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# European mechanisms for safeguarding the rule of law and national responses

Anna Wójcik

We, as part of the Osiatyński Archive, have produced a comprehensive report focusing on European mechanisms intended to restore the rule of law in Poland, as well as the responses of the Polish authorities to these measures. Our analysis delves into the political and legal instruments provided by the European Union, together with the relevant case law from the European Court of Human Rights.

The rule of law crisis in Poland has continued for eight years, steadily expanding and deepening. Recent events, such as the Law and Justice (PiS) Party's enactment and President Andrzej Duda's endorsement of an Act of Parliament establishing a commission to combat Russian influence, which has been utilized as a tool to suppress political opposition, vividly highlight the gravity of the situation.

In response to this Act, the president has submitted it for review to the Constitutional Tribunal – a body which, despite its affiliation with the ruling party, has experienced setbacks in its role as a rubber-stamp for government policies. This is evident from the challenges faced in assembling an eleven-member panel to deliberate on the constitutionality of the amendment to the Act on the Supreme Court. The government and the PiS president have argued that this amendment is necessary to unblock €34 billion for the National Recovery and Resilience Plan.

Poland's multifaceted rule of law crisis in mid-2023 encompasses several key aspects:

- The membership and functioning of the Constitutional Tribunal. The European Commission announced it would file an application with the Court of Justice of the European Union (CJEU) against Poland regarding membership and functioning of the Constitutional Tribunal.

- The appointment of 15 judges to the National Council of the Judiciary by the Sejm (the lower chamber of the Polish parliament). The CJEU and the European Court of Human Rights has criticized it in their rulings for bringing about the politicization of the judicial appointment procedure in Poland. As a result, the composition of the Supreme Court and ordinary courts includes judges who do not satisfy the requirements of an independent court under EU law and the European Convention on Human Rights.
- Harassment of judges who openly criticize the negative changes made to the judiciary by the authorities.
- Politicization of the prosecutor's office and harassment of prosecutors who voice criticism about the changes in the judiciary.
- The combination of the roles of minister of justice and prosecutor general, both of which are currently held by Zbigniew Ziobro, a PiS politician.
- Disregard for the Polish Constitution, EU law, and international law in the process of creating and applying legislation.
- The failure to implement the rulings of the Court of Justice of the European Union and the European Court of Human Rights in cases involving controversial reforms that adversely affect the rule of law standards.

In addition to these challenges, Poland is also grappling with systemic attacks on media freedom and pluralism. These attacks are manifested by the politicization of the state media, the obstruction of independent private media and the financial support given to pro-government private media, resulting in an unfair distortion of competition on the media market. This situation creates a conducive environment for the propagandistic 'defence' of the negative changes taking place within the courts and prosecutor's office.

The European Union, which was founded on the principle of the rule of law enshrined in Article 2 of the EU Treaty, has made concerted efforts through its institutions and governments of member states to encourage the United Right government to restore the rule of law standards in Poland. Despite these endeavours, the outcomes achieved so far have been limited in their effectiveness.

**Anna Södersten** presents an analysis of Sweden's Presidency of the Council of the European Union and its efforts in addressing the rule of law. A significant achievement of the presidency was the organization of a hearing for Poland on 30 May 2023, under

the Article 7 procedure of the EU Treaty. However, the expected results of this 'political dialogue' mechanism, which has been in place since 2017, have not materialized, as it has not effectively resolved the risk of a serious breach of the rule of law in Poland. The procedure focuses on the lack of independent oversight of the constitutionality of laws regarding the membership and functioning of the Constitutional Tribunal, as well as the erosion of safeguards ensuring judicial independence.

The weakness of the mechanism can be attributed to a political and personal factor: the Polish government (like the Hungarian government) has shown a lack of genuine interest in engaging in an honest dialogue. Additionally, the design of the mechanism itself poses challenges. Unanimity among EU governments is required to proceed with the sanctions aspect, whereas this has been effectively undermined by the pragmatic alliance between the governments in Warsaw and Budapest. These factors have contributed to the limitations and shortcomings of the current mechanism for addressing rule of law concerns in Poland and Hungary.

**Jakub Jaraczewski** highlights the European Commission's more assertive utilization of legal mechanisms at its disposal to safeguard the values enshrined in the Treaties. This is exemplified by the recent cases brought before the Court of Justice of the European Union against Hungary and Poland. The case against Hungary specifically addresses the homophobic and transphobic Law of 2021, marking the first time the European Commission has directly alleged a breach of Article 2 of the EU Treaty. Previously, the Commission had only invoked the breach of this Article as an alternative argument. If the CJEU upholds the Commission's reasoning in its ruling, it will pave the way for complaints regarding other breaches of the values listed in this provision. The case against Poland focuses on the Constitutional Tribunal and is also ground-breaking, as it marks the first time the Commission has brought such a case regarding the establishment and functioning of the constitutional court of an EU Member State. These developments showcase the Commission's heightened resolve in safeguarding fundamental principles and can have significant implications for future legal actions regarding the protection of Treaty values.

**Paulina Pacuła** sheds light on the European Union's recent efforts to establish mechanisms for safeguarding the EU budget, focusing on the principle of conditionality. These mechanisms make the allocation of EU funds contingent upon the observance of the rule of law by the Member States. A regulation introducing a special conditionality mechanism was enacted in late 2020. It was activated in 2022 for Hungary following the re-election of Viktor Orbán's Fidesz party for a third term. Additionally, the disbursement of funds from the EU budget for 2021-2027 is now contingent upon compliance with the EU Charter of Fundamental Rights, which is incorporated into partnership agreements between the Union and national/regional authorities of Member States.

The European mechanisms for upholding the rule of law also encompass the case law of the European Court of Human Rights. **Marcin Szwed** elaborates on the court's eight judgments regarding various aspects of the rule of law crisis and identifies the key outstanding issues in over 300 pending complaints. These issues include defective appointments to ordinary courts, the appointment of assessors, the impact of the circumstances of appointments on breaches of the European Convention on Human Rights, the mechanism of extraordinary complaints and the rights of judges to protection and independence.

Challenges persist with regard to the implementation of court judgments. **Mariusz Jałoszewski** explains how independent judges who criticize detrimental changes to the judiciary continue to face harassment from the authorities, thereby breaching rulings from the EU Court of Justice and the European Court of Human Rights, as well as flouting preventive measures issued by European courts.

The ruling party in Poland, PiS, touts 'law and justice' as its guiding principle. However, as explained by PiS chairman Jarosław Kaczyński, it is understood as building a 'just, fair state for ordinary people, not for the elite,' rather than strictly adhering to the constitution and international law.

**Dominika Sitnicka** analyses the discourse of power surrounding reforms in the judiciary during the pre-election period in the first half of the year in Poland. Parliamentary elections are scheduled for October. Official statements from the ruling party acknowledge that the envisaged changes in the judiciary did not materialize as planned. Examples of judicial deterioration are cited in areas aligned with the PiS party's identity politics. The failed reform becomes the impetus for a new reform agenda, set to take place after the elections.

An unofficial campaign strand involves PiS's attempts to discredit the opposition, particularly Donald Tusk and the Civic Platform, by accusing them of serving non-Polish interests, namely German and Russian interests simultaneously. This narrative is partly fuelled by anti-German sentiment. **Maria Skóra** clarifies the actions taken by the German government regarding the rule of law crisis in Poland and reveals why Germany is relieved that this crisis needs to be resolved between Brussels and Warsaw.





# The Swedish Presidency in the Council of the European Union and the Article 7 Procedure of the Treaty on the European Union

Anna Södersten

**Sweden is presiding over the Council of the European Union until the end of June. As one of its four priorities, it has placed strong emphasis on addressing the rule of law issues within the EU. A hearing was held for Poland at the end of May as part of the Article 7 Treaty on the EU procedure.**

The rule of law crisis in some EU Member States, most notably Poland and Hungary, has deepened in the last decade. Some Member States have introduced reforms that undermine the rule of law and democracy more extensively. These reforms not only affect the given Member States, but also the EU: as argued by several prominent legal scholars, the EU cannot function without the rule of law in the Member States.<sup>1</sup> Some observers even describe the rule of law crisis as an ‘existential threat’ to the EU.<sup>2</sup>

For several years, the EU has been trying to solve these problems. Yet, little has come of the efforts to address them.

On the contrary – the rhetoric is noticeably hardening from the Member States in question, and is followed by concrete actions. The Polish government has used the Constitutional Tribunal to challenge the primacy of EU law, leading the European Commis-

1 See for example Laurent Pech and Kim Lane Scheppele (2017), ‘Illiberalism Within: Rule of Law Backsliding in the EU,’ *Cambridge Yearbook of European Legal Studies*, 19, 3-47.

2 See, for example, Laurent Pech and Petra Bárd, ‘The Commission’s Rule of Law Report and the EU Monitoring and Enforcement of Article 2 TEU Values’, Policy Department for Citizens’ Rights and Constitutional Affairs Directorate-General for Internal Policies, PE 727.551 – February 2022.

sion to bring a case against Poland before the Court of Justice of the European Union. It also argues that the CJEU is overstepping its powers by ruling on the implementation of the principle of judicial independence in EU Member States. And it claims that the EU has to respect the national identity of its Member States, using this as the justification for the government's policies, even if they breach EU law.

Alongside the European Commission and the Court of Justice of the European Union (CJEU), the rotating presidency is one of the players in the EU which can bring about change. Sweden holds the Presidency of the Council of the EU in the first half of 2023. How will it deal with the rule of law issue?<sup>3</sup> What tools does it have at its disposal? What actions is the Presidency planning against the Member States in question? And what can limit its room for manoeuvre?

## The rule of law as a priority

There seems to be limited research on the role of the rotating Presidency with regard to the rule of law. When examining the Presidency programmes and priorities of the last few years, it becomes clear that almost all of them mention the Union's values – or, specifically, the rule of law – in one way or another. While some Presidency programmes only mention it briefly, other Presidency programmes explain in greater detail how the rule of law will be protected and why it is important.

Some Presidency programmes mention the rule of law, but they simultaneously emphasize the need for national sovereignty (e.g., the Presidency Programme of Slovenia from the second half of 2021 states: 'we would like to show how the rule of law can be further strengthened in full respect of national constitutional systems and traditions').

The Swedish government presented the presidency programme in December 2022.<sup>4</sup> The 'Democratic values and the rule of law – our foundation' was declared as one of the four priorities alongside 'security – unity', 'resilience – competitiveness' and 'prosperity – green & energy transition'. As for democratic values and the rule of law, the programme proclaims:

'The European Union is based on democratic values, paving the way for cohesion, individual freedoms, non-discrimination, increased economic output and global influence. Upholding the principle of the rule of law and fundamental rights is therefore an essential element of Sweden's – and indeed every –

3 On the Swedish Presidency generally, see Louise Bengtsson and Jakob Lewander, 'The Next Presidency of the Council of the EU: what to expect when Sweden takes over', November 2022:19epa.

4 See the website of the Swedish Presidency: <https://swedish-presidency.consilium.europa.eu/en/programme/priorities/> (last accessed, 8 February 2023).

Presidency of the Council.'

The rule of law is therefore one of four priorities of the Swedish Presidency. But how will this be concretized and pursued?

### Article 7 TEU hearing

One of Sweden's tasks was to move the so-called **Article 7 procedure** forward. Under Article 7(1), sometimes referred to as 'the warning procedure', the Council can determine that there is a 'clear risk of a serious breach by a Member State' of the rule of law. It is not possible to impose sanctions under this procedure; it is 'only' about the Council making such a decision. In other words, the only consequence of the procedure is 'naming and shaming'.

The warning procedure has been activated twice: the Commission activated it against Poland in December 2017, and the European Parliament activated it against Hungary in September 2018.

Since then, the Council has held several hearings with Poland and Hungary,<sup>5</sup> but it has not yet voted on the matter (namely on the fact that there is a 'clear risk of a serious breach'). What is required is a four-fifths majority of the Member States in the Council and the approval of the European Parliament. Some observers claim that the reason why the Council has not yet voted on the matter is not the requirement for a majority, but rather political reluctance to single each other out in this way.<sup>6</sup>

It could be argued that this reluctance affects the EU's credibility: the EU has tools to deal with the situation, but it is not using them to their full potential. Even if it were impossible to move the procedure forward, the engine should perhaps at least be kept running. One way of letting the engine run is to organize hearings in the Council with Poland and Hungary, an optional task of the rotating Presidency. Yet, Article 7 hearings are not held regularly (European Parliament demands that they should be held regularly).<sup>7</sup>

The Swedish Presidency Programme states that 'The Presidency will take the Coun-

5 Ten hearings have been organized by rotating presidencies. In the case of Poland, one hearing was organized by the Bulgarian presidency on 26 June 2018; two hearings were organized by the Austrian presidency, on 18 September 2018 and on 11 December 2018 respectively; one hearing was organized by the Portuguese presidency on 22 June 2021; and one was organized by the French presidency on 22 February 2022. As for to Hungary, two hearings were organized by the Finnish presidency, on 16 September 2019 on 10 December 2019 respectively; one hearing was organized on 22 June 2021 by the Portuguese presidency; one was organized by the French presidency on 23 May 2022, and one was organized by the Czech presidency on 18 November 2022.

6 R. Daniel Kelemen (2020), 'The European Union's authoritarian equilibrium,' *Journal of European Public Policy*, 27(3), 481-499.

7 European Parliament resolution of 5 May 2022 on ongoing hearings under Article 7(1) of the TEU regarding Poland and Hungary, P9\_TA(2022)0204, para. 3.

cil's work on the Article 7 procedures forward in a constructive spirit.'

Jessica Roswall, the Minister for EU Affairs, has explained that the Presidency will either organize hearings, or only produce a report – and they are 'ready to do both'.<sup>8</sup> It is 'how things develop' that will decide how to move forward.<sup>9</sup>

The hearing for Poland took place on 30 May. The last hearing under the Article 7 procedures were organized by the French presidency: for Poland on 22 February 2022, and for Hungary on 23 May 2022. The Czech Republic held a hearing against Hungary on 18 November 2023. Spain is holding the presidency in the second half of 2023, followed by Belgium.

Only one year after the Swedish presidency, two presidencies, held by Poland and Hungary respectively, follow one another, both being subject to EU measures for not respecting the rule of law. Neither Poland nor Hungary will, of course, pursue these issues during their respective rotating presidencies. Therefore, there is a small 'window' for action for the EU which will soon close.<sup>10</sup> Clear results need to be achieved as soon as possible.

## Monitoring of EU financial mechanisms to foster compliance with the rule of law

The other task of the rotating presidency in terms of the rule of law would be the **follow-up of the milestones** that both Poland and Hungary must reach in order to receive money from the recovery and resilience fund. Roswall has explained that the presidency will follow these issues very closely, together with the Commission.<sup>11</sup>

The Polish 'milestones' apply to judicial independence. The Polish government has committed to the following:

- All disciplinary cases against judges will be resolved by a separate court, which is independent of the current Disciplinary Chamber, satisfying the requirements of EU law as specified by the rulings of the Court of Justice. This court will be independent, impartial and established by law.
- Judges will not be subjected to disciplinary liability for requesting preliminary rulings from the Court of Justice of the European Union, for the content of their judgments, or

8 Sieps Podcast, episode 46.

9 Ibid.

10 Spain will hold the Presidency in the second half of 2023, followed by Belgium.

11 Sieps Podcast, episode 46.

for assessing whether another court is independent, impartial and established by law.

- The procedural rights of parties in disciplinary proceedings will be strengthened. Judges affected by previous rulings of the Disciplinary Chamber will have the right of a prompt review of those judgments by a court that satisfies EU requirements, meaning that it is independent, impartial and established by law.

The Hungarian government has committed to fulfilling 27 'super milestones' regarding the foundations of the democratic system. In EU jargon, these refer to 'long-standing horizontal challenges related to the robustness and functioning of public institutions in general, which also has implications on economic and social processes in the country'.<sup>12</sup>

They apply to countering corruption, transparency and accountability in public procurement, independence of the judiciary and decision-making processes of public institutions. Most of these issues fall under the Article 7 procedure with regard to Hungary.

Another issue applies to the **conditionality mechanism** that the Commission activated against Hungary in April 2022. In September 2022, the Commission presented a proposal to the Council that the EU should suspend 65% of the commitments for three operational programmes under the cohesion policy (amounting to €7.5 billion). The Council made a decision to suspend the money in December 2022. After Hungary adopted a number of significant remedial measures, and given Hungary's level of cooperation, the 'remaining risk' for the budget was now only approximated at 55% of the commitments of the programmes in question (amounting to €6.3 billion). Therefore, as long as the situation is moving forward in Hungary, the Commission and Council might use the conditionality mechanism as a carrot and stick, and slowly open up the money from the funds (although this is an approach that many scholars are fiercely criticizing).<sup>13</sup> It remains to be seen if this is something that will take place as early as during the Swedish Presidency.

## Limitations

What affects the Swedish Presidency's ability to push the rule of law issue forward? For the Swedish Presidency, the single most important issue is Russia's invasion of Ukraine and the need to preserve unity among the EU Member States.<sup>14</sup> The challenge for the

12 Rule of law-related 'super milestones' in Hungary's and Poland's recovery and resilience plans. Briefing requested by the CONT committee. European Parliament, PE 741.581 – January 2023, [https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/741581/IIPOL\\_BRI\(2023\)741581\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/741581/IIPOL_BRI(2023)741581_EN.pdf), (last accessed, 30 May 2023).

13 Under the Conditionality Regulation, Where the Commission considers that the situation leading to the adoption of measures has been remedied in part, it shall submit to the Council a proposal for an implementing decision adapting the adopted measures. Article 7.2 of the Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ L 4331 , 22.12.2020, p. 1-10.

14 Sieps podcast, episode 46.

Swedish Presidency is to make progress in the rule of law crisis without threatening unity among the Member States. This is a delicate balancing act, but proclaimed to be one of the priorities; the Presidency has vowed to push the rule of law issues forward.

In addition to the war and the need to preserve unity, what might also influence the Presidency's abilities to push the rule of law issue forward is the domestic parliamentary situation. The Swedish government is a minority government made up of a coalition of the Moderate Party, the Christian Democrats and the Liberals. The government is supported by the far-right populist Sweden Democrats, which is the second largest party in the Swedish parliament, gaining 20.54% of the votes in the general election in September 2022 (after the Social Democrats with 30.33 % of the votes).

The Sweden Democrat party has neo-Nazi roots, but just like so many other far-right populist parties around Europe they try to present themselves as mainstream. They focus on typical far-right populist issues, such as immigration, crime, European integration and climate change.<sup>15</sup> In the European Parliament, they are members of the European Conservatives and Reformists (ECR) group, which often vote against rule of law measures taken by the EU. One recent example is that they voted against the European Parliament's resolution of September 2022 declaring that Hungary is no longer a democracy, but a hybrid regime.<sup>16</sup> The question is how much influence the Sweden Democrats have over the Swedish EU Presidency and specifically over the rule of law issues.

The cooperation between the government and the Sweden democrats is formally set out in the 'Tidö Agreement'.<sup>17</sup> This agreement details how the cooperation will look over a number of policy areas. It also stipulates that the Sweden Democrats shall have civil servants in the government office. The EU Presidency is not mentioned in the agreement, nor is the rule of law specifically.<sup>18</sup> The Tidö Agreement, however, stipulates that the government must inform the Sweden Democrats before presenting its position to the EU Affairs Committee in the Swedish Parliament (according to the Swedish constitution, the government must consult the EU Affairs Committee in the Swedish parliament before decisions are made in the EU Council). However, to what degree this information duty affects the Swedish Presidency is not known.

15 For an overview, see e.g., Cas Mudde, *The Far Right Today* (Cambridge: Polity Press, 2019).

16 European Parliament resolution of 15 September 2022 on the proposal for a Council decision determining, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2018/0902R(NLE)), P9\_TA(2022)0324. The ECR group voted overwhelmingly against the resolution, see A9-0217/2022: [https://www.europarl.europa.eu/doceo/document/PV-9-2022-09-15-RCV\\_EN.html](https://www.europarl.europa.eu/doceo/document/PV-9-2022-09-15-RCV_EN.html)

17 The Agreement was signed in October 2022: <https://via.tt.se/data/attachments/00551/04f31218-dccc-4e58-a129-09952cae07e7.pdf>

18 It should also be noted that the agreement includes elements that some observers argue undermine the rule of law in Sweden, in particular some formulations on migration (and therefore, referring to the rule of law in a broad sense).

## An honest broker

The role of the rotating Presidency is a complex one. It has an important task of acting in the interest of all Member States by setting the agenda for the Council and impartially brokering agreements. Its role is to be an ‘honest broker’, namely to mediate between Member States – and not to push its own agenda; its role is to be ‘neutral’. But how should the presidency priorities be understood with respect to neutrality? And what is actually ‘neutrality’ when it comes to protecting the rule of law in the EU?

One answer to these questions is that the rule of law is special: it has a special position with respect to all other policy areas (if the rule of law can be described as a ‘policy area’ at all). Of course, the rule of law is expressed in the EU Treaties and should be protected for that reason alone. But it is also fundamental in a way that other issues are not.<sup>19</sup> As previously mentioned, it can be argued that it is ultimately about the EU’s existence. Protecting the rule of law is about preserving the EU’s constitutional system.

Yet, it will inevitably also be a task for the Swedish Presidency to seek compromises, however painful they may be. We saw an example during the German Presidency in 2020 when Germany encountered great difficulties in getting the EU to adopt the conditionality mechanism regulation (a procedure that was activated for the first time against Hungary in 2022). It eventually succeeded, but the German presidency also faced criticism for going too far in compromising with Poland and Hungary, which had threatened to use their vetoes.<sup>20</sup>

Protecting the rule of law is one of the Swedish presidency’s priorities. It may be the case that the Swedish EU Presidency might be able to push the rule of law issues more decisively without the Sweden Democrats at the negotiating table, but many things are unclear at this point: we do not know how much the Sweden Democrats have with regard to these issues. In any case, it seems more likely that it is the war and the consequent need for unity among the Member States that has a greater influence over the way of handling the rule of law issue rather than anything else. Yet, to keep the engine running and to live up to the priorities in the Presidency Programme, some kind of action must be expected. The organization of a hearing for Poland at the Council under the Article 7 procedure can be considered a significant achievement for the Swedish presidency.

19 I can see a parallel here between the above discussion and the recent debate on ‘scholactivism’ (a combination of ‘scholars’ and ‘activism’). It is a debate among legal scholars on the appropriate relationship between scholarship, power and justice. This debate seems to be particularly intense when it comes to the rule of law. Some observers argue that the rule of law issues are merely to be described, but that no position should be taken as it is incompatible with the academic task: they should be ‘neutral’. Other commentators argue that legal scholars have a moral duty to defend the rule of law. For more on this debate, see, for example, Khaitan Tarunabh (2022), ‘On scholactivism in constitutional studies: Skeptical thoughts’, *International Journal of Constitutional Law*, 20(2), 547-556.

20 Christophe Hillion, editorial, *Common Market Law Review*, April 2021.



# Landmark proceedings against Hungary and Poland for breaches of EU Law

Jakub Jaraczewski

**The two recent infringement procedures initiated by the European Commission against Hungary and Poland have garnered particular attention from experts in EU law. They apply to Hungary's homophobic and transphobic law from 2021 and the membership and functioning of the Polish Constitutional Tribunal. Both of these procedures are exceptional and are likely to have a significant impact on both countries and the whole of the legal order of the EU.**

## Impasse in the political dialogue

One of the European Commission's principal roles is to be a 'guardian of the Treaties', the custodian and protector of European Union law and values. Indeed, a large chunk of EU history is that of the Commission attempting to reign in the Member States when they cross the red legal lines of the common acquis.

None of those struggles has been as dramatic as the attempts to avert the rule of law crisis in Hungary and Poland. The two Member States – first Hungary under the Fidesz government since 2010 and then Poland ruled by the United Right coalition led by PiS since 2015 – have seen extremely concerning developments regarding the rule of law and human rights. The authorities in both countries have been exerting political control over the judiciary, weakening checks and balances and removing obstacles to the agendas of the ruling parties.

These actions have led to outrage among some citizens, including judges, lawyers, legal advisors, prosecutors and representatives of academic and expert communities.

Initially, the European Commission responded weakly to the ongoing dismantling of



the rule of law in EU Member States. Opting for a ‘political dialogue’ in an ultimately futile attempt to convince Hungarian and Polish governments to change their course and respect EU values voluntarily, the Commission achieved little.

While the Court of Justice of the European Union started handing out the first judgments arising from preliminary references from courts in both Member States, the primary method of the early reaction of the EU was the ‘dialogue’ under the Article 7 TEU procedure. This procedure has produced valuable recommendations developed by the Council with respect to both Member States, but a political deadlock arising from the requirement of unanimous agreement in the Council for the procedure’s strongest sanction has rendered it ineffectual.<sup>21</sup>

The procedure against Poland and Hungary continues to this day. A hearing regarding Poland was held on 30 May.

### **Breakthrough: proceedings against breaches of EU law**

It was only in 2019 that the European Commission started to use more effective tools. These include infringement procedures, which have the advantage of the ability to impose fines on a Member State if it fails to respect a judgment of the CJEU or to follow its interim order.

This has already been the case regarding Poland, as the country failed to comply with an interim order regarding the Disciplinary Chamber of the Supreme Court for which a €1 million per day fine was imposed. The European Commission has realized over €500 million of that penalty so far, deducting it from payments of EU funds to Poland.

Two recent infringement procedures that resulted in the European Commission bringing a case against Hungary and Poland have aroused particular attention from experts. These are the cases of the Hungarian anti-LGBT+ law and the Polish Constitutional Tribunal. Both are unique for different reasons, will likely probably a tremendous impact on these two Member States and the legal order of the EU as a whole.

### **The Hungarian case of the anti-LGBT+ law**

The Hungarian case applies to the 2021 law, which purportedly had the intention of ensuring that taking stricter action is taken against paedophile offenders and amending specific laws to protect children. The Hungarian law included strict limits on children’s

21 Pech, J. Jaraczewski, J. (2023). Systemic Threat to the Rule of Law in Poland: Updated and New Article 7 (1) TEU Recommendations. Central European University Democracy Institute Working Paper 2023/02.

access to media content and advertising that promotes or portrays 'divergence from self-identity corresponding to sex at birth, sex change or homosexuality'.

However, the provisions of the law are exceptionally vague as to precisely what qualifies as restricted content, which gives the authorities an extensive margin for interpretation. This has led to the alarm being raised among the Hungarian civil society and LGBT+ communities that the law could be abused to censor and remove harmless content, and which would constitute an instrument of discrimination aimed at pushing the LGBT+ minority out of the public space.

This law is appearing in the increasingly stronger anti-LGBT+ stance of the Hungarian government and the ruling party Fidesz. Aggressive rhetoric targeted against gay, lesbian and transgender people in Hungary led to several legal developments, such as the 2022 referendum on LGBT education, which failed to reach the threshold of validity, and the aforementioned new law. The Hungarian government has been focusing its messages around several discriminatory undertones, aiming at various minorities to build an image of a heteronormative Hungary that is threatened by sexual minorities.

The Commission quickly launched an infringement procedure against Hungary and found the Hungarian government's explanations to be unsatisfactory. Therefore, it ultimately brought an action against Hungary before the CJEU, claiming that the Hungarian restrictions have breached a large number of EU laws. Some of these alleged breaches are related to specific laws on services, e-commerce and audiovisual media, as all contain clauses prohibiting discrimination and unjust restrictions of access to the media market.

However, the Commission's most striking and revolutionary decision was to claim that, in enacting this law, Hungary breached Article 2 of the Treaty on European Union in a standalone manner, not connected with any other provision of EU law.

Article 2 is a core element of the TEU, as it outlines the core values of the EU: democracy, human rights and the rule of law, including minority rights and non-discrimination. While it has previously been repeatedly invoked by the Commission, it was always connected with a claim of breaching another specific article of EU law which covered an element in detail that was broadly outlined in Article 2.

Here, however, the Commission took a surprisingly bold move of invoking Article 2 in a standalone manner, a move with possible massive ramifications, because if the CJEU were to find such qualification of a breach to be valid, a path would be paved for broader claims of breaching EU law through the disrespect of common values than to date.

## The Polish case regarding the Constitutional Tribunal

The procedure regarding the Polish Constitutional Tribunal was initiated by the European Commission not based on some specific legislation introduced in Poland but on the condition and activities of the Polish constitutional court. Shortly after assuming virtually unopposed power by controlling both chambers of the Polish parliament and having the support from President Andrzej Duda, who had previously been a member of the ruling party, the Polish ruling coalition embarked on a series of moves intended to seize quickly control over the Constitutional Tribunal quickly.

Apart from a series of legislative amendments to laws governing the court that made it easier for judges appointed by the parliamentary majority to elect a new, pro-government president of the Tribunal, the parliament effectively overwrote three appointments to the Tribunal made by the previous government, installing a trio of judges who took seats that *de iure* had already been assigned. These moves allowed the ruling party PiS to capture the court and influence its activities.

Following the capture, the Tribunal started to increasingly act less as an independent constitutional court and more as a rubber stamp used to validate laws enacted by the current authorities and strike down older laws. It embarked on a series of increasingly worrying decisions, including the 2020 ruling on the abortion law, which effectively restricted the already minimal access to abortion even further, leading to mass demonstrations and protests.

But it was the series of rulings targeted squarely at questioning the primacy of EU law and authority of the Court of Justice of the European Union that finally prompted a belated reaction by the Commission. In particular, two 2021 judgments in which the Tribunal examined the EU treaties and held that EU law does not have primacy over Polish law with regard to the laws on the judiciary. These judgments constitute not so much an attempt by the Polish authorities to undermine the Treaties themselves as to a challenge of a series of CJEU decisions regarding the capture of the Polish judiciary.

It was this particular area of the Constitutional Tribunal's activity that finally prompted a reaction from the Commission.

The Commission initiated an infringement procedure against Poland in December 2021, and after more than a year of exchanging correspondence between Brussels and Warsaw, the Commission found the Polish government's explanations unsatisfactory and decided to refer the matter to the CJEU. The Commission claims that the Polish Tribunal is no longer independent, is operating in conflict with EU law and the

authority of CJEU and that its membership, including the judges appointed in a manner which overrides previous appointments, is defective.

The last element has already been examined by another European court, namely the European Court of Human Rights, which found that the right to a fair trial is breached if a case before the Constitutional Tribunal is heard by at least one defectively appointed judge.

This development is crucial for several reasons. It is the first time the Commission has taken a Member State to the CJEU with regard to the condition of its constitutional court. The Commission had previously launched an infringement procedure against Germany over its Federal Constitutional Court questioning the authority of the CJEU, but that procedure ended when the German authorities provided adequate assurances and explanations. The Polish case will be the first instance of the CJEU examining the status and activity of a constitutional court with possibly huge ramifications if it finds the Polish Tribunal lacks independence and is an active threat to the EU legal order.

## Conclusions

The last two years have clarified how governments that flout the rule of law respond to attempts to enforce these values: these players only baulk under financial pressure, as the loss or freezing of EU funds is potentially politically damaging back home. This is clear from other actions by the European Commission aimed at enforcing respect for the rule of law – the withholding of the Covid-19 recovery and resilience fund and cohesion funds for Hungary and Poland has led to visible attempts by both governments to roll back at least some of the problematic legislation. Therefore, the Commission should focus on tools that can hurt the bottom line of the Member States which fail to respect EU values. Infringement procedures are adequate if they are applied speedily and followed up with the Member State being taken to the CJEU, opening the path towards potential penalties for non-compliance with the Court's decisions.

However, it should be emphasized that such procedures should not be treated as a last resort for safeguarding EU law. They need to be launched swiftly when an infringement is identified, and the Member States must not be allowed to stall the procedure with dialogue conducted in bad faith. Speed and efficiency are key, especially given the extent of damage a 'rogue' Member State can inflict on its own rule of law and the legal order of the whole of the EU.

Finally, while the fines for non-compliance with judgments and decisions imposed by the CJEU in infringement cases are not insignificant, they pale in comparison to the monetary value of withholding cohesion or recovery funds, which amount to billions of euros and significantly affect the financial bottom line of EU Member States. In im-

posing these penalties, the Court should consider the amounts that have been so far ignored by Member States, such as Poland, which has refused to budge under fines of over €500m, and which are being realized. Based on this, the CJEU could look into ramping up the financial pressure on Member States, which fail to observe EU values. While damage to the rule of law or human rights does not translate directly into lost trade or uncollected taxes, it potentially has a far more lasting negative impact on the legitimacy of the EU.



# Financial mechanisms for protecting the rule of law in the European Union and their effectiveness

Paulina Pacuła

**The increase in the EU's instruments for protecting the rule of law through the protection of the EU budget with new financial mechanisms has led to a significant increase in pressure on Member States to observe the principles of the rule of law. How are they designed and are they effective?**

The European Union has an extensive list of tools intended to protect the rule of law in Member States. In addition to political tools, such as the new rule of law framework established in 2014, the procedure of the political dialogue provided for in Article 7 of the EU Treaty, and legal tools, such as the procedure against the breaches of EU law provided for in Article 258 of the Treaty on the Functioning of the European Union, it also has financial sanction mechanisms that are based on the principle of conditionality.

These include the conditionality mechanism introduced in 2020.<sup>22</sup> As well as making the disbursement of funds from the post-pandemic Recovery and Resilience Facility conditional on the fulfilment of the conditions, namely the so-called milestones, negotiated by the European Commission with the Hungarian and Polish governments regarding the rule of law.

The principle of conditionality is also included in the Multiannual Financial Framework 2021-2027, the EU's budget. The conditions of access to EU funds, including for the cohesion policy, are specified in the agreements between the national and

<sup>22</sup> Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on the general regime of conditionality for the protection of the Union budget.

regional authorities and the EU.

## The principle of conditionality and the need to protect the rule of law

The principle of conditionality is one of the basic logical principles on which the EU is based.<sup>23</sup> It assumes that a country has to satisfy certain conditions before it can enjoy the benefits of integration. The EU enlargement policy is based on this principle. In order to become a member of the EU, a country needs to go through the accession process and align its functioning with that of the EU in three areas: politics, economics and administration, or in other words it needs to meet the so-called Copenhagen criteria. The euro area is also based on it. A country has to meet the convergence criteria to join the monetary union.<sup>24</sup>

The principle of conditionality is also enshrined in the principles of functioning of the EU: a Member State is required to comply with EU law, and its breaches carry the threat of various sanctions, including the infringement procedure (Article 258 of the Treaty on the Functioning of the European Union), which can lead to an action being brought against the State before the Court of Justice of the European Union. Article 2 of the EU Treaty presents the EU's values, including the rule of law.<sup>25</sup> If a state persistently breaches them, this can lead to the initiation of the procedure from Article 7 of the Treaty on European Union, the further steps of which provide for the possibility of sanctions being imposed on the State, including even the suspension of voting rights in the Council of the EU, which consists of the governments of the EU.

## The rule of law is an EU value

The principle of the rule of law referred to in Article 2 of the Treaty on European Union requires all public authorities to act within the limits of the law, in accordance with the values of democracy and respect for fundamental rights (namely in line with the Charter of Fundamental Rights of the European Union) and under the control of an independent and impartial judiciary.

It also requires the observance of the principle of legalism. The law-making process in the EU is to be transparent, accountable, democratic and pluralistic. The principle of legal certainty, the prohibition of arbitrariness of the activities of the

23 Mattelaer, A. (2018). Exploring the boundaries of conditionality in the EU. European Policy Brief, June 2018, <https://www.egmontinstitute.be/app/uploads/2018/06/EPB-51-Conditionality-in-the-EU.pdf?type=pdf>, accessed on 21/03/2023.

24 Ferrer, J. N., Musmeci, R., Rinaldi, D., & Polli, O. (2018). The EU Budget and its Conditionalities. CEPS, p. 10. <https://www.ceps.eu/wp-content/uploads/2020/06/The-EU-Budget-and-its-Conditionalities.pdf>, accessed on 21/03/2023.

25 See the full text of Article 2 of the TEU: 'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.' in: consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (2016/C 202/01).

executive branch, the principle of effective judicial protection, including access to justice provided by independent and impartial courts, and the principle of the separation of powers must be observed.<sup>26</sup>

Therefore, the principle of the rule of law imposes a number of very important constraints on the authorities, equally the executive, legislative and the judicial authorities.

## Dismantling the rule of law in the EU and new ways of protecting it

Meanwhile, as the Polish, Hungarian and Greek examples show,<sup>27</sup> it is becoming increasingly common for governments that do not respect democratic standards to disregard EU rules.

The eagerness of the executive branch to dismantle the democratic mechanisms of checks and balances, politicize and limit the independence of the judiciary, lift the review of constitutionality of the law, restrict the freedom and pluralism of the media and weaken the control functions of parliaments has brought about the experience of an unprecedented wave of autocratization in the European Union Member States over the past decade.<sup>28</sup>

The extreme right-wing government in Austria, the successive governments of Viktor Orbán's party in Hungary since 2011 and the rule of the Law and Justice (PiS) party in Poland since 2015 have led to the discussion on and introduction of new tools for protecting EU values in the EU. The EU's enlargement policy is considered one of the world's most effective policies for democratizing countries seeking to join the EU. As has become painfully clear, 'the Copenhagen dilemma' involves a move away by countries from the standards already achieved after their accession to the EU.<sup>29</sup>

The EU has introduced many new institutions, mechanisms and tools in the last decade to protect the rule of law – both those that mobilize governments to observe values and principles and to protect the EU budget and other funds. One such institution is the European Public Prosecutor's Office, which was established in 2017. However, Hungary and Poland have not joined it. The EU has the powers to specify the financial principles of the implementation of the Union's budget to protect the Union's financial interests and to ensure that the principle of solidarity and mutual trust between Mem-

26 For a definition of the rule of law and the principle of the rule of law, see Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on the general regime of conditionality for the protection of the Union budget.

27 Papada E., Altman D., Angiolillo F., Gastaldi L., Köhler T., Lundstedt M., Natsika N., Nord M., Sato Y., Wiebrecht F., Lindberg S.I., (2023). 'Defiance in the face of autocratization. Democracy Report 2023', University of Gothenburg, Varieties of Democracy Institute (V-Dem Institute), March. [V-dem\\_democracyreport2023\\_lowres.pdf](#), accessed on 21/03/2023.

28 Op. cit.

29 Bard P., S. Carrera, E. Guild and D. Kochenov (2016), 'An EU mechanism on Democracy, the Rule of Law and Fundamental Rights', CEPS Paper in Liberty and Security no. 91, CEPS, Brussels, April 2016.



ber States is respected. As the Court of Justice of the EU has ruled, the protection of the EU budget understood in this way falls within the EU's treaty powers.<sup>30</sup>

## Financial mechanisms for protecting the rule of law and the EU budget

The financial mechanisms for protecting the rule of law and the EU budget are based on modifications to the regulations on spending funds from the EU budget for 2021-2027 and on the strengthening of the conditionality principle contained in them.<sup>31</sup>

They are:

- the conditionality-based design of the Recovery and Resilience Facility (namely the so-called Recovery Fund);<sup>32</sup>
- a new fiscal conditionality mechanism contained in Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on the general regime of conditionality for the protection of the Union budget;<sup>33</sup>
- a new Common Provisions Regulation governing access to funding from eight EU funds, including cohesion policy funds.<sup>34</sup>

The multiannual financial framework for 2021-2027<sup>35</sup> encompassing provisions on the so-called 'general conditionality regime' to protect the EU budget and the regulation establishing the Recovery and Resilience Facility was approved at the Special European Council in July 2020.

We had to wait until December 2020 for the detailed regulation laying down the so-called 'conditionality' mechanism. The regulation increasing the conditionality of access to EU funds for 2021-2027 entered into force on June 2021.

30 Cf. ruling of the Court of Justice of the EU in C-156/21 and C-157/21.

31 Whether these mechanisms should serve to protect the rule of law by protecting the EU budget or rather to protect the EU budget by protecting the rule of law was the subject of the main disputes during the tripartite negotiations on the general conditionality regime. Cf. Dimitrovs A., Droste H., 'Conditionality mechanism: What's in it?', VerBlog, 30/12/22, <https://verfassungsblog.de/conditionality-mechanism-whats-in-it/>, accessed on 21/03/2023.

32 Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility.

33 Cf. Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on the general regime of conditionality for the protection of the Union budget.

34 Regulation (EU) 2021/1060 of the European Parliament and of the Council of 24 June 2021 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy (OJ L 231, 30.6.2021, p. 159).

35 'Long-term EU budget 2021-2027 and recovery package', Consilium (europa.eu), <https://www.consilium.europa.eu/en/policies/the-eu-budget/long-term-eu-budget-2021-2027/>, accessed on 21/03/2023.

## Conditionality encompassed by the Recovery and Resilience Facility

The Recovery and Resilience Facility is the centrepiece of the NextGenerationEU programme, namely the second largest pool of investment funds in the EU after the multiannual financial framework. With a total value of more than €800 billion, the Facility offers grants and loans to support reforms and investments in EU Member States.

In order to receive funds, Member States have to prepare National Recovery and Resilience Plans (NRRPs), in which they specify how they intend to spend these funds to achieve the Facility's objectives. Furthermore, they have to fulfil the milestones negotiated with the European Commission, namely the most important reforms intended to implement the recommendations arising from the periodic evaluation under the European Semester. One of the most important areas to which the milestones apply is the rule of law.

The conditionality contained in this financial instrument is therefore multi-level. The first level constitutes the negotiations between the Member State and the European Commission on the content of the NRRP itself. In this phase, the European Commission ensures that the recovery plan reflects as many of the requirements and recommendations as possible for the Member State arising from the European Semester. The next phases are the Member State's achievement of successive milestones, namely the most important reforms that are a condition for receiving successive tranches of payments. The failure to achieve the milestones from a given tranche prevents the European Commission from disbursing funds. The conditionality of access to funds from the Recovery and Resilience Facility also applies to the principle of ex-post monitoring, which is contained in the NRRP – the European Commission reserves itself the right to monitor the achievement of the milestones after payment is received in order to verify that, for example, the reforms have not been undone.

Apart from the Netherlands, all Member States, including Poland and Hungary, in the case of which the milestones on the rule of law were particularly important, decided to take advantage of the Recovery and Resilience Facility. In both these cases, the conditionality mechanism contained in the structure of the Facility proved to be effective in forcing the governments to prepare at least partial reforms restoring the rule of law in terms of, for example, restoring the independence of the judiciary (in the case of both Poland and Hungary) or combating corruption (in the case of Hungary).<sup>36</sup>

As experience shows, the effectiveness of this mechanism is mainly based on the po-

<sup>36</sup> Schwarcz A., 'Rule of law-related "super milestones" in the recovery and resilience plans of Hungary and Poland', Briefing of the European Parliament, PE 741.581, January 2023, [https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/741581/IPOL\\_BRI\(2023\)741581\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/741581/IPOL_BRI(2023)741581_EN.pdf), accessed on 21/03/2023.

litical will of the European Commission to enforce reforms that will actually contribute to the recovery of the rule of law.<sup>37</sup> As this process is ongoing, it is difficult to assess its impact today. As at the end of May 2023, Poland and Hungary had still not met the first milestones and have not filed applications for disbursements.

## The new fiscal conditionality mechanism

The new fiscal conditionality mechanism was established by the regulation of 16 December 2020 on a general regime of conditionality for the protection of the Union budget.<sup>38</sup> In Article 7 it emphasizes the obligation of Member States to respect the rule of law 'whenever Member States implement the Union budget'.

Additionally, the Regulation establishes an entirely new instrument for protecting the EU budget against the financial risk related to shortcomings in the rule of law, commonly referred to as the 'conditionality mechanism' or the 'rule of law' mechanism. It enables, among other things, the suspension or reduction of disbursements from the Union budget to a country in the case of which it is demonstrated that there is 'a genuine link between a breach of the principle of the rule of law and an effect or serious risk of effect on the sound financial management of the Union or the financial interests of the Union' (Article 4).

The first country to which this procedure was applied is Hungary. The European Commission officially activated the conditionality mechanism with respect to Hungary on 27 April 2022, after the Court of Justice of the EU confirmed the legality of this mechanism following an application by Poland and Hungary.<sup>39</sup> Negotiations continued until September, with Hungary declaring that it would implement 17 remedial measures. On 18 September, the European Commission recommended to the Council that it should freeze 65% of the funding from three cohesion policy programmes in connection with the breach of the rule of law,<sup>40</sup> and then upheld this recommendation at the end of November because of Hungary's failure to implement the 17 remedial measures agreed upon with the EC.<sup>41</sup> The Commission simultaneously accepted Hungary's NRRP, which meant that the need to meet ten rule of law milestones was added to the 17 remedial measures arising from the conditionality mechanism. The Council accepted the Commission's motion but, invoking the proportionality principle, decided on 12 December

37 Sitnicka D., 'The Act on the Supreme Court does not satisfy the milestones. It does not eliminate the provisions of the Muzzle Act', OKO.press, 15/12/2022, <https://oko.press/ustawa-o-sn-nie-spelnia-kamieni-milowych>, accessed on 21/03/2023.

38 Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on the general regime of conditionality for the protection of the Union budget.

39 Judgment of the Court (Full Court) of 16 February 2022 – Hungary v European Parliament and Council of the European Union (C-156/21) and Republic of Poland v European Parliament and Council of the European Union – C-157/21.

40 'EU budget: Commission proposes measures to the Council under the conditionality regulation', EC press release of 18/09/22, [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_22\\_5623](https://ec.europa.eu/commission/presscorner/detail/en/ip_22_5623), accessed on 21/03/2023.

41 'Commission finds that Hungary has not progressed enough in its reforms and must meet essential milestones for its Recovery and Resilience funds', EC press release of 30/11/2022, [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_22\\_7273](https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7273), accessed on 21/03/2023.

to freeze 55% for Hungary for 2021-2027, namely €6.3 billion.<sup>42</sup>

The procedure of the conditionality mechanism does not set a deadline for implementing the remedial reforms. The regulation of this mechanism only provides for the need to inform the European Commission of the progress in the matter every three months. The next date for such consultations was 16 March 2023, but neither the European Commission nor Hungary decided to issue any communication. This could mean one thing: there is nothing to be proud of.

As with the conditionality contained in the structure of the Recovery and Resilience Facility, the political factor – the readiness of the European Commission to enforce reforms that actually result in the restoration of the rule of law – plays a key role in the effectiveness of this procedure.

Meanwhile, the remedies accepted by the European Commission have been assessed by numerous experts as insufficient<sup>43</sup> and their implementation leaves much to be desired. According to an assessment by Hungarian NGOs submitted to the European Commission within the framework of the annual consultations for the rule of law report, the majority of the reforms recently introduced in Hungary arose from the conditionality mechanism, but their implementation does not significantly undermine the kleptocratic system built by Orbán.<sup>44</sup>

## Common provisions on EU funds for 2021-2027

Another area of strengthening of conditionality to enforce the observance of the rule of law is that of the regulations regarding access to the largest pool of funds from the Multiannual Financial Framework, namely cohesion policy and several other funds, including the Just Transition Fund.<sup>45</sup>

This effect was achieved by introducing so-called horizontal principles and the related so-called basic conditions into the Common Provisions Regulation, the fulfilment of which is necessary to obtain the disbursement of funds. One of the horizontal principles applies to the need to comply with the Charter of Fundamental Rights when

42 'Rule of law conditionality mechanism: Council decides to suspend €6.3 billion given only partial remedial action by Hungary', EC press release of 12 December 2022, <https://www.consilium.europa.eu/en/press/press-releases/2022/12/12/rule-of-law-conditionality-mechanism/>, accessed on 21/03/2023.

43 Pacuła P., 'EC's decision on Hungary. "Orbán is livid, but is not afraid of pseudo-reforms. The EC could have forced more"', OKO.press 30/11/22, <https://oko.press/decyzja-ke-ws-wegier-orban-wsciekly-choc-nie-boi-sie-pseudoreform-ke-mogla-wymoc-wiecej-wywiad>, accessed on 21/03/2023.

44 'Contributions of Hungarian CSOs to the European Commission's Rule of Law Report 2023', January 2023, [https://transparency.hu/wp-content/uploads/2023/01/HUN\\_CS0\\_contribution\\_EC\\_RoL\\_Report\\_2023.pdf](https://transparency.hu/wp-content/uploads/2023/01/HUN_CS0_contribution_EC_RoL_Report_2023.pdf), accessed on 21/03/2023.

45 This regulation governs the disbursement of funds from the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund, as well as the three migration and internal affairs funds: the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy. See Article 9 of the regulation of 24 June 2021.

implementing the funds.<sup>46</sup>

It therefore clearly arises from the regulation that respect for the principles laid down in the EU Charter of Fundamental Rights – including, among other things, the principle of the right of access to an impartial court and the principle of non-discrimination – is a prerequisite for the disbursement of funds to the Member States.

What is the effectiveness of such a regulation? Poland is an interesting example here. Guided by incorrect premises, the Polish government itself declared in the partnership agreement with the European Commission, which is fundamental for the disbursement of any EU funds for 2021-2027, that it does not satisfy the criterion of compliance with the Charter of Fundamental Rights.<sup>47</sup> Interestingly, this interpretation by no means arose from the lack of independence of the Polish courts, which has already been found several times by the Court of Justice of the EU, which is a result of the judicial reforms that are incompatible with EU law and therefore incompatible with Article 47 of the Charter of Fundamental Rights. According to the Polish government, this incompatibility arises from a misinterpretation of the legal effects of the so-called British Protocol to the Charter.<sup>48</sup>

This declaration meant that the Polish government ensured that Poland cannot receive any disbursements from the €76.5 billion pool of EU funds earmarked for it for 2021-2027, other than small amounts of advances, so-called technical assistance funds and reimbursements of the costs required to satisfy the basic condition. This is because, until the basic condition is satisfied, the EC is unable to reimburse the appropriate project costs. Therefore, the Polish government needs to convince the EC that it meets the basic condition and, as such, it has to repair the justice system to an extent that is similar to that specified in the milestones arising from the NRRP.<sup>49</sup> Therefore, the Polish government has two important reasons for conducting the required reforms: access to the funds for the NRRP and to the 2021-2027 cohesion policy funds.

### Are these mechanisms effective?

The increase in the EU's instruments for protecting the rule of law through the protection of the EU budget with new financial mechanisms has led to a significant increase in pressure on Member States to observe the principles of the rule of law.

46 See Article 9 of the Regulation of 24 June 2021, titled 'Horizontal Principles'.

47 See Partnership Agreement for the implementation of the 2021-2027 cohesion policy, Ministry of Development Funds and Regional Policy document of 30 June 2022, p. 220, accessed on 21/03/2023.

48 Pacuła P., 'EC confirms: the Polish government claims the Charter of Fundamental Rights does not apply to us. This is nonsense', OKO.press 20/03/2023, <https://oko.press/komisja-europejska-fundusze-spojnosci-karta-praw-podstawowych>, accessed on 21/03/2023.

49 Pacuła P., 'EC confirms: No cohesion funds will be disbursed if Poland does not restore the independence of the courts', OKO.press 09/02/2023, <https://oko.press/ke-potwierdza-nie-bedzie-wyplat-niezaleznosci-sadow>, accessed on 21/03/2023.

The effectiveness of these mechanisms is determined by one fundamental element: that the observance of the rule of law is an *ex ante* and not an *ex post* condition. As experience shows, these measures are effective primarily as measures for protecting the EU budget and not as measures for protecting and restoring the rule of law. This is because, as the examples of Poland and Hungary show, their application has so far not resulted in the restoration of the rule of law, but has blocked access for these countries to funding from the EU budget. The ultimate impact on the rule of law will also largely depend on the political will of the European Commission to enforce real and not sham reforms.



# The European Court of Human Rights and Cases Related to the Rule of Law Crisis in Poland

Marcin Szwed

**The European Court of Human Rights has issued eight rulings on matters related to the rule of law crisis in Poland since 2021. More than 300 cases are waiting for consideration. What questions will the Strasbourg Court answer?**

The European Court of Human Rights (ECtHR) issued a judgment in *Xero Flor w Polsce sp. z o.o. v Poland* in May 2021.<sup>50</sup> This was the first ruling of the ECtHR on the rule of law crisis in Poland. In the following months, the Court ruled on further cases regarding other aspects of this crisis. Several hundred other cases are currently pending before the Court from applications of people who are affected in various ways by the breach of the European rule of law standards by Poland's current authorities.

It is worth mentioning at least some of these and consider the possible practical significance of the increasing number of rulings of the ECtHR on the crisis in the Polish judiciary given that the current Polish authorities are not only not executing these rulings, but are even directly challenging them.

## ECtHR rulings to date – what we know

The ECtHR has issued 8 rulings in cases related to the rule of law crisis in Poland to date. These cases applied to the inclusion of a defectively elected person in the bench of the Constitutional Tribunal (*Xero Flor*), adjudication by the Supreme Court with the participation of people appointed on the NCJ's motion after the 2017 reform,

50 ECtHR ruling of 7 May 2021 in *Xero Flor w Polsce sp. z o.o. v Poland*, application 4907/18.

namely the so-called neo-NCJ (*Reczkowicz v Poland*,<sup>51</sup> *Advance Pharma sp. z o.o. v Poland*,<sup>52</sup> *Dolińska-Ficek and Ozimek v Poland*<sup>53</sup> and *Juszczyszyn v Poland*<sup>54</sup>), dismissal of presidents and vice-presidents of courts by the Minister of Justice (*Broda and Bojara v Poland*<sup>55</sup>), expiry of the term of office of the judge-members of the NCJ (*Grzęda v Poland*<sup>56</sup> and *Żurek v Poland*<sup>57</sup>) and the system of harassing independent judges (*Żurek v Poland* and *Juszczyszyn v Poland*). These rulings enable a number of important conclusions to be drawn.

Firstly, it is clear that the participation of a defectively elected person in the examination of constitutional complaints by the Constitutional Court could lead to a breach of the ‘right to a court established by law,’ guaranteed under Article 6(1) of the European Convention on Human Rights.

Secondly, there can also be no doubt that the participation of Supreme Court judges, who were appointed on the motion of the neo-NCJ, in adjudicating on individual cases, regardless of the chamber in which they adjudicate, can lead to a breach of the ‘right to a court established by law.’

Thirdly, we also know it is inadmissible to harass judges because of their adjudicatory actions intended to protect an individual’s right to have a case heard by an independent and impartial court established by law.

Fourthly, in the *Grzęda* case and the later *Żurek* case, the Court established that the expiry of the term of office of the judge-members of the NCJ in 2018 breached their right to a court that is protected under Article 6 ECHR.

## What we do not know

However, many issues regarding the crisis in the Polish judiciary are still unresolved. Perhaps the ECtHR’s case law will provide answers in the coming months to some of the questions that have been bothering us, because a number of potentially important proceedings – not only from Poland’s perspective – are pending before this body.

51 ECtHR ruling of 22 July 2021 in *Reczkowicz v Poland*, application 43447/19.

52 ECtHR ruling of 3 February 2020 in *Advance Pharma sp. z o.o. v Poland*, application 1469/20.

53 ECtHR ruling of 8 November 2021 in *Dolińska-Ficek and Ozimek v Poland*, applications 49868/19 and 57511/19.

54 ECtHR ruling of 6 October 2022 in *Juszczyszyn v Poland*, application 35599/20.

55 ECtHR ruling of 29 June 2021 in *Broda and Bojara v Poland*, applications 26691/18 and 27367/18.

56 ECtHR (Grand Chamber) ruling of 15 March 2022 in *Grzęda v Poland*, application 43572/18.

57 ECtHR ruling of 16 June 2022 in *Żurek v Poland*, application 39650/18.



## Defective appointments to the ordinary courts

The ECtHR's ruling on the consequences of adjudication by judges appointed on the motion of the so-called neo-NCJ to the ordinary courts will almost certainly be of greatest practical importance to Polish citizens.<sup>58</sup>

The fundamental question is whether the approach presented by the ECtHR in cases regarding defective appointments to the Supreme Court can be automatically transferred to the assessment of the status of judges of the ordinary courts.

It is worth recalling that cases regarding defective judicial appointments are considered with account taken of the so-called *Astradsson* test – it will undoubtedly also be applied to cases regarding appointments to the ordinary courts. This test assumes that three issues must be established in order to establish whether defects in an appointment have brought about a breach of the right to a court established by law.<sup>59</sup> First, whether there was a gross breach of national law. Second, whether the breach applied to norms of fundamental significance to the course of making the appointments. Third, whether the domestic courts properly examined and remedied the effects of the breaches in the procedure of appointing the judge.

In all the cases resolved by the Court to date, while assessing the first two elements of the test, the Court attached the greatest importance to the fact that the judge was appointed on the motion of the neo-NCJ. Although the Court also took into account other breaches in *Dolińska-Ficek and Ozimek* and *Advance Pharma*, there is no doubt that it was precisely the defective membership of the NCJ that had the greatest impact on the decision.

Judges of the ordinary courts are also appointed by the President on the motion of the neo-NCJ, so it can be argued that, even in their case, there has been a gross breach of the norms of national law of fundamental significance to the whole of the appointment procedure.<sup>60</sup>

## Appointments of assessors to the courts

However, the Polish legal literature sometimes points out that assessors and people

58 Proceedings regarding the incorrect appointments of judges of courts other than the Supreme Court are currently pending before the ECtHR, see *D.C. v Poland*, application 41335/21; *Zielińska v Poland and 11 other applications*, application 48534/20 and others; *Brodowiak v Poland*, application 28122/20; *Dżus v Poland*, application 48599/20.

59 ECtHR (Grand Chamber) ruling of 1 December 2020 in *Ástráðsson v Iceland*, application 26374/18, para. 243-290.

60 See e.g. M. Szwed, *Hundreds of judges appointed in violation of the ECHR?: The ECtHR's Reczkowicz v. Poland ruling and its consequences*, VerfassungsBlog, 29 July 2021, <https://verfassungsblog.de/hundreds-of-judges-appointed-in-violation-of-the-echr/>, DOI: 10.17176/20210730-015909-0.

appointed to their first judicial positions after the period of assessorship should be treated differently. The argument justifying such a thesis is supposed to be that, in the case of both of these groups, the appointment procedure significantly limits the NCJ's discretion, so it can be argued that the fact that this body is politicized is not so important. In this situation, it would have to be accepted that, in the case of assessors and former assessors, a breach of Article 6 ECHR could be avoided as early as at the second stage of the *Astradsson* test (a breach of domestic law that does not apply to norms of fundamental importance to the whole of the appointment procedure).<sup>61</sup>

I believe this argument could be correct, but it cannot be applied to other categories of judges of the ordinary courts, whose situation will be more like that of the newly appointed Supreme Court judges.

### Circumstances of a judge's appointment

However, this does not necessarily mean that the involvement of such people in the benches of the ordinary courts must lead to a breach of the ECHR.<sup>62</sup> This is because the *Astradsson* test also has a third stage, which assumes that Article 6 ECHR will not be breached if the effects of the defective appointment are properly examined and remedied by the national courts. The case law to date does not give an unambiguous answer to how this concept should be construed – this is because, in none of the Polish cases considered so far has there been any examination of the circumstances of the judge's appointment, and therefore the third stage of the *Astradsson* test was of little relevance in these cases. However, it can be assumed that its essence is almost certainly to ensure that a party is able to raise an objection about the defectiveness of the appointment during the proceedings, and the national court then considers this objection taking into account the criteria developed in ECtHR case law.

This does not necessarily mean that the national court should overturn a judgment passed by a judge appointed in breach of the law, but it has to sufficiently examine all the circumstances and examine its decision. By accepting this interpretation of the *Astradsson* test, it is possible to reconcile the approach presented by the ECtHR with the test of independence and impartiality established by the resolution of the three chambers of the Supreme Court.<sup>63</sup>

61 See J. Roszkiewicz, *Individual test of the independence of a judge appointed in breach of the law – comments on the case law of the Court of Justice of the European Union, the European Court of Human Rights, the Supreme Court and the Supreme Administrative Court*, 'Przeegląd Sądowy' 2022, no. 11-12, p. 89.

62 See e.g. M. Szwed, *Testing judicial independence: On the recent developments in the Polish rule of law crisis*, VerfassungsBlog, 18 August 2022, <https://verfassungsblog.de/testing-judicial-independence/>, DOI: 10.17176/20220818-182010-0.

63 I discuss this problem in more detail in the article entitled 'The right to a court established by law and adjudication by judges of the ordinary courts appointed on the motion of the National Council of the Judiciary after 6 March 2018,' which appears in 'Przeegląd Konstytucyjny' No. 4/2022.

## Extraordinary complaint

The proceedings pending before the ECtHR regarding President Lech Wałęsa's application, among others, may also be important from the point of view of the situation in Poland.<sup>64</sup> It not only applies to the issue of defective appointments of Supreme Court judges, but also problems related to the structure and functioning of the extraordinary complaint.

The Court will have the opportunity to assess whether this measure, which makes it possible to challenge final judgments, even those issued many years ago, poses an excessive threat to Poland's certainty of the law. The importance of this case is evidenced by the fact that, as arises from the questions which the ECtHR asked the parties to the proceedings, the Court is even considering applying a pilot procedure in this case.

## The right of judges to protection and respect for their independence

Meanwhile, from an international perspective, an extremely important problem that runs through some Polish cases before the ECtHR<sup>65</sup> applies to the possibility of inferring the right of judges to protection and respect for their independence from Article 6 of the Convention. The ability to accept such an interpretation has been considered in the literature,<sup>66</sup> but the Court has so far never explicitly stated that such a right exists.

In the case law of the ECtHR to date, issues related to the protection of the independence of the judiciary have been mentioned directly in the applications filed by citizens or indirectly in the applications of the judges.<sup>67</sup> In the former case, the applicants rely on the allegation of a breach of the right to an independent court guaranteed by Article 6 ECHR. Such breaches can arise, for example, from the lack of adequate guarantees of judicial independence, such as protecting a judge from arbitrary removal from office.

From such an angle, however, Article 6 primarily protects the party to the proceedings – it is the entity that is entitled to a trial by an independent court. However, the Convention also protects judges themselves to a certain extent. They too, in principle, are entitled to a trial in court under Article 6 ECHR, for example, in disciplinary

64 See *Wałęsa v Poland*, application 50849/21.

65 See *Biliński v Poland*, Application 13278/20; *Synakiewicz and Others v Poland*, Application 46453/21 and others; *Leszczyńska-Furtak and Others v Poland*, Application 39471/22 and others.

66 See especially: M. Leloup, *Who Safeguards the Guardians? A Subjective Right of Judges to their Independence under Article 6(1) ECHR*, 'European Constitutional Law Review' 2021, vol. 17, issue 3, pp. 394-421.

67 See also: M. Szwed, *The irremovability of judges in the case law of the European Court of Human Rights*, 'Przegląd Konstytucyjny' 2021, no. 3, pp. 143-177.

or professional cases.<sup>68</sup>

Furthermore, according to the ECtHR case law, disciplinary penalties imposed on judges or other similar measures can constitute interference with privacy in the meaning of Article 8 of the Convention, which means that they will have to satisfy the requirements of legality or proportionality. This is how the Court has qualified even the suspension of Judge Juszczyszyn by the Disciplinary Chamber.<sup>69</sup>

Sometimes, however, it may be difficult to demonstrate the connection between a specific form of interference with a judge's privacy and his privacy. For this reason, the question arises about the admissibility of inferring from Article 6 ECHR a judge's right to respect and protection of independence, which would be independent of, for example, the judge's right to privacy or freedom of expression.<sup>70</sup>

The acceptance of such an interpretation would almost certainly strengthen the protection of judicial independence by the Convention. After all, judges who are subjected to various types of pressure or harassment would be able to turn to the ECtHR with an application based directly on Article 6 ECHR, not only to challenge a possible lack of judicial route or procedural unfairness, but also to raise objections as to the substantive inadmissibility of the sanctions imposed on them, without the need to demonstrate that there has been interference, for example, with their private lives.

If the ECtHR accepts that such a right can be inferred from Article 6 ECHR, this will undoubtedly be a significant change in the case law, the importance of which could substantially extend beyond Polish cases. This is because judges in other European countries will also gain the easier ability to seek protection under the Convention in connection with various types of threat to their independence.

## How will the ECtHR deal with the increasing number of cases from Poland?

It arises from the information provided by the Court that more than 300 cases are currently pending before it regarding various types of problems related to the judiciary in Poland.<sup>71</sup>

It can be expected that this number will steadily increase, as the current Polish authorities have not demonstrated any willingness to implement the ECtHR's rulings and elimi-

68 See e.g. M. Leloup, *Not Just a Simple Civil Servant: the Right of Access to a Court of Judges in the Recent Case Law of the ECtHR*, 'European Convention on Human Rights Law Review' 2022, DOI: doi: <https://doi.org/10.1163/26663236-bja10055>.

69 *Juszczyszyn v Poland*, para. 227-282.

70 M. Leloup, *Who Safeguards...*, pp. 404-405.

71 This information was announced in the ECHR's press release of 16 February 2023 entitled *Non-compliance with interim measure in Polish judiciary cases*.

nate the main source of breaches of the Convention, which is the current form of the NCJ.

The increase in the number of applications will be all the more likely if the ECtHR challenges the participation of newly appointed judges in the benches of the ordinary courts. This is because this will mean that parties which are dissatisfied with the judgments of the courts issued with the participation of judges appointed on the motion of the reorganized NCJ will be able to file applications with the ECtHR based on allegations referring to irregularities in domestic proceedings.

It is worth noting that the change in the policy regarding the order in which cases are considered, which was adopted in 2021, assuming the separation and priority treatment of the category of so-called impact cases, namely cases of particularly significant, systemic importance,<sup>72</sup> has also translated into the reasonably fast, at least by ECtHR standards, consideration of Polish cases regarding the rule of law crisis.

For example, the *Advance Pharma* case was settled just over two years after the application was filed, and it also took the same amount of time to consider Judge Juszczyzyn's application.

In comparison, proceedings on the lack of civil partnerships in Poland have been pending for more than 10 years, while cases regarding the operation of the National Centre for the Prevention of Dyssocial Behaviour in Gostynin have been pending for 5.5 years.

Furthermore, new 'judicial cases' are often communicated to the government very quickly – in *Leszczyńska-Furtak and others v Poland*, in which the applications were filed by the judges who were transferred from the Criminal Division of the Court of Appeal in Warsaw to the Labour and Social Insurance Division of that court, the communication was sent less than 4 months after the application was filed.

Finally, in cases related to the crisis around the judiciary in Poland, the ECtHR also issues interim measures obliging the Polish authorities to, for example, suspend certain decisions<sup>73</sup> or prevent defectively appointed people from issuing rulings in the cases of the applicants.

It appears that the ECtHR does not intend to change its approach to Polish cases related to the rule of law crisis and start treating them as secondary. The question, however, is whether the Court is able to handle the potentially ever-increasing number of complaints about similar problems.

72 A description of the new strategy regarding the order in which cases are heard is available at: [https://echr.coe.int/Documents/Court\\_that\\_matters\\_ENG.PDF](https://echr.coe.int/Documents/Court_that_matters_ENG.PDF).

Sometimes, when there is a massive influx of cases in which a breach of human rights arises from the same problem, the Court decides to implement the so-called pilot procedure. It is based on issuing a judgment, the operative part of which contains an unequivocal statement that the breach of the Convention is caused by a specific systemic shortcoming and the State is given the obligation to eliminate the given problem.

Simultaneously, when the pilot judgment is issued, the Court suspends the consideration of similar cases for a specified period, giving the parties to the proceedings time to resolve the dispute amicably. Such a procedure was used, among others, in *Rutkowski v Poland*,<sup>73</sup> in which the breach of Article 6 ECHR was caused by irregularities in the functioning of the application regarding protractedness. In issuing its ruling, the ECtHR deferred the consideration of already-communicated cases of protractedness for two years and future cases for one year. During this time, the government proposed a solution to the problem in general terms, and made so-called unilateral declarations in the pending cases, in which it recognized the breach of the ECHR with respect to the applicants affected by the protractedness and undertook to pay them just compensation and make systemic reforms.

In its decision in the case of *Zaluska, Rogalska and others v Poland*,<sup>74</sup> regarding a group of 400 cases, the consideration of which had been deferred, the ECtHR acknowledged such actions as being sufficient and approved the government's unilateral declarations, which meant that the cases would be removed from the list. In this way, the Court brought about the resolution of the problem and the settlement of the cases pending before it, while avoiding the difficulties arising from the need for the separate consideration of several hundred similar cases.

It cannot be ruled out that the Court will apply a similar approach in cases involving a rule of law crisis – as I have already pointed out, the Court itself suggested this in its communication in *Walesa v Poland* regarding the extraordinary complaint to the Supreme Court.

However, the effectiveness of the pilot procedure depends on the State's attitude. Since the Polish government not only does not intend to make any systemic reforms, but also does not accept that there has been a breach of the Convention at all in cases involving the judiciary, the implementation of this procedure might not actually change much, because the Court will ultimately need to rule on the merits anyway.

However, the ability to hear such repetitive cases with a bench of three judges (instead

73 ECtHR ruling of 7 July 2015 in *Rutkowski and others v Poland*, application 72287/10 and others.

74 ECtHR ruling of 20 June 2017 in *Zaluska, Rogalska and others v Poland*, application 53491/10 and others.

of the standard seven-member bench) could be a certain improvement.

## Execution of judgments

None of the judgments issued by the ECtHR to date regarding the rule of law crisis in Poland has so far been implemented in general terms, namely by eliminating the systemic problem underlying the breach of the Convention.

The independence of the NCJ has not been restored, the status of the defectively appointed judges has not been verified, while the people elected as judges of the Constitutional Tribunal in breach of the law continue to participate in the adjudication of cases.

Furthermore, as the media reported, in *Dolińska-Ficek and Ozimek*, the government has not paid the compensation awarded by the Court to the applicants.<sup>75</sup> The Polish authorities not only are not implementing the Court's rulings, but they are also directly questioning their validity, which is evidenced by the Prosecutor General's applications to the Constitutional Tribunal, which led to the finding that Article 6 ECHR is partially unconstitutional.<sup>76</sup> The President of the Court of Appeal in Warsaw recently refused to enforce an interim measure issued by the ECtHR in *Leszczyńska-Furtak and others* mentioned above, citing these decisions of the Constitutional Tribunal.<sup>77</sup>

The bodies of the Council of Europe do not currently have effective mechanisms to force a reluctant State to implement ECtHR judgments. The Committee of Ministers supervises the execution of judgments, but it does not have the power to impose sanctions on States. Although the Committee can approach the ECtHR under Article 46 ECHR to issue a judgment declaring a State's failure to perform its obligation to execute a judgment, firstly, it very rarely takes advantage of this power<sup>78</sup> and, secondly, it is rather doubtful that the State which challenges the validity of ECtHR judgments will take another ECtHR judgment obliging it to execute judgments to heart.

It cannot be ruled out that the Council of Europe summit in Reykjavik, which took place on 16 and 17 May 2023, could lead to some changes being made to increase the effectiveness of supervision of the execution of ECtHR judgments.

75 See A. Gmiterek-Zablocka, *A Lublin judge won against Poland in Strasbourg, but did not receive compensation. 'This may be playing for time,' TOK.FM*, 23 June 2022, [https://miasta.tokfm.pl/miasta\\_tokfm/7.185052.28615054.polska-nie-wykonala-wyroku-europejskiego-trybunalu-praw-czlowieka.html](https://miasta.tokfm.pl/miasta_tokfm/7.185052.28615054.polska-nie-wykonala-wyroku-europejskiego-trybunalu-praw-czlowieka.html);

76 See ruling of the Constitutional Tribunal of 24 November 2021, case ref. K 6/21; ruling of the Constitutional Tribunal of 10 March 2022, case ref. K 7/21.

77 See, e.g., M. Jałoszewski, *ECtHR calls on government to urgently implement ruling on sending three Warsaw judges away on disciplinary charges*, 'OKO.press', 3 February 2023, <https://oko.press/etpcz-zabiezpieczenie-radzik-schab>.

78 See ECtHR (Grand Chamber) judgment of 29 May 2019 in *Ilgar Mammadov v Azerbaijan*, Application 15172/13; ECtHR (Grand Chamber) judgment of 11 July 2022 in *Kavala v Turkey*, Application 28749/18.

The 'European Implementation Network', which brings together many European NGOs, including the Helsinki Foundation for Human Rights, has presented a number of interesting proposals on this. Among other things, it presented a proposal to introduce a new sanction that could be imposed on a State that fails to implement ECtHR judgments. Such a measure should be effective, being more severe than the current resolutions of the Committee of Ministers, but softer than expulsion from the Council of Europe.<sup>79</sup>

However, it is questionable whether even the implementation of a reform of this kind would induce the Polish authorities to execute the ECtHR rulings. After all, even the heavy financial sanctions imposed on Poland by the bodies of the EU have so far only led the Polish authorities to make sham reforms, which do not eliminate the fundamental threats to exercising the right to a trial in court.

Można się jednak zastanawiać, czy nawet wdrożenie tego rodzaju reformy skłoniłoby polskie władze do wykonania wyroków ETPC. Wszak nawet dolegliwe sankcje finansowe nałożone na Polskę przez organy unijne doprowadziły jak na razie jedynie do podjęcia przez polskie władze pozornych reform, które nie eliminują podstawowych zagrożeń dla realizacji prawa do sądu.

## Restoring the rule of law

Poland will hold parliamentary elections in the autumn of 2023, which could lead to a reshuffle on the Polish political scene. In an attempt to normalize relations with the European Union and the Council of Europe, the new authorities could consider restoring the rule of law in Poland as one of their priorities. This process will certainly be long, but the need to implement ECtHR judgments could constitute a certain starting point here.

The Committee of Ministers formulated certain guidelines on the steps to be taken in this respect in December 2021 in its decisions on the execution of the judgments in *Xero Flor*,<sup>80</sup> as well as *Reczkowicz and Broda and Bojara*.<sup>81</sup>

In the case of the first of these, the Committee drew attention to need to ensure that the benches of the Constitutional Tribunal are legitimate, to regulate the status of rulings

79 European Implementation Network, *Proposals for the work of the Council of Europe on the Implementation of Judgments of the European Court of Human Rights*, p. 2, <https://static1.squarespace.com/static/55815c4fe4b077ee5306577f/t/62820f2bd8316c4d2f4f8e6e/1652690732420/EIN+Proposals+on+the+Implementation+of+Judgments.pdf>.

80 Decision of the Committee of Ministers of 8 December 2022, CM/Del/Dec(2022)1451/H46-24, [https://hudoc.exec.coe.int/eng?i=CM/Del/Dec\(2022\)1451/H46-24E](https://hudoc.exec.coe.int/eng?i=CM/Del/Dec(2022)1451/H46-24E).

81 Decision of the Committee of Ministers of 8 December 2022, CM/Del/Dec(2022)1451/H46-25, [https://hudoc.exec.coe.int/eng?i=CM/Del/Dec\(2022\)1451/H46-25E](https://hudoc.exec.coe.int/eng?i=CM/Del/Dec(2022)1451/H46-25E).



issued by the Constitutional Tribunal in benches with defectively elected people and to consider implementing measures to protect against political pressure in the process of selecting judges of the Constitutional Tribunal. In turn, with regard to the execution of the judgment in *Reczkowicz*, the Committee recommended, among other things, the restoration of the independence of the NCJ by enabling judges to elect the judicial members of that body, and regulating the status of people appointed on the motion of the reorganized NCJ and the rulings issued by them.

Of course, the Committee's recommendations are formulated rather vaguely and leave a certain amount of room for the State to choose the most adequate measures. In this respect, resolving the issue of defective judicial appointments and the legal consequences of judgments issued by people appointed in this way could certainly pose a substantial difficulty.

Certainly, any attempt to rectify these problems has to be preceded by thorough analyses to determine the effects of the proposed regulations and to assess their compatibility with international standards.

# Non-Compliance with European Court Judgments in Poland



Mariusz Jałoszewski

**The Polish authorities under the United Right government are not executing the judgments of the Court of Justice of the European Union and the European Court of Human Rights. Judges are executing them, for which they are being persecuted.**

Not only have the United Right government and its nominees in the courts not executed a number of rulings of the CJEU and the ECtHR, but they are also demonstrably breaching the interim measures issued by both of these European courts. Judges applying these rulings and the European Convention on Human Rights, EU treaties and the EU Charter of Fundamental Rights are also being harassed all the time.

The United Right government in Poland, in which PiS party plays first fiddle, has been demonstrating a confrontational attitude to EU values and principles since 2015. One of the main points of the Warsaw-Brussels dispute is the dispute over the rule of law, especially the independence of the courts, over which the government has been gradually taking control for eight years.

The consequences of this dispute include numerous complaints of Polish citizens to the ECtHR regarding breaches of Article 6.1 ECHR. Furthermore, the Polish courts are submitting numerous questions to the CJEU requesting preliminary rulings on the organization of the judiciary in Poland. These complaints and questions have already allowed both of these Courts to assess the compliance of the changes in the Polish justice system with the European standard guaranteeing the right to a fair trial before an independent and impartial court established by law. This assessment is highly critical of the Polish government.

The rulings of the ECtHR and the CJEU are ground-breaking not only for Poland. They are also important to the European legal system.

Unfortunately, the Polish government is not doing anything to comply with these rulings. Quite the contrary. It is deliberately not implementing them, knowingly exposing Poland not only to the loss of billions of euros for the National Recovery and Resilience Plan, but also to its marginalization in the EU and the Council of Europe. The consequence of such a policy may also be the blockage of funds from the EU budget for 2021-2027.

The lack of appropriate reaction of the EU bodies and Member States to this attitude of the Polish government, which is destructive to the whole of the EU legal system, can lead to dangerous precedents and encourage subsequent populist governments to undermine EU values and principles.

### **CJEU and ECtHR rulings not executed by the Polish government**

The ECtHR and CJEU rulings are a reflection of the destruction of the rule of law in Poland and show how the authorities are taking control of the judiciary in stages. Both courts have issued a number of rulings on this.

The reaction to them should have been to change the laws that both courts found to be incompatible with the European standard of the right to a trial in a court or incompatible with EU law.

However, nothing of the kind has taken place in Poland. The authorities react to these rulings in several ways:

First, they ignore them.

Then, they question the right of both courts to adjudicate on the organization of Polish courts and conclude that these rulings are not applicable in Poland. To this end, they initiate proceedings in the Constitutional Tribunal which is staffed by PiS authorities, which issues judgments in their favour. It is the Constitutional Tribunal that has just acknowledged that the judgments of the ECtHR and the CJEU on Polish courts and the interim measures issued by the CJEU are not applicable in Poland.

Thirdly, they make sham legislative changes which are, in fact, intended to deceive the European Commission.

Fourthly, they announce the completion of the 'reform' of the courts involving the liquidation of the current courts, the appointment of new ones and the removal of independent judges from the profession.

Below, I discuss examples of the most important judgments and interim measures issued by both of the European courts, which the Polish government has not executed or is pretending to change the law.

## Rulings of the European Court of Human Rights

### 1. Xero Flor sp. z o.o. v Poland , ruling of 7 May 2021, application 4907/18.

The ECtHR ruled that Article 6.1 of the Convention had been breached. It follows from this ruling that the bench of the Polish Constitutional Tribunal, in which judges who have been defectively elected by the Sejm (so-called ‘stand-in judges’) adjudicate, is not a court established by law. And the rulings issued by such a bench are not binding. However, the Constitutional Tribunal continues to rule with defective judges. Defective judges were even involved in issuing rulings that undermine the application of CJEU and ECtHR judgments in Poland. Disciplinary action was taken against Judge Olimpia Barańska-Małuszek from Gorzów Wielkopolski for applying the ECtHR judgment in the Xero Flor case in her judgments.<sup>82</sup>

### 2. Broda and Bojara v Poland, ruling of 29 June 2021, applications 26691/18, 27367/18.

The ECtHR ruled that Article 6.1 of the Convention had been breached. In this judgment, it concluded that the dismissal of the vice-presidents of the Regional Court in Kielce, without guaranteeing the right of appeal to a court, was in breach of the Convention. In this judgment, the ECtHR assessed the massive purges of court presidents and vice-presidents conducted by Minister of Justice Zbigniew Ziobro at the turn of 2017 and 2018. These purges were allowed by the amendment to the Act on the Structure of the Ordinary Courts. The rules for appointing and dismissing presidents and vice-presidents of courts have not changed to this day. This is still done arbitrarily by Minister of Justice Zbigniew Ziobro.

### 3. Reczkowicz v Poland, ruling of 22 July 2021, application 43447/19.

The Court ruled that Article 6.1 of the Convention had been breached. This ruling contested the status of the neo-judges in the Disciplinary Chamber of the Supreme Court. In other words, judges nominated by the neo-National Council of the Judiciary, which was elected on the Principles that had been amended in 2017, whose status was also contested. The Court ruled that the neo-National Council of the Judiciary was not sufficiently

82 See M. Jałoszewski, First reprisals for undermining Przyłębska's Constitutional Tribunal. Disciplinary action against a judge from Gorzów, they are also prosecuting Morawiec, OKO.press, 15 October 2021, <https://oko.press/pierwsze-represje-za-podwazenie-tk-przylebskiej/>.

independent of the legislative and the executive branches, and therefore a bench, which includes a judge nominated on its recommendation, should be considered unlawful.

However, the neo-NCJ is still operating, and furthermore, the Sejm appointed it for a second term of office in 2022, with an almost unchanged membership. It is still giving out defective nominations, which already total 2,500-3,000. The defective judges are issuing defective rulings.

#### **4. Dolińska-Ficek and Ozimek v Poland, ruling of 8 November 2021, applications 49868/19 and 57511/19.**

The ECtHR held that Article 6 of the Convention had been breached. Judges Monika Dolińska-Ficek and Artur Ozimek ran for membership of the Supreme Court before the neo-National Council of the Judiciary. They wanted to test the fairness and transparency of these recruitments. In their cases, the ECtHR ruled that the neo-NCJ was not independent of the politicians. It stated that Poland should resolve the problem of the lack of independence of the NCJ, which is a major source of the rule of law problems. The Court also questioned the correctness of the appointment of judges to the Chamber of Extraordinary Control and Public Affairs of the Supreme Court. Because the defective NCJ had given them nominations.

The government is doing nothing to fix the defectiveness of the new NCJ. It is defending the status of the defective neo-judges appointed by it. And this means that Polish citizens are complaining en masse to the ECtHR about judgments issued by Polish courts, through defective benches.

#### **5. Advance Pharma sp. z o.o. v Poland, ruling of 3 February 2022, application 1469/20.**

The ECtHR held that Article 6 of the Convention had been breached. The Court acknowledged that the nominations of the neo-NCJ for neo-judges from the Civil Chamber of the Supreme Court were defective. In the light of this ruling, Małgorzata Manowska, who serves as the first president of the Supreme Court is not a judge of the Supreme Court. The ruling is not being executed. There is no reform of the NCJ, nor is there a proposal to dissolve the defectively appointed judges of the Supreme Court, of whom there are approximately 50. Furthermore, the neo-NCJ is settling a major recruitment for the Civil Chamber of the Supreme Court, and could appoint as many as 12 new judges.

#### **6. Piekarska-Drażek, Gregajtys, Leszczyńska-Furtak v Poland, interim measure of 7 December 2022, applications 39471/22, 39477/22, 44068/22.**

The ECtHR prohibited the compulsory transfer of the judges to other divisions of the Court of Appeal in Warsaw pending its judgment. The three judges were transferred from the criminal division to the labour division in August 2022, contrary to their many years of specialization. This was the decision of the president of the Court of Appeal in Warsaw. The transfer was a punishment for applying the judgments of the ECtHR and the CJEU. However, despite the interim measure issued by the ECtHR, the judges were not reinstated in the criminal division because the court president refused to perform the interim measure. The court president acknowledged that the ECtHR does not have the right to issue interim measures. The Polish government accepted his position. This is a precedent-setting disregard of the ECtHR's interim measure that groups Poland with Russia and Turkey.

#### **7. Żurek v Poland, interim measure of 18 October 2022, applications 36137/22, 41885/22.**

The ECtHR has prohibited Kraków-based Judge Waldemar Żurek's cases from being heard by the Chamber of Extraordinary Control and Public Affairs of the Supreme Court, whose status the judge is challenging, pending its judgment. But this Chamber, in which only neo-judges rule, breached the ECtHR's interim measure and examined one of Żurek's cases on 31 January 2023.

### **Rulings of the Court of Justice of the European Union**

#### **1. A.K. v. National Council of the Judiciary and C.P. and D.O. v Supreme Court. Joined Cases C-585/18, C-624/18 and C-625/18. Ruling of 19 November 2019.**

The Supreme Court requested a preliminary ruling. This was the first CJEU ruling on the assessment of the changes in the Polish judiciary. The CJEU included criteria in it for assessing the legality of the Disciplinary Chamber of the Supreme Court and the new NCJ. The authorities did not change anything after it was issued. Quite the contrary. They started repressing judges and enacted the so-called Muzzle Act, prohibiting judges from examining the status of the NCJ, the Disciplinary Chamber and neo-judges.

#### **2. A.B., C.D., E.F., G.H., I.J. v National Council of the Judiciary. Case C824/18. Ruling of 2 March 2021. Preliminary questions from the Supreme Administrative Court.**

The judgment applied to the legality of the new NCJ and the nomination of judges of the Civil Chamber of the Supreme Court – including the nomination for the president of the Supreme Court, Małgorzata Manowska – and the Criminal Chamber. In it, the CJEU contested the status of the NCJ, but this body is still operating and the new judg-

es of the Supreme Court are still adjudicating.

### **3. European Commission v Poland. Case C-791/19. Ruling of 15 July 2021.**

The CJEU ruled that the system of disciplinary liability of judges in Poland is incompatible with EU law. This judgment contested the status of the Disciplinary Chamber and the judges appointed to it by the new NCJ.

This is the only judgment that the authority has only partially executed. It did so with great reluctance under pressure from the European Commission, which blocked funds for Poland for the National Recovery and Resilience Plan. President Andrzej Duda helped with the partial execution of this ruling, as he prepared an amendment to the Act on the Supreme Court. As a result, the Disciplinary Chamber was liquidated in the middle of 2022. The disciplinary system for judges has still not been reformed. A new Professional Liability Chamber of the Supreme Court was formed in place of the liquidated Chamber, but it too is defective for two reasons. Firstly, the judges were personally appointed to it by the president, namely a politician. He did this with the complicity of the prime minister. In other words, it is not a court established by law, but nominated by politicians. Other than that, of the 11 members of the new Chamber, as many as 6 are neo-judges whose status the ECtHR and the CJEU undermined. Furthermore, the defective judges rule on disciplinary cases of judges who are being repressed for applying European law and rulings of the ECtHR and CJEU. Such a defective bench reinstated Poland's last suspended judge, Maciej Ferek from Kraków, in March 2022.

### **4. W.Ż. v National Council of the Judiciary. Case C487/19. Ruling of 6 October 2021.**

The Civil Chamber of the Supreme Court asked preliminary questions. The Court of Justice of the EU ruled that the arbitrary transfer of judges to other divisions within a court is a form of repression and is in conflict with EU law. It may breach judicial independence. The Court also ruled that rulings issued by the neo-judges of the Supreme Court from the Chamber of Extraordinary Control and Public Affairs may be found to be null and void.

Not only has this ruling not been executed, but it is being demonstratively flouted. Because the people from the authorities now treat the forced transfer of judges in the courts as a new measure of repression with respect to judges applying European law.

Furthermore, the authorities of the Supreme Court constituting new judges blocked the execution of this CJEU ruling by the Civil Chamber, which asked preliminary questions. First, the president of the Supreme Court, Małgorzata Manowska, refused to release

the files that had returned after the CJEU issued its ruling for several months. Then the seven-member bench that asked the preliminary questions was changed. It now has as many as four neo-judges, including Supreme Court President Manowska. This is highly significant. Because the Civil Chamber is to decide on the status of the new Supreme Court judges in this case. It can be assumed that, after the change in the bench, this will become impossible or the neo-judges will vote that they are legal.

**5. W.B. and others. Case C-748/19 to C-754/19. Ruling of 16 November 2021. The Regional Court in Warsaw asked preliminary questions.**

The CJEU specified the criteria on the basis of which the courts in Poland can consider the right of Minister of Justice Zbigniew Ziobro to post judges to adjudicate in other courts to be in conflict with EU law. The Court ruled that doubts could be cast over the independence of the posted judges. Because decisions on postings are arbitrary and it is possible to influence the posted judges and their rulings in this way. The system of posting judges has not changed. Today, they are mainly given to judges who are checked out by the ministry.

**6. W.Ż. and others v Supreme Court. Cases C496/20 to 496/20, C-506/20, C-509/20 and C-511/20. Ruling of 22 December 2022. The Chamber of Labour and Social Insurance of the Supreme Court asked preliminary questions.**

The case applies to whether the new judges of the Supreme Court are lawful judges. The CJEU refused to answer the questions, acknowledging that it has already ruled on this matter many times and the Chamber of Labour can issue its own judgment. But it is unknown as to whether such a judgment can be issued. Because, after the case files returned from the CJEU, the president of the Supreme Court, Małgorzata Manowska, 'arrested' them. She does not want to forward them to the Labour Chamber. Furthermore, judges from this Chamber are now being threatened with disciplinary cases. The president of the Supreme Court is also considering changing the benches that asked the preliminary questions.

**7. European Commission v Poland. Case C-791/19. Interim measure of 8 April 2020.**

The Court issued an interim measure suspending the adjudicatory work of the Disciplinary Chamber of the Supreme Court until a ruling is issued (it was passed on 15 July 2021). In accordance with this measure, the Chamber had been suspended by the former president of the Supreme Court, Małgorzata Gersdorf, but her term of office ended in 2020. She was replaced by a temporary president, Kamil Zaradkiewicz, who reversed her order and unfroze the work of the Chamber. He only suspended the



examination of disciplinary cases of judges. This arose from the fact that the interim measure was interpreted very narrowly.

## **8. European Commission v Poland. Case C-204/21. Interim measure of 14 July 2021.**

This application suspended the disciplinary chamber's adjudication activities on cases of immunity of judges, as well as the provisions of the Muzzle Act (which prohibits judges from examining the status of the new NCJ, or neo-judges, on the basis of EU law). This interim measure has not been executed to this day. That is why the CJEU imposed a fine on Poland of €1 million per day. It was reduced to €500,000 per day in April 2023. It already amounts to more than €500 million.

The neo-judges from the Disciplinary Chamber of the Supreme Court, Minister of Justice Zbigniew Ziobro and the presidents of the courts have been demonstratively flouting this interim measure. They have been suspending judges on the basis of the provisions frozen by the CJEU. The provisions of the Muzzle Act are still being used to repress judges. They are being used by disciplinary commissioners initiating proceedings for executing ECtHR and CJEU rulings. This is a blatant breach of this interim measure.

### **How the authorities and their people in the courts are repressing judges for applying European law and executing ECtHR and CJEU rulings**

The application of European law and the judgments of the ECtHR and the CJEU regarding the courts is being penalized by the authorities and their people in the courts. The Polish government does not want to allow the legitimacy of the institution in which it has its nominees and the legitimacy of the neo-judges to be contested.

The repression for this started in the second half of 2018, when Minister of Justice Zbigniew Ziobro appointed his disciplinary commissioners for judges: Chief Commissioner Piotr Schab and his two deputies, Michał Lasota and Przemysław Radzik. They have set a system of repression of judges in motion. They file disciplinary cases against judges on any pretext, e.g. for statements in the media about the rule of law, for judgments, for applying European law or for meetings with citizens.

Disciplinary cases have been initiated against 100-200 independent judges in Poland. The record holder is Judge Waldemar Żurek from Kraków, who has more than 20 disciplinary cases and is the judge who is most persecuted by the authorities in Poland.

Importantly, disciplinary cases for enforcing judgments of the ECtHR and the CJEU are initiated against judges on the basis of the provisions of the Muzzle Act, which the

CJEU suspended in the interim measure on 14 July 2021. Several examples, just from 2023. Judge Paweł Juszczyzyn from Olsztyn is under threat of several disciplinary charges for contesting the status of neo-judges. Wojciech Maczuga from Kraków is threatened with the same charges. Meanwhile, Judge Sławomir Bagiński is facing disciplinary action for conducting a test of independence of a neo-judge. Judge Bagiński applied the test specified in the ruling of the ECtHR in *Guðmundur Andri Ástráðsson v Iceland* of 1 December 2020 (application 26374/18).

The judges were not frightened by the disciplinary action. That is why other forms of repression started to be used to slow down the application of rulings of the ECtHR and CJEU. Judges started to be suspended from 2020. The Disciplinary Chamber managed to suspend six judges. They are Paweł Juszczyzyn from Olsztyn, Maciej Ferek from Kraków, Maciej Rutkiewicz from Elbląg and Igor Tuleya, Piotr Gąciarek and Krzysztof Chmielewski from Warsaw. All of their suspensions have now been lifted, mainly by the new Professional Liability Chamber of the Supreme Court, which was established in the middle of 2022. A dozen or so applications for the suspension of further judges are still pending.

Attempts are also being made to silence independent judges in Poland in the prosecutor's office headed by Zbigniew Ziobro (he combines the functions of minister of justice and prosecutor general). These are handled at the highest level in the prosecutor's office, namely by the National Prosecutor's Office. A special internal affairs department has been set up in it to prosecute judges and prosecutors. However, the proceedings against judges conducted there are repressive and involve looking for any excuse to indict. It was this department that wanted to press groundless criminal charges against Judge Igor Tuleya for openness of court proceedings.

The latest form of repression against judges is their transfer to other divisions within the courts as punishment. Frequently not in line with their specialization, to make the punishment even more severe. Because the judge quickly has to learn the new law and the extensive line of judgments of the courts. This was first applied to Judge Waldemar Żurek from Kraków in 2018. It was on the basis of his case that the CJEU issued a ruling in October 2021 on the transfer of judges. The Regional Court in Katowice issued a non-final ruling in March 2023 that his transfer was in conflict with Polish law and ordered his return to his old division.

Decisions to transfer judges are made by court presidents, who have been appointed by the Minister of Justice. This is not only a form of punishment, but also a way of removing them from judging important cases and depriving them of the ability to apply rulings of the ECtHR and CJEU.

In addition to Judge Żurek, the following were also transferred:

- Łukasz Biliński from Warsaw. He was transferred from the criminal division to the labour division. This is a punishment for acquitting people protesting against the authorities. The judge frequently applied the European Convention on Human Rights in his judgments.
- Wojciech Maczuga, Beata Morawiec, Katarzyna Wierzbicka and Maciej Czajka from Kraków. The last of these was the only one to be transferred from the criminal division to the civil division, in conflict with his specialization. After the judges protested, the court president backed down from this. Their transfer was punishment for refusing to adjudicate with neo-judges.
- Piotr Gąciarek and Anna Ptaszek from Warsaw. They were transferred from the criminal division to the executive division. This was punishment for refusing to adjudicate with neo-judges.
- Agnieszka Niklas-Bibik from Słupsk for challenging the status of a neo-judge.
- Marzanna Piekarska-Drażek, Ewa Gregajtyś and Ewa Leszczyńska-Furtak from Warsaw. They are highly valued criminal court judges. They were transferred from the criminal division to the labour division. This was punishment for challenging the status of neo-judges based on rulings of the ECtHR and CJEU. It was in their case that the court president refused to implement the ECtHR's interim measure.
- Paweł Juszczyśzyn and Wojciech Kuciejewski from Olsztyn. Both were transferred from the civil division to the labour division. After a few days, the court president withdrew from this in Judge Kuciejewski's case. Judge Juszczyśzyn should also have been reinstated in the civil division, as this is what the Bydgoszcz court ordered in its judgment. But the court president does not want to implement this judgment. And he applied to the Minister of Justice to forcibly remove the judge from the profession.
- The forcible transfer of these judges is in conflict with the CJEU ruling of 6 October 2021 in Waldemar Żurek's case (C-487/19). The court presidents are also breaching the provisions of the Polish Act on the Structure of the Ordinary Courts.

## How the rulings of the ECtHR and the CJEU are not being implemented in Poland in 2023

Disciplinary Commissioner Radzik and the Chamber of Control in the Supreme Court are breaching the ECtHR rulings. The Disciplinary Chamber of the Supreme Court did not apply the CJEU rulings. The disciplinary commissioners and court presidents nominated by Ziobro and Minister of Justice Ziobro himself are breaching the CJEU's rulings. First President of the Supreme Court Manowska is blocking the release of case files for implementing three CJEU rulings.

Judges are facing disciplinary action for implementing the ECtHR's and CJEU's rulings, including performing a test of a judge's independence based on the criteria presented by the ECtHR in *Astradsson v Iceland*. The amendment to the court acts proposed by President Andrzej Duda and adopted in 2022 prevents the *Astradsson* test from being performed. The amendment only ostensibly has the objective of implementing the CJEU rulings. The fine for failing to implement the CJEU's interim measures is increasing, already having exceeded half a billion euros.

Suspended Judge Maciej Ferek from Kraków was reinstated by a defective bench, which was incompatible with the rulings of the CJEU and ECtHR. Despite European standards that judges must not be punished for the content of their rulings, the disciplinary commissioners are not withdrawing their motions to suspend further judges. Judges are increasingly complaining about bullying and unequal treatment at work.

Citizens are filing successive complaints with the ECtHR because their cases are being heard by defective benches. But the neo-NCJ is still nominating defective neo-judges and the President is still appointing them.



# Political Dimensions of the Rule of law Crisis in the Context of the Election Campaign in Poland

Dominika Sitnicka

**The ruling party in Poland admits in official statements that the changes in the judiciary have not succeeded as planned. This is one of the threads of the campaign for the parliamentary elections to be held in the second half of 2023, which is already unofficially taking place. The processes taking place in areas that are part of PiS's identity politics are most frequently cited by the ruling party as an example of judicial degeneration.**

## **A reform that failed**

The intensive reform of the judiciary which has been uninterruptedly pursued by the PiS government since the end of 2015, even in the narrative of the ruling party, is a weakness, an issue that needs to be improved.

It was just in 2022 that the chairman of PiS, Jarosław Kaczyński, publicly admitted several times that there are problems with the implementation of his intended policy in the area of the judiciary.

'I must admit that, in the face of various obstacles, the internal ones, because unfortunately there were some of those, and the external ones, the reform has not succeeded to date,' said Kaczyński in June 2022 on Public Television. 'In sections, many things have improved, the pace of many things has improved, although there is no general change. If the question were to be asked about whose fault it is, which is an understandable and natural

question, then there are many guilty parties.’<sup>83</sup>

Prime Minister Mateusz Morawiecki assesses the situation even more harshly: ‘We probably cannot have a greater chaos and more troubles than we currently have in the judiciary, but whether one judge can say something about another judge is not so fundamentally important that we should be stuck in an impasse as a result. The judiciary has been driven into semi-collapse and will continue to vegetate until there is some improvement and perhaps a broader consensus for change. Today it is worse than it was,’ he said in an interview with the pro-government weekly ‘Sieci’ in December 2022.<sup>84</sup>

While Mateusz Morawiecki spoke in his statement primarily about the repercussions of the reforms – which had failed, contested by the legal community and international institutions (which we will discuss in the third part of the text), Jarosław Kaczyński was considering the bigger picture. The PiS chairman is creating an image of the judiciary in Poland as still not working in accordance with the ‘Polish *raison d’état*’, which he identifies with the interests of his political environment.

‘The reform of the courts is absolutely necessary; what is happening in the courts today is simply one gigantic scandal. This does not mean that every judge is bad and every judgment is scandalous, but there really are a lot of these scandalous judgments and, primarily, it can be said that the systemic inequality of citizens before the law is already taking place,’ said Kaczyński in October 2022.

‘Those who are somehow exposed, but obviously not those from our side, but those from the other side, have, in fact, no longer secured themselves an amnesty, but a permanent abolition. However, other citizens are liable on ordinary principles, but this is compounded by some extraordinary kindness of the courts with respect to criminals, including the worst ones.’<sup>85</sup> He said this has to change, but, he said, ‘this is difficult in the current political conditions, especially in connection with our membership of the EU’.

He also elaborated on this thought in June 2022, during meetings with voters in Inowrocław and Włocławek: ‘The Polish judiciary has to be changed. We are not questioning the independence of the courts, but they have to be a part of the state – just like the legislative and the executive branches. The courts have to be subject to and comply with the laws; it is a question of equality before the law (...). The current courts are a

83 Kaczyński on the reform of the courts: It has not worked to date. There is no general change, Forsal.pl, 21 June 2022, <https://forsal.pl/gospodarka/polityka/artykuly/8466298.kaczynski-reforma-sadow.html>.

84 D. Wielowieyska, ‘Morawiecki crushes his own government. I don’t know if we could have any more chaos’, Gazeta Wyborcza, 12 December 2022, <https://wyborcza.pl/7.75398.29251412.morawiecki-miazdzy-wlasny-rzad-nie-wiem-czy-mozemy-miec-jeszcze.html>.

85 Kaczyński: The reform of the judiciary is absolutely necessary. What is happening in the courts today is simply one gigantic scandal, Dziennik Gazeta Prawna, 17 October 2022, <https://www.gazetaprawna.pl/wiadomosci/kraj/artykuly/8569297.kaczynski-reforma-sadownictwa.html>.

creation of the communists.’

Similarly, on 3 December in Legnica: ‘There have to be apolitical courts, which we do not have today. Only contrary to what they think in the European Union, they are politically opposed to us and not in agreement with us.’<sup>86</sup>

## Courts as the reviewers of the authorities

The right-wing politicians are, of course, strongly contesting the activities of the judges who are applying European law, and more specifically CJEU rulings, for example, to examine the status of the judges appointed in a procedure with the participation of the National Council of the Judiciary appointed on the principles from 2017. The allegations against the politicization of the courts and individual judges do not only apply to the case law regarding the judiciary itself.

The Polish ordinary and administrative courts are repeatedly legally assessing the actions of the authorities, namely the legislative and executive branches as well as other state services on many other issues – from the legal situation of LGBT+ people, through migration policy to the legislative process. In just the last two or three years, the courts issued judgments stating that:

- the pandemic restrictions were introduced unconstitutionally;
- the prime minister’s decision ordering the 2020 presidential elections to be held exclusively by post was not supported by the law (the elections were ultimately held in a manner where postal voting was one of the options);
- just like the decisions of some of the local authorities to provide the personal data of the citizens to the Polish Post Office to conduct the presidential elections by post;
- local government family charters and declarations of ‘freedom from LGBT ideology’ breached the law;
- pushbacks of people illegally crossing the Polish-Belarusian border are illegal.

In the light of the complete subordination of the Constitutional Tribunal to the authorities, the ordinary and administrative courts are still playing an important role in controlling and evaluating the actions of the government. Although the systemic effective-

86 M. Danielewski, Coalition of morons and crooks, namely the authority about itself in its own words, OKO.press, 3 December 2022, <https://oko.press/koalicja-palantow-z-oszustami-czyli-wladza-o-sobie-wlasnymi-slowami/>.

ness of their judgments is limited (pushbacks are still being applied, no one is politically or legally liable for shortcomings in law-making), they can be of great importance in individual cases.

The big problem for the PiS government is caused by the judges who discontinue proceedings or acquit activists, namely citizens who loudly contest the actions of the authorities and exercise their right to freedom of expression and freedom of assembly. It is precisely the cases that apply to areas which are part of PiS's identity politics which are most frequently cited by the ruling party as examples of judicial degeneration.

The identity-important areas for the authorities include:

- religious issues, i.e., among other things, the protection of the Catholic Church from public criticism, prosecution of so-called insults to religious feelings;
- LGBT+ people – namely condoning discriminatory language and practices with respect to sexual minorities;
- events on the Polish-Belarusian border, namely ruthless support of pushbacks of migrants.

## Bad judgments, bad judges

In March 2023, the court acquitted 32 people who interrupted a mass in Poznań Cathedral in October 2020 as part of the protests of the Women's Strike after the Constitutional Tribunal ruled on abortion. The prosecutor's office charged them with malicious obstruction of a religious act.<sup>87</sup>

Minister of Justice and Prosecutor General Zbigniew Ziobro commented on the court's verdict. 'These are decisions that cannot be understood or explained except by such ostentation in disregarding the law, in gross breach of the law by the court and in encouraging other groups to destroy a certain religious consensus in Poland,' he said on TVP Info. He also said that 'instead of judging and applying the law, the court is applying the criteria of extreme left-wing ideology', that 'this is the downfall of part of the judiciary in Poland'.

'This politicization which has taken place in recent years as a result of, unfortunately, the support of the total opposition and the EU, means that some people in the

87 J. Theus, The court acquitted 32 people who interrupted a mass after the Constitutional Tribunal's ruling. 'The protest had to take place in a church', OKO.press, 13 March 2023, <https://oko.press/sad-uniewinnil-32-osoby-ktore-przerwaly-msze-po-wyroku-tk-protest-musial-odbyc-sie-w-kosciele/>.



judiciary have forgotten that they are judges, that they are supposed to humbly serve the law, whereas they are pursuing some political objectives,<sup>88</sup> added Ziobro.

The chair of the National Council of the Judiciary, and privately Zbigniew Ziobro's schoolmate, sent a letter to the president of the Poznań court, in which she contested the verdict and suggested that he send the judge who ruled on the case for training on the regulations on the protection of religious worship. The document was publicized.

The verdict was also widely criticized by other United Right politicians. 'This is one major scandal. Now I shall ask the court (what would happen) if I were to go into the courtroom and proclaim some views on various subjects, say I found an excellent place to announce various views,' said Minister of Education and Science Przemysław Czarnek.

The discontinuation of proceedings in March 2023 against Left MP Joanna Scheuring-Wielgus encountered similar comments. This case also involved a protest in a church in connection with abortion. The prosecutor's office in Toruń charged her with the malicious obstruction of a religious act and insulting religious feelings.

The Solidarna Polska politicians did not like the court's decision to discontinue it, and started to criticize and even threaten the judge on Twitter. 'This is not a judge, but someone in disguise implementing the ideological expectations of the leftists. The judicial reform that was stopped in 2017 and an efficient Disciplinary Chamber in the Supreme Court are needed,' wrote Marcin Warchoń, Deputy Minister of Justice.

In March 2023, the Gdańsk court sentenced the president of the pro-right to life foundation to one year of a restriction of freedom in connection with their campaign defaming LGBT people, equating their orientation with paedophilia.

'Scandalous verdict from Gdańsk: the head of the Pro Right to Life foundation sentenced to one year of a restriction of freedom, a payment of PLN 15,000 to Ochojska's foundation and an apology for his campaign against the LGBT lobby. The caste is treating the courts as a political and repressive tool against opponents of the [rainbow flag] ideology,' commented Deputy Minister of Justice Marcin Romanowski on the case.

The court discontinued Barbara Kurdej-Szatan's case in December 2022. The famous actress posted a video in the social media in November 2021 showing the violence of the Polish border guards against migrants. She called them, among other things,

88 Z. Ziobro on the verdict regarding the protest in the cathedral in Poznań: this is the downfall of a part of the judiciary, 14 March 2022, Radio Poznań, [https://radiopoznan.fm/informacje/pozostale/z-ziobro-o-wyroku-ws-protestu-w-katedrze-w-poznaniu\\_-to-upadek-czesci-sadownictwa](https://radiopoznan.fm/informacje/pozostale/z-ziobro-o-wyroku-ws-protestu-w-katedrze-w-poznaniu_-to-upadek-czesci-sadownictwa).

'machines without brains or hearts' and 'murderers', for which the prosecutor's office charged her with insulting the Border Guard service and its officers.

'The court has given immunity to another celebrity,' Solidarna Polska MP Michał Woś assessed the decision. 'Judges should be subject to certain disciplinary processes but not to create a closed caste where they are each scratching each other's backs. We, as Solidarna Polska, wanted to reform this, the reforms were on the table, they were ready. But what happened? The first compromise with the EU, where the prime minister ran off to Mrs Gersdorf with flowers, saying that everything would now be great with the EU. And then we took a step back. And the politicized judges organized themselves into an even more concreted caste and now they are indulging in something like this,' said Woś.<sup>89</sup>

'Indeed, in recent days, we have had a certain accumulation of indecent court judgments that permit vulgarity, aggression and a range of behaviours that a normal person would find unacceptable. But there is one common factor linking these matters. It is about people who support the opposition and judges who are playing at politics,' Deputy Justice Minister Sebastian Kaleta assessed in turn.

'When we embarked on the reforms of the judiciary, one of the theses to conducting them was the conviction that the Polish judiciary is extremely politicized (...). The latest rulings can be treated as a form of demonstration by the judges who have already demonstrated their political views and proved that, in their judgments, they have no problems in transferring their political views to the content of the judgments they issue. This is because these judges are convinced that no reforms of the judiciary will take place because of various concessions and negotiations with the European Union. They therefore feel confident.' In this interview, Sebastian Kaleta stated that the judges pass such judgments because they feel confident 'under the protection of the opposition, the media and the European Union, they are convinced that they can issue whatever rulings they like' and, on top of that, they feel they are 'winning this battle.' 'We need to return to the path of reform as urgently as possible. We have been repeating this for the past five years because the reform of the judiciary has been in limbo since that time,'<sup>90</sup> concluded the Deputy Minister of Justice.

In another interview, of March 2023, Deputy Minister of Justice Kaleta declared that

89 P. Kmiecik, Discontinuation of proceedings against Barbara Kurdej-Szatan. The court decided, RMF24.pl, 13 February 2023, [https://www.rmf24.pl/fakty/polska/news-umorzenie-postepowania-wobec-barbary-kurdej-szatan-sad-podja.nld.6595009#crp\\_state=1](https://www.rmf24.pl/fakty/polska/news-umorzenie-postepowania-wobec-barbary-kurdej-szatan-sad-podja.nld.6595009#crp_state=1).

90 ONLY HERE. Kaleta: We urgently need to return to the path of reform, wPolityce.pl, 7 December 2022, <https://wpolityce.pl/polityka/625268-tyko-u-nas-kaleta-trzeba-pilnie-wrocic-na-sciezke-reform>.

'we can expect a serious, in-depth reform of the judiciary after the elections.'<sup>91</sup>

## Announced reform and the flattening of the structures of the courts

A plan to reorganize the judiciary has been waiting in the Ministry of Justice for several years, which is intended to be the third and final stage of the subordination of the judiciary to the ruling camp.

Today, the system of ordinary courts is two-instance. It is divided into district courts, which hear the simplest cases and against whose judgments appeals can be filed with the regional courts. The first instance regional courts hear more complex cases and appeals against their judgments can be filed with the court of appeal. More experienced judges work in the regional courts and the courts of appeal.

Ziobro's reform envisages a flattening of this structure, the liquidation of all courts and the creation of two new levels of the judiciary. Regional courts are to be created which will take over the function of the courts of appeal and regional courts, while regional courts will replace the district courts. Ranks of judicial promotion are also to disappear.

Such a reorganization will mean that judges will have to be reappointed to office and sent to new courts, which means they will all undergo vetting before the new NCJ.

It will be possible to demote judges, send them to work away from home, send them on early retirement, or they simply may not be appointed at all under various pretexts. This is what happened in the case of the reorganization of the prosecutor's office.

The first information about the plans for change was circulating even before 2020. In early 2020, Solidarna Polska politicians confirmed that such a scenario existed, among other things, during the programme convention. 'Today, we have a blown-up, almost Byzantine judicial system – four levels. 'That is why we are proposing a change by flattening the structure, liquidating this blown-up structure of the judiciary, introducing two instances, a uniform judicial position and easier routes for promotion of diligent and reliable judges, of whom we have a huge number,' said Deputy Minister of Justice Marcin Warchoł in February 2020.<sup>92</sup>

Such statements unambiguously indicated that this ministry sees this section of the reform as some kind of closure of the system. However, there was no consensus within

91 There will be a real and thorough reform of the courts after the elections. Radio Plus, 23 March 2023, <https://www.radioplus.pl/wiadomosci/sebastian-kaleta-w-sednie-sprawy-prawdziwa-i-doglebna-reforma-sadownictwa-bedzie-po-wyborach-aa-xz5G-UXgC-fZUn.html>.

92 M. Jałoszewski, Ziobro is already making no secret of what he will do with the courts. There will be a reorganization and a great purge throughout Poland, OKO.press, 10 February 2023, <https://oko.press/ziobro-juz-nie-kryje-co-zrobi-z-sadami/>.

the PiS government regarding the continuation of the changes in the judiciary.

The first half of 2020 saw the shock of the pandemic, the turmoil surrounding the so-called postal elections, followed by Andrzej Duda's intense presidential campaign, to which the whole of the state apparatus was committed. At the same time, the European Commission initiated an infringement procedure against Poland in connection with the functioning of the Disciplinary Chamber and the so-called Muzzle Act. In the autumn of 2020, there were huge political tensions between PiS and Solidarna Polska; massive protests swept through Poland over the Constitutional Tribunal's decision on abortion, and Prime Minister Morawiecki took part in the negotiations on the EU budget and the Recovery Fund.

There was simply insufficient political space for a new reform. It is also obvious for the ruling coalition that taking such steps with respect to the judiciary will certainly encounter a reaction from the legal community and civic society and will lead to the initiation of further infringement procedures against Poland. The opening of a new front in the dispute over the rule of law was not an option as long as the government was in dialogue with the EU institutions on the acceptance of the National Recovery and Resilience Plan (NRRP).

This dialogue was further complicated in 2021 because of the Polish authorities ignoring the rulings of the CJEU on the disciplinary system, which resulted in expensive daily fines being imposed on Poland, as well as by a decision of the Polish Constitutional Tribunal in October 2021.

2022 brought a certain breakthrough. The PiS government succeeded in closing the milestone negotiations and gaining approval for the NRRP. In June, after many months of friction within the coalition, an amendment to the court laws rolling back some of the reforms to the disciplinary system was also enacted. When it transpired in July that, according to the EC, these changes were insufficient, there was again an impasse lasting several months.

The government presented another amendment to the court laws in December 2022 as a result of the negotiations with the Commission. This time it sparked resistance not only within the Solidarna Polska ranks, but also from the President himself, who considered that its provisions would interfere too much with his prerogative of appointing judges. The new law was passed by parliament in January 2023 – with Solidarna Polska and some opposition party parliamentarians opposing it. The President decided not to sign it – in February, he referred it to the Constitutional Tribunal, contesting its provisions very broadly.

Now, the ruling coalition is trying to get the Constitutional Tribunal to resolve this issue as quickly as possible, which is difficult because of the ongoing dispute there over Julia Przyłębska's tenure as its president. President Andrzej Duda has been urging the judges of the Constitutional Tribunal in press interviews 'to un-argue with each other', while Chairman Jarosław Kaczyński has been authoritatively pointing out who is right in this dispute and why it should be ended.

## The electoral importance of the rule of law

The linking of judicial reforms to the prospect of unblocking funds from the Recovery Fund, or the application of the so-called conditionality mechanism negotiated in December 2020, has brought a new quality to the public debate on the rule of law. The matter of potential breaches of the rule of law standards has not only been significant to Poland's international prestige and domestic politics since 2021. It has also gained a tangible, quantifiable financial dimension.

From this moment, the electoral promise of the democratic opposition parties is not only to restore the rule of law to improve the quality of the Polish judiciary, to guarantee citizens fair trials that are free of political pressure and to improve relations with the European Union. The necessary reforms are supposed to be a guarantee that no EU funds will be blocked for Poland – either from the Recovery Fund or the Cohesion Funds. Nor will we pay expensive fines. The EU money will initiate investments and the investments will mean that inflation will fall.<sup>93</sup> The rule of law is no longer an issue regarding frequently highly abstract values, but a matter that has a specific price.

The lack of funds for the NRRP is a serious image problem for the PiS government. It arises from a March 2023 Ipsos poll for OKO.press<sup>94</sup> that 54% of Poles hold the PiS government responsible for the fact that billions of euros have still not reached Poland. 17% blame the opposition for this situation, 14% blame the European Commission and just 2% blame the President. In September 2022, as many as 67% of respondents answered the question 'should the PiS government surrender to the European Union's recommendations to respect the rule of law and thereby end the dispute with the European Union, which is blocking the disbursement of money from the Recovery Fund?' in the affirmative.<sup>95</sup>

The new reality, in which the rule of law is systemically linked to finance, has made

93 A. Skiba, 'We desperately need funds for the NRRP!' Leszczyna's strong words on blocking payments to Poland, NaTemat.pl, 1 July 2022, <https://natemat.pl/422713.potrzebujemy-srodkow-z-kpo-izabela-leszczyna-w-rozmowie-z-natemat-krytykuje-rzad>.

94 M. Pankowska, The NRRP blockade is the PiS government's fault – that is what most Poles believe. The President is innocent [IPSOS poll], OKO.press, 6 April 2023, <https://oko.press/blokada-kpo-sondaz-ipsos/>.

95 D. Sitnicka, 67% of respondents want PiS to surrender to the EU on the rule of law. Billions of euros are at stake, OKO.press, 20 September 2022, <https://oko.press/kpo-pis-sondaz/>.

it much more difficult for the PiS government to create a convincing narrative. Since 2015, the ruling coalition's main argument has been that changes in the judiciary are being implemented in accordance with national law, in turn European institutions, such as the European Commission or the Court of Justice of the EU have no right to raise any objections or block these changes, because the judiciary is not among the competences delegated to the EU. In the government's narrative, anyone who undermined the judicial reforms being implemented in any way acted to the detriment of the interests of the Republic of Poland and committed an attack on Poland's sovereignty. The enemies are therefore divided into the following categories: EU institutions which oppress the Polish government, most frequently in the name of German interests; opposition politicians who, on the one hand, complain to the EU institutions and demand the introduction of further sanctions against Poland and, on the other, merely fulfil the orders of the European bureaucrats and the German government; the judges themselves, who defend their own ill-conceived professional interests and fulfil the orders of the opposition politicians; activists who sow social discord on the instructions of the opposition politicians.

The PiS politicians have repeatedly stated outright that the common objective of the European Commission and the Polish opposition is to overthrow the government and for the Civic Platform, headed by Donald Tusk, who is a part of the European establishment, and his potential coalition partners, to win the elections.

'Some of those playing this game want to do so [transfer funds from the Recovery Fund – added] only after the elections, hoping that the lack of these funds will help our political opponents (...). And with all certainty, those playing it know that, in the light of European law, they have to transfer these funds to us at some point. This is a method that violates not only the European treaties but also the whole of international law and should therefore be rejected,' said Jarosław Kaczyński in November 2022.<sup>96</sup>

PiS therefore disagrees with the comments made by the European institutions regarding the changes in the judiciary, considering them outrageous, illegal and in conflict with the national interest. On the other hand, however, a constant dialogue is being held with the EC and the decision is made to backtrack some of the reforms, of which the amendments in June 2022 and January 2023 were the clearest examples.

This rift can be seen in the coalition itself. In June 2022, while commenting on the recently enacted Act on the Courts and the negotiated milestones in the NRRP during a

96 Disbursement of funds for the NRRP. PiS Chairman: The EC is waiting until the elections, PolskieRadio24.pl, 12 November 2022, [https://polskieradio24.pl/5/1222/artykul/3069371\\_wyplata-srodkow-z-kpo-prezes-pis-ke-czeka-do-wyborow](https://polskieradio24.pl/5/1222/artykul/3069371_wyplata-srodkow-z-kpo-prezes-pis-ke-czeka-do-wyborow).

meeting with voters, Prime Minister Mateusz Morawiecki said: 'We are already reforming this justice system for the seventh year. I wouldn't want to die for the justice system. Really. It's not worth it. The retention of Poland's sovereignty, which is the most important matter today is primarily worth it. The NRRP and all the EU funds, which also depend on this programme, serve to strengthen our sovereignty (...). Anyone trying to stir up hysteria around the so-called milestones is wrong and is not only mistaken, but is providing ammunition for Russian propaganda. Do you know why? Because, as I said before, we can also lose our sovereignty through a huge economic crisis, which will simply lead to an economic collapse.'<sup>97</sup>

The position of Solidarna Polska, PiS's coalition partner responsible for the justice system since 2015, opposes this. SP's politicians, led by Zbigniew Ziobro, claim that participation in the Recovery Fund is financially unviable because it is actually an expensive loan. Zbigniew Ziobro's party voted against the ratification of the Fund in May 2021. In December 2020, in turn, it opposed Prime Minister Morawiecki's acceptance of the so-called conditionality mechanism. In a media statement, the justice minister even indirectly called the head of the Polish government a 'softie'.

According to Solidarna Polska, the sources of the whole problem with the judiciary were the two presidential vetoes in July 2017 – against the government's Act on the NCJ and the Act on the Supreme Court. Although further Acts were soon passed – this time prepared by the President but differing from the originals only in minor details – for Zbigniew Ziobro's party this was a show of weakness, the unacceptable yielding to pressure from Polish public opinion and international institutions. The recipe for all ills is therefore supposed to be the continuation of the reforms of the judiciary, even at the cost of losing funds. Solidarna Polska's politicians voted in January 2023 against the latest amendment to unblock the funds for the NRRP.

For the democratic opposition party, this dissonance is an opportunity to emphasize that the ruling coalition is in a state of decay and serious conflict, which is preventing them from ruling efficiently and using EU funds effectively. It is also a confirmation that, in the final reckoning, the PiS-led battle for the courts is only bringing losses – court proceedings are increasingly protracted, a question mark is hanging over the certainty of legal transactions because of numerous ECtHR and CJEU judgments, Poland is already paying fines of almost PLN 2.5 billion and funds are blocked. The opposition's rule of law agreements are therefore a promise to reset and stabilize the situation.

The other dimension of the promise to restore the rule of law in Poland is the systemic

97 Prime minister: I wouldn't want to die for the justice system, Dziennik Gazeta Prawna, 17 June 2022, <https://www.gazetaprawna.pl/wiadomosci/kraj/artykuly/8463884.morawiecki-kpo-kamienie-milowe-wymiar-sprawiedliwosci-gazeta-polska.html>.

one. According to the opposition's narrative, depriving PiS of its authority is a prerequisite for holding the ruling party accountable for political corruption, the use of invasive spyware, such as Pegasus, against the opposition and public officials, overstepping authority (e.g. in the case of the postal elections) and money from special purpose funds or ministry budgets for achieving party goals.



# The Rule of Law Challenge in Poland from the Perspective of Germany



Maria Skóra

**How has Germany's approach to the erosion of the rule of law in Poland changed? What is the current approach of Olaf Scholz's government? What can democratic forces expect from Berlin? On the difficult relations between Germany, Poland, and the EU.**

2016 marked the beginning of not only the erosion of the rule of law in Poland, but also of the gradual collapse of Polish-German relations. What is Germany's role in Poland's dispute with the European Union (EU) over the rule of law and why? Could the change of government in Germany and the turnaround in the foreign policy (*Zeitenwende*) announced in February 2022 affect Germany's reaction to the rule of law crisis in Poland?

The answer should lie in politics at European level, which, however, is inevitably intertwined with the federal level. The Polish government's relationship with the European Commission led by Ursula von der Leyen, as well as the scepticism of the Law and Justice (PiS) party towards Germany, the ruthless exploitation of anti-German sentiment based on the feeling of historical injustice and a negative assessment of Berlin's foreign policy today for PiS's immediate political purposes, including elections, are also not insignificant.

## Progressing crisis in the relationship

We have been observing the gradual deterioration of Polish-German relations at diplomatic level since 2016. At that time, the tone of communications with Germany from the newly formed government under PiS changed.

Formal dialogue was dominated by clear differences in views. The subjects of the first meeting between the then prime minister, Beata Szydło, and Chancellor Angela Merkel included the relocation of refugees from the Middle East in the EU countries and Germany's 'open door' policy, as well as the reinforcement of energy cooperation between Germany and the Russian Federation, primarily through the Nord Stream 2 gas pipeline, in the context of the ongoing crisis in Ukraine at that time (the war in Donbas).

However, at diplomatic level, assurances were being made of close cooperation between the two countries and good neighbourly relations. Simultaneously, representatives of the ruling PiS camp, the politicized public media and the private media supporting the government started to instrumentalize the historical resentments of some Poles and intensified the anti-German narrative in order to achieve ad hoc political goals.

This was exemplified not only by personal attacks on a political rival, namely Donald Tusk, and insinuations about his 'grandfather in the Wehrmacht', but also on the German media, and the repeated accusations in the Polish state media of German politicians working to the detriment of Poland's interests.

In 2017, PiS politicians also returned to the issue of war reparations from Germany, a topic regularly recurring in the Polish public debate.

Therefore, there are reasons why relations between Warsaw and Berlin have cooled significantly in recent years, despite the courtesy and ritual assurances of good intentions.

Fortunately, the anti-German obsession of the 'Good Change' (an election slogan used by PiS, promising a general improvement in the event of their victory) has not affected the economic relations between the two countries. According to an Ipsos poll for OKO.press conducted in late 2022, 41% of Poles have changed their opinion of Germany for the better in recent years.

Although Germany is largely not showing any particular interest in Eastern Europe and Poland, it has however started to view their eastern neighbour in a less positive light.

The Polish government's provocative rhetoric and playing the anti-German card have not gone unnoticed in Germany. Together with the dismantling of the rule of law and democracy, attacks on women's rights and the rights of sexual minorities, as well as strange statements by some politicians from the ruling coalition about the dictatorship of cyclists and vegetarians, Poland has become an object of political satire in Germany.

Poland's Western neighbours do not understand what is happening today to a country that successfully underwent a difficult political transition, becoming the leader of

the democratizing Central and Eastern Europe. This is probably why almost half the respondents in Germany would consider PiS's defeat in the forthcoming elections a change for the better.

If it is any consolation, this does not reflect Poles being liked less, but is a critical assessment of the political situation in Poland. However, the decided majority of German respondents would not want to live in Poland. The country is considered a destination for tourism and cheap shopping, albeit rapidly developing, but still poorer than Germany.

### **Germany is concerned about the attack on the rule of law in Poland**

The liberal-progressive government led by Olaf Scholz, which was elected in Germany in 2021, inherited the problem of organizing a relationship with the PiS government. This task became even more complicated after Russia's attack on Ukraine in February 2022.

Poland is Germany's fifth-largest trading partner, both in terms of imports and exports. German companies are making substantial investments in Poland, including in the automotive industry and business process outsourcing. After Brexit, Poland rose to fifth place in the EU in terms of population, thereby strengthening its political potential.

This means the attack by the PiS and Solidarna Polska government on the rule of law in Poland, and therefore in the EU, has become at least a cause for concern among the political elite in Germany. The independence of the courts and the certainty of the law in Poland are in the interest of German companies investing here, and are also of huge significance to the European Union and the respect for EU law.

The approach of Angela Merkel's government to Poland's rule of law dispute with the EU was ambiguous. This is hardly surprising: from the German perspective, it is not easy to criticize Poland. Berlin's attitude to Warsaw is shaped by a historic feeling of guilt, especially among the older generations. Simultaneously, in Poland, under PiS rule, the painful past is frequently used to win political capital among voters and sabotage the dialogue with Germany.

### **German presidency of the Council of the EU brings a breakthrough**

Germany assumed the rotating presidency of the Council of the European Union in the second half of 2020 and could no longer avoid confrontation with the Polish government over breaches of the rule of law in Poland.

Under Viktor Orbán's rule, Hungary has transformed into a hybrid regime, or an elec-

toral autocracy. Slovenia, under the populist government, was attacking the state media and the opposition. Attacks on the rule of law in EU Member States were already a huge problem of a European dimension, threatening the very DNA of the Union.

This gave Germany fresh opportunities to respond to the situation in Poland – in an internationalized context and from Brussels during the presidency of the Council.

Diplomatic action was taken up. Debates on the rule of law in selected countries were held at the General Affairs Council, namely meetings of European affairs ministers of all EU Member States, on the initiative of Michael Roth, the then minister of state for Europe of the Federal Foreign Office. They were held as peer reviews of Member States, an exchange of knowledge and experience. The process was supposed to lead to a common understanding of the rule of law. However, the first edition did not address the question of the rule of law in Hungary and Poland.

At that time, the German presidency was responsible for finalizing the multiannual financial framework, namely the EU budget, for 2021-2027, as well as the new EU pandemic recovery funds.

There were disputes over the allocation of funds and the key to their allocation.

The budget negotiations proved all the more difficult because, for the first time, they included clauses on the respect of the rule of law.

Two extremely different paradigms clashed: the European Parliament's radical concept of protecting *the rule of law* using the EU budget, and the moderate approach of the European Commission and the European Council involving the protection of *the budget* through the rule of law.

A compromise proved impossible. The choice fell on a general system of conditionality for protecting the EU budget. The protection of funding defeated the protection of values, which ultimately received an auxiliary role.

The opponents of this solution accused the German presidency of presenting a conservative approach towards Poland and Hungary. However, it should be appreciated that, despite the political resistance of some EU governments, the conditionality mechanism, referred to also as rule of law mechanism, was adopted at all, albeit in a reduced form.

The second act of the drama then started. Poland and Hungary threatened to veto the EU budget. They contested the conditionality mechanism before the Court of Justice of the European Union. The CJEU ruled that the conditionality mechanism was not in

breach of EU law and could be applied. So far, the mechanism has been applied to Hungary, after Orbán's victory in the 2022 elections and his government's attempts to break down EU unity over Ukraine and Hungary's policy toward Russia.

### **MEPs have been loudly demanding the rule of law in the EU...**

German MEPs, specifically Daniel Freund and Terry Reintke of the Green Party and Katarina Barley of the Progressive Alliance of the Socialists and Democrats, are speaking out loudly, and perhaps most loudly, in the European Parliament about the need for decisive action to restore the rule of law and respect for human rights in Poland and Hungary.

### **...the ministers and the chancellor are more restrained**

The readiness to openly confront governments breaching the EU's core values does not just depend on political colours. It declines as the position in the hierarchy of authority increases.

Germany's former Federal Foreign Minister Heiko Maas from the Social Democratic Party focused on raising the issue of the rule of law in multilateral formats, for instance by working with EU commissioners or by looking for support in the Weimar Triangle format, a forum for debate between Germany, France and Poland.

At her last EU summit in October 2021, Chancellor Angela Merkel was encouraging attempts to resolve the problems with the rule of law through dialogue, and not legal steps.

### **The European Commission under Ursula von der Leyen**

President of the European Commission Ursula von der Leyen, a Christian Democrat from the Civic Platform's (PO) sister party, has been criticized most for its actions – or inaction – in protecting the rule of law in the EU since the beginning of her term of office. Von der Leyen is pursuing a conciliatory strategy, avoiding escalation.

Under her leadership, the European Commission has agreed to 'milestones,' namely conditions regarding the rule of law, which the EU requires to be met in order to disburse funds for Hungary's and Poland's national recovery and resilience plans (NRRP).

The wording of the provisions negotiated with the Morawiecki and Orbán governments encountered fierce criticism from rule of law experts. Four associations of European judges contested the Council's decision to accept the 'milestones' in the Polish NRRP before the Court of Justice of the EU (CJEU), arguing that they do not lead to the implementation of the judgments of CJEU against Poland. The case is pending.

The 'milestones' are criticized as a gateway for autocrats in Hungary and Poland. They can enact legal blunders which will not fix the rule of law issue, but will provide an excuse for EU institutions to agree to transfer funds earmarked for the NRRP. An accusation was also raised against Von der Leyen that she considers overcoming the effects of the pandemic and the energy crisis, and primarily the maintenance of European unity in the face of Russia's aggression against Ukraine, to be more important than democracy and the rule of law in the EU Member States.

### **A new era of protecting the rule of law in the EU**

However, it cannot go unnoticed that, in recent years, the European Union has not only expanded the mechanisms for upholding EU values, but has also started to apply them. It has introduced the rule of law mechanism and initiated it against Hungary. It has taken advantage of the opportunity to use the money from the NRRP as a further mechanism of financial pressure for restoring the rule of law in Hungary and Poland. It has included conditions for compliance with EU principles, which are necessary for the disbursement of EU budget funds, in the partnership agreements it has signed with the central government and regional authorities.

Even the Polish government's attempts at moral blackmail of the EU, justifying the need to disburse the frozen NRRP funds, by highlighting the generosity of Poles to the refugees from Ukraine and the pro-Ukrainian stance of the Polish authorities, did not help.

### ***Zeitenwende* and value-based foreign policy**

Federal elections were held in Germany in 2021, resulting in a change of government. The so-called 'grand coalition' of the Christian Democrats and Social Democrats was replaced by a 'traffic light' coalition of Social Democrats, Greens and Liberals.

The Greens, in particular, clearly formulated negative assessments of Germany's European and foreign policy to date, not only regarding the matter of the rule of law in the EU, but also Germany's relationship to date with Russia, and Germany's role in the world in general. They announced a feminist foreign policy, oriented toward democratic values. Co-chair of the Green Party, Annalena Baerbock, took over the Federal Foreign Office. In the coalition agreement, the ruling parties undertook to protect the EU values enshrined in Article 2 of the EU Treaty, including the rule of law.

In February 2022, after Russia launched a full-scale war against Ukraine, Chancellor Scholz announced *Zeitenwende* – a turnaround in the country's foreign policy and its security policy. Russia's attack on Ukraine was construed in Germany as the end of an era, which requires a paradigm adjustment: the assumption of a proactive role in

shaping the geopolitical order in Europe and the world.

The synergy of value-oriented feminist foreign policy and *Zeitenwende* could have been expected to bring a change in Germany's approach to the rule of law crisis in the European Union. However, during their first visits to Poland, both Chancellor Olaf Scholz and Minister Annalena Baerbock were cautious in their statements. Although they mentioned that the rule of law and human rights are of key significance to the European Union, they did not elaborate on the Polish-Hungarian context. Once again, it transpired that it is not easy for Berlin to criticize Poland, especially from a position of power. The matter became even more complicated after 24 February 2022.

### After the outbreak of the war in Ukraine

Poland's perception of Germany deteriorated after the outbreak of the war in Ukraine, the initial reactions and slip-ups in the German government's communications. Today, Germany is Ukraine's biggest ally in Europe in terms of value of military and humanitarian support provided. A million Ukrainian refugees have found a safe haven in Germany. However, the country's reputation has been marred by years of dependence on Russian resources, dragging its feet on switching Russia off from the SWIFT bank payment system, imposing sanctions and supplying arms.

Germany has an active community of Russian sympathizers, who relativize the extent of the tragedy in Ukraine. This is the decided minority. However, it is very visible and audible, because of mobilization and disproportionate media attention. This phenomenon places Germany in an even worse light.

The immediate help provided to Ukrainians by the Polish public, as well as the solemn and fulfilled assurances of support for Ukraine by the Polish authorities, have made Poland an advocate of the Ukrainian cause on the international arena.

The Polish government's rhetoric had already been aggressive towards Germany. Germany's ambivalent attitude toward Russia gave rise to very fierce criticism of its Western neighbour. Caustic comments regarding the German government, such as the confusion over the proposal to deploy German 'Patriot' anti-missile systems in Poland, are the order of the day.

PiS is stirring up anti-German sentiment in Poland in the current pre-election campaign, based on both a negative assessment of Germany's current policies, as well as a sense of historic injustice. In addition, the pro-government state and private media are scaring the public claiming the opposition is the 'German option' (according to the PiS rhetoric: a camouflaged representation of German interests) in Warsaw and

Brussels, posing a threat to the interests of Poland and Poles. It is difficult to have a substantive dialogue on democracy and the rule of law in these circumstances. It is difficult to build bridges between the countries.

The German and Polish public also differ on the matter of aid to Ukraine, its role in the EU and NATO structures, as well as its attitude to and relations with Russia.

The impact of the war in Ukraine can be felt more in Poland than in Germany, not only by the larger presence of Ukrainian refugees in proportion to the rest of the population, but also as a result of the fear of a Russian attack on Poland or a better understanding of the existential threat facing Ukraine. Poles want Ukraine in NATO and the European Union. They are not willing to make concessions to Russia, and they support sanctions and Russia's isolation.

The German public has a broader view of the world, a greater interest in and understanding of issues such as the climate crisis, the threat of world hunger and the global economic crisis. These problems are considered more pressing than the current conflict in the region.

### In the triangle

As for the matter of the rule of law in Poland, Germany is restricting its involvement in bilateral relations, while looking for a solution in the Warsaw-Brussels-Berlin triangle. It is the EU institutions that are responsible for diplomatic action and pressure, including financial pressure, applied to the Polish authorities. The only way to defend democracy in the EU is through European mobilization. This direction has been maintained by the new German government.

German politicians play a momentous role in the EU institutions. Although the European Commission headed by Ursula von der Leyen is mainly pressured by commissioners from countries other than Germany, it has taken up various measures in recent years, which are intended to protect EU values, including the rule of law, in EU Member States, especially in Hungary, but also in Poland.

The German presidency of the Council of the EU came at a key moment in the EU's history, when the EU budget and its protection through the new conditionality mechanism, as well as the post-pandemic recovery fund, were being negotiated in the final stage. Its freezing later proved to be one of the most effective incentives to date for the PiS government to make concessions to Brussels in the dispute over the independence of the judiciary in Poland.



Not only are the formal paths of cooperation between Member States important in the EU, but so is political will.

Germany does not want to play the role of 'Europe's policeman' and take the lead in calling for disciplining other EU Member States for breaches of the European community's core values. This role has been willingly assumed by other countries, especially the Netherlands under Prime Minister Mark Rutte.

Of course, this has no influence on the behaviour of the Polish authorities and the media supporting them, which take advantage of almost every gesture made by Germany towards Poland, even the desire to improve security on the EU and NATO borders with the deployment of German 'Patriot' systems, to incite a conflict between the countries and arouse anti-German sentiment. According to the narrative of PiS and Solidarna Polska, Germany only intends to build its hegemony in the European Union, to the detriment of a developing Poland, while Brussels is merely an extension of Berlin and its sinister agenda.

Being aware of this, the German government will almost certainly continue to look for a resolution of the rule of law crisis in Poland through EU institutions.

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