



State of the rule of law in Poland. Challenges for the European Union's institutions in the new term of office

**Maria Ejchart-Dubois, Sylwia Gregorczyk-Abram,
Paulina Kieszowska-Knapik, Michał Wawrykiewicz**

The European Commission (EC) achieved a tremendous success in 2018 on the route towards recovering the rule of law in Poland. On 19 October 2018, the Court of Justice of the European Union (CJEU) issued a decision to apply temporary measures under the anti-infringement procedure conducted on the basis of Article 258 of the Treaty on the Functioning of the European Union (TFEU), in connection with the attempt of the Polish authorities to force the judges of the Supreme Court and the Supreme Administrative Court aged over 65 to retire, including the First President of the Supreme Court Małgorzata Gersdorf, whose six-year term of office is guaranteed by Article 183, para. 3 of the Polish Constitution (her office ends in 2020). **Under the interim measure applied by the CJEU, Poland was ordered to immediately reinstate all judges of the Supreme Court and the Supreme Administrative Court to office.** This decision was implemented by the Polish authorities by passing the Act on the amendment of the Act on the Supreme Court of 21 November 2018. Although the interim measure was implemented, the EC did not withdraw its complaint, arguing that the judgment had to be issued because the Polish authorities can repeat the enactment of an act breaching the legal order of the EU and, furthermore, the judgment will be of particular interpretive significance to the whole of the justice administration system in the Member States. **On 24 June 2019, the CJEU issued a judgment in which it acknowledged that the provisions of the Polish Act on the Supreme Court of 8 December 2017 were in breach of the Treaty criteria, in particular the EU principle of effective judicial protection,** as referred to in Article 19 of the Treaty on European Union (TEU).

Several proceedings are still pending before the CJEU, the fundamental allegations of which apply to a breach of Poland's rule of law. These are proceedings to provide preliminary rulings, conducted on

the basis of legal enquiries submitted by Poland's ordinary courts, the Supreme Court and the Supreme Administrative Court. Among them, the following issues are being considered:

- whether the newly established (in 2018) **Disciplinary Chamber of the Supreme Court**, to which judges were nominated by the **National Council of the Judiciary (NCJ)**, which itself was elected almost entirely by the politicians of the ruling party, is an independent court in the meaning of European standards. In this case, the Advocate General of the CJEU issued an opinion on 27 June 2019, in which he explicitly stated that the Disciplinary Chamber does not meet the standards of independence in the meaning of EU law, while the NCJ elected politically does not fulfil its role as an independent body safeguarding the independence of the judiciary which can impartially choose judges. The judgment in this case is expected in autumn this year;
- whether the newly established (in 2018) **Chamber of Extraordinary Control and Public Affairs of the Supreme Court**, also chosen by the politicized NCJ, is an independent court in the meaning of European standards. In the justification of the enquiry for a preliminary ruling, the Supreme Court pointed out that the procedure for appointing judges to this Chamber of the Supreme Court bore the signs of a gross, intentional breach of the law. The process of laying down the law on the basis of which the new chambers of the Supreme Court and the new, politicized method of appointing the NCJ had the same features. It should be pointed out that, among other things, in accordance with its responsibilities, the Chamber of Extraordinary Control and Public Affairs is to be responsible for **approving the validity of elections** in Poland and reviewing the **extraordinary appeal** (a new legal institution, questioned by the EC with respect to treaty standards, as discussed below). In this case of the request for a preliminary ruling, the Supreme Court requested that the CJEU apply the expedited procedure. The first of the procedural activities (written stage of the proceedings) should be expected in the autumn of this year;
- whether **the new system of disciplinary proceedings** with respect to Polish judges threatens judicial impartiality and therefore whether the principle of effective judicial protection arising from Article 19 TEU is being breached. In this case, the opinion of the Advocate General of the CJEU is to be announced on 24 September 2019, while the judgment should be expected at the end of this year.

Furthermore, on 3 April 2019, the EC opened **new anti-infringement proceedings** regarding a new disciplinary system, which, according to the Commission, “undermines the independence of Polish judges by not offering necessary guarantees to protect them from political control”. On 17 July 2019, the EC embarked on the second stage of the procedure issuing a so-called reasoned opinion and setting a 2-month deadline for the Polish government. If the EC's recommendations on the adjustment of the disciplinary system to the Treaty criteria are not performed, the Commission will file a complaint with the CJEU, most probably together with a request for an interim measure.

It should also be remembered that the **procedure regarding the control of the rule of law in Poland conducted on the basis of Article 7 of the Treaty on European Union (TEU)**, which was initiated by the EC on 20 December 2017, is still pending. Among the Commission's recommendations, the following issues regarding the independence of the Polish judiciary remain unresolved:

- the **method of appointment, the current membership and the operation of the NCJ** after the amendments to the regulations of 8 December 2017. Members were removed before the end of their four-year term of office (which is guaranteed under Article 187, para. 3 of the Polish Constitution) from the previous membership of the NCJ in 2018, while the new method of recruitment

to the NCJ does not meet the European standard, according to which the majority of people in judiciary councils should be elected by judges. The membership of the NCJ was elected in 2018 by the ruling majority, while the procedure of appointing members of the new NCJ was highly non-transparent. The NCJ has plays a key role in the Polish judicial system, because it safeguards the independence of the courts and judicial impartiality, as well as nominating candidates for judges of all levels, from district courts to the Supreme Court. The NCJ has been suspended in the rights of a member of the European Network of Judicial Councils because of serious reservations about its independence of politicians. According to the surveys conducted among the judges and court clerks, over 90% of them believe that the NCJ is not performing its constitutional role;

- reservations regarding the appointment of presidents and vice-presidents of the **ordinary courts**. Over 150 presidents and vice presidents were replaced without consultation and without substantive reasons from August 2017 to February 2018, by way of the special powers of the Minister of Justice, who is simultaneously the Prosecutor General. Decisions regarding the extension of the right of judges to adjudicate after reaching a certain age are taken by the politicized NCJ, which results in a restriction of judicial impartiality;
- under the amendments to the Act on the system of ordinary courts, the Minister of Justice received an influence on **disciplinary proceedings against judges**, in particular regarding the appointment of a special Disciplinary Commissioner of the Ordinary Courts and his deputies, as well as the choice of judges of disciplinary courts, with the association of judges being left with no influence, which is unacceptable from the point of view of European criteria regarding the independence of courts and the impartiality of judges. The Disciplinary Chamber of the Supreme Court, which was completely re-elected by the ruling majority and which includes former prosecutors, who were previously subordinated to the Minister of Justice, adjudicates in the last instance of the disciplinary process. The independence of the judiciary requires that the system of disciplinary proceedings includes safeguards against its use as a means of political control of court judgments. Meanwhile, in recent months, increasingly more disciplinary proceedings have been instituted against those judges who are brave enough to publicly defend the constitutional values and systemic European rules, as well as those who submit requests for preliminary rulings to the CJEU. This is obviously of the nature of harassment and repression, which has the objective of exerting a so-called “chilling effect” to intimidate other judges;
- a new institution of an **exceptional complaint** was introduced into the Polish legal system in 2018, which provides for the ability to review court judgments issued over 20 years and therefore to overturn final judgments of Polish courts in which the courts applied EU law based on the rulings of the CJEU, which affects the stability of the whole of the European legal system.
- the matter of filling positions, the membership and functioning of the **Constitutional Tribunal** (CT), the lack of swearing in of three judges correctly selected in October 2015, the membership of the CT containing three so-called stand-in judges, the removal of 3 Constitutional Tribunal judges from adjudicating, the lack of publication of judgments of the Constitutional Tribunal from 2016 (they were published in 2018, but as “decisions of the CT issued in breach of the law” and not as judgments), the President of the CT was elected in a manner that was inconsistent with the procedure.

Despite the above proceedings that are pending and completed before EU institutions and the CJEU, the Polish authorities are continuing to intensively conduct activities intended to consolidate the breaches of the rule of law.

Despite the said opinion of the Advocate General of the CJEU regarding the Disciplinary Chamber of the Supreme Court and the judgment that is expected in the autumn, after this opinion was issued,



the President announced a new recruitment of judges to this Chamber of the Supreme Court. Despite the request for the preliminary ruling about the status of the Chamber of Extraordinary Control and Public Affairs of the Supreme Court, the Polish parliament is currently processing amendments to the Electoral Code indicating the clear competence of this Chamber for approving the validity of the elections in Poland.

A person elected by the new NCJ and appointed by the President as a judge of the Civil Chamber of the Supreme Court in 2018, asked a question on 1 July 2019 on the legal subordination of the current authority of the Constitutional Tribunal regarding the status of the previous NCJ and all judges elected by it (up to 2017), including Supreme Court judges. The objective of this seems to be to obtain a legal mechanism primarily enabling the removal of the “old” judges from the Supreme Court, including the First President of the Supreme Court, Prof. Małgorzata Gersdorf, as well as the annihilation of the proceedings before the CJEU regarding preliminary rulings (because they were asked by judges appointed by the previous NCJ). As the Constitutional Tribunal cannot currently be considered an independent adjudicating body, a rapid judgment approving the arguments presented in the enquiries should be expected.

Summary

The Polish rule of law requires further intensive action by the European Union. As recent practice has shown, the most effective instrument for restoring the condition that is required from the point of view of European standards and the criteria enshrined in the TEU and the Charter of Fundamental Rights has proved to be the EC’s complaint to the CJEU based on Article 258 TFEU in the so-called anti-infringement procedure, together with a request for an interim measure. An area that could be encompassed by such a procedure is the method of appointing the National Council of the Judiciary, in terms of the protection of the EU principle of effective judicial protection in Poland.

Furthermore, it is worth considering the resumption of work by the LIBE Committee of the European Parliament (EP) on the report on the condition of the rule of law in Poland. The data and materials gathered during the previous term of office of the EP could be updated, including through public hearings in the EP, while the report prepared and adopted by the LIBE Committee could be included in the rule of law control procedure conducted by the EU Council on the basis of Article 7 TEU.

The authors are members of the #Free Courts Initiative, a civil society group of Polish lawyers seeking to preserve the independence of the Polish judiciary.

Stefan Batory Foundation

Sapieżyńska 10a
00-215 Warsaw
tel. (48-22) 536 02 00
fax (48-22) 536 02 20
batory@batory.org.pl
www.batory.org.pl

Publication is licensed under
the Creative Commons
Attribution-ShareAlike 3.0
Poland Unported Licence (cc BY-SA 3.0)



Warsaw, July 2019