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5 The difficulty of upholding the rule of law across the European Union: *The case of Poland as an illustration of problems the European Union is facing*

Abstract: This chapter identifies the most important means and institutions that are or might be responsible for the upholding of the rule of law in the European Union, either at the European Union or the national level, such as the Rule of Law Framework, Article 7 TEU procedure, and infringement proceedings under Article 258 TFEU. It also shows, in the case of Poland, some abusive actions that are taken by Member States to weaken the rule of law and the effectiveness of EU law. Poland and the persisting intra-EU tensions resulting from its insufficient implementation of the rule of law principle are shown as an exemplary illustration of a larger issue, demonstrating the Union's limited ability to enforce the rule of law, if the country concerned persists in challenging it. That said, this chapter concludes with some recommendations on how the European Commission can act in order to counter breaches of the rule of law even more effectively.

Keywords: European Union; Poland; rule of law; Commission, Court of Justice; enforcement

Introduction

The rule of law, which has become a focal aspect in the EU political and legal discourse over the last decade or two, is a fundamental value of the EU. It is enshrined in Article 2 of the Treaty of the European Union ("TEU"), according to which the EU is founded, among other things, on the rule of law as the value common to the Member States. However, recent years have not been easy for the rule of law in the EU. It is difficult to state when and where exactly the rule of law crisis⁰ in the European Union started. Was it as early as 2000 when the far-right Freedom Party joined the Austrian government? In 2011 when Viktor Orbán com-

1 Interestingly, the word 'crisis' is no longer used, only in colloquial language or in academic articles to describe the situation in Poland, but also appears in EU documents. See e.g. European Parliament resolution of 21 October 2021 on the rule of law crisis in Poland and the primacy of EU law (2021/2935(RSP)).

menced his reforms in Hungary? Or no earlier than in 2015 when the Law and Justice party seized power in Poland and started dismantling the major checks and balances by, among other things, subordinating courts to the will of the executive power? Without a doubt, however, all these potential starting points have a lot in common – they have triggered concern about the ability of the European Union to address challenges to the rule of law principle deriving from such situations. At the same time, the last few years have shown that some Member States continue to struggle with observing the rule of law in the European Union. Poland is a prime example of this. Few could have imagined that the whole situation would develop so dynamically when the European Commission launched a dialogue with Poland in January 2016, under the title “A new EU Framework to strengthen the Rule of Law” (Commission 2014). Six years later there are still ongoing proceedings against Poland, activated under Article 7(1) TEU (Commission 2017).² There have been numerous preliminary references³ from Polish courts to the Court of Justice of the European Union (“Court” or “CJEU”),⁴ including from the “high-level courts” such as the Supreme Court or the Supreme Administrative Court, concerning the EU requirements on the independence of the judiciary. Finally, there have been several infringement proceedings on the same subject, started against Poland by the European Commission under Article 258 TFEU.⁵ In spite of that, the problem with the rule of law in Poland is still present.

Poland and the persisting intra-EU tensions resulting from its insufficient implementation of the rule of law principle have thus become an exemplary illustration of a larger issue, demonstrating the Union’s limited ability to enforce the rule

2 Under Article 7(1) TEU, on a reasoned proposal by one-third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four-fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure. The Council shall regularly verify that the grounds on which such a determination was made continue to apply. See further point II.2 below.

3 A procedure enshrined in Article 267 of the Treaty on the Functioning of the European Union (“TFEU”), used in cases where mainly the interpretation of an EU law is in question and where such interpretation is necessary for a national court to give judgment.

4 For instance, in 2020, approx. 70% of preliminary references from Polish courts concerned the rule of law. See: <https://prawo.gazetaprawna.pl/artykuly/1494903,tsue-wnioski-prejudycjalne-polskie-sady-praworzadnosc.html> (last access: 16 October 2022).

5 See judgment of the Court dated 24 June 2019, Case C-619/18, *Commission v Poland*, ECLI:EU:C:2019:531; judgment of the Court dated 5 November 2019, Case C-192/18, *Commission v Poland (Indépendance des juridictions de droit commun)*, ECLI:EU:C:2019:924 and judgment of the Court dated 15 July 2021, Case C-791/19, *Commission v Poland (Régime disciplinaire des juges)*, ECLI:EU:C:2021:596.

of law, if the country concerned persists in challenging it. In 2013, i.e. before the Law and Justice party started dismantling the major checks and balances in Poland,⁶ David Landau defined “abusive constitutionalism” as “the use of mechanisms of constitutional change in order to make a state significantly less democratic than it was before.” (Landau 2013: 195). When writing these words, he was not thinking about Poland, but they accurately describe the recent situation in Poland.

To tell the truth, backsliding in respect of the rule of law has become a question of concern to the EU in recent times due to events that took place not only in Poland but also in Austria (entry of a far-right party into government), France (the threatened deportation of members of the Roma community), Hungary (many concerns regarding e.g. judicial independence or media freedom), Italy (control of broadcast and printed media by the executive) or Romania (government’s refusal to obey constitutional court rulings) (Barrett 2018: 31). Having said that, except for Hungary and to a lesser extent Romania, we must be cautious in comparing situations in these Member States to the backsliding of the rule of law in Poland. The scale of violations in Poland is large and the problem with the rule of law is comprehensive.

This chapter is divided into three sub-chapters. The first section aims to identify the most important means and institutions that are or might be responsible for the upholding of the rule of law in the European Union, either at the EU or the national level. The second section shows, in the case of Poland, some abusive actions taken thereby to weaken the rule of law and effectiveness of EU law, and the context within which such processes unfold. Finally, I will present what actions were taken by the Commission and the Court to uphold the rule of law in Poland and will discuss to what extent at least some of them were taken too late or were insufficient. That said, the chapter concludes with some recommendations on how the Commission can act to counter breaches of the rule of law more effectively for the benefit of the European Union as a whole.

⁶ Under the guise of “reforms”. For more on this see R.D. Kelemen and L. Pech who note that the changes adopted by the Polish authorities should not be called “reforms”, but rather a set of unconstitutional measures whose main effect – if not the main goal – “has been to hamper the constitutionally protected principle of judicial independence” so as “to enable the legislative and executive branches to interfere with the administration of justice” (Kelemen & Pech 2018: 17).

Institutional mechanisms to uphold the rule of law in the EU

The EU needs its Member States to turn EU law and policy into a living reality, and this in turn requires that the EU values are enforced and that the rule of law is strongly adhered to in all Member States. The EU has several instruments to protect the rule of law therein. The following subsections discuss the core tools.

The rule of law framework

The Rule of Law Framework was created by the EU in 2014 to enable the Commission to find a solution with the Member State concerned to prevent the emergence of a systemic threat to the rule of law in that Member State that could develop into a “clear risk of a serious breach” within the meaning of Article 7 TEU (Commission 2014). In other words, the role of the Rule of Law Framework is to resolve future threats to the rule of law in Member States already before the conditions for activating the mechanisms foreseen in Article 7 TEU (discussed in the next subsection) would be met. This is done through dialogue with the EU country concerned. The Rule of Law Framework establishes a three-stage process. They are (i) the Commission’s assessment, (ii) the Commission’s recommendation, and (iii) monitoring of the EU country’s follow-up to the Commission’s recommendation. Interestingly, as described by Artur Nowak-Far, although the procedure foreseen in the Rule of Law Framework was meant to produce a legal and binding effect, the Rule of Law Framework rules were deprived of a binding force (Nowak-Far 2021: 321).

In a nutshell, in the first stage, the Commission collects and examines all the relevant information and assesses whether there are clear indications of a systemic threat to the rule of law as described above. If, as a result of this preliminary assessment, the Commission is of the opinion that there is indeed a situation of a systemic threat to the rule of law, it will initiate a dialogue with the Member State concerned, by sending a “rule of law opinion” and substantiating its concerns, giving the Member State concerned the possibility to respond. In the second stage, unless the matter has already been satisfactorily resolved in the meantime, the Commission issues a “rule of law recommendation” addressed to the Member State concerned, if it finds that there is objective evidence of a systemic threat and that the authorities of that Member State are not taking appropriate action to redress it. Where appropriate, the recommendation may include specific indications on ways and measures to resolve the situation. In the third stage, the Commission monitors the follow-up given by the Member State concerned to the rec-

ommendation addressed to it. If there is no satisfactory follow-up to the recommendation by the Member State concerned within the time limit set, the Commission shall assess the possibility of activating one of the mechanisms set out in Article 7 TEU.

Poland was the first ever, and the only one so far, Member State to be subject to the Rule of Law Framework with four recommendations issued by the Commission.⁷

Article 7 TEU procedure

Article 7 TEU has been characterised as a provision of unique, exceptional character aimed at the protection of the substance of the EU (Tichý 2018: 89). In fact, it incorporates three different procedures which further can be divided into two mechanisms: (i) a procedure to declare the existence of a “clear risk of a serious breach” of the values referred to in Article 2 TEU and the adoption of recommendations how to remedy the situation addressed to the Member State in breach (Article 7(1) TEU); (ii) a procedure to determine the existence of a serious and persistent breach of values (Article 7(2) TEU) – both procedures constitute a mechanism with the aim to prevent further breaches – and (iii) a sanctioning mechanism following the occurrence and recognition of a serious and persistent breach which allows the Council to suspend certain rights deriving from the application of the treaties to the Member State in question, including its voting rights in the Council (Kochenov 2021: 136). Importantly, the existence of a serious and persistent breach may only be determined by the European Council acting by unanimity (except for the respective country facing allegations regarding a breach of the rule-of-law value). This requirement of unanimity is considered the major hurdle in the process. Consequently, some authors suggest a possibility to initiate a joint Article 7 procedure against two or more states if the merits of the case are similar and offended values are identical. This would disqualify the member states that are feared to be the next in line from vetoing the European Council’s decision (Dumbrovsky 2018: 205).

So far, the procedure has been initiated twice – against Poland (Commission 2017) and Hungary (European Parliament 2018).⁸ In both cases, although several years have passed, proceedings are ongoing.

⁷ Commission Recommendations: (EU) 2016/1374 of 27 July 2016, (EU) 2017/146 of 21 December 2016, (EU) 2017/1520 of 26 July 2017 and (EU) 2018/103 of 20 December 2017.

⁸ Interestingly, this was made without the Rule of Law Framework having been used before.

Infringement proceedings

For many years it has been debated in the literature whether Article 7 TEU excludes the applicability of Article 258 TFEU on the Commission's options for action in case a Member State fails to fulfil its rule of law obligations as provided by the Treaty (Schmidt & Bogdanowicz 2018: 1069–1073). By its judgment in the case C-619/18 *Commission v Poland (Independence of the Supreme Court)*, in which the Court has held that Poland infringed the principle of judicial independence under Article 19(1)(2) TEU, the Court confirmed that Article 7 TEU and Article 258 TFEU are separate procedures and may be invoked at the same time (see also P. Bárd & A. Sledzinska-Simon 2020: 1555–1584; Bogdanowicz & Taborowski 2020: 306–327).

In a nutshell, the procedure under Article 258 TFEU works as follows. If the Commission considers that a given Member State may not be meeting its obligations arising from EU law, it sends a letter of formal notice to the Member State in question requesting further information. That State must send a detailed reply by a given deadline, usually two months. On the basis of this reply, the Commission may either issue a reasoned opinion (which may be understood as a formal request to comply with EU law, calling on the EU country in question to inform it of the measures taken to comply within a specified period, usually two months) or close the case. If the country concerned fails to comply with the Commission's opinion within the timetable given, the Commission may refer the case to the Court.

As aforementioned, the Commission has already carried out several infringement proceedings against Poland concerning its breach of rule of law obligations.

Other mechanisms

Whereas the three abovementioned mechanisms are arguably the most important means and institutions for upholding the rule of law in the European Union, they are not the only ones. For instance, the Cooperation and Verification Mechanism, set up by the Commission in 2007, is a transitional measure to assist specifically one member state – Romania – to remedy persisting shortcomings in the field of judicial reform. For assessing progress, the Commission set criteria (benchmarks) and reports progress thereon on a regular basis.⁹

⁹ In 2021, Romania still had 17 outstanding recommendations and had met no benchmarks. See question for written answer to the Commission raised by Traian Băsescu: https://www.europarl.europa.eu/doceo/document/E-9-2021-003380_EN.html#:~:text=The%20Cooperation%20and%20Verification%20Mechanism,Member%20States%20and%20the%20EU (last access: 12 December 2022).

Most recently, an additional instrument was introduced, seeking to allow for swifter and at the same time more effective counteraction than the above-mentioned mechanisms in case a Member State breaches the rule of law principle. Namely, Regulation 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget (“Regulation 2092/2020”) was adopted in order to protect the Union budget against breaches of the principles of the rule of law which may affect the sound financial management and the financial interests of the Union. Under this regulation, the Commission will propose appropriate and proportionate measures (such as a suspension of EU funds) to the Council in case rule of law breaches in a given Member State threaten the EU’s financial interests. The Council will then take a final decision on the proposal of measures. Importantly, unless the decision adopting the measures provides otherwise, the imposition of these measures shall not affect the obligations which the concerned Member State’s government entities have toward the final recipients or beneficiaries, including the obligation to make payments.

In February 2022, the Court dismissed the action for annulment of Regulation 2092/2020 lodged by Poland and Hungary (Judgment of the Court in Joined Cases C-156–157/21, *Hungary and Poland against European Parliament and Council of the European Union*). A few months later, the Commission proposed for the first time budget protection measures to the Council against Hungary (Commission 2022a). At the time of writing, it has not proposed any similar measures against Poland.

Actions against upholding the rule of law in the EU. The Polish case

In its annual report on the rule of law situation in the European Union, the Commission pointed out that Member States’ constitutional courts play a key role in the system of checks and balances (Commission 2022b). Unfortunately, decisions taken by constitutional courts may sometimes raise concerns about the rule of law. It may be argued that the rule of law crisis in Poland started from the crisis around the Polish Constitutional Tribunal.¹⁰ Poland’s rule of law crisis – i.e. the governing

10 Another one would be a judiciary crisis (see point III.2 below). It must also be remembered, however, that there are other elements of an “illegal” war, as one Polish professor put it, against the Constitution of Poland carried out by the constitutional authorities, the Parliament, the President, and the government – namely the freedom of the media, the civil service, human rights and

party's attempts to undermine judicial independence in its pursuit of further power gains – became a challenge for the Union, which henceforth had to ensure that Member States respected the rule of law not only at the time of accession, but also afterwards, and to restore the rule of law when it was eroded in a Member State. Thus, to contribute to a better understanding of what the Union is up against, this section explains the evolution of Poland's rule of law situation, emanating from its constitutional crisis. This crisis has several dimensions, but I will focus on two. The first concerns the elections – held before the lower chamber of parliament, the "Sejm" – of new judges to the Constitutional Tribunal in November 2015.

The whole dispute started in October 2015, when the outgoing legislature, ahead of the general elections to the Sejm, nominated five individuals to be appointed as judges of the Constitutional Tribunal by the President of Poland. Three judges were to fill seats vacated during the mandate of the outgoing legislature, while two were to step into office during the term of the incoming legislature. However, in November 2015, the new Sejm annulled all five nominations by the previous legislature and, shortly thereafter, nominated five new judges. The President of Poland immediately (literally, in the middle of the night) swore in these new candidates, having consistently refused to swear in the previously appointed judges. In its following judgments of 3 December 2015 (Case K 34/15) and 9 December 2015 (Case K 35/15), the Constitutional Tribunal ruled, among other things, that the previous legislature of the Sejm had been entitled to nominate three judges, while it had not been entitled to elect the remaining two. Despite these judgments, the three judges nominated by the previous legislature have not been permitted to take up their posts on the Tribunal until today, and their oath has not been taken by the President (Wiącek 2021: 16–22).

In its recommendations adopted under the Rule of Law Framework, the Commission set out its concerns on the situation of the Constitutional Tribunal and recommended how these should be addressed. However, none of the recommended actions set out by the Commission have been implemented. Consequently, in its proposal for a Council decision on the determination of a clear risk of a serious breach by Poland of the rule of law, the Commission considered that the independence and legitimacy of the Constitutional Tribunal are seriously undermined, the constitutionality of Polish laws can no longer be effectively guaranteed, and judgments rendered by the Tribunal under these circumstances can no longer be considered as providing an effective constitutional review (Commission 2017).

freedoms including the guarantees of fundamental rights. See further Wyrzykowski 2019: 417–418. On the rule of law in the context of competition law see also Bernatt 2022.

Tomasz Tadeusz Koncewicz aptly noted that the Constitutional Tribunal “was targeted first [by the governing majority], because that would ensure that further phases [of the unconstitutional capture] would sail through without any scrutiny.” (Koncewicz 2017) This leads to the second aspect of the constitutional crisis in Poland: the current practice of the Constitutional Tribunal, as this court was turned into “a defender and protector of the legislative majority” (Sadurski 2019: 84).

The current position of the Constitutional Tribunal was perhaps best summarised by the Polish Ombudsman in July 2018: “*in matters that are of systemic importance, matters in which there is a deep and political interest, one cannot count on the independence of the Tribunal.*” (Flis 2018) Indeed, since 2017, i.e. the first full year of Julia Przyłębska’s presidency of the Constitutional Tribunal, in all politically sensitive issues the panels have had a majority of PiS-elected judges (Sadurski 2019: 69). Given the outspoken nature of the Ombudsman, and his criticism of the situation, it should come as little surprise that one of those panels found a reason to remove him from office in 2021, by ruling that he cannot perform his duties after the end of his term, even in a situation when parliament has not yet elected a successor (Judgment of 15 April 2021, Case K 20/20). This draft judgment was prepared by Stanisław Piotrowicz, who was, until 2019, an active member of Law and Justice.

Having effectively taken over the Constitutional Tribunal, the governing majority was not shy in using it as a weapon to fight judicial independence in Poland. One of the illustrations of this fight was lowering the mandatory retirement age of Supreme Court judges from 70 to 65. This was subject to one of the EU infringement proceedings described in point II.3 above which eventually resulted in the judgment of the Court in favour of the Commission, demanding the abolition of the newly introduced retirement rule. Reducing the mandatory retirement age of Supreme Court judges in Poland from 70 to 65 was, to some extent, also adjudicated by the Court in Joined Cases C-585/18, C-624/18 and C-625/18, this time in preliminary reference procedure, in connection with the Law on the Supreme Court of 8 December 2017 entering into force (see also Leloup 2020: 145–169; Krajewski & Ziółkowski 2020, 1107–1038).¹¹

¹¹ It is worth mentioning that a few weeks after the preliminary references were made by the Supreme Court, on 5 October 2018, the Attorney General/Minister of Justice filed for the unconstitutionality of Article 267 TFEU, to the scope within which Article 267 TFEU allows a court to refer a question for a preliminary ruling, asking for interpretation of the Treaties or the validity or interpretation of acts of law adopted by institutions, authorities or organisational units of the Union in matters related to form of government, shape, and organization of the judiciary, as well as proceedings before the judicial authorities of a Member State of the European Union. In the view of the Attorney General/Minister of Justice, “the question referred in Case no. PO 7/18 consists *de facto*

The CJEU's judgment was of pivotal importance in the larger context of the rule of law crisis, beyond the detailed regulation of retirement conditions. Namely, among other things, the Court held that a body like the Polish National Council of the Judiciary (*Krajowa Rada Sądownictwa*), which takes part in the process of the appointment of judges, must be sufficiently independent of the legislative and executive authorities.¹² Through this assessment, the Court ruled that the circumstances in which members of the National Council of the Judiciary were elected, and the way in which it functions, may be evaluated from the point of view of EU law.

The importance of the judgment went well beyond the case in which references for preliminary rulings were made. The case itself concerned the Supreme Court's new Disciplinary Chamber, formed in 2017 by judges newly appointed by the President of the Republic of Poland on a proposal of the National Council of the Judiciary. However, the judgment should be read in a way that all courts whose judges were appointed with the involvement of the National Council of the Judiciary must meet the standards specified in the judgment. In particular, as the National Council of the Judiciary's potential lack of independence from the legislature and the executive was determined to have resulted in (in this specific judgment) a lack of independence and impartiality of the Disciplinary Chamber judges, the judgment furthermore established – to this extent – a lack of independence and impartiality of other judges appointed with the involvement of the National Council of the Judiciary.

The position of the CJEU led the Supreme Court to the general conclusion that its Disciplinary Chamber is not a court within the meaning of EU law, as stated in its Judgment of 5 December 2019 (Case III PO 7/18, para. 79). In practical terms, it opened the door to questioning panels in courts that include individuals appointed with the recommendation of the National Council of the Judiciary, and the judgments these panels issued.¹³ However, the jurisprudence of the courts in such cases has been divergent.¹⁴

in obtaining CJEU's answer to the scope of compliance with EU law of the manner of appointing judges [...] as well as the status of the National Council of the Judiciary within the system of public authorities of the Republic of Poland." Although it has been for years, the case before the Constitutional Tribunal has not yet been decided (Case K 7/18).

¹² See in particular paras. 140–145 of the judgment.

¹³ In this context see also judgment of the Court dated 6 October 2021, Case C-487/19, *WŻ*, ECLI:EU:C:2021:798. In this judgment the Court held that the second subparagraph of Article 19(1) TEU and the principle of the primacy of EU law must be interpreted as meaning that a national court must declare *null and void* an order of another national court on the ground that, in the light of the circumstances in which the appointment of the judges sitting in that court took place, the latter does not constitute an independent and impartial tribunal previously established by law, for the purpos-

Consequently, on 23 January 2020 a resolution of the combined Civil Chamber, Criminal Chamber, and Labour Law and Social Security Chamber of the Supreme Court¹⁵ was issued in which it was held – contrary to the government’s position – that the National Council of the Judiciary is not independent from legislative and executive power (Case BSA I-4110–1/20). As a consequence, three chambers pointed out a court formation is unduly appointed (unlawful) where the court formation includes a person appointed to the office of a judge of the Supreme Court upon application of the current National Council for the Judiciary. In the case of common courts, the conclusion was the same, save that the defective appointment causes, under specific circumstances, a breach of the standards of independence within the meaning of both the Polish Constitution, Charter of Fundamental Rights of the European Union, and the Convention for the Protection of Human Rights and Fundamental Freedoms.

The response from the Constitutional Tribunal was immediate. Only five days later (*sic!*) it decided to issue an interim measure and suspend the application of the resolution of the Supreme Court from the date of its issue (Order of the Constitutional Tribunal, 28 January 2020, Case Kp 1/20). The purpose of this measure was that the resolution would have no effect until the Constitutional Tribunal’s final judgment in question. Finally, the Constitutional Tribunal held in an Order of 21 April 2020 (Case Kp 1/20) that “the Supreme Court – also in connection with an international court ruling – does not have the jurisdiction to provide a *law-making interpretation* of legal provisions that leads to modifications in the legal situation regarding the organisational structure of the judiciary, by adopting a resolution”. In the April 2020 Order, it also ruled that the act of appointing judges constitutes the exclusive competence of the Polish President, which s/he exercises – at the request of the National Council of the Judiciary – in person, in an irrevocable way, and without any participation or interference on the part of the Supreme Court.

The decision of the Constitutional Tribunal clearly ran contrary to EU law. In fact, as Michał Ziółkowski noted, a careful reading of the Polish Constitution and

es of the second subparagraph of Article 19(1) TEU (emphasis added). For further discussion on this judgment see Mańko & Tacik 2022: 1169–1194.

14 See e.g. Resolution of the Extraordinary Control and Public Affairs Chamber of the Supreme Court dated 8 January 2020, Case I NOZP 3/19, para. 32, according to which the appointment of judges cannot be questioned before any court or any authority in Poland regardless of the nature and scope of violation of the law.

15 I.e. without the Disciplinary Chamber and Extraordinary Control and Public Affairs Chamber, i.e. another new Chamber of the Supreme Court that was created in 2018. Both Chambers would be acting as “judges in their own case”.

the statute on the Supreme Court was sufficient to assert that the Tribunal did not have the power to question the Supreme Court's constitutional position and powers to interpret and apply the law (Ziółkowski 2020: 362). One of the former judges of the Polish Constitutional Tribunal (in 2007–2016), pointed out that, following the decision, the Tribunal's position degraded further (Granat 2021). Others even concluded that the Constitutional Tribunal, by issuing its decision, had crossed the EU Rubicon and indirectly nullified the judgment of the CJEU in Joined Cases C-585/18, C-624/18, and C-625/18, *AK, CP, and DO vs Sąd Najwyższy*, ECLI:EU:C:2019:982. Consequently, in the view of these authors, the situation around the Constitutional Tribunal became worse than ever (Pech et. al 2021: 8).

The worst, however, was yet to come.

Following a judgment of 2 March 2021 in Case C-824/18, *A.B. and Others (Nomination des juges à la Cour suprême – Recours)*, in which the Court held that the rules of national law, including even constitutional provisions, cannot be allowed to undermine the unity and effectiveness of EU law (see para. 148 of the judgment), the Polish Prime Minister applied in March 2021 to the Constitutional Tribunal to verify the compliance of Articles 2, 4(3) and 19(1) of the TEU with the provisions of the Polish Constitution (Case K 3/21). This request constitutes a key moment in Polish rule of law crisis and shows the scale of the challenge the Union is currently facing, as Poland's head of government questioned the fundamental supremacy of EU law over national (constitutional) law in the context of basic principles and values the Union is founded on. Suffice it to mention that in Article 4(3) TEU the principle of sincere cooperation is enshrined, whilst Article 19(1) TEU covers the principle of effective judicial control. In the Prime Minister's view, the provisions of the TEU that are not compliant with the Constitution are those that entitle or oblige the authorities applying the law to "derogate from applying the Constitution" where it does not comply with EU law, prescribe the application of the law in a way that is inconsistent with the Constitution, or which entitle courts to check the independence of judges appointed by the President of Poland and to verify the resolutions of the National Council of the Judiciary concerning a motion to the President to appoint judges.

In October 2021 the Constitutional Tribunal issued a ruling which was fundamentally convergent with the Prime Minister's motion: Art. 1 (1) and Art. 1 (2) in conjunction with Art. 4 (3) TEU, Art. 2 TEU and Art. 19 (1) (2) TEU, understood in a certain way,¹⁶ are inconsistent with the Polish Constitution.

¹⁶ For instance, the Constitutional Tribunal held that Article 1 (1) and Article 1 (2) in conjunction with Article 4 (3) TEU are inconsistent with the Polish Constitution "insofar as the European Union, established by equal and sovereign states, creates "an ever closer union among the peoples of Eu-

The judgment of the Constitutional Tribunal represents a flagrant violation of European Union Law.¹⁷ One should not be surprised, though. As pointed out by Taborowski, this is yet another link in the chain, intended to legalise the lawlessness and arbitrariness of the appointment of judges, alongside the operation of the new chambers in the Supreme Court, the “muzzle law”¹⁸ and the abusive disciplinary and criminal proceedings against judges (Taborowski 2021).

Response from the EU

In October 2019, the European Commission brought proceedings against Poland on account of national measures establishing the new disciplinary regime for judges of the Supreme Court and the ordinary courts (Case C-791/19, *Commission v Poland (Régime disciplinaire des juges)*). Specifically, in the view of the Commission, Poland had infringed the second subparagraph of Article 19(1) TEU on four grounds: first, the treatment of the content of judicial decisions as a disciplinary offence; second, the lack of independence and impartiality of the Disciplinary Chamber of the Supreme Court; third, the discretionary power of the president of that chamber to designate the competent court, thereby preventing disciplinary cases from being decided by a court established by law; and, fourth, the failure to guarantee the ex-

rope”, the integration of whom – happening on the basis of EU law and through the interpretation of EU law by the Court of Justice of the European Union – enters “a new stage” in which: a) the European Union authorities act outside the scope of the competences conferred upon them by the Republic of Poland in the Treaties; b) the Constitution is not the supreme law of the Republic of Poland, which takes precedence as regards its binding force and application; c) the Republic of Poland may not function as a sovereign and democratic state”. Meanwhile, the binding interpretation of EU law is the CJEU’s exclusive domain. Pursuant to Art. 19(3)(b) in connection with Art. 19(1)(2) TEU, it is the CJEU that ensures the legal interpretation of the Treaties by issuing preliminary rulings (Art. 267 TFEU) on the interpretation of EU law at the request of courts in Member States.

17 For a more detailed discussion of this judgment see P. Bogdanowicz, *Legal opinion on the legal consequences of the Constitutional Tribunal ruling in case K 3/21 on the incompatibility of the provisions of the Treaty on European Union with the Constitution of the Republic of Poland in light of European Union law*, available at: https://www.batory.org.pl/wp-content/uploads/2021/11/P.Bogdanowicz_Legal.opinion.on_the_legal_consequences.of_the_Polish.Constitutional.Tribunal.ruling.in_caseK3_21.pdf (last access: 12 December 2022). To tell the truth, in other Member States, some decisions taken by other constitutional courts, e.g. in Romania and Germany, have also raised concerns as regards the primacy of EU law. On the German decision see further e.g. Annunziata 2021: 123. On the Romanian case see further e.g. Selejan-Gutan 2022.

18 Formally speaking, this is the Act of 20 December 2019 amending the Act – Law on the System of Ordinary Courts, the Act on the Supreme Court and Certain Other Acts. The Act entered into force on 14 February 2020.

amination of disciplinary cases within a reasonable time and the rights of the accused judges to a defence, thus taking into account the rights enshrined in Articles 47 and 48 of the Charter of Fundamental Rights of the European Union. The Commission also claimed that Poland has infringed the second and third paragraphs of Article 267 TFEU, because the right of national courts to make a reference for a preliminary ruling is limited by the possible initiation of disciplinary proceedings against judges who exercise that right.

On 8 April 2020, the CJEU sided with the Commission and adopted interim measures (Case 791/19 R), pending the Court's final judgment, obliging Poland to suspend the provisions constituting the grounds for the Disciplinary Chamber ruling on disciplinary cases concerning judges, both at first instance and on appeal, and to refrain from referring cases pending before the Disciplinary Chamber before a panel whose composition does not meet the requirements of independence, as defined in the CJEU's case law (see also Pech 2020: 137–162).

It has been noted in the literature that the CJEU's order suffered from one key weakness, namely the Commission's incomprehensible failure to prevent the Disciplinary Chamber, acting hand in hand with Poland's National Prosecutor's Office, from using the national procedure to waive judicial immunity as a threat or weapon (Pech et. al 2021: 31). Few months after the CJEU's order, the National Prosecutor's Office motioned the Disciplinary Chamber to strip the immunity of those judges of common courts who are known for defending free, independent courts (Jałoszewski 2020), that is, the "old" judges of the Criminal Chamber of the Supreme Court (Woźnicki 2021).

However, I do not fully share this overly critical reading of the CJEU's order. From a legal point of view, the CJEU's order prevented the Disciplinary Chamber of the Supreme Court from adopting a resolution allowing a common court judge to be held criminally liable and suspending them from their duties. First, no composition of the Disciplinary Chamber satisfies the independence requirements arising from European Union law. Therefore, the Disciplinary Chamber should not be able to consider any cases that are pending before it until the Court judgment ending the proceedings in Case C-791/19 is issued. Regardless of the above, in its order, the CJEU ordered the suspension of the provisions of the Act on the Supreme Court whereby "the Supreme Court is divided into the following chambers: [...] 5) Disciplinary Chamber" and those that specify the jurisdiction of the Disciplinary Chamber. As a result, the Disciplinary Chamber should not be able to operate at all. The order implies no jurisdiction of the Disciplinary Chamber. In particular, the Disciplinary Chamber should not be permitted to take any action in which it acts as a disciplinary court for judges. Adjudicating on whether or not to allow a judge to be held criminally liable, which is the responsibility of the disciplinary court, constitutes acting in such a capacity.

Where I am critical is that in light of the above, the Commission should have returned to the CJEU and asked for a daily penalty payment to be imposed (Pech et al. 2021: 23) in line with the CJEU's earlier case law (see order of the Court, 20 November 2017, in Case C-441/17 R *Commission v Poland (Białowieża Forest)*). Instead, on 3 December 2020, the Commission sent an additional letter of formal notice to Poland, adding a new grievance to a previous infringement procedure started on 29 April 2020 and also concerning the “muzzle law”.

The “muzzle law”, among other things, broadens the notion of disciplinary offence and thereby increases the number of cases in which the content of judicial decisions can be qualified as a disciplinary offence. It grants the new Extraordinary Control and Public Affairs Chamber of the Supreme Court the sole competence to rule on issues regarding judicial independence and prevents Polish courts from assessing, in the context of cases pending before them, whether other judges had the power to adjudicate cases.

Here, once more, the Polish rule of law crisis fuelled further the Union's limited ability to enforce the rule of law as its institutions' – and notably, the Commission's – reaction proved insufficient in bringing the defecting Member State back to abiding by the rules. Basically, it might have been expected that the Commission would at least bring the “muzzle law” before the CJEU as quickly as possible. However, nothing could be further from the truth. The Commission's action, along with the request to order *interim measures* pending the delivery of the final judgment, was brought to the Court on 1 April 2021.¹⁹ In other words, it took the Commission nearly 16 months to bring the “muzzle law” before the CJEU.

Two years later, the CJEU has not yet issued its judgment. At the same time, I note that the CJEU has eventually delivered its judgment in another of the cases referred to above, i.e., concerning the Disciplinary Chamber of the Supreme

¹⁹ On 14 July 2021, the Vice-President of the Court issued the order for interim measures in Case C-204/21 R *Commission v Poland*, ECLI:EU:C:2021:593. On 27 October 2021, another order was issued by the Vice-President of the Court: Poland was obliged to pay the Commission a periodic penalty payment of EUR 1 000 000 per day until Poland complies with the obligations arising from the previous, or, if it fails to do so, until the date of delivery of the judgment closing the proceedings in Case C-204/21 (ECLI:EU:C:2021:878). Since *Poland* refused to pay these penalties, starting from April 2022 the Commission has been deducting them from payments due to Poland under EU funds. Interestingly, on 14 July 2021, the Constitutional Tribunal held that Article 4(3), the second sentence, of the TEU in conjunction with Article 279 of the TFEU – “*insofar as the Court of the European Union ultra vires imposes obligations on the Republic of Poland as an EU Member State, by prescribing interim measures pertaining to the organisational structure and functioning of Polish courts and to the mode of proceedings before those courts*” (case P 7/20). This judgment is another flagrant breach of EU law by the Constitutional Tribunal.

Court.²⁰ Unsurprisingly, the Court held that Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU and Article 267 TFEU. Surprisingly, it took the Court 21 months to do so. For the abolition of the Disciplinary Chamber of the Supreme Court, which was an obvious consequence of the CJEU's judgment, we had to wait another 12 months.²¹ It is hard not to recall Penn's much-quoted phrase that "to delay justice is injustice" (Penn 1905: 86).

In this context, it should also be mentioned that in December 2021 the Commission launched another infringement procedure against Poland, here for violations of EU law by its Constitutional Tribunal (Commission 2021). However, it took the Commission more than one year to refer Poland to the CJEU for these violations (Commission 2023).

Conclusion

The European Union has a number of means and instruments to uphold the rule of law within the Union. However, when a given Member State is unwilling to respect the rule of law, the whole process of enforcement is much more difficult. Poland is a good example. In recent years, Poland has turned into a state where some institutions charged with the task of protecting democracy against distortions by a current majority – such as the Constitutional Tribunal – have become disabled and are then enlisted in service of the governing majority (Sadurski 2019: 243).

While appreciating the Commission's role in enforcing the rule of law in Poland – it brought the first case ever on the compatibility of national measures on the organisation of the judicial system in question with EU law in the context of an infringement action under Article 258 TFEU and made Poland undergo Article 7(1) TEU proceedings – one cannot shake off the feeling that the Commission did not do all it could against the development of the rule of law crisis in Poland. One can even argue that some of the Commission's delayed reaction, if any, to the Disciplinary Chamber ignoring the CJEU's order in Case C-791/19, or on the adoption of the infamous "muzzle law", led to the abusive actions that have been taken recently by Polish authorities with the use of the Constitutional Tribunal.

These actions constitute a further stage of the rule of law crisis in Poland. This crisis consists no longer only in passing unlawful laws or court-packing but of the systemic negation of European Union law, including the questioning of the princi-

²⁰ See footnote 5.

²¹ However, illegally appointed judges of the Disciplinary Chamber were left in the Supreme Court which raises serious doubts about proper implementation of the CJEU's judgments.

ple of primacy, compliance with the rulings of the CJEU, or respect for the rule of law. All of this results in a sad conclusion that judicial independence must now be said to have been structurally disabled by Polish authorities (Pech et al. 2021: 41). This shows the scale of the challenge the Union is currently facing.

It seems that the Commission has a choice now: either take its job as guardian of the Treaties even more seriously or face the risk that there will not be anything left to guard. It is not yet too late but the Commission must at least act: more quickly (e.g. two months given to Member States to respond to a letter of formal notice or reasoned opinion is generally too long), more decisively (not to wait until the last minute), more consistently (not to be afraid to request the CJEU for a penalty payment if previous decisions are not implemented) and more boldly (i.e. launching infringement proceedings even in cases when there is not a 100% chance of winning in Luxembourg).

At the same time, it is submitted by some authors that enforcement of the rule of law per se is not a *panacea*. Under this view, the most mature answer to the problems should necessarily involve not merely the reform of the enforcement mechanisms but the reform of the Union as such (Kochenov, Bard 2019: 30). But that's a paper for another time.

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