



The rule of law in Poland Actions by EU institutions and unaddressed recommendations of the European Commission

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The European Commission's efforts to restore the rule of law in Poland in 2018 were relatively successful. Yet provisions subordinating the judiciary to the executive (including disciplinary proceedings against judges), which are completely incompatible with European standards, are still in place. The complaint filed with the Court of Justice of the European Union (CJEU) halted the Polish parliament's and government's actions against the Supreme Court undermining the rule of law. Although the government has conceded on the Supreme Court, it has not abandoned its aim of subordinating the judiciary to the executive. This is being done 'through the back door' using existing legislation that has 'enveloped' judges and courts in pressure from the parliamentary majority. The actions of the authorities are now slightly less visible for the media and experts, but unless they are stopped, the rule of law in Poland will deteriorate significantly in the coming months. The most powerful instrument of the Polish authorities is currently the politically-subordinated National Council of the Judiciary, which decides on judges' careers, and the disciplinary procedures controlled by the Minister of Justice (who is also the Prosecutor General), which is being used to harass and remove judges from their profession.

Effectiveness of the Commission's complaint to the CJEU

On 19 October 2018, the CJEU announced an interim measure in the infringement procedure conducted on the basis of Article 258 of the Treaty on the Functioning of the EU (TFEU) regarding the Polish Act on the Supreme Court of 8 December 2017. In its complaint to the CJEU, the Commission questioned whether the Polish regulations forcing Supreme Court and Supreme Administrative Court judges who

had turned 65 to retire – including the Supreme Court’s first president, Professor Małgorzata Gersdorf, whose six-year term is guaranteed by Article 183 of the Polish constitution and ends in 2020 – are compatible with EU law (this change took place while they were serving as judges; the retirement age was previously 70). The CJEU’s interim measure required Poland to reinstate all Supreme Court and Supreme Administrative Court judges aged 65 and over. Although it can be complied with directly (*ex lege*), the decision was only ‘implemented’ by the Polish authorities a month later in an amendment to the Act on the Supreme Court passed on 21 November 2018, which demonstrates a lack of substantive acceptance of the CJEU’s decision.

Proceedings are also underway at the CJEU in connection with the prejudicial questions filed by Polish courts asking whether domestic law is compatible with EU law. **An exceptionally important hearing will be held at the CJEU on 19 March 2019** (in combined cases C-585/18, C-624/18 and C-625/18) on the requests for preliminary rulings filed by the Supreme Court regarding matters of fundamental importance to the rule of law in Poland, namely:

- the National Council of the Judiciary – whether it satisfies the TFEU criteria and ensures that the EU principle of judicial protection is implemented in Poland?
- the Supreme Court’s Disciplinary Chamber – whether it is an independent court in accordance with European standards?

However, Polish law still contains fundamental breaches of the rule of law.

The National Council of the Judiciary – political subordination of a key judicial body

The National Council of the Judiciary currently operates as a caricature of itself – a political ‘pump’ to the profession of judge for people who are politically submissive, not accepted in their environment, without any achievements and often with disciplinary offences and personal obligations to the authorities.

The Commission upholds its serious concerns about the appointment of the National Council of the Judiciary, as well as its membership and functioning after the amendments to the regulations of 8 December 2017. Members of the previous National Council of the Judiciary were removed before the end of their four-year term (which is guaranteed under Article 187 of the Polish Constitution). The new method of appointing members does not satisfy European standards according to which most of them should be appointed by judges. The current members of the National Council of the Judiciary were chosen by the ruling party, which has made it politically subordinated (additionally, the procedure for choosing new members was not transparent). The National Council of the Judiciary plays a key role in Poland’s judicial system. It is supposed to protect the independence of the courts and the impartiality of judges and nominates judges at all levels, from district courts to the Supreme Court. The Commission was especially critical of the role of the National Council of the Judiciary in the selection of judges to the Supreme Court’s new chambers in 2018, namely the Disciplinary Chamber and the Chamber of Extraordinary Control and Public Affairs (choosing politically loyal candidates). The Venice Commission is also concerned about how they were appointed and their powers. The membership rights of the National Council of the Judiciary in the European Network of Councils for the Judiciary were suspended on 17 September 2018. According to a poll held among judges, 91% believe the National Council of the Judiciary is not fulfilling its constitutional role.

To sum up: politicians from the ruling party control who enters the judicial profession, as well as their careers and promotions.

Disciplinary proceedings against judges – a fundamental challenge to the rule of law in Poland

The second instrument for putting pressure on judges, who are in office and are therefore not yet subordinated, is a new, almost ‘inquisitorial’ disciplinary procedure.

Amendments to the Act on the System of Ordinary Courts granted the Minister of Justice decisive influence over disciplinary proceedings against judges, which goes against the rules of a democratic state with the rule of law. This applies to the appointment of a special Disciplinary Commissioner of the Ordinary Courts and his deputies and the selection of disciplinary court judges without giving the judicial association any say. The Supreme Court’s Disciplinary Chamber is fully selected by the ruling party and includes former prosecutors who previously reported to the Minister of Justice. The Disciplinary Chamber is the second instance in disciplinary proceedings and can remove judges from their profession. The Commission noted that, in its ruling of 25 July 2018 in case C-216/18 PPU § 67, the CJEU highlighted that judicial independence requires that the disciplinary proceedings system contain safeguards against using it to exert political control over court rulings.

In recent months, there has been a growing number of disciplinary proceedings against judges who openly defend constitutional values and the rule of law, as well as those who ask the CJEU for preliminary rulings. These actions are clearly repressive and seek to achieve a ‘freezing effect’ in judicial circles. Disciplinary commissioners review all these files and judgments of those judges from the past few years, looking for charges that can be raised against defiant judges. One of them already has seven proceedings, another has four and a third faces a total of 172 disciplinary charges (!). **This directly affects judicial independence, morale and consequently their judgments.**

Unresolved issues: the extraordinary complaint, the ordinary courts, the Constitutional Tribunal

The Commission’s recommendations on the institution of the extraordinary complaint, the appointment of presidents of the ordinary courts and their deputies and the Constitutional Tribunal remain fully applicable.

In its recommendation of 20 December 2017, the Commission advised that the **extraordinary complaint** be removed from the Polish legal system. This institution allows court judgments issued over the past twenty years to be revised, which could undermine legally binding verdicts in which Polish courts applied EU law (including that based on CJEU judgments). This would affect the stability of the entire (common) European legal system.

The Commission upholds its reservations on **the appointment of presidents and vice presidents of courts**. A purge was conducted between August 2017 and February 2018 using the special powers of the Minister of Justice (who is simultaneously the Prosecutor General). Over 150 presidents and vice presidents were replaced without consultation or real justification. Furthermore, the power of the National Council of the Judiciary to extend the right of judges to adjudicate reduces their independence because their further career depends on a politicised body’s decision.

The appointment, membership and operation of the Constitutional Tribunal remain problem areas, too. Three judges correctly selected in October 2015 have not been sworn in, the Tribunal

has so-called judge-doublers, three 'old' judges can no longer adjudicate, Tribunal rulings from 2016 were not published (they were published as 'Constitutional Tribunal decisions issued in breach of the regulations', rather than rulings), while the President of the Constitutional Tribunal was elected in conflict with the procedures.

Summary

Although the interim measures announced by the CJEU on 19 October 2018 in response to the European Commission's complaint constituted a very important step towards restoring the rule of law in Poland, showing the huge power of EU institutions in protecting judicial independence in the member states, the rule of law in Poland requires further action from the EU, both by European institutions and individual countries. As the past few months have shown, the Commission's complaint to the CJEU as part of the infringement procedure (Article 258 of the TFEU) and its request for interim measures has been the most effective instrument for restoring European standards and criteria set out in the TFEU and the Charter of Fundamental Rights. The protection of the independence of Polish courts and the impartiality of judges is not only key for Poles, but also for all EU citizens, whose rights cease to be protected. The European legal system can only function properly when all countries protect human rights and all treaty and constitutional guarantees. The battle for the rule of law in Poland sets a precedent and is effectively a battle for the survival of the EU, as a community in which each member state guarantees that rights and freedom are protected to a similar standard.

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

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