of work on reform of the Council. The motion to the Constitutional Tribunal was a smokescreen to confuse the public and allow the

government to take control of the courts at a lower political cost. And so, with the help of the recently subjugated Constitutional Tribunal, the Minister received a *carte blanche* to demolish the body constitutionally responsible for the protection of an independent judiciary.

As a consequence of the Tribunal's verdict, the Parliament was able to pass a bill which gave politicians full control over the appointment and promotion of judges. Parliament also passed a bill of amendment to the Courts Act which gave the Minister of Justice huge influence over the presidents heading the work of the courts.

As if this were not enough, soon another bill on the judiciary was passed to the Sejm which further consolidates PiS's plans for unitary state power. The party's executive takeover of the National Council of the Judiciary would be of little use if there were no vacancies that board could fill. The aim of the latest bill targeting the Supreme Court was to create vacancies at the very top of the judicial hierarchy. Almost overnight, all Supreme Court judges, except those chosen by the Minister for Justice, were to be sent into retirement.

This flagrantly unconstitutional onslaught on the independence of the judiciary showed how far PiS's multi-stage process of violating the Polish Constitution had progressed. The government's attack on the separation of powers was objected to in almost all legal environments: advocate and attorney-at-law councils and even prosecutors' associations. The changes were condemned by the parliamentary opposition, which has called for mass protests. Strong criticism has also come from abroad.

In 2017 I was sent a paraphrase of provisions of the Constitution that summarized the situation well. The author wrote that after control has been taken of the National Council of the Judiciary and the Supreme Court, article 10(2) of the Polish Constitution on the separation of powers will read as follows. 'Legislative power is exercised by PiS, executive power is exercised by PiS, and judicial power is exercised by PiS.'

Popular protests and presidential power grabs

Following huge street protests in summer 2017 against the legislative changes, President Duda vetoed the draft legislation that would have allowed PiS to commandeer the National Council of the Judiciary and Supreme Court. That glimmer of hope for those increasingly disillusioned with the President's distance from his own political stable was in fact an *ignis fatuus*, a will-o'-the-wisp.

President Duda's veto of the legislation did not signal a refusal to sign it in on the grounds of merit: in fact, he did not present any criticism of the draft law, and his silence on this matter showed his acceptance of the principle (promoted by PiS in their draft legislation) that members of the Council should in future be appointed by politicians rather than by judges, as had previously been the practice. Rather, Duda's objection was a means to his own political ends: he chose to propose his own bills for taking political control over the judiciary, thus wresting control over the Supreme Court from the Minister of Justice, under whose power the legislation he vetoed would have placed it.

Ultimately, the President proposed new bills on the National Council of the Judiciary and the Supreme Court in September 2017, and after several weeks of private consultations between him and the leader of PiS – who does not even hold any public office – became law. The outcome of these entirely opaque negotiations came in the final set of presidential proposals, namely:

- the removal of 40 per cent of judges from the Supreme Court, including its President, thereby shortening her constitutionally enshrined term of office;
- the establishment of a new Supreme Court Chamber which will be responsible for assessing the validity of elections;
- the appointment of a new National Council of the Judiciary whose judicial members will be, contrary to the Polish Constitution, elected by Parliament.

This flagrant upsetting of the balance of power between the judiciary and the legislature, where PiS have a majority, led judicial associations and the

political opposition to call for a boycott of appointments to the new National Council of the Judiciary.

The call was a success: out of 10,000 Polish judges, only eighteen agreed to stand for appointment to the new National Court Register (KRS). An overwhelming majority of them have links to the Minister for Justice and their candidacies are questionable to say the least. After it has been appointed, the National Council of the Judiciary will be completely dependent upon politicians, allowing them to influence the process of appointment of all Polish judges. This influence will extend to those who take up seats in the new chambers of the Supreme Court.

To conclude, the commandeering of the Constitutional Tribunal and the National Council of the Judiciary displays two characteristics familiar to those who study authoritarian systems. First, it displays a preference for mediocre appointments, the choice of second-rate actors to play starring roles. Second, the appointments represent a phenomenon known as the ‘hollowing out’ of institutions responsible for protecting the rule of law. When the core of those institutions, which is independence, is removed, they become useful props for the ruling powers to move about the stage in a purely theatrical show of legitimacy.

The historical explanation: Post-Communist transition, lustration, and law as obstacle to justice

In order to understand the current Crisis, one needs to go back to the beginning of the Polish transformation, namely to the year 1989. That was the year of hope for everyone who had suffered under Communism. Both the key players in the PiS government and their supporters believed that the collapse of Communism would bring to justice all the servants of that regime. Yet the Polish transformation went in another direction — a direction marked out by the ‘thick line’, announced by the first post-Communist Prime Minister Tadeusz Mazowiecki. This thick line was to be drawn between the present and the past; the consequence was that no revenge was taken and that a smooth transition ensued.

For those who support PiS, such an approach was tantamount to treason. At the time, they perceived the roundtable talks between the pre- and post-Communist regimes as collaboration. That perception never abandoned them, and their desire for vengeance went unfulfilled. The realization of their desire came close to fulfilment in 1992, when Antoni Macierewicz, then Minister of Internal Affairs, attempted to reveal the list of those who had collaborated with the Communist secret service. What followed, however, was not revenge, but the deposition of revenge-seeking parties from power. What was even worse for those people who sought retribution, was that the new Polish Parliament, elected in 1993, enacted the first post-Communist Constitution, in 1997, without the involvement of those parties.

It is for these historical reasons that both PiS and their supporters perceive the current Polish Constitution to be illegitimate. From their point of view, the Constitution (enacted in 1997) promotes leftist and liberal values, including the protection of acquired rights and the safeguards of procedural justice. They believe the Constitution was enacted in bad faith: that its real purpose is to protect the beneficiaries of Communism and to secure the status quo.

PiS’s suspicions concerning the legitimacy of the Constitution found confirmation (at least in their eyes) after the party gained power as the dominant partner in a coalition government in 2005. One of their crucial political projects was the so-called ‘Lustracja’ bill: a piece of legislation aimed at revealing the cooperation of Polish citizens with the Communist secret service. This legislation was struck down by the Constitutional Tribunal in 2006 on the grounds of non-compliance with Article 2 of the Constitution — the principle of the rule of law. The Constitutional Tribunal found the ‘Lustracja’ bill’s definition of cooperation with the secret service to be too vague: a charge perceived by PiS as a pretext for not bringing the collaborators to justice.

Shortly after this decision by the Constitutional Tribunal, the leader of PiS, Jarosław Kaczyński, coined the term ‘legal impossibilism’ to refer to the situation as he saw it: namely, that the principles of procedural justice make it impossible to bring about

real, material justice. In this view, the Constitution is an implement whose purpose is to protect post-Communist elites and to block the rescindment of their rights, the revocation of their benefits, and the redistribution of their ill-gotten gains.

Analysing the Crisis from a historical viewpoint leads us to the conclusion that the subjective experience of the rule of law in Poland — in particular the belief that the law is an obstacle on the road to justice — created in the leaders of PiS and their supporters a very peculiar understanding of the relationship between procedural justice and substantive justice.

For historical reasons, PiS leaders and supporters have no faith either in procedural justice or in checks and balances. Their frustration concerning what others perceive as a great Polish success, namely the smooth transition from Communism to constitutional democracy, impelled them towards a massive assault on the rule of law when their time to wield power finally came.

The legal explanation: Excessive formalism

Those following the Polish constitutional crisis from abroad may see it as a traditional clash between law and politics. Analysed in Schmittian terms, law as a system of rules represents an obstacle to the realization of the current political will, and as such must yield to politics. When law and politics clash, politics represents a set of values external to law; law, in turn, represents its own values, mostly formal, which cannot be reconciled with the external values of politics. Analysed in Radbruchian terms, law secures legal safety; politics promotes effectiveness. When law and politics clash, politics trumps law to change the society in accordance with the political will, even if this involves breaking the law.

From this perspective, the nature of the political attacks aimed at the rule of law in Poland may seem familiar: they are attacks through which political values prevail over legal values, and procedural justice yields to the promotion of material justice. The meaning of material justice is defined by those who won the elections. During the debate on nullifying the appointment of five Constitutional Tribunal judges on 26 November 2015, the parliamentarian Kornel Morawiecki, said:

Law is something important but it is not sacred. (...) Above law stands the good of the Nation. If law interferes with this good, we shall not treat law as something inviolable or unchangeable. What I say is this: law shall serve us! Law that does not serve the nation is lawlessness!

A similar position was presented in the Report of the Team of Experts appointed by the Speaker of the Sejm (lower parliamentary chamber) to respond to the Venice Commission's 2016 reports concerning the rule of law in Poland. 'In the construction of a democratic state based on the rule of law (such as Poland), the principle of democracy prevails over the abstract legal order, the latter being the quintessence of constitutional democracy'.

The above quotations may suggest that the current attack on the rule of law in Poland resembles the old-school totalitarian attacks seen under the Weimar Republic or Communist Russia. Those attacks consisted in establishing a clear and explicit hierarchy in which law is subservient to politics, and the values of the latter prevail over those of the former. However, the kind of attack on the rule of law we currently encounter in Central and Eastern Europe is different: even if in unguarded moments politicians explicitly declare that politics should prevail over law, when they execute their policy and justify it, they rather pay lip service to the law than ignore or dismiss it completely.

The reason why illiberal governments in contemporary Europe do not openly proceed with illegal action is easy to identify. The rule-of-law values are well entrenched in public life and memories of the totalitarian regimes that preceded and followed World War II have not yet faded from the public memory. Politicians who wish to achieve an unconstitutional goal, such as commandeering the judiciary, have to use a much more sophisticated technique than overtly disregarding the rule of law. To succeed, they have to convince the general public they are acting in accordance with the law, whether it takes the form of a national constitution or of EU regulations. The impression they want to produce is that politics is subservient to the law, thus allowing their actions to appear legal even if their effects are not. To do so, they draw on ostensibly legal tools to achieve illegal (unconstitutional) goals.

Paying lip service to the rule of law allows Poland's politicians to mask their attacks on the independence of the judiciary. The disguised character of their attack makes it difficult for the general public to recognize that an attack is really taking place. As a consequence, the public is not motivated to defend the judiciary or its independence, thus giving free rein to politicians. What is more, the fact that the attack on judicial independence is carried out in a way that seems to secure its superficial compliance with the letter of the law makes it difficult for the judiciary itself to expose the real nature of the attacks.

The perpetrators of the new-school attack on the rule of law go to great pains to convince others that their actions are justified within the existing legal framework. The main argument they provide is that their actions are compliant with the letter of the law — even if the consequences of those actions cannot be reconciled with its spirit, as expressed in the Constitution.

The illegality of the new-school attacks on the independence of the judiciary can be revealed only by a non-formalistic strategy, namely by showing that those attacks infringe constitutional principles, even if they are compliant with isolated, bright-line rules, and by considering the real-life effects of the application of those bright-line rules. As several studies have shown, however, including a [FLJS Policy Brief published in 2005](#), judges in Central and Eastern Europe have been trained in the tradition of judicial formalism, according to which formal compliance of one's actions with the law is sufficient basis for their legality. In other words, to repel the attacks, judges must go beyond the letter of the law and into the realm of its spirit. Yet, this is a step too far for formalistically trained judges.

My thesis is that the rule of law crisis in Poland has not been caused so much by the strength of the political attack on the rule of law but by the weakness of the defence mechanisms that should have been triggered once that attack started. This is not to say that all attempts to exploit formalistic judicial reasoning as a basis for political attacks on the judiciary were successful. The Constitutional Tribunal, for instance, was able to defend itself

against the isolated interpretation of Article 197. It did so by refusing to base the constitutional review of the new law concerning the Constitutional Tribunal's operation, and based it directly on constitutional principles. Alas, the Constitutional Tribunal's readiness to deploy a principle-based argumentation to protect the independence of the judiciary should be perceived as an exception rather than a rule. As a constitutional court whose source text is principle-based, the Constitutional Tribunal has a particular inclination to use principle-based reasoning, but this inclination is not an entrenched element of the Polish legal culture as a whole.

The sociological explanation: Neo-authoritarianism and the crisis of liberalism

No constitutional crisis is only about the law. Even if lawyers in Poland and in the European Union have a tendency to perceive the Polish crisis as solely a legal one, it is not. The violations of the Polish Constitution and obligations arising from EU law have deep sociological grounds. This needs to be kept in mind, especially by those responsible for building an argumentation that could alleviate the conflict between the Polish government and the European Commission.

Lawyers struggling with the assault on the rule of law in Poland face a multidimensional problem, resulting from the fact that a large section of Polish society has no time for the niceties of the constitutional order, instead seeking reform to address social problems. The government's narrative presents the dismantling of the rule of law as the cure for several social ills, including historical injustice and the dangers of globalization. With governmental propaganda presenting the assault on the rule of law as a cure for multiple ills, those opposing the treatment are at risk of losing their patient. By perceiving the dismantling of the rule of law as a purely legal problem, the defenders of the rule of law seem to be denying the very need for treatment. The failure to take into consideration the underlying social problems which have motivated this attack on the rule of law is a dangerous oversight on the part of those who wish to put Poland back on the road to recovery.

A recent sociological study carried out in a medium-sized Polish town may be of some help. According to this study, the supporters of the governing party display features of a neo-authoritarianism syndrome. What is neo-authoritarianism? The Polish people are ready to provide their elected representatives with an absolute right to change the rules, including the constitutional ones, even without the formal legitimacy to do so. The abstract legal order must yield to the will of the people.

As for regular authoritarianism, its main elements are:

- domination over the weak and the alien, including ethnic and sexual minorities, refugees, and whoever else can be perceived as an enemy;
- a preference for a politically effective strong-hand approach to social problems;
- belonging to a national community that provides its members with aspirations far beyond the typical needs of a middle class.

All those elements can be explained by Erich Fromm's concept of 'the authoritarian personality'. This concept, originally constructed by Fromm to explain the psyche of the Germans under the Weimar Republic, provides an excellent basis for a diagnosis of Poland's reversion to authoritarianism.

In essence, whenever social unrest occurs (the threat of terrorism, an immigration crisis, a difficult labour market) a feeling of uncertainty and danger spreads and the government deftly capitalizes on it (Islamization of Europe, the threat of unemployment, and fear of disease). The broader social uncertainty reinforces what Fromm identified as the social masochistic component of the authoritarian personality — the wish to dissipate in something larger than oneself: in the idea of a nation, patriotism, in some grand plan imposed by a charismatic leader. This leader's plan brings order to the lives of those who cannot muster the strength to organize their own. By making their world more clearly defined, by making it clearer who is friend and who is foe, the leader's plan gives such individuals the impression of being able to regain control over their fate.

Aggressive criticism of supporters of the leader only increases the sense of danger that has been instilled within them; in confirming the existence of enemies, such criticism enhances trust in the leader who intends to combat them. In Poland's case, this mechanism explains the positive correlation between intervention by EU authorities into the Polish affairs and popular support for the governing party.

The narrative provided by the neo-authoritarian parties also appeals to our youth. Young people are a generation more interested in 'freedom to' than 'freedom from', to use Isaiah Berlin's famous distinction. Unlike their parents and grandparents, they have never needed to fight for freedom from coercion, nor have they experienced oppression. Free from coercion and oppression, they have been left to organize their lives as they want. The problem is, they do not really know what to do with this excess of freedom and, returning to Fromm, they may feel an urge to escape from it. Escape routes are provided by such normative ideologies as patriotism and nationalism, which provide clear paths for thinking and acting. However anachronistic it may sound, patriotic values appeal to today's youth, even if the patriotism peddled to them by our authoritarian-inclined leaders is one of failure, sacrifice, struggle, and hate, not the patriotism of victory, tolerance, cooperation, and openness.

A recent notorious example of the appeal to patriotic emotions was Poland's so-called Holocaust law, a new piece of legislation which criminalized the act of accusing the Polish nation of crimes against humanity. From a practical point of view, the law didn't make much sense: the phrase 'Polish death camps' was only used sporadically before the law was enacted, and was effectively combated by a combination of NGOs, state bodies, and strategic allies. However, the law allowed PiS' aggrieved supporters to unite in an unprecedented defence of their nation against the whole world when its narrow nationalistic agenda and ham-fisted promulgation raised eyebrows — and protests — worldwide. This feeling of unity is exactly what the authoritarian personality craves, and what the current Polish government is pleased to deliver, at whatever cost.

Returning to ideologies, but of the non-rule-imposing variety, liberalism joins the rule of law in being in crisis. Unlike nationalism and patriotism, it is a social notion for individuals who know how to lead their lives. The rule of law and constitutionalism underpin the liberty of living one's life without the threat of coercion. However, a large number of our fellow citizens do not have a clear idea of how to lead their lives and are relieved to be provided with ready-made solutions. Liberalism has nothing to offer them. Creating plans for people's lives would be an anomaly in the liberal DNA, as it would limit people's freedom.

Thus, liberalism by definition fails in creating an attractive narrative for people who are unwilling or unable to create one for themselves. In fact, for some, the target of creating a social space free from coercion threatens them, as it obliges them to take responsibility for their own lives.

Conclusion

What lessons can we derive from Poland's predicament? In line with my interpretations of the crisis, I would propose three. First, the historical interpretation teaches us that there is no such thing as a complete and successful post-authoritarian transition. Transitional societies are like cancer survivors — even when they seem healthy, they require constant monitoring. Social frustrations need

to be addressed, especially if the style of the transition did not give them room for adequate expression.

Second, the legal explanation I propose teaches us that to transform a legal order from a totalitarian one into one based on the rule of law requires more than the changing of the law in the books. The way the law is applied by the courts and the way the legal reasoning is carried out is of at least equal importance. The promotion of the rule of law in the post-Communist countries must transform what we call the law in action by encouraging judges to embrace a more holistic, principle- and consequence-based approach to applying laws. As we have seen, a superficial understanding of the rule of law as compliance with bright-line rules only, and a lack of understanding of the role principles play in the legal system, may both contribute to backsliding into authoritarianism.

Third, the sociological interpretation teaches us that freedom never can be taken for granted. Even if my generation remembers a world in which, as our Constitution states, 'fundamental freedoms and human rights were violated in our homeland', our children do not. To secure the freedoms of those who, for historical reasons, do not fear that they will lose it, we need to rewrite the liberal values into a new language. This is no easy task.

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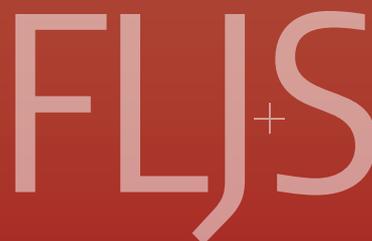
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