# CHALLENGES TO THE RULE OF LAW IN THE EUROPEAN UNION: THE DISTRESSING CASE OF POLAND

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## ABSTRACT

The article analyzes the developments of the rule of law in Poland over last three years and discusses the current and possible future reaction of the European Union to a worrisome situation in one of its member states. It focuses on several questions. What are the reforms in Poland? Can the legal system defend itself against changes which are inconsistent with the Constitution? If not, why it retreated and ceased to be self-sufficient in this regard? What mechanisms of securing EU principles can be activated? How are they interrelated? To what extent have they already been used? Are they sufficient? These and other questions are raised in the light of the current situation in Poland. In its major part, the paper characterizes the action taken, and especially the legislative measures adopted by the ruling parliamentary majority. These measures lead to the de facto change of the system, incompatible with the current Constitution and the principle of the rule of law. The second part analyzes the instruments available within EU law in the context of Poland's membership in this supranational organization.

## Keywords

Constitutional Tribunal, Court of Justice of the European Union, European Union, infringement proceedings, judicial independence, National Council of the Judiciary, ordinary courts, Poland, preliminary rulings, rule of law

## 1. Introduction

For many years Poland was perceived as a leader of transformation in Central and Eastern Europe, as a model of bloodless transition from the authoritarian (communism) regime of the Polish People's Republic to a system of modern democracy. The transformation process initiated by round table talks between the government and the democratic opposition in the spring 1989 led to free elections of 1989 and 1991, accession to the Council of Europe in 1991 and the ratification of the European Convention on Human Rights in 1993. Subsequently, a new Constitution was drafted and adopted by a nationwide referendum in 1997. Poland joined the NATO, associated itself with the European Communities and eventually became a member of the European Union in 2004. Poland was indeed a 'wonderful child', a success story of transformation. Poland's international profile has rapidly improved: Poland actively participated in a number of peacekeeping missions led by the UN, the NATO and the EU; Poles were elected to the highest positions: Jerzy Buzek, the President of the European Parliament (2009–2012), Donald Tusk, the President of the European Council (since 2014). This would not have been possible without a necessary political consensus as to the integration with 'Western Europe', based on a general sense of belonging to the legal culture founded on the values of democracy and the rule of law. At the systemic level it resulted in the elimination of the monopoly of a communist party that controlled the entire state and the creation of a new legal structure based on democratic principles. Since then, public authority is governed by law and not vice versa. Public bodies may act only on the basis and within the limits of what is legally permissible. The separation of powers is guaranteed; state functions are performed by bodies which cooperate with each other but remain autonomous. They control and restrain each other. Political parties usually influence the legislature and the executive, but the judiciary is

to maintain autonomy from the other powers, judges being impartial and objective when they act in their judicial capacity.

Poland of today, however, is described as a country where democracy becomes an enemy, dies; where the rule of law backslides, is dismantled, grows dark; where the constitutional order is taken over in a hostile manner, the Constitutional Tribunal has been disabled, the judiciary gradually falls under political control.[1] Some of these denominations have a literary nature and were used to attract and appeal to the reader. Nonetheless, they reflect the climate of political and legal discussion about developments in Poland. The constitutional crisis is underway. The ruling parliamentary majority has and continues to introduce systemic modifications that are incompatible with the Constitution. They lead to a significant shift in the model of the functioning of the state and enable the taking of full control over it, in violation of the principle of the separation of powers. This is particularly visible in the area of justice, within which the ruling political leadership has gained excessive political influence on the following key bodies: the Constitutional Tribunal, the Supreme Court, the National Council of the Judiciary, a development which clearly endangers the independence of all courts and judges and thus their ability to perform their judicial function.

Part of the changes implemented in Poland do not comply with the standards of the current 1997 Constitution, including the principles of the rule of law, separation of power and independence of the judiciary. The institutions entrusted with a task to safeguard the constitutional order were degraded. In the first place, the Constitutional Tribunal, whose role is to protect the Constitution, i.a. by constitutional review of parliamentary legislation. The Polish legal system has diminished its ability to self-repair.

The consequences of this situation stretch beyond the boundaries of domestic legal system. In relation to Poland's participation in the European Union, they also produce effects in the area of Union policies and activities. Both legal orders are closely related: certain part of Union legislation is directly applicable in the national legal system, the EU legal acts are carried out by domestic bodies, including courts, before which a private party may invoke EU legal rules of direct effect. Thus, a Polish judge is also a 'European judge', and certain rulings taken by domestic courts have or may have legal effects in the legal systems of other member states – based on mutual trust and the principle of mutual recognition of court judgments and decisions.

The principle of the rule of law shall protect private parties from excessive state interference. Different contexts in which the law has developed in various countries have led to significant variations in the understanding this concept. All of them, however, have a common ground: imposing effective restrictions on the exercise of public authority to preserve the rights and freedoms of the individual. The rule of law today belongs to the canon of fundamental constitutional principles of modern democracies. Accepted at a global level by a majority of countries, it enjoys a special position in Europe. It is guaranteed by constitutions of states and founding acts of the Council of Europe and the European Union. It is confirmed in numerous judicial cases: constitutional and ordinary court decisions, as well as rulings of the European Court of Human Rights and the EU Court of Justice. Irrefutably, it has gained a pan-European status. It means not only it is (or should be) shared by all members of European regional organizations, but more specifically, in the EU context – it brings legal consequences: it is required by Union law for both candidates and members as a fundamental standard. Moreover, it is safeguarded by political and judicial remedies, may eventually lead to differentiation of member states rights and obligations, and significantly weaken the position of members found in violation of EU principles.

The rule of law is formulated at a certain level of generality. The precise content of the 'rule' may vary, to some extent, in different states. A major study undertaken in recent years by the Venice Commission, a Council of Europe advisory body on constitutional matters, let the Commission to determine certain minimal concepts of what is the rule of law. The Commission concluded that:

> 'despite differences of opinion, consensus exists on the core elements of the Rule of Law as well as on those of the Rechtsstaat and of the Etat de droit, which are not only formal but also substantive or material (materieller Rechtsstaatsbegriff). These core elements are: (1) Legality, including a transparent, accountable and democratic process for enacting law; (2) Legal certainty; (3) Prohibition of arbitrariness; (4) Access

> to justice before independent and impartial courts, including judicial review of administrative acts; (5) Respect for human rights; and (6) Non-discrimination and equality before the law.'[2]

In accordance with the 1997 Constitution of Poland, the rule of law is a cornerstone of the Polish state and legal system. It is proclaimed by Article 2: 'The Republic of Poland is a democratic state ruled by law, implementing the principles of social justice'. The Constitution embraces comprehensive elements of the concept, both formal and substantive: legality (Art. 7), supremacy of the Constitution (Art. 8), separation and balance of powers (Art. 10 (1) and 173), independence of the judiciary (Art. 173, 178-182, 186), protection of human rights, including procedural rights (esp. Chapter II, Art. 30-81). More detailed content of these provisions and further substantive elements have been recognized by the Constitutional Tribunal and led to an extensive body of case law.

The rule of law is one of the principles of the European Union. It is recognized by the Treaty on European Union (Art. 2). It has been explicitly referred to by the Court of Justice in numerous cases. The rule of law – together with the respect for human dignity and human rights, freedom, democracy, equality – are the most fundamental rules of the Union and its legal order. They establish the most basic framework of the material constitution of the Union. They bind not only the EU itself but equally its members; both EU and national bodies are designated as addressees.

## 2. Developments in the judicial system in Poland 2015-2018

The 'Law and Justice' party (Prawo i Sprawiedliwość) came to power in autumn of 2015. First, its candidate, Andrzej Duda, won presidential elections in May. The party caught winds in its sails, and a few months later repeated the success story winning the parliamentary elections in October 2015. It obtained nearly 38% of votes and, in accordance with the D'Hondt method, was allocated 51% of seats in the Sejm, a lower Parliament's chamber. Together with 61% seats in the Senate, 'Law and Justice' acquired an absolute majority in the Parliament. Accompanied by a loyal President of the Republic, the ruling party proceeded with the implementation of reforms, calling them a 'good change'.

This part of the article focuses on four institutions only: the Constitutional Tribunal, the Supreme Court, the National Council of the Judiciary and ordinary courts (common courts). One needs to bear in mind that developments in Poland which raise doubts in the context of the rule of law are associated not only with the functioning of courts and tribunals, but also cover other areas: the police, public prosecutors, the civil service, the media, the electoral system, the exercise of individual rights and freedoms, in particular the right to assembly.

### 2.1 Constitutional Tribunal

Judicial review of the constitutionality of legislative acts is a crucial guarantee that the Constitution will be observed. In Poland, as in a number of other European countries, it is carried out by the Constitutional Tribunal. The beginning of the current problems with the rule of law started when the mechanism of constitutional review has been disabled. How was this possible? A few judges of the Constitutional Tribunal were illegally replaced and some of Tribunal's judgments have not been respected. If the mechanism of constitutional review were still operational, as it was shaped by the Constitution, we would not have been witnessing today many of the issues. A number of controversial legal provisions which were brought into effect would have been declared unconstitutional by that body for substantive grounds or/and procedural flaws (hastiness in legislative process, extreme shortening of deadlines, shortening or interrupting parliamentary discussions, obstructing to table legislative amendments or present their justification). Nevertheless, the Constitutional Tribunal has been deprived of the possibility to exercise its constitutional role; that safety mechanism was turned off. Perceived by the ruling party as a negative legislator which will block the implementation of its political agenda, the Tribunal was the first rule-of-law-institution that was disarmed. How was this done? During a time-span of one year, from November 2015 to November 2016, the Parliament passed six laws on the Constitutional Tribunal to bring through a politically motivated 'repair' of this body.[3] As long as the genuine Tribunal was still able to carry out constitutional review, one of the laws

was recognized as unconstitutional in full,[4] the two other as partially unconstitutional.[5] These Tribunal's rulings were nonetheless ignored by the government.

### 2.1.1 Unlawful replacement of judges

Three judges who had been legally appointed by the previous legislature in October 2015 were not admitted to adjudicate as they had not been sworn in by the President of the Republic. They were unlawfully replaced by three other persons (sometimes referred to as 'duplicate-judges', dublerzy). The legality of the previous appointments by the Sejm was confirmed by a judgment of the Constitutional Tribunal itself.[6] By adopting special legislation, the Parliament endeavored to restore itself the power to re-appoint judges.[7] However, it had no competence to do so and to retroactively invalidate or revoke the appointments made by the previous Sejm and choose new persons in their place. There was no proper legal basis to repeat the appointment procedure in respect of those three seats since they were lawfully acquired and thus were not vacant. Legal rules that authorized the re-election of the judges were likewise recognized as contrary to the Constitution by the Tribunal itself.[8]

### 2.1.2 Non-recognition of Tribunal's judgments

The government did not recognize some of the judgments rendered by the Constitutional Tribunal and refused to publish them in the Journal of Laws, an official gazette, denying their universally binding and final legal effect which is expressly provided for by the Constitution (Art. 190 (1)). Most of these rulings were later published. However three judgments remained unpublished for 19-27 months and were even removed from Tribunal's website as if they have never been delivered.[9] As a result, these judgments were not implemented. De facto, the government usurped a competence to review the legality of the Tribunal's judgments and, as a result, to make final decisions on what is and what is not in line with the Constitution when the executive does not share the position taken by the Tribunal.

In April 2018 the Parliament adopted an act providing for the publication of the three judgments ignored so far.[10] Admittedly, the new legislation was redundant since the obligation to publish Tribunal's judgments stems directly from the Polish Constitution (Art. 190 (2)). Nonetheless, the initiative was meant as a sign of goodwill in the dialogue between the government and the European Commission. The judgments were published on 5 June 2018, although in a peculiar way. They were not denominated as 'judgments' (wyroki) but 'findings' or 'conclusions' (rozstrzygnięcia) to underline that they had not been accepted by the government. They were accompanied by a note stating that they had been taken unlawfully. Hence, in the form of a legislative act the Parliament assessed the legality of individual judgments of the Constitutional Tribunal. No such power has been vested in the Parliament. In addition to recognizing them as unlawfully adopted, the Parliament ordered nevertheless their official publication, yet it required a note conveying a message that these judgment do not matter at all.

### 2.1.3 Legality of Tribunal's judgments adopted by unlawfully appointed judges

Almost half of judgments delivered by the Constitutional Tribunal in 2017 were adopted with the participation of the unlawfully appointed judges. Thus, a fundamental issue of their legal value remains unanswered since they had been irregularly delivered by unauthorized persons. Possible consequences of recognizing these rulings in the future as invalid or non-existent (non-acts) may undermine the stability of Polish legal order.

There is no easy resolution of this situation and it may require adoption of special rules of a constitutional rank. No formal legal procedure exists in the Polish legal system to challenge the legality of the rulings of the Constitutional Tribunal. Nobody has ever predicted a situation could in which unauthorized persons sit in the Tribunal and render 'judgments'. Fearing that some judges of ordinary courts might refuse to apply such judgments in cases they adjudicate, the ruling party leaders suggested that those who refuse to apply them due to the Tribunal's composition would face disciplinary proceedings.

### 2.1.4 Further irregularities

There have been more anomalies at the Constitutional Tribunal that have contributed to its situation. One of them is the abnormal

appointment procedure of the current Tribunal's President. Mrs. Julia Przyłębska was appointed despite essential procedural flaws at her nomination among the Tribunal's judges. In addition, three other judges, appointed back in 2010, were precluded from adjudicating by President Przyłębska on account of an application lodged by the minister of justice to review the legality of their appointment. Furthermore, the requests to exclude the duplicate-judges from adjudicating panels were dismissed by panels composed i.a. by the duplicate-judges themselves, in clear violation of the 'Nemo iudex in causa sua' principle. There have been also cases of manipulation of compositions of adjudicating panels when judges initially assigned to case were later replaced. One could get the impression that judges were selected to draft a judgment such as would be expected by the government.

## 2.2 Supreme Court

In July 2017, the Parliament adopted three laws: on the Supreme Court, the National Council of the Judiciary and ordinary courts, which enabled to take excessive political control over the judiciary in Poland. They provided for, i.a.: the termination of the tenure of all judges of the Supreme Court, an arbitrary power of the minister of justice to extend temporarily the mandate of Court's judges at his discretion, the expiration of the term of office of judges-members of the National Council of the Judiciary, major reorganization of that Council, granting a decisive role on the composition of the Council to political powers. After numerous civil protests in many Polish cities, the President vetoed the first two acts, yet he signed the law on ordinary courts. President's decision seemed to be motivated by a desire to stop the protests as well as to protect own political position and powers, which were weakened in favor of the minister of justice. Within two months the President presented his own new draft laws on the Supreme Court and on the National Council of the Judiciary that in many aspects mirrored the acts he vetoed. The Law on the Supreme was soon adopted by the Parliament and entered into force on 3 April 2018.[11] Several mechanisms embodied in the act raised serious concerns in respect of the rule of law.

### 2.2.1 Compulsory retirement of judges

The Law on the Supreme Court lowered the retirement age from 70 to 65 years. It entailed the termination of mandates and compulsory retirement of a group of 40% of judges of the Supreme Court. It was made applicable both to the new judges and those who have already been adjudicating and who reached the age of 65 in three months from the entry into force of the new legislation (i.e. until 4 July 2018). No temporal provisions were foreseen not to cover those judges who had been appointed when the retirement age was set at 70 years. As a result, the new retirement age was applied retroactively and may be regarded as the removal of judges from the office.

The Law provided certain 'escape clause': the judges who reached the age of 65 by 4 July 2018 could have requested the President of the Republic to extend their mandate. However, it was at full discretion of the President alone to consent or refuse; he could equally take no action at all. Only if the President expressly consented, the judge remained in office. No material grounds were specified for either the consent or refusal. The President's act required no justification, no judicial remedy was available to challenge the act. This extraordinary retirement scheme affected 27 judges; 15 of them did not apply for an extension – they retired in July 2018; 12 either applied to the President or made other statements that they wish to continue their tenure – only 5 of these judges received President's approval, the other 7 were retired in September 2018. In its infringement action (see below Section 3.3.3.), the Commission has recently request the EU Court of Justice to order interim measures that would suspend the Law on the Supreme inasmuch as to bring back the situation as of the date of entry into force of the Law (3 April). If the EU Court does so, it would create a retroactive effect and force the executive to reverse the changes made so far pending the CJEU final judgment.

The government reduced a justification to reform the retirement age mainly to the purported need to 'decommunize' the Supreme Court. The rationale appeared to be false for several reasons. Firstly, after the fall of communist regime in 1990 some 80% of Supreme Court judges were negatively verified

and excluded. The implementation of the 2017 Law led to the retirement of a single judge of the 'communist past' only. Thus, from the point of view of the declared aim, the adopted means were not effective. Secondly, if the reference to the communist past of judges were to justify the law, it affected many other judges and thus introduced collective responsibility, although no one should be held accountable for the acts of others. There is no reason why a judge should bear the consequences only for adjudicating in the same court as the judge whose past was questioned. Thirdly, the Law provided no effective legal remedy for those affected by the forced retirement depriving them of due legal protection. The true purpose of introducing the special retirement mechanism appears to be different that the one declared: to enable a quick change in the composition of the Supreme Court and introduce judges loyal to the ruling majority. This was indeed confirmed by the later developments, in particular the way in which new judges were nominated by the National Council of the Judiciary.

### 2.2.2 Extension of a judge's mandate

The above described retirement mechanism was introduced as temporary, it affected the judges who had been 65 or more on the date of entry into force of the new Law. However, a similarly discretionary procedure has been introduced with regard to all judges who reach the reduced retirement age in the future. The extension of their tenure is possible twice for a three-year term of office, and the judge must, likewise, individually apply to the executive: the President of the Republic. Again, there are no substantive criteria for the President to make the decision, the President is not required to provide grounds in case of refusal either.

Originally, there were two major differences in respect of this mechanism: no specific deadline to decide on the judge's request, and an optional consultation with the National Council of the Judiciary. If the President took no decision until the judge reached the retirement age, the judge was supposed to remain temporarily in office. As a result, the judge could have been kept uncertain as to the outcome of the request; a refusal could have come at any time and terminate his mandate. The April 2018 amendment to the Law imposed a three-month deadline on the President to make the decision. If the president does not take a decision, the judge retires.

Furthermore, initially the 2017 Law on the Supreme Court provided that the President 'may' request an opinion of the National Council of the Judiciary. The decision to consult the NCJ was at his discretion, thus it did not make the procedure any less arbitrary. The optional consultation of the NCJ was replaced with an obligation to consult by April novelization.

The mechanism is of discretionary nature. The President is not bound by any criteria. De facto, the judge who applies for a prolongation of the mandate is at the President's mercy. Despite amendment to the Law adopted in May 2018, which introduced some criteria to be followed by the NCJ when issuing opinions for the President, it did not significantly change the nature of the procedure. These are the criteria for the NCJ and not for the President. Council opinions are not binding on the President, anyway. Most importantly, the criteria are general, broad and value judgment, e.g. 'the interest of justice or an important public interest'. In consequence, a substantial power and an instrument of influence was vested with the President. Surprisingly, the judge may appeal from a preparatory, non-binding NCJ opinion, yet there is no judicial remedy expressly provided against a final decision, if the President denies the judge's request. The powers attributed to the executive body may induce a 'prior compliance' effect: the judge who considers himself fit to continue the service at the Supreme Court may be tempted to rule in line with the expectations of those who will examine the prolongation request.

### 2.2.3 Termination of the First President's tenure

The new Law was intended to terminate a constitutionally based six-year term of office of the First President of the Supreme Court (Art. 183 (3) Constitution). The incumbent First President, Małgorzata Gersdorf, was 65 years old and fell within the new retirement rule. Accordingly, a provision of ordinary legislation was used to abrogate a constitutional rule, which is manifestly contrary to the lex superior rule.

### 2.2.4 Extraordinary appeal

The extraordinary appeal, established by the new Law on the Supreme Court, is an

extraordinary legal action to overturn a final court judgment, in full or in part. It may be based both on points of law but also on findings of facts. The latter differs the appeal from a cassation remedy. Although the Law provides some substantive grounds for the use of this remedy, yet they are imprecise, not specific but formulated in very broad terms, based on general clauses ('necessity to ensure the rule of law and social justice') and value-judgment concepts (e.g. 'violation of principles determined in the Constitution', 'violation of freedoms and rights determined in the Constitution', 'a flagrant breach of the law', 'obvious contradiction between court findings and the collected evidence'.). This affords the opportunity for an excessive use of the extraordinary review and impairs the principles of stability of courts' decisions and the legal certainty.

An extensive time-frame for lodging the appeal was foreseen; it can be submitted within five years after the contested judgment had been taken. Temporarily, over the period of three years from the entry into force of the new legislation, the time-frame is even more generous: judgments given after 17 October 1997 (the day of the entry into force of the current Polish Constitution) may be appealed from.

The right to bring an appeal has not been granted directly to the party contesting the court ruling, it may be exercised by a limited number of state bodies. A general power to bring the action was vested with the General Public Prosecutor and the Human Rights Commissioner (ombudsman). In addition, seven other bodies (incl. commissioners for children's rights, patients' rights, etc.) were granted limited powers to lodge complaints in cases 'within their jurisdiction'. In May 2018, the scope of those entitled to bring the appeal was further restricted with regard to the rulings which became final before 3 April 2018 (entry into force of the legislation that introduced the extraordinary appeal). Bodies that had been previously granted a limited power of appeal have the power revoked. Only the first two actors are now entitled to lodge such appeals: the General Public Prosecutor and the ombudsman. The right to appeal against other rulings (i.e. those final after 3 April 2018) remained unchanged. Subordination of filling the appeal to the will of another entity means that the remedy is considered 'ineffective' from the viewpoint of the requirement to exhaust domestic remedies before lodging a complaint with the European Court of Human Rights.[12] Therefore, the use of this remedy will not be necessary to bring a case to the Strasbourg Court.

The May 2018 novelization of the extraordinary appeal regime brought another change. It widened the possibility not to annul the contested judgment even if the conditions for its repeal had been met. Instead, it allows the Supreme Court to make a 'satisfaction statement': declare that the judgment was issued in violation of the law. Such formal recognition that there had been an infringement is to provide a sufficient satisfaction to the party without actually overturning the court's ruling. The amendment introduced a new premise for delivering such statements: when the repeal of the judgment 'would violate international obligations of the Republic of Poland'. The general category of 'international obligations' includes i.a. both the obligations arising from the participation in the European Union as well as standards stemming from the 1950 European Convention on Human Rights. If the expected cancellation of the judgment would lead to a breach of such obligations, the Court may decide to admit the appellant's submission as a matter of principle, without interfering with the existing legal situation. The satisfaction statement provides an opportunity to avoid far-reaching consequences of a cancellation judgment, e.g. pecuniary compensation that the foreign parties may seek. However, the Supreme Court may nonetheless decide to revoke the judgment, if the 'principles or human and civil rights and freedoms specified in the Constitution' justify annulment anyway. The general clause applied here leaves a considerable level of discretion to the Court.

The changes adopted by the legislature in April and May 2018 limit the substantive and personal scope of the extraordinary appeal, yet only to a minor extent. They do not remove the risks which the extraordinary appeal poses. The introduction of the appeal to the Polish legal system was substantiated by a need to remove judgments delivered in a flagrant breach of the law and presented as a response to the public sense of (material) justice. The latter appears to be more a populist than a genuine rationale and the former belittled the existing extraordinary legal remedies. The newly created mechanism may seriously affect the stability of the legal

system and the functioning of the judiciary. The Venice Commission indicated that similar systems of extraordinary review that existed in a number of former communist countries, were found by the European Court of Human Rights as violating the principle of res judicata and of the legal certainty.[13] The Commission concluded that:

> It will be possible to reopen any case decided in the country in the past 20 years, on virtually any ground. Moreover, in the proposed system the new judgements, adopted after the re-opening, will also be susceptible to the extraordinary review. It means that no judgment in the Polish system will ever be 'final' anymore.[14]

## 2.3 National Council of the Judiciary

The National Council of the Judiciary (NCJ) is a constitutional body furnished with a crucial task to safeguard the independence of judiciary (Art. 186 (1) Constitution). Its activities are intertwined with judges' professional careers: from admission to the profession, through promotion and transfer until dismissal and early retirement. The government and the legislature should therefore be very careful not to compromise the stature of the Council in the exercise of its important role.

In December 2017 several significant legislative changes related to the National Council of the Judiciary were adopted.[15] The rules related to Council's composition (premature interruption of 4-year term of office; politicization of election of new members), remained clearly in conflict with the constitutional standards. Mainly for this reason, in September 2018 the NCJ membership at the European Network of Council for the Judiciary (ENCJ) was suspended. The ENCJ, an international institution that includes representatives of EU judiciaries, came to the conclusion that its Polish member (one of the ENCJ founding fathers) does not comply with the membership conditions which require the national body to be independent of the executive and the legislature. In the view of the representatives of European judges, the Polish judicial council does not meet the ENCJ criteria any longer.

### 2.3.1 Collective termination of judges-members term of office

The National Council of the Judiciary is composed of 25 members, 15 of whom should be chosen from amongst the judges (Art. 187 (1) Constitution).[16] The new legislation provided for an automatic early termination of a four-year mandate of the then 15 judges-members of the NCJ. However, the their term of office has been expressly specified by the Constitution (Art. 187 (3)). Consequently, here again, a rule of ordinary legislation has (blatantly) overridden a constitutional provision.

### 2.3.2 Appointment of new judges-members

The newly adopted procedure vested the power to appoint the NCJ judges-members with the Sejm, in excess of the powers attributed to the parliamentary body by the Constitution (it provides that the Sejm elects four members, and the Senate another two (Art. 187 (1)). In practice, the competence may be exercised alone by the ruling party that has an absolute majority in the Parliament and thus gained control over the composition of the Council.

The new NCJ was appointed in March 2018. As a result of judges' associations calling to boycott the new Council, only 18 out of ten thousand judges in Poland decided to stand for election. The media soon pointed out that the vast majority of candidates had been in one way or the other related to the minister of justice: they were delegated by the minister to work in the ministry, recently promoted, appointed as courts presidents, etc. They had been clearly in a relation of professional dependence or personal gratitude to the member of the executive. Furthermore, the identity of those who signed the pre-nomination lists were not disclosed,[17] which was not only contrary to the declared transparency of the nomination process but also violated the right of access to public information. The latter was confirmed by the administrative court.[18] In the end, 15 judges were appointed by the Sejm, but the process was not close to a success, and the current Council does not have the same weight as its predecessor.

### 2.3.3 NCJ role in selecting Supreme Court judges

In June 2018 the President of the Republic opened the appointment process for new judges of the Supreme Court. In the current procedure the NCJ is responsible for evaluating applicants, choosing nominees and offering them to the President for appointment. The Supreme Court that enjoyed a dominant position in previous mechanism has been entirely excluded in the new one. The Council carried the selection in August 2018 in a way that gave rise to serious concern. The evaluation was superficial, based on incomplete materials related mostly to formal conditions for candidates, selection criteria were unclear, the procedure was non-transparent. The Council allocated only some 15 minutes to let its team interview each applicant in camera. The candidates were not requested to substantiate their applications, prove the legal expertise, share their accomplishments, e.g. the rulings they are particularly proud of, or attach academic publications. The NCJ voted on candidates upon very brief, 2-3 minute long presentations of the candidatures by a Council's member; in most cases, no additional questions were asked, no discussion took place. Reduced assessment of candidates in a fast-paced procedure resulted in the nomination of a few candidates who did not actually meet the statutory criteria.

### 2.3.4 Politicization of the NCJ

The election of the members of the new Council by the legislature raised concerns about the politicization of the body. A few months of the functioning of the reshaped NCJ have confirmed their validity. The low quality selection procedure of the new Supreme Court judges suggests that the nominees had been decided elsewhere in advance. The nominations were received by the applicants related to the government, and especially, the minister of justice. Despite modest materials collected with regard to the applicants, the voting on acceptance or rejection of the candidatures were almost unanimous. They were based on very short, sketchy presentations, without actual comparing and discussing the candidatures.

The new NCJ is not fulfilling its role as the guardian of the independence of the judiciary. When representatives of the ruling majority offend judges or threaten them with disciplinary proceedings the Council does not react. Some NCJ members of the KRS have insulted judges or threatened them with disciplinary responsibility themselves. The Council has visibly abandoned the role entrusted to it by the Constitution.

## 2,4 Ordinary Courts

The Law on the Organization of Ordinary Courts was amended in July 2017.[19] A number of novelties brought in it raise substantial doubts with regard to the rule of law, separation of powers and the independence of the judiciary. The new legislation significantly strengthened the powers of the minister of justice in respect of the appointment and dismissal of courts' (vice)presidents, promotion and discipline of judges, and the internal organization of the courts. The new powers of the minister have to be seen in the context of the merger (since 2016) of the office of the justice minister with the General Public Prosecutor. Thus, the increase in minister's powers vis-à-vis the judiciary, de facto has considerably reinforced the influence of the country's chief prosecutor on judges.

### 2.4.1 Appointment and dismissal of court presidents and vice-presidents

Court presidents carry out managerial tasks, but they also perform judicial functions. The powers of the executive to appoint presidents should be balanced. On the basis of July 2017 legislation, the appointment of courts presidents has become a discretionary power of the minister of justice. No involvement of the judicial bodies, the judicial self-government, or the National Council of the Judiciary has been kept. The appointment is now the exclusive competency of the minister. The appointment of vice-presidents differs from the above only in that the vice-presidents are appointed by the minister on the motion of the presidents of the respective courts. Liberty in the appointment of court presidents may adversely affect the independence of judges, due to the powers that the president may exercise, like the possibility of transferring a judge to another department, in a number of cases – even without the judge's consent. The power may be abused against judges and trigger a 'chilling effect'.

The power to dismiss courts presidents and vice-presidents during their term of office,

likewise, has been attributed to the minister of justice. To some extent it has been restricted by material and procedural requirements. Unlike the case of appointments, the minister needs to justify the dismissal on substantive grounds. However, the grounds are formulated in broad terms and involve value judgment criteria, for example: 'further performance of the function cannot be reconciled with the interest of the administration of justice'. The legislation adopted in 2017 provided for a consultative participation of the National Council of the Judiciary. The NCJ was asked for an opinion, nevertheless, a negative opinion on dismissal was binding on the minister only if it adopted by a qualified majority of two-thirds. In April 2018, the procedure was slightly amended: instead of asking the NCJ for an opinion, the minister shall request an opinion of the college of the respective court. The court college may expressly or tacitly (30 days to respond) authorize the minister to dismiss the president. If the college adopts a negative opinion, in turn the minister requests an opinion of the NCJ. As before, only a negative opinion of the Council adopted by a two-thirds majority may prevent the minister from dismissing the court's president.

The 2017 Law provided a temporary regime of six months (i.e. until 12 February 2018), when the minister of justice was at full liberty to dismiss presidents and vice-presidents of ordinary courts. He could do so without invoking any substantive criteria or reasons and did not need any opinion either of the Council or a court college. No judicial remedy was available against minister's decision. The exact data on how many presidents and vice-presidents were replaced during the period were disclosed only months later. Out of some 700 such positions in Poland, the minister dismissed 158 people, i.e. about 20% of the (vice-)presidents. In practice, dismissals were delivered in an expeditious way: sent by fax, included no reasons or only a laconic justification. There was a case when a dismissal had been 'delivered' with retroactive effect, i.e. a dismissal was sent on Tuesday, becoming effective as of Monday, the day before.

### 2.4.2 Retirement age

The legislation adopted in July 2017 lowered the retirement age of judges which had been until then set at 67. In addition, it differentiated between the retirement age of male judges (65 years) and female judges (60 years). The new measure, adopted in violation of the EU antidiscrimination legislation, led the European Commission to launch the EU infringement procedure and bring a case to the Court of Justice of the European Union (C-192/18 Commission v Poland, see below Section 3.3.2). In quick response to that, the government changed their position, and the Parliament amended the court legislation again in April 2018 and restored an equal retirement age for all judges (65 years). Instead of lower retirement age of female judges, the amendment entitled them to request voluntary retirement at the age of 60.

### 2.4.3 Prolongation of a judge's mandate

Like the Supreme Court judges, the mandate of ordinary courts judges may be extended beyond the retirement age. The Law enacted in July 2017 made it, however, conditional upon ministerial consent. The amendment to the Law adopted in April 2018 replaced the minister of justice with the National Council of the Judiciary in this respect. It may seem like a proper solution, yet it must be kept in mind that it is now the new Council elected in a politicized process and staffed mostly with persons linked to the minister.

Initially, considering the judge's prolongation request, the minister of justice should have taken into account imprecisely formulated general grounds: 'a rational use of human resources of ordinary courts and the needs arising from the workload of individual courts'. In April 2018, the grounds were further broadened making the prolongation dependent on a general consideration: 'if it is justified by the interest of the administration of justice or an important public interest …'. The modification made the power to consent even more discretionary than before.

The Law did not specify for how long the mandate could be prolonged. It may be extended until the age of 70 or for a shorter period of time, making the judge dependant on the decision-maker's discretion. Moreover, a judge who requested an extension of the mandate, and in relation to whom the decision was not taken until he reached the retirement age, remained temporarily in office – pending the conclusion of the proceeding. It may appear as a fair solution, nonetheless it made it possible to keep the judge

uncertain, in fear that he may receive the refusal at any time. As a result, the judge's independence became vulnerable.

### 2.4.3 Disciplinary proceedings

A number of aspects of disciplinary proceedings against the judges raise very serious concerns. The minister of justice (and the General Public Prosecutor at the same time) has become extremely influential in these proceedings. It is the minister who appoints disciplinary officers. In addition, the minister may appoint a 'special' disciplinary officer to conduct a specific case (called a 'disciplinary officer of the minister of justice'), who can take over any disciplinary proceeding conducted by an 'ordinary' officer. Furthermore, the minister may object to the officer's refusal to launch a disciplinary proceeding. The objection is tantamount to an order to initiate the case, and the officer is bound by minister's indications as to the further course of the proceeding. What is more, the judges of disciplinary courts of first instance are appointed by the minister of justice as well. The minister is also entitled to appeal against the ruling of the disciplinary court. The second instance is the newly established disciplinary chamber of the Supreme Court. The President of the Republic appointed the majority of its members in September 2018. Half of the appointees had served as prosecutors before; thus, they have so far been subordinated to the General Prosecutor. The others have been associated or cooperating with the minister or the ruling party as well.

The practice of resorting to the disciplinary mechanism has been intensifying. Initially, there were mainly verbal announcements and threats of disciplinary proceedings, for example against judges who asked preliminary questions to the Court of Justice of the EU the content of which did not suit those in power. A reference for a preliminary ruling is the domestic court's right under the founding treaty of the EU. Discouraging or preventing a court from making a reference to the CJEU is contrary to European law and the EU Court's case law. There are more examples. A member of the National Council of the Judiciary (judge Johann) even stated that judges may be disciplinary punished for the content of the substantive justification of the judgment. A public prosecutor threatened judges of the court in Rzeszów with disciplinary proceedings when they did not accepted the prosecutor's request and ordered to supplement the case file before filing an act of indictment. A preparatory disciplinary proceeding was launched against a judge after he had acquitted five KOD members (Committee for the Defense of Democracy, a civil society organization) who protested against the ruling party running the election campaign on occasion of opening a museum exhibition (judge Czeszkiewicz, the case was discontinued without bringing it to the court). In recent weeks, the process of 'disciplining' the judges reached a next level and has taken the form of specific actions. The case files of certain judges have been reviewed several years back, without giving reasons (e.g. judges: Barańska-Małuszek, Żurek). It looks like a search for an excuse to initiate disciplinary proceedings against a judge. Those judges who have publicly criticized changes in the judiciary as unconstitutional, violating the rule of law and judicial independence, have been summoned for interviews by disciplinary officers (e.g. judges: Frąckowiak, Markiewicz, Przymusiński, Tuleya). Public criticism is qualified as 'political activity' by the ruling majority. Some judges who have asked preliminary questions to the EU Court of Justice have been summoned as well (e.g. judges: Maciejewska, Tuleya).

Disciplinary proceedings in the situations described above may ultimately lead to the removal of judges from the office and to the intimidation, discouragement of other judges en masse ('chilling effect'). The executive acquired an opportunity to use the disciplinary procedure to exert pressure on judges. These measures have two main objectives. First, to persuade judges to adjudicate in a manner consistent with the expectations of the government. This applies not only to court judgments that close the proceeding at a given instance, but also to decisions on detention orders, admitting indictment acts, enforcement of custodial sentences, etc. Secondly, to discourage judges from criticizing changes in the judiciary, or reminding the authorities of violations of the Constitution, or pointing to government's interference in judicial independence.

## 3. The European Union's reaction

The developments in Poland triggered reaction of numerous international institutions, including Council of Europe bodies (the Venice

Commission, the Human Rights Commissioner, GRECO – Group of States Against Corruption, the Secretary General, the Parliamentary Assembly, the Consultative Council of European Judges), United Nations (the Human Rights Council, the Special Rapporteur on the independence of judges and lawyers), OSCE (the Office for Democratic Institutions and Human Rights) and, as expected, the European Union (the European Commission, the European Parliament, the Council, the European Network of Councils for the Judiciary).

The European Union institutions share the responsibility over the rule of law compliance of organization's members. The distribution of powers among them reflect their position within the Union's institutional architecture. The primary responsibility to monitor member states is assigned to the European Commission, a body furnished with the task to 'ensure the application of the Treaties (...) [and] oversee the application of Union law' (Art. 17 TEU). The Commission's role of a 'watch-dog' can be implemented both through preventive and corrective measures. Bodies in which members states are represented, the European Council and the Council of the European Union, are attributed a political power to evaluate the member state rule-of-law conduct. The power may have far-reaching consequences, in particular when the Council eventually decides to apply sanctions against an EU member. The European Parliament, on the other hand, has a considerably narrower scope of powers in this area. It can, in part, compensate its weaker position by the political weight of the actions it can take: especially by holding debates or adopting resolutions. The main initiator of the activities is, of course, the European Commission; to a limited extent, the initiative may be taken also by the Parliament. In turn, the Council is a passive body, responding to the actions of other. The Court of Justice of the EU may step in only if properly requested to adjudicate on a rule-of-law issues. The CJEU jurisdiction in this area may be exercised within the infringement procedure, preliminary ruling mechanism, or – on procedural issues only – Art. 7 machinery.

## 3.1 Is a court a 'court'? The independence of the judiciary in CJEU case-law

In its case-law, the Court of Justice of the EU has developed a detailed definition of a 'court'. It did so in the context of the preliminary ruling procedure, in which a national court approches it with a legal question. The CJEU enjoys an inherent power to verify whether a request for a ruling comes from an authorized body, i.e. a 'court or tribunal'. It can do so on request or of its own motion, when deciding the admissibility of the national request. The Treaty does not specify which body is to be understood as a 'court or tribunal', yet the Court of Justice has consistently pointed to a number of criteria which it takes into account when assessing if a body is in fact a 'court of tribunal'. The formula reads:

> 'the factors to be taken into account in assessing whether a body is a 'court or tribunal' include, inter alia, whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies rules of law and whether it is independent'.[20]

Not a formal denomination as a 'court' is decisive for the actual classification of a body as a 'court or tribunal' under Article 267 TFEU, but carrying out the function of adjudicating, acting as a judicial body. The 'court' proceedings are initiated by action of a party that desires to have a dispute settled. Bringing the case to the 'court' results in the lis pendens, and precludes autonomous action in another ordinary court.[21] Judicial proceedings are by nature adversarial, involve relation of opposition, and lead to a binding ruling.[22] The 'court' is not at liberty to take a stand in the case, it is both entitled and at the same time obliged to consider and decide the case.[23] When delivered, the court's ruling has the effect of res judicata.[24]

It is clear, the independence of the body belongs to constitutive elements of a 'court' and is intrinsic to the very basic idea of adjudication. It forms an essential requirement of the right to an effective remedy provided for by Article 19 (2) TEU and Article 47 EU Charter of Fundamental Rights. As such it must be guaranteed at EU level, within the CJEU, but equally by member states at national level with respect to domestic courts.[25] In its case-law, the Court of Justice identified external (objective) and internal (subjective) aspects of independence.[26] Judicial independence sets the limits of political process on the judiciary.[27] First of all, when considering a case, the court must be free from

outside influence, is protected 'against external intervention or pressure liable to jeopardise the independent judgment of its members as regards proceedings before them'.[28] It is presumed that:

> the court exercises its functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever'.[29]

These elements are accomplished by the separation of powers, organizational and functional autonomy of courts which are furnished with a monopoly to administer justice. Other public bodies should be deprived of instruments by which they may exert pressure on courts to follow the 'desired' direction.

In Commission v Hungary the Court of Justice addressed the issue of political influence. It held that the mere risk that political influence could be exercised is enough to hinder the body in the independent performance of tasks.[30] It continued to indicate a particular example of such influence: a threat of a premature termination of the body's term of office. It could lead to 'prior compliance' that would be incompatible with the requirement of independence.[31] In this case, the EU Court of Justice was not referring to a court, but to a supervisory authority for the protection of personal data, which in accordance with Directive 95/46[32] was required to exercise its functions 'with complete independence'. There is no good reason why the protection of the independence of judicial bodies should deserve any less.

The second aspect of judicial independence, the internal one, embraces the impartiality and objectivity of the court. As the CJEU pointed out, it:

> seeks to ensure a level playing field for the parties to the proceedings and their respective interests with regard to the subject-matter of those proceedings. (…) requires (…) the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law.'[33]

The Court recognized a number of personal and institutional guarantees of independence and impartiality, in particular with respect to: court composition; appointment of judges; length of their service; grounds for abstention, rejection and dismissal; protection against removal from office[34] – in particular, the dismissals of members of that body should be determined by express legislative provisions;[35] remuneration of judges which should correspond to their function;[36] disciplinary regime which must include guarantees to prevent a risk that it is used as a system of political control of the content of judicial decisions.[37] These guarantees serve a double purpose: firstly, to create an environment for the judge that enables him or her to carry out the judicial function in a sense of occupational and personal safety. Secondly, to grant the parties a sense of confidence and certitude that the court is a 'third party',[38] for which only the facts of the case and the legal rules in force matter, and when, in the end, the court delivers a judgment, it is the very law that speaks.[39]

In Köllensperger and Atzwanger, the Court of Justice declared a request for a preliminary ruling from the Tiroler Landesvergabeamt admissible despite the fact that the provisions on the removal of its members were vague.[40] In the opinion of the advocate general they appeared 'too vague to serve as a guarantee against undue interference or pressure on the part of the executive'[41] and as a result, the body lacked the status of a 'court or tribunal'. Interestingly, to substantiate its special leniency, the Court applied a general presumption that public authorities act in compliance with national constitution and the rule of law:

> 'It is not for the Court to infer that such a provision is applied in a manner contrary to the Austrian constitution and the principles of a State governed by the rule of law.'[42]

In this case, a general clause of a bona fides nature sufficed. It is rhetorical to ask, what conclusion may be drawn, if the presumption that state bodies act in compliance with the Constitution and the rule of law is rebutted and may no longer be maintained?

There are next challenging questions when one moves from a level of ordinary courts who 'may' request a preliminary ruling to the level of highest judicial bodies which 'shall' bring the matter before the CJEU. In particular, when a ruling is requested by the reformed Supreme Court, in which a number of judges are removed and replaced by new ones in accordance with the 2017 Law. In other words, does a court whose significant part of members is replaced on the

basis of a Law incompatible with constitutional standards, both Polish and European, remains a 'court'? Is the body still 'established by law'?

Would the 'new' Constitutional Tribunal ever decide to request another preliminary ruling from the EU Court of Justice. The former did so once, in 2015. Its qualification to bring a case to CJEU did not raise any issue.[43] With all likelihood, the 'reformed' Constitutional Tribunal will not attempt to make use of Article 267 TFEU, especially not in a composition that includes unlawfully appointed judges ('duplicate-judges'). The EU Court, if so seized, may find the request inadmissible by concluding that the Tribunal cannot be regarded as a 'tribunal'.

The apparent questions that arise are whether the courts in Poland meet the criteria developed by the CJEU? What aspects should be looked at to provide the answer? The situation of the judiciary is dynamic, it is unfolding in an undesirable direction. There are issues that raise serious concern with respect to judicial independence in Poland. Top judicial bodies have been politicized or are being subjected to political influence. Political authorities, in particular the executive have armed themselves with instruments of influence on courts and judges, thus gained excessively strong position towards the judiciary. In many situations the authorities are granted wide margin of discretion because the law either provides no specific material grounds for a decision or introduces broad terms, vague criteria and general clauses. Yet, it is premature to give a single general yes / no answer. The situation of courts and judges needs to be differentiated on the basis of more specific criteria and considerations: the nature of the court case, the parties involved (e.g. political activists or the opposition), the expectations of the government as to the court's finding, personal interest of state functionaries in the case, as well as the individual courage of the judge, not giving in to pressure, rejecting the conformist stance.

## 3.2 Article 7 mechanism and the EU rule of law framework

The Treaty on European Union provides for a three-level political mechanism to protect the constitutional values of the European Union, including the rule of law (Art. 7 TEU). It comprises: (1) a preventive mechanism in which the Council (at a ministerial level) may determine a 'clear risk of a serious breach' by a member state of EU values; the Council adopts the decision by a qualified majority of four-fifths after having obtained the European Parliament's consent; (2) an infringement mechanism in which the European Council (the heads of state or government) may determine the 'existence of a serious and persistent breach' of the values; the European Council action requires unanimity (minus the country concerned) and, again, the consent of the European Parliament; and (3) a remedy mechanism in which the Council (ministers) may decide by a qualified majority to suspend certain rights of a member state in the Union, including voting rights in the Council itself.

The three mechanisms together establish a structured, coherent framework, which is not a unitary procedure, however. The Treaty requires merely that the decision to apply sanctions be preceded by a determination that a 'serious and persistent' breach exists; hereby, the third stage depends on the implementation of the second one. The second mechanism is autonomous: the determination of a breach does not have to be either preceded by a warning decision indicating a 'risk', or followed by sanctions. In the Article 7 mechanism, a finding of a violation does not necessarily lead to the application of sanctions, they remain non-obligatory.

The mechanisms No. 2 (finding a violation) and No. 3 (sanctions) were introduced first by the 1997 Amsterdam Treaty, and later supplemented with a preventive procedure by the 2001 Treaty of Nice. The new mechanism (No. 1) was meant to avert the use of 'more serious' remedies of the mechanisms already in place which, due to their nature, were sometimes referred to as a 'nuclear option'. In 2014, the European Commission found it necessary to further supplement the existing Article 7 procedure with an additional early warning mechanism, called: A new EU Framework to strengthen the Rule of Law.[44] If a 'systemic threat' to the rule of law in a EU member is identified, the Commission should initiate a dialogue with the state and, in sequence: assess the threat, provide an opinion, adopt a recommendation. The new framework was intended to come into play before a need arises to make use of the treaty procedure.

The Commission's new framework was launched against Poland in January 2016 and led to the adoption of four recommendations in the time-span of two years.[45] The Polish

government rejected the objections raised by the Commission in respect of the judicial reforms implemented in Poland. It dismissed the mechanism as unlawful and questioned the very right of the Commission to make use of it.[46] Consequently, the resultant 'dialogue' was, in effect, unproductive, which in turn, prompted the Commission to start the Article 7 procedure in December 2017 and request the Council to make a determination of a 'clear risk of a serious breach' of the rule of law in an EU member state.[47] The treaty mechanism has been triggered for the very first time in European Union history. When and how it will come to an end, we do not know. Following a request to the Council, the Commission re-established dialogue with the Polish government, which gave limited hope. It did not lead to a significant change, and most of the Commission's concerns remained unanswered. In accordance with the Treaty, the Council then decided to take the next step and organize a hearing: a formal exchange with the Polish government at the Council's meeting. The Council decided to hold the hearing over several meetings focused on different issues. So far two meetings took place: on 26 June and 18 September. Polish government maintained its previous positions and did not offer any measures to eliminate the threats to judicial independence. The next hearing is expected in November 2018.

The mechanism of protecting the Union's values is of clear political nature. Finding whether there is a 'clear risk of a serious breach' or a 'serious and persistent breach' is based on broad terms, vague notions and value judgments. This leaves a wide margin of discretion. Moreover, any binding determination that ends a stage of the proceedings is to be made by a political body composed of state representatives: the Council of the European Union or the European Council. Thus, pleas and legal arguments can actually give way to – or be supported by – political considerations and arrangements. A judicial body, the Court of Justice of the European Union, may be involved in these mechanisms only on procedural matters, when the member state concerned questions the legality of the decision adopted. The very initiation of the procedure is not meant to be mandatory. Those entitled to launch Article 7 (the Commission, a third of member states and – for the warning mechanism – the European Parliament), while aware of facts that substantiate the use of the treaty mechanism, are not bound to act. They could be politically blamed for inaction, especially with a reference to the principle of good faith, and related principles: of solidarity, loyal cooperation and effective implementation of obligations accepted. However, a CJEU proceeding for failure to act (Article 265 TFEU) would be inadmissible bearing in mind the rigors that it introduces: the existence of a specific, absolute obligation to act. There is no such duty as far as the power to activate Article 7 is concerned. And indeed, calls have been made for a long time to initiate the procedure vis-à-vis other countries too. Only recently the European Parliament decided to initiate the mechanism in respect of Hungary as well.[48]

The effectiveness of the mechanism and the protection of the Union's principles depend on whether EU institutions and member states will continue to uphold the principles to which they all subscribed, once their application in practice becomes a bone of contention. We do not know when, and how the procedure under Article 7 will end. The ruling majority in Poland is about to finish the implementation of changes which subordinate the judiciary to the political power. It will most likely complete them before decisions are taken under this mechanism. Will they be able to reverse the changes? Only to a limited extent. It is possible to imagine some concessions on the part of the government in terms of institutional re-arrangements. To an even lesser extent, a reversal of personal changes could be expected. While it may be relatively easier to re-elect members of the National Council of the Judiciary, it will be more difficult to reinstate the judges removed from the Supreme Court or to overturn the changes in the Constitutional Tribunal.

## 3.3 Infringement actions

direct rule-of-law related proceeding against Poland may serve a few basic purposes. Firstly, as there is a major disagreement between Polish government and the Commission on whether developments in Poland actually go against the rule of law, a CJEU ruling could clarify the issue. If confirmed by the Court, this would effectively annul the government's claim that the changes in the Polish judiciary respect the rule of law, or even – as the government maintain – strengthen the judicial independence. Secondly, it would unequivocally validate the required conduct

and compel the government to comply with the EU rules. Thirdly, the awareness that further defiance of EU obligations may lead to the Court imposing severe financial penalties on Poland, may prompt the government to take more determined steps to comply than before.

### 3.3.1 General considerations

The action for infringement of European Union law is the only general contentious CJEU jurisdiction procedure envisaged in the Treaty in which a case is brought directly against a member state. Specified in Articles 258-260 TFEU, it may be initiated both by the European Commission and other EU member states, if they consider an EU member 'failed to fulfil an obligation under the Treaties'. The flouted obligation may stem not only from written EU primary law – the treaties, but also from EU secondary legislation, international agreements to which the Union is a party, and general principles of EU law.[49] Similarly, as in the case of Art. 7 TEU, the competence to launch the infringement procedure is of discretionary nature: 'the Commission is not bound to commence the proceedings (…) it has the right, but not the duty'.[50]

Mechanisms of art. 7 TEU and art. 258 TFEU are autonomous. The scope of parties is almost identical: the Commission against a member state. However, the subject-matter has been formulated differently, the legal bases of the procedures and the nature and the course of proceedings are different, as well as the possible consequences for the member state. Both mechanisms may be implemented simultaneously, as indeed has happened in the case of Poland. The particular subject of the mechanism of Art. 7: protecting the values (principles) of the Union indicates that it has a more general and broader scope. It is presumed that values (principles) are indivisible; a member state cannot uphold them in part only. The rule of law cannot be respected in one area of state activity, and not in the other one. Such a state would not be 'ruled by law' any longer. While the infringement proceeding seemed to be limited to the scope of EU law, which is not necessarily true any longer; Art. 7 mechanism is not, and equally covers non-union activities of states. Member state action taken outside the scope of EU law, when it poses a threat to the rule of law, and esp. judicial independence, may nevertheless be dealt with by initiating Art. 7 mechanism.

To what extent the rule-of-law issues could be actually addressed in an infringement proceeding? Can the principle of the rule of law be examined by the EU Court of Justice within the framework of the mechanism? The infringement action has been tailored for cases where pleas concern violation of specific obligations that are defined at some level of specificity. This will be the case primarily when a specific provision of EU law has been breached.[51] In as much as the general principle of the rule of law may be concretized into detailed EU legal rules, like the prohibition of sex discrimination, naturally the case may be decided by the Court. In this situation, however, the Court does not assess the breach of the general principle as such, but a more detailed legal rule (e.g. Art. 157 TFEU). The general principle will represent the context of the case and not constitute its subject-matter to be ruled on by the Court.

The Court of Justice has traditionally taken the position that it may review infringements of general principles of EU law, and in particular, fundamental rights, when member state's contested conduct falls within the scope of EU law.[52] The limits of EU conferred powers are to draw up the boundaries of Court's jurisdiction in principle-based cases. This was illustrated in the EU Charter of Fundamental Rights which has provided that the Charter's standards are addressed to member states 'only when they are implementing Union law' (Art. 51 (1)).[53] The Charter's provision narrowed down the scope of obligations into 'implementation' of EU law. In *Åkerberg Fransson* the CJEU moved from a literally meaning of the Charter's provision and confirmed that EU members 'implement' EU law not only when they undertake activities to fulfill obligations established by EU law (e.g. enact national legislation to transpose an EU directive) or exercise discretion attributed by EU law, but also when national legislation meets EU objectives even if it was not adopted for a strict purpose of 'implementation'.[54]

Unquestionably, the competence to organize national judicial system does not fall within the powers vested in the European Union. This remains in the domain of member states' competences. To the extent, however, that the national action intertwines with the EU guaranteed legal protection: access to court,

right to an effective remedy, right to a fair trial – it does fall within the scope of EU law. Member states are under an obligation to organize their domestic judiciary in a way that does not impede the exercise of rights stemming from EU law.

The step that opened a more general possibility for CJEU to consider the rule-of-law related issues was made in February 2018 in Associação Sindical dos Juízes Portugueses. The Court of Justice confirmed that judicial independence forms part of the general principles of EU law and is applicable to both EU courts and national courts.[55] Furthermore, the Court stated that EU law protects the independence of domestic courts.[56] It found itself competent to look into a 'domestic' matter of independence of national judiciary and assess it from the viewpoint of European standards:

> 'every Member State must ensure that the bodies which, as 'courts or tribunals' within the meaning of EU law, come within its judicial system in the fields covered by that law, meet the requirements of effective judicial protection. (…) Consequently, to the extent that the Tribunal de Contas (Court of Auditors) **may** rule, as a court or tribunal' (…) on questions concerning the application or interpretation of EU law, (…) the Member State concerned must ensure that that court meets the requirements essential to effective judicial protection (…) In order for that protection to be ensured, maintaining such a court or tribunal's **independence** is essential'[57] (emphasis added)

The case concerned temporary reduction of judges remuneration introduced by Portugal in the context of budgetary policy to eliminate excessive state deficit. The discretion that a member state may exercise in a particular area does not include judicial independence, and does not relieve the state from the obligation to uphold it.[58] The EU Court of Justice is competent to evaluate national guarantees of judicial independence irrespective of whether they are directly linked to EU law or not, that is, whether the particular issue of judicial independence falls within the scope of EU law. For the Court, in order to substantiate its jurisdiction in respect of national legislation on the judiciary, it seems sufficient to combine two elements: (1) the existence of a general right to an effective legal remedy in the fields covered by EU law, and (2) a possibility that the domestic court may apply EU law.[59] If a national court may be called upon to interpret and apply Union law, the court should meet the standards of a 'European' court.

### 3.3.2 Commission v Poland (Case C-192/18)

In December 2017 the Commission eventually decided to bring a rule-of-law related case to the EU Court of Justice; the action was submitted on 15 March 2018. It is of limited scope, it refers only to one piece of legislation: the 2017 Law on Ordinary Courts (see above Section 2.4.). It covers a narrow subject-matter and two specific pleas, both related to the retirement of judges: the differentiation in pensionable age for female and male judges, and the discretionary powers of the minister of justice to decide on the prolongation of judges' mandate.

The first plea, the differentiation of the retirement age for men and women, is based on Art. 157 TFEU and the Gender Equality Directive 2006/54[60] that prohibit such treatment. The plea is related to discriminatory treatment not only of judges of ordinary courts, but equally the judges of the Supreme Court and public prosecutors for whom the 2017 Law introduced similar rules. The obligation invoked by the Commission is specific, strict, well-defined, present in EU legislation and Court's case-law for a long time. In particular, fixing different retirement ages for men and women is prohibited; the Directive clearly defines such a provision as contrary to the principle of equal treatment.[61]

The second plea deals with the discretionary power of the minister of justice to extend the mandate of judges who reached the retirement age. The Commission invoked the obligations under Art. 19 (1) TEU in relation to Art. 47 EU Charter, i.e. the right to an effective remedy before an independent and impartial court. Still, the action seems to be narrowed down in comparison to the content of both a letter of formal notice and a reasoned opinion, the two formal documents that the Commission was required under the treaty to communicate to the government prior to bringing a case to the Court. They both referred expressly also to the minister's discretionary power to dismiss and appoint court presidents.[62]

Still, the obligation referred to in the second plea is of a more general nature than the first one, as it is directly linked to the rule of law. The independence of the judiciary is inherent to the

principle of the rule of law and it forms part of its very concept. This is an important development vis-à-vis Poland. The Commission's reference to the breach of the judicial independence indicates the context of the case, but it is does more than that: it is a genuine plea sent to the Court.

The direct infringement action that the Commission lodged with the Court was the reason for subsequent legislative initiative in Poland. The amendment of 12 April 2018 to the Law on the organizations of Ordinary Courts restored the same retirement age for all judges (65 years). It might bring to a close this part of the Commission's infringement action. It 'might', because it is a discretionary prerogative of the Commission to either withdraw or sustain the application. It is clear from the case law of the Court of Justice that subsequent modification of legislation do not invalidate the action brought. In a number of cases the CJEU held that:

> 'the question whether there has been a failure to fulfil obligations must be examined on the basis of the position in which the Member State at issue found itself at the end of the period laid down in the reasoned opinion, and the Court cannot take account of any subsequent changes.'[63]

Polish legislation did not comply with EU standards not only at the end of the period specified in the reasoned opinion but also on the day when the action was brought to the Court. Thus, this part of action has not become devoid of purpose as a result of subsequent legislation. It is worth noting that even repealing the law with a retroactive effect, e.g. by way of legislation or a ruling of a constitutional court does not change the position of the Court of Justice because such change results from an event which took place after the key date and therefore cannot be taken into account.

The extension of judges' mandate beyond the age of retirement is the other concern brought to the Court's attention by the Commission that has also been dealt with by the April legislation. Yet, in a more cosmetic way that does not alter a critical assessment of the procedure and its impact on the independence of the judiciary. It brought two modifications, mentioned above in Section 2.4.3. The minister of justice was replaced with the National Council of the Judiciary which is now furnished with the competence to extend judges' mandate. Although it may be considered as a positive development, one needs to bear in mind that the new Council is a different body than before: appointed by politicians, based on a Law inconsistent with constitutional standards, and composed mostly of people related to the justice minister. Furthermore, the April amendment broadened the substantive criteria for prolongation of the mandate, thus granting even more discretion with respect to judges' active service. Finally, it has to be noted that there is still no express time-frame for making a decision on prolongation. Therefore, the second plea remains legitimate.

Despite a more general nature of the second plea, the infringement action brought by the Commission is relatively narrow. As was highlighted above, the rule-of-law issues in Poland are much more extensive than that. If the Court of Justice follows in the future the approach it took in Associação Sindical dos Juízes Portugueses, it opens wider opportunities for the Commission (and potentially to other EU member states) to bring next infringement cases on judicial independence in Poland (and equally, in other EU members).

### 3.3.3 Commission v Poland II (Supreme Court case)

On 3 October 2018, the Commission lodged a second complaint with the CJEU concerning violation of judicial independence by Poland, this time – in relations to the Supreme Court. The action was not communicated in the EU Official Journal yet or made available on Court's website; the information available so far is based in part on Commission's press releases.[64] The Commission pointed to violation of the principle of irremovability of judges by a forced, premature retirement of judges, also including the interruption of the term of office of the First President of the Supreme Court (see Sections 2.2.1–3. above). The Commission also questionned the discretionary nature of the President's power to agree or refuse to extend the term of office of Supreme Court judges, as well as the lack of judicial review in the case of a negative prolongation decision. The case may involve the National Council of the Judiciary, to the extent that it participates in the procedure for the retirement of judges and the extension of their mandate. The Commission clearly considers the NCJ to be a politicized body which does not meet European standards.

The Commission asked the CJEU for an expedited procedure taking into account the on-going process of replacing judges of the Supreme Court in Poland. It also requested interim measures pending final judgment. The exact wording of the request is not known at the moment, but interestingly enough, the measures requested would apparently be retroactive in nature since the Commission applied for the restoration of the Supreme Court to the situation as before 3 April 2018. That would mean that the retired judges are reinstated in some way, Prof. Gersdorf continues as the First President of the Supreme Court, no new judges are appointed to the positions occupied again by reinstated judges. If such interim measures are in fact ordered by the CJEU, their implementation would be legally feasible, yet politically extremely difficult for the government. Should the government, however, do not comply with the interim measures, Poland most probably would be facing severe financial consequences.[65]

## 3.4 Preliminary rulings

If a domestic court considering a case to which EU law applies, encounters difficulties in its application, it has a possibility, and sometime a duty, to submit a legal question to the Court of Justice of the European Union. By asking such a preliminary question, the court seeks clarification with respect to either interpretation of EU law or the legality of legal acts adopted by Union institutions. This specific procedure of cooperation or 'dialogue' between national courts and the EU Court is to secure uniform interpretation of EU law in all member states, ensure its consistency, its full effect and its autonomy.[66] The EU Court's jurisdiction does not embrace directly the interpretation of domestic law, all the more, the assessment of the validity (constitutionality) of national laws. The latter is naturally reserved for national courts. Nonetheless, the CJEU may deal with certain consequences of domestic legislation from the viewpoint of upholding the European standards. In particular, this will be true for the independence of national judiciary, since it is no longer an internal 'affaire' of members states but has become a European issue as a consequence of the supranational nature of the Union and the extent of integration it covers. Firstly, at a more general level, the EU Court may assess whether the domestic body which requests a preliminary ruling is authorized to apply to the Court as the right to submit a request is reserved exclusively for a 'court or tribunal' (see above Section 3.1.). Hence, the Court of Justice has an inherent competence to verify whether the national body is in fact a 'court or tribunal'. The notion of a 'court or tribunal' is an autonomous concept under EU case law. Denomination of a national body as a 'court' made by domestic law usually will be accepted by the Luxembourg Court. However, not because such an indication is sufficient or decisive, but national courts usually do meet the criteria indicated by the CJEU. The independence of the body is one of the basic eligibility criteria for a 'court'. Secondly, the Court may be involved in the preservation of a prerogative of national bodies to request a preliminary ruling, if national law or domestic practice would attempt to restrict the right. Thirdly, the Court of Justice may be addressed by a domestic court of another member state when that court is to decide whether to execute, or refuse to enforce a decision of a Polish court. The system of judicial cooperation in the EU is based on mutual trust. If judicial bodies of other EU member states begin to lose confidence in Polish courts, they may question the enforceability of their decisions. Two of these scenarios: the last and the first one have already begun. The CJEU was asked, in a series of preliminary questions, to assess a number of aspects of changes made in the Polish judiciary. None of these questions have been answered yet, the cases are pending. The CJEU was also asked by a foreign (Irish) court to advise on the terms of a duty to execute a European arrest warrant issued by Poland (LM case).

### 3.4.1 Preliminary questions from Polish courts

Although the changes in the judicial system in Poland began in autumn 2015, the first requests for a preliminary ruling were submitted to the EU Court of Justice almost three years later, in August 2018. The 'late' response was due to several reasons. Initially, the changes concerned the Constitutional Tribunal alone and did not have immediate consequences in cases pending in ordinary courts or the Supreme Court. Yet, there was a conviction that sooner o later questions to the CJEU would be referred, it was a matter of time, just like individual complaints to the European Court of Human

Rights alleging violation of Article 6 ECHR (right to a fair trial) are expected as well. In addition, a case that would be suitable for a preliminary ruling was awaited, i.e. a case with a European element, that is, a case to which EU law applied. It was only the judgment of the CJEU in Associação Sindical dos Juízes Portugueses that pointed to a broader possibility of requesting a preliminary ruling in cases concerning the independence of the judiciary. It is possible that the judgment in the case of Portuguese judges was a specific response of the European Court to the development of the situation in Poland.

The Supreme Court's decisions of 1 and 2 August to ask preliminary questions opened the door to the Luxembourg Court. During the two-month period, the Supreme Court issued five decisions to request preliminary rulings. Ordinary courts followed in the footsteps of the Supreme Court, e.g. the district courts in Warsaw and Łód. Judges in Poland began to use their EU based powers to challenge the developments affecting judicial independence and the right to legal protection. Preliminary questions are focused on several issues: irremovability of judges in relation to the forced retirement as a result of the lowered retirement age; discretionary powers of the executive to decide on the extension of judge's mandate; discrimination on grounds of age linked to the two above issues; competence of the domestic court to order interim measures suspending the application of certain national provisions when requesting a preliminary ruling; guarantees of independent disciplinary proceedings (political influence over them, the risk of their use to control the content of judicial decisions, the possibility of using unlawfully obtained evidence in disciplinary proceedings). None of these questions have been answered yet. The first CJEU rulings can be expected in a few months; Polish courts requested the Court of Justice to proceed under the expedited procedure.

The government's reaction to referrals of preliminary questions was disapprobative. The rationale for submitting applications was questioned. The government reused an argument that has been exploited earlier many times, that the changes in Poland are beyond the EU competence, because allegedly they concern only the organization of the judiciary, which remains an exclusive domestic competence. The judges were accused of delaying the resolution of cases and the administration of justice as a result of the suspension of national proceedings pending a reply from the Luxembourg Court. It has been argued that the questions referred concern matters unrelated to the domestic cases; if this were the case, the CJEU and not the government should be the deciding authority.[67] Judges who had referred preliminary questions were threatened with disciplinary liability; in fact, some of them were later summoned for interviews with disciplinary officers.

### 3.4.2 The right to a fair trial and the principle of mutual trust (LM case)

In March 2018, an Irish court suspended the execution of a European arrest warrant (EAW) issued by Poland. It did so on account of doubts whether the person, when transferred to the requesting state, will be granted the right to a fair trial.[68] This was the first case in which a foreign court, taking into consideration the changes in Poland, voiced doubts as to whether this is a country whose courts can still be trusted. Since the obligation to execute the EAW arises from EU law, the Irish court referred questions to the CJEU for a preliminary ruling on how to proceed, in particular what criteria and procedures are to be adopted to decide on the surrender of the person wanted for prosecution.

That new development may challenge Poland's participation in European judicial area. Adopted in 2002, the European arrest warrant is historically the first EU instrument implementing the principle of mutual recognition. It is a surrender procedure that replaced extradition arrangements between EU members. It limits the application of traditional principles of double criminality and specialty. It does not differentiate by citizenship of the persons sought; it provides likewise for surrender of own nationals. Today, the EAW is still the most widely known, but there are many more instruments on judicial cooperation in both civil and criminal matters that are based on mutual trust among the EU states.[69] Mutual trust restraints the discretion of the requested state by providing for a (nearly) automatic recognition and execution of a foreign court judgment or decision. It facilitates judicial cooperation making it quicker, less formalized, thus more effective. The trust is justified by a basic assumption that EU member share 'a set of common values on which the European

Union is founded'. It requires a member state 'to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law'. Ergo, it involves presumption that fundamental rights have been observed by the other member states.[70] Mutual recognition presupposes a high level of homogeneity of member states legal systems that share the same values and safeguard an equivalent and effective level of protection. This is where the rule of law, judicial independence and fair trial guarantees come to play a critical role. If, in relation to a particular state, the basic assumption on shared values turned out to be false, as a result, the presumption of compliance with fundamental rights could be rebutted. Then the trust and confidence in that country could be lost as well. In such circumstances, the mutual recognition mechanism may not be feasible any longer with the participation of that state.

Execution of a European arrest warrant is the rule, refusal – an exception, limited to either mandatory or optional grounds pointed out in the EU Framework Decision.[71] The Decision does not expressly allow for a refusal to execute a warrant because of a risk of violation of fundamental rights; there is no such premise among the grounds for non-execution. Admittedly, the Decision's preamble indicates that its implementation may be suspended in the event of a serious and persistent breach of EU values by a member state, insofar as the breach is determined by the Council in accordance with Article 7 TEU political procedure. This has not happened so far in relation to Poland or any other EU state. Yet, the Framework Decision shall not modify the obligation to respect EU fundamental rights and fundamental legal principles (Art. 1(3) Decision). In the case of a conflict of obligations under the Framework Decision (EU secondary legislation) and obligations under the Union treaties or the Charter of Fundamental Rights (EU primary law), the latter prevail in accordance with the lex superior rule. At the request of the domestic court, it was the role of the Court of Justice of the EU to indicate the criteria to determine whether such a conflict exists in a given case and, if so, how it should be resolved.

In Aranyosi and Căldăraru the CJEU confirmed that 'in exceptional circumstances' the national court, when considering executing an arrest warrant, is entitled to deny its execution on fundamental-rights grounds. While the case concerned the detention conditions of persons transferred on the EAW basis, its applicability to LM case was to be checked with the CJEU. In Aranyosi and C□ld□raru the Court argued for a two-step test: (1) finding that there is a real risk of violation of fundamental rights because of the general conditions in the requesting state, and (2) an assessment whether there are substantial grounds to believe that the individual concerned will be exposed to that risk.[72] The latter is to be found with the assistance of supplementary information which the executing judicial authority may ask from the requesting judicial body.[73] The Irish court in LM case asked the CJEU to rule if the Aranyosi and Căldăraru test is to be followed in a rule-of-law situation and whether the risk must be individualized.[74] In other words, a national court in an EU member state may be able to establish the existence of deficiencies in the rule of law in another member state; in this context, the EU Court was asked to clarify how the consequences of such a determination at national level should be assessed in relation to an individual arrest warrant case.

In its ruling of 25 July 2018, the Court of Justice confirmed that the Irish court is to apply the same test to assess whether to execute the EAW in relation to LM. The CJEU concluded:

> 'where the executing judicial authority, called upon to decide whether a person in respect of whom a European arrest warrant has been issued for the purposes of conducting a criminal prosecution is to be surrendered, has material (…) indicating that there is a real risk of breach of the fundamental right to a fair trial (…), on account of systemic or generalised deficiencies so far as concerns the independence of the issuing Member State's judiciary, that authority must determine, specifically and precisely, whether, (…) there are substantial grounds for believing that that person will run such a risk if he is surrendered to that State.'

When deciding on the surrender of the person wanted for prosecution, the court must link the general negative assessment with the individual situation of the requested person. In the CJEU view, the general risk of violation of the right to a fair trial does not necessarily mean that every accused person is exposed to such a risk in his or her individual case. It is the task of the executing court to verify, in each case, whether such a relationship exists. If so, the person

sought cannot be handed over to the requesting state. The Court of Justice has indicated the considerations which the national court should take into account in its individualized assessment: the specific concerns of the person sought, his or her personal situation, the nature of the offence and the factual context of the arrest warrant.[75] The determination made by the executing judicial authority should be specific and precise.[76] The CJEU further requires that the executing court requests the issuing judicial authority for supplementary information to have an up-to-date knowledge.[77]

Some observers appeared to be disappointed that the Court of Justice did not rule directly on whether the rule of law was violated in Poland. It did not, because this was not a question which it had to answer. This issue was essentially determined by the Irish court itself. The CJEU was careful not to go beyond the limits of the jurisdiction entrusted to it by the Treaty. A general evaluation of the rule of law made in the context of this case would exceed the scope of the preliminary ruling mechanism. However, the LM case is the first of this type, but probably not the last one; the Court may be confronted with similar questions in other cases where the principle of mutual recognition is at stake. Depending on the wording of the questions put to the Court, the CJEU may provide more far-reaching answers or more direct ones.

## 3.5 Effectiveness and consequences of EU control mechanisms for Poland

Are EU mechanisms effective? Do they allow a member state to be forced to act in accordance with its obligations arising from its participation in the Union, in particular the respect for the rule of law? For the time being, they have not proved to be so. Changes have been introduced in Poland for three years. For most of this period, the activity of the European institutions consisted in watching, noting, giving opinions and possibly recommending. The procedures have been initiated, most of them are ongoing. Only the preliminary ruling procedure at the request of the Irish court has come to an end. Yet, the specific nature of the case and the procedure resulted in the fact that there is no definite answer, it is the domestic court that is ultimately to take the decision on the execution of the EAW and the transfer of the person sought to Poland. We do not know when, and how the procedure under Article 7 will end. The ruling majority in Poland is about to finish the implementation of changes which subordinate the judiciary to the political authority. It will most likely complete them before decisions are taken under this mechanism. Will they be able to reverse the changes? Only to a limited extent. It is possible to imagine some concessions on the part of the government in terms of institutional re-arrangements. Yet, a reversal of personal changes can hardly be expected. While it might be relatively easy to re-elect members of the National Council of the Judiciary, it will be more difficult to reinstate the judges removed from the Supreme Court or to overturn the changes in the Constitutional Tribunal.

The actual direct effect of EU control procedures may become sanctions imposed on Poland, as well as other negative consequences of political and judicial decisions taken within the EU framework. A finding, pursuant to Art. 260 TFEU, that the state has failed to fulfill its obligations may at the end of the day result in the imposition of considerable fines: a lump sum or periodic penalty payment. The former is repressive in nature, the latter is meant to force the state to perform the obligation(s). In the context of the infringement procedure, pecuniary sanctions may also be imposed at an earlier stage, once they have been decided by the Court of Justice which ordered interim measures pending a final decision on the case. Failure to implement them can be expensive.

The reduction in funding from the European Union could become another negative consequence. It could be done under the rule-of-law conditionality mechanism proposed by the Commission. Negotiations between the Commission, the Council, and the European Parliament are underway. The limitation of funding could apply to almost all EU spending programmes in the context of the Multiannual Financial Framework 2021-2027. Considering that a significant part of public investment in Poland is (co-)financed from EU funds, the consequences of the conditionality mechanism would be particularly severe.

The negative consequences may also take non-pecuniary forms. The Article 7 mechanism may ultimately lead to the suspension of certain rights of the member state in the EU, including voting rights in the Council. This would drastically reduce the state's participation

in the EU decision-making process, its capacity to influence the development of European integration as well as the ability to safeguard the state's own interests. In addition, the preliminary ruling of the Court of Justice may result in limiting Poland's participation in the judicial cooperation: in recognition and enforcement of judgments and court decisions. The judgment of the CJEU in LM case has already resulted in the EAW issued by Polish authorities ceasing to be automatically enforced, as the other member state courts taking a decision whether to execute the EAW must ensure in a given case that the rule of law in Poland will not prejudice the rights of the person transferred.

## 4. CONCLUDING REMARKS

Since autumn 2015, Poland has been undergoing an unprecedented change in its constitutional system. The most rapid and far-reaching since the fall of the authoritarian regime in 1989. The changes impact many areas of the state: the judiciary, public prosecutors, the police, the civil service, the media, as well as electoral law and the rights of individuals, in particular the right to assembly. In the field of the judiciary, in the first place, they have affected the key bodies: the Constitutional Tribunal, the Supreme Court, the National Council of the Judiciary, and also to a lesser extent, the ordinary courts. As a result of these, the principles of the rule of law, separation of powers, and judicial independence have been substantially distorted.

1. Developments in Poland have aroused astonishment. How did it happen? Why did it happen? How was it possible? In a country that was perceived as a leader of transformation in Central and Eastern Europe; a country which appeared to be a stable democracy furnished with a system of law based on a modern Constitution. Yet, it all has proven to be insufficient. The 'Law and Justice' party, that within a few months in 2015 won both the presidential and parliamentary elections, took a brutal shortcut. A motto: 'fighting with legal impossibilism' was used to justify a radical change of the system. 'Legal impossibilism' was intended to mean a certain inability, incapacity to change the law, caused allegedly by excessive and unnecessary legal formalism, which prevents the adoption of politically desirable and socially expected changes.[78] Thus, formalism embodied in the principles of procedural justice impedes instituting material justice.[79] In addition, the ruling party identified a source of 'impossibilism' in ill-will of lawyers' corporations and castes, including members of the judiciary. They were accused of preserving the existing system, reluctant to accept changes, suspected of obstructing the coming inevitable reforms. A maxim: 'where there is a will, there is a way' set the path. Even the Constitution should not hold back the fight against the legal inability. Indeed, the incapacity to formally change the Constitution, due to the lack of a required majority to revise it, itself fits into this 'legal impossibilism'. Perceived as a potential obstacle, the Constitutional Tribunal, an actor that could stop a 'good change', was first to be disarmed. This opened the door to the next changes.
2. Over three years, the legislative and the executive have gained overwhelming influence on the judiciary. The changes made so far may seriously undermine the independence and impartiality of courts and judges. Alterations to the judicial system have created a network of political influence on judges. They affect the whole professional career of the judge: from education and training, access to the profession, appointment, promotion, transfer, disciplinary responsibility, dismissal and retirement. It raises anxiety that judges, when considering a case, may take into account not only the facts of the case and the law applicable but also extrajudicial considerations. They may be inclined to determine the merits of the case in accordance with the views or expectations which are communicated either explicitly or implicitly.
3. The judicial reform has been carried out with a call: 'This is what the citizens demand, and what we have promised them', nonetheless it does not meet the genuine expectations of the public. What people really want are more speedy, efficient proceedings, and a greater understanding of what is happening in a courtroom. This has not been done so far. Instead, the Constitutional Tribunal was dismantled, the National Council of the Judiciary politicized, part of members of these bodies and courts' presidents replaced; the Supreme Court has been undergoing personal changes too. The actual deficiencies

of the Polish judicial system have not been addressed by the measures so far implemented.

4. If someone relied on justifications for legislative changes and statements made by political leaders, the declared objectives of the 'reforms' would seem to be: the repair of the judiciary, its democratization and submission to greater public scrutiny, removal of compromised judges, rationalization of proceedings, ensuring justice. However, the measures implemented contradict the declarations. Judicial institutions have been weakened, judges are systematically insulted and intimidated, judicial proceedings take longer, political influence in the judiciary is increasing. The true aim of the changes turns out to be making the judiciary dependent on political power and eliminating judicial control over the executive. The control relationship is being reversed: the courts are no longer supposed to control the actions of other state bodies, but the political leadership is supposed to control the judiciary. 'Judges are to play a servant role towards the state' has declared a prominent politician of the ruling majority. The takeover of the Constitutional Tribunal has eliminated the possibility of reliable control over the constitutionality of adopted legislation. The replacement of the composition of the National Council of the Judiciary has ensured political influence over the process of appointment and promotion of judges. The exchange of Supreme Court judges is expected to ensure control over the jurisprudence of lower courts. Judges of ordinary courts cannot be replace, as there are not enough 'substitutes'. Therefore, they have been subjected to discipline, intimidation, a 'chilling effect'. The most rebellious ones may be removed from the profession. It will serve as an example for others, the majority of the remaining may eventually learn a lesson.
5. On account of the government taking control over the Constitutional Tribunal, a genuine, abstract constitutional review has been disabled. Since the Constitution provides that its provisions are directly applicable, the courts are entitled to examine the constitutionality of legislative acts in individual cases they consider. They cannot declare them null and void, yet they may refuse to apply them in specific cases. The government strongly opposes such in concreto review, and the minister of justice has threatened judges with disciplinary proceedings if they apply the Constitution directly, and find the conflicting legislation inapplicable in a given case.
6. The current leadership demonstrates a dual attitude towards the Constitution. It essentially questions the act, contests the legitimacy of premises upon which the Constitution is based, imputes a post-communist origin of the act, describes it as a fruit of a 'rotten compromise'. It maintains, it was adopted to protect the members of the fallen regime and their interests, it precludes any major, substantial changes. Nonetheless, the party does not formally reject the Constitution as such. It is comprehensible; a complete delegitimization of the basic legal act would turn against the government. The addressees of legal rules might feel released from following and obeying the law, making it ineffective. The technique is much more subtle: pick and choose. Firstly, Constitution stipulations are invoked in isolation. They are stripped of their systemic and functional context. They are appealed to selectively and only to the extent that corresponds to the current agenda. The government pretend to act in line with the Constitution and strongly deny any allegations of non-compliance with it and the rule of law. Secondly, when adopting and implementing subsequent changes, the government normally backs its initiatives by a mention of the will of the 'nation', the 'sovereign', as interpreted selectively and authoritatively by the ruling party. The will of the nation is supposed to be above the law, hence, also above the Constitution. The will of the sovereign was vested in 'Law and Justice' party when it won the 2015 parliamentary elections and the government represent the will of the nation. In fact, the parliamentary majority implies that it has been given a 'carte blanche'. It ignores the fact that the 1997 Constitution was indeed adopted by 'the sovereign' in a nationwide referendum and can only be revised in accordance with a constitutional procedure.
7. Among the EU institutions, the European Commission has so far been the most active, maintaining both formal and informal dialogue with the Polish government.

After adopting several recommendations, the Commission launched the Article 7 monitoring mechanism. It may eventually lead to the use of limited sanctions: suspension of certain membership rights. Hitherto, it has brought only modest effects. Firstly, a change in the 'dialogue climate', when after months of irreverence for the Commission, at the beginning of 2018, the government has declared a will to talk and seek a compromise. Secondly, adopting some amendments to previously enacted legislation that has been heavily criticized by the Commission. The situation is not fully clear as to the further scenarios. The EU Treaty procedure has been initiated, yet we do not know when and how it will come to an end. The decisive role and thus the outcome of this process, rests with bodies made up of representatives of governments; their action is often politically motivated.

8. In the context of Poland's membership in the EU, violation of national principles of the rule of law, constitutes a breach of EU constitutional values at the same time. Polish issues have become a European issue. Tight links exist between the domestic and EU legal orders. National authorities, and in particular, the judicial bodies play an important role in implementation and execution of EU law. If the confidence in Polish legal and the judiciary will continue to fall, Poland's participation in judicial cooperation with other EU members may be at risk. Based on the principle of mutual trust, the cooperation is the corner stone of the EU area of freedom, security and justice. Distrust in the independence of the judiciary may hold back transnational 'dialogue' between Polish judicial bodies and their counterparts from other EU member states. It may slow down or even undermine the prosecution of criminals, mutual assistance, and transnational legal transactions. The recognition of court judgments and decisions in other EU members is not fully possible without ensuring an adequate, sufficiently high quality of members' legal and judicial systems. The loss of trust by the EU and its member states, may have serious consequences for Poland's capacity to continue to participate fully in European integration.

## NOTES

1. See i.a. R. Cohen, *How Democracy Became the Enemy*, The New York Times, 6 April 2018; M. Matczak, *The Strength of the Attack or the Weakness of the Defence? Poland's Rule of Law Crisis and Legal Formalism*, DOI: 10.2139/ssrn.3121611; L. Garlicki, *Die Ausschaltung des Verfassungsgerichtshofes in Polen? (Disabling the Constitutional Court in Poland?)*, [in:] A. Szmyt, B. Banaszak (eds.), *Transformation of Law Systems in Central, Eastern and South-Eastern Europe in 1989-2015*, Gdańsk 2016, s. 63 i n.; E. Łętowska, *Zmierzch liberalnego państwa prawa w Polsce*, Kwartalnik o prawach człowieka 1-2/ 2017; E. Łętowska, *The current dismantling of the rule of law in Poland,* https://www.academia.edu/35832671; M. Wyrzykowski, *"Wrogie przejęcie" porządku konstytucyjnego*, [w:] M. Bernat et al. (ed.), *Wyzwania dla ochrony konkurencji i regulacji rynku,* Warszawa 2017; M. Wyrzykowski, *Bypassing the Constitution or changing the constitutional order outside the constitution*, [in:] A. Szmyt, B. Banaszak (eds.), *op. cit.*; L. Pech, K.L. Scheppele, *Illiberalism Within: Rule of Law Backsliding in the EU*, Cambridge Yearbook of European Legal Studies 19/2017; L. Pech, S. Platon, *Systemic Threats to the Rule of Law in Poland: Between Action and Procrastination*, European issues n° 451/2017; T.T. Koncewicz, *Unconstitutional capture and constitutional recapture. Of the rule of law, separation of powers and judicial promises*, Jean Monnet Working Paper 3/17.
2. European Commission for Democracy through Law (Venice Commission), *Rule of Law Checklist*, 18 March 2016, CDL-AD(2016)007, para. 18. The Checklist consists of a thorough, detailed list of indicators that is thought as a tool to evaluate the rule of law in individual states.
3. Acts of 19 November 2015 (Dz.U. [*Journal Laws of the Republic of Poland*] 2015, item 1928), 22 December 2015 (Dz.U. 2015, item 2217), 22 July 2016 (Dz.U. 2016, item 2072), and three Acts of 30 November 2016 (Dz.U. 2016, items 2072–2074).
4. Judgment of 9 March 2016, K 47/15 (concerning the Act of 22 December 2015).
5. Judgment of 9 December 2015, K 35/15 (concerning the Act of 19 November 2015); Judgment of 11 August 2016, K 39/16 (concerning the Act of 22 July 2016).
6. Judgment of 3 December 2015 (K 34/15).
7. Act of 19 November 2015.
8. Judgment of 9 December 2015 (K 35/15).
9. Judgments of 9 March 2016 (K 47/15), 11 August 2016 (K 39/16) and 7 November 2016 (K 44/16).
10. The Act was adopted on 12 April. On the day of sending the article for publication, the act was not yet signed by the President, which is a prerequisite for its proper promulgation.
11. Law of 8 December 2017 on the Supreme Court (Dz.U. 2018, item 5).
12. M. Balcerzak, *Skarga nadzwyczajna do Sądu Najwyższego w kontekście skargi do Europejskiego Trybunału Praw Człowieka*, Palestra 1–2/2018, p. 16.
13. Opinion No. 904/2017, 11 December 2017, CDL-AD(2017)031, para. 54.
14. Para. 58, Opinion No. 904/2017.
15. Law of 8 December 2017 amending the Law on the National Council of the Judiciary and certain other laws (Dz.U. 2018, item 3). The Law entered into force on 17 January 2018.
16. The other members represent: the Sejm (4) and the Senate (2), the President (1), and the Minister of Justice (1); *ex officio* members of the Council are: the First President of the Supreme Court and the President of the Supreme Administrative Court.
17. Candidates had to be pre-nominated by groups of 2000 citizens or 25 judges. All candidates appointed in March 2018 were nominated by groups of judges.
18. Judgment of 12 July 2018 (II SA/Wa 520/18,), Voivodeship Administrative Court in Warsaw; judgment is not final.
19. Law of 12 July 2017 amending the Law on the Organization of Ordinary Courts and certain other laws (Dz.U. 2017, item 1452). The Law entered into force on 12 August 2017.
20. Para. 38, Judgment of 27 February 2018, C-64/16, *Associação Sindical dos Juízes Portugueses* (*ASJP*) (EU:C:2018:117); almost identical with the original formula in C-54/96 *Dorsch Consult Ingenieurgesellschaft mbH*, para. 23 (EU:C:1997:413).

21. See judgment of 16 February 2017, C-503/15 *Ramón Margarit Panicello*, para. 34 (EU:C:2017:126).
22. See also K. Lenaerts, I. Maselis, K. Gutman, *EU Procedural Law*, Oxford 2014, p. 53.
23. *'It is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature'*, para. 28, *Panicello*.
24. *Ibidem*, at 34.
25. See para. 42, *ASJP*.
26. For an in-debth analysis of subjective and objective tests under ECHR case law, see Prof. Rick Lawson's contribution in the current *Revista*.
27. See K. Lenaerts, *The Court of Justice …, op. cit.*, p. 5.
28. Judgment of 19 September 2006, C-506/04 *Graham J. Wilson*, para. 51 (EU:C:2006:587).
29. Para. 37, *Panicello*.
30. Judgment of 8 April 2014, C-288/12 *Commission v Hungary*, para. 53 (EU:C:2014:237).
31. *Ibidem*, para. 54.
32. Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281/31).
33. Para. 52, *Wilson*.
34. Para. 51 and 53, *Wilson*.
35. Order of 14 May 2008, C-109/07 *Jonathan Pilato*, para. 24 (EU:C:2008:274).
36. Para. 45, *ASJP*.
37. Judgment of 25 July 2018, C216/18 *PPU, LM*, para. 67 (EU:C:2018:586).
38. *'Guarantees of independence and impartiality require rules (…) in order to dismiss any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it'*, para. 53, *Wilson*.
39. Only in exceptional cases the Court of Justice accepted as a *'court or tribunal'* a body that was not fully independent. It occurred in some cases of administrative bodies which were also acting in a judicial capacity. Here the Court required a separation of functions between the departments responsible for administrative tasks and the departments vested with judicial functions, and the exercise of judicial activities by the latter without receiving any instruction from the former. See e.g. the judgment of 21 March 2000, C-110–147/98 *Gabalfrisa SL*, para. 39 (EU:C:2000:145).
40. *'If the conditions for appointment are no longer met or if circumstances occur which prevent proper exercise of the office and are likely to do so for a long time'*, see judgment of 4 February 1999, C-103/97 *Joseph Köllensperger GmbH&Co. KG and Atzwanger AG*, para. 21 (EU:C:1999:52).
41. Opinion of 24 September 1998, para. 26 (EU:C:1998:433).
42. Para. 24, *Köllensperger and Atzwanger*.
43. Judgment of 7 March 2017, C-390/15 (EU:C:2017:174).
44. Communication of 19 March 2014 from the Commission to the European Parliament and the Council, COM(2014) 158 final/2.
45. Commission Recommendations regarding the rule of Law in Poland: (1) of 27 July 2016, C(2016) 5703 final; (2) of 21 December 2016, C(2016) 8950 final; (3) of 26 July 2017, C(2017) 5320 final; (4) of 20 December 2017, C(2017) 9050 final.
46. In part, the position of the government was backed by an evaluative Opinion of Legal Service of the EU Council which concluded that the new Framework is not compatible with the principle of Conferral (art. 5 (2) TEU), See Opinion of Legal Service, *Commission's Communication on a new EU Framework to strengthen the Rule of Law - compatibility with the Treaties*, 27 May 2014, 10296/14, para. 28. For a critical analysis see i.a. P. Marcisz, M. Taborowski, *Nowe ramy Unii Europejskiej na rzecz umocnienia praworządności. Krytyczna analiza analizy krytycznej*, Państwo i Prawo 2017, Issue 12, pp. 101–103.
47. European Commission, *Reasoned proposal in accordance with article 7 (1) of the Treaty on European Union regarding the rule of law in Poland*, 20 December 2017, COM(2017) 835 final.
48. Resolution of 12 September 2018 on a proposal calling on the Council to determine, 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.
49. Zob. m.in. K. Lenaerts, I. Maselis, K. Gutman, *EU Procedural Law*, *op. cit.*, p. 162–164.
50. Judgment of 14 February 1989, C-247/87 *Star Fruit Company*, para. 11–12 (EU:C:1989:58).

51. See Commission Communication, *A new EU Framework to strengthen the Rule of Law*, p. 5.
52. The Court *'has no power to examine the compatibility with the European Convention on Human Rights of national rules which do not fall within the scope of Community law.'*, C-260/89 *ERT*, para. 42 (EU:C:1991:254); *'The Court has no such jurisdiction with regard to national legislation lying outside the scope of Community law'*, C-159/90 *Society for the Unborn Children Ireland* (*Grogan*), para. 31 (EU:C:1991:378); *'The fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by European Union law, but not outside such situations'*, *'Where a legal situation does not come within the scope of European Union law, the Court does not have jurisdiction to rule on it'*, C-617/10 Åkerberg Fransson, para. 19 and 22 (EU:C:2013:105).
53. Furthermore, the Charter stipulates: *'The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.'*, Art. 51 (2).
54. See at para. 28, Åkerberg Fransson.
55. *'The guarantee of independence, which is inherent in the task of adjudication is required not only at EU level as regards the Judges of the Union and the Advocates-General of the Court of Justice (...) but also at the level of the Member States as regards national courts.'*, para. 42, *ASJP*.
56. See K. Lenaerts, *The Court of Justice and national courts: A dialogue based on mutual tryst and judicial independence*, speech delivered at the Supreme Administrative Court in Warsaw, Poland, 19 March 2018, p. 8.
57. Para. 37, 40-41, *ASJP*.
58. In that sense, para. 15, *ASJP*.
59. See M. Taborowski, *CJEU Opens the Door for the Commission to Reconsider Charges against Poland*, Verfassungsblog, 2018/3/13, DOI: 10.17176/20180313-203040, para. 2-3.
60. Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) (OJ 2006 L 204/23).
61. Art. 9 (1) (f), Directive 2006/54.
62. Press Release IP/17/3186,__Press Release IP/17/2205.
63. Judgment of 6 November 2012 *Commission v Hungary*, C-286/12, para. 41 (EU:C:2012:687).
64. Press Release IP/18/5830, Press Release IP/18/4987.
65. See for example case C-441/17, *Commission v Poland (Białowieża Forest)*; in the judgment of 17 April 2018, the Court found that Poland failed to fulfill its obligations under EU law (EU:C:2018:255). Before delivering the judgment, the CJEU ordered interim measures and informed that in the case of non-compliance, it will order a periodic penalty payment of at least EUR 100 000, Order of 20 November 2017, para. 118 (EU:C:2017:877). The government complied.
66. See e.g. judgment of 6 March 2018, C-284/16 *Achmea BV*, para. 37 (EU:C:2018:158).
67. See also S. Biernat, M. Kawczyńska, *Czy pytanie prejudycjalne SN jest (niedopuszczalne)?*, „Rzeczpospolita", 8 September 2018.
68. Judgment of 12 March 2018, *The Minister for Justice and Equality v. C.*, [2018] IEHC 119.
69. For an overview see. i.a. A. Frąckowiak-Adamska, *Następstwa wyroku w sprawie LM (Celmer) i postępowania na podstawie art. 7 TUE dla funkcjonowania sądów polskich w ramach współpracy prawnej UE* [in:] J. Barcz, A. Zawidzka-Łojek (ed.), *Sądowe mechanizmy ochrony praworządności w Polsce w świetle najnowszego orzecznictwa Trybunału Sprawiedliwości UE*, Warsaw 2018, p. 91–96.
70. P*ara. 36–37, LM.*
71. Art. 3, 4 and 4a, Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190/1)
72. Judgment of 5 April 2016, C404/15 and C659/15 PPU, *Aranyosi and Căldăraru* (EU:C:2016:198), para. 88-94, 104.
73. Para. 95, *Aranyosi and Căldăraru* .
74. Para. 145, *Minister for Justice and Equality v C.*
75. Para. 79, *LM*.
76. Para. 68, *LM*.
77. Para. 76-77, *LM*.
78. See J. Zajadło, *Pojęcie „imposybilizm prawny" a polityczność prawa i prawoznawstwa,* Państwo i Prawo 2017, No. 3, p. 17.
79. M. Matczak, *Poland: From Paradigm to Pariah? Facts and Interpretations of Polish Constitutional Crisis*, (12 March 2018), DOI: 10.2139/ssrn.3138541, p. 10.