



Backsliding of the Rule of Law in Poland – a Systemic Problem With the Independence of Courts

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PROFESSIONAL
ARTICLE



ABSTRACT

The article concentrates on backsliding of the rule-of-law in Poland which is being observed already since 2015. This is a process which is neither a sudden nor a recent development and has been confirmed also by a series of judgements issued by the European Court of Human Rights (ECHR) and the Court of Justice of the European Union (CJEU) which address the question of judicial independence in Poland. The protective roles of other key justice system institutions, such as the Constitutional Court and the prosecutorial system, have been seriously compromised over time by the infiltration of government zealots promoting executive usurpation of justice system authority. The key elements of this process are presented to show the mechanism that has been used to dismantle the fundamentals of the democratic rule-of-law state.

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On 25 July 2022, the European Court of Human Rights (ECHR) communicated a new round of 37 cases filed against Poland based on complaints that the right to a fair trial envisaged in Article 6 of the European Convention on Human Rights had been violated because Polish courts no longer met the standards of independent tribunals established under the law.¹ Indeed, given the frequency of such cases being filed with the ECHR, some might argue that a special section be established at the court specifically for the review of Polish cases. The incidence of such alleged violations confirms a systemic problem with the Polish justice system. More to the point, the ECHR already has issued several judgments affirming violations of Article 6 linked to the erosion of judicial independence in the Polish judiciary, but the government, in violation of the separation of powers and EU law, has consistently refused to implement the court's decisions. As a result, the rule-of-law in Poland is deteriorating.

It may be difficult for outside observers to understand why a country that long has been seen as the best example of a successful transformation from a communist regime to a democracy continues to decline in all possible rankings that measure the rule of law.² This backsliding is also visible in light of the number of cases filed with both the European Court of Human Rights (ECHR) and the Court of Justice of the European Union (CJEU) which address the question of judicial independence in Poland, a fundamental requirement for protecting individuals from state omnipotence and for the effective operation of the EU as such. To date, the Polish government has not prevailed in any of those cases.

Backsliding of the rule of law in Poland is neither a sudden nor a recent development. It has been in process for years and more recently has been exacerbated by efforts of the country's governing party to undermine and even abolish key elements of the democratic rule-of-law state. Few of those elements remain in effect because governmental domination and influence over the judiciary continues to grow. The protective roles of other key justice system institutions, such as the Constitutional Court and the prosecutorial system, have been seriously compromised over time by the infiltration of government zealots promoting executive usurpation of justice system authority.

Indeed, this sinister process started in 2015 with the regressive loss of the institutional independence of the Constitutional Court. Although the *Law and Justice* party prevailed in parliamentary elections, it failed to achieve the majority required for amending the Constitution. Moreover, the party forced the appointment of new Constitutional Court judges loyal to the government.³ Those appointments blatantly violated existing law and well-established constitutional customs guaranteeing the Constitutional Court's

1 <https://hudoc.echr.coe.int/eng-press#%7B%22itemid%22:%5B%22003-7392627-10111159%22%5D%7D>).

2 According to the World Justice Project in 2021 Poland saw the largest decline in Rule of Law Index over the last year among all countries in the European Union (-2,4 %), <https://worldjusticeproject.org/sites/default/files/documents/WJP-INDEX-21.pdf>; also report of the Freedom House, <https://freedomhouse.org/country/poland/freedom-world/2022>.

3 A. Bodnar, "Polish Road Toward and Illiberal State: Methods and Resistance" w: *Indiana Law Journal*, Vol. 96, Issue 4, Summer 2021, p. 1062 – 1064; See also: opinions issued by the Venice Commission which assessed twice legislative amendments to the Law on Constitutional Court; Venice Comm'n, Opinion on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, COUNCIL OF EUR. (Mar. 11, 2016), [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2016\)001-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)001-e) [<https://perma.cc/RW8B-L3YG>]; Venice Comm'n, Poland: Opinion on the Act on the Constitutional Tribunal, COUNCIL OF EUR. (Oct. 14, 2016), [https://www.venice.coe.int/webforms/documents/default.aspx?pdf=CDL-AD\(2016\)026-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdf=CDL-AD(2016)026-e) [<https://perma.cc/6HR9-57FR>].

impartiality and institutional independence. In 2017, a majority of the court's judges abdicated exercising their fundamental functions such as ensuring the compliance of legislation with the Constitution and enforcing protection of constitutional rights of individuals. Instead, the judges have allied themselves with the governing majority to proactively dismantle the rule of law foundations. It has relinquished its role as guardian of the Constitution, opting instead to rubberstamp all new draft legislation adopted by the Parliament, including laws that obviously and egregiously violate constitutional law and its underlying principles. It aided and abetted the ruling political party to alter Poland's system of governance without changing the Constitution.⁴

In light of the usurpation of judicial power by unlawfully appointed judges, the ECHR decided in the famous case *Xero Flor Sp. z o.o. v. Poland* that the Constitutional Court has forfeited its status of a duly established court of law and, consequently, that the individuals subject to its jurisdiction are deprived of the right to a fair trial.⁵ In response, the Polish Government has ignored the ECHR judgement and authorized the Constitutional Court continues its operation. Additionally, in response to the decision of the ECHR, the Constitutional Court presumptively declared Art. 6 of the European Convention on Human Rights unconstitutional to the extent that it "authorizes the ECHR or national courts to assess the compliance with the constitution and convention of statutes related to the judiciary system, the jurisdiction of courts and the law specifying the system, procedure and method of electing members of the National Council of the Judiciary."⁶

A clear pattern in operations of the Constitutional Court can be seen. Whenever the governing party is dissatisfied with a decision issued by the European courts, it refers the question to the Constitutional Court to declare the decision in violation of the Polish Constitution. Previously, rulings issued by the Court of Justice of European Union had questioned the status of judges appointed with involvement of the National Council of Judiciary, itself dominated by politically connected judges.⁷ Another case pending before the Constitutional Court and, filed by Poland's Minister of Justice demands that the court declare as unconstitutional the EU mechanism that makes Member States'

⁴ W. Sadurski, "Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler", 11 HAGUE J. ON THE RULE L. 63, 77 (2019).

⁵ ECHR judgement from 7 May 2021, Case of *Xero Flor w Polsce sp. Z o.o. v. Poland*, (Application no. 4907/16), p. 276 – 291, [https://hudoc.echr.coe.int/eng#{%22fulltext%22:\[%22Application%20no.%204907/18%22\],%22documentcollectionid%22:\[%22GRANDCHAMBER%22,%22CHAMBER%22\],%22itemid%22:\[%22001-210065%22\]}](https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22Application%20no.%204907/18%22],%22documentcollectionid%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-210065%22]}); Read more: B.Grabowska-Moraz, "Strasbourg Court Entered The Rule Of Law Battlefield – Xero Flor v. Poland", Strasbourg Observers, September 15, 2021, <https://strasbourgothers.com/2021/09/15/strasbourg-court-entered-the-rule-of-law-battlefield-xero-flor-v-poland/>.

⁶ Judgment of the Constitutional Court from 24 November 2021, no. K 6/21, <https://trybunal.gov.pl/en/hearings/judgments/art/11709-art-6-ust-1-zd-1-konwencji-o-ochronie-praw-czlowieka-i-podstawowych-wolnosci-w-zakresie-w-jakim-pojeciem-sad-obejmuje-trybunal-konstytucyjny>; read more: J. Jaraczewski, "When is a Tribunal not a Tribunal? The Judgment of the Polish Constitutional Court in case K 6/21", <https://eulawlive.com/op-ed-when-is-a-tribunal-not-a-tribunal-the-judgment-of-the-polish-constitutional-tribunal-in-case-k-6-21-by-jakub-jaraczewski/#>.

⁷ Judgment of the Constitutional Court from 07 October 2021, no. K 3/21, <https://trybunal.gov.pl/en/hearings/judgments/art/11662-ocena-zgodnosci-z-konstytucja-rp-wybranych-przepisow-traktatu-o-unii-europejskiej>; statement of the retired judges of the Constitutional Court, <https://ruleoflaw.pl/statement-of-retired-judges-of-the-constitutional-tribunal-of-10-october-2021/>; read more: P. Swiecicki, "Why it the Decision of the Constitutional Tribunal such a Threat to the Rule of Law?", <https://ruleoflaw.pl/why-is-the-decision-of-the-constitutional-tribunal-such-a-threat-to-the-rule-of-law/>.

access to EU budget funds contingent on demonstrated respect for the principles of the rule of law. The hearing is scheduled for September this year.⁸

This ongoing subordination of the Constitutional Court to the Government, as manifest in decisions it render blatantly in violation of the Polish Constitution and EU law, culminated in the European Commission (EC) initiating an infringement procedure against Poland. The EC argues that the Constitutional Court (i) is not a court established by law; (ii) it does not guarantee effective and independent control of the constitutionality of the law, and (iii) undermines the primacy and effectiveness of the EU legal order.⁹

Starting in 2016 and paralleling to the takeover of the Constitutional Court, the Polish Parliament has also adopted various laws that fundamentally challenged the entirety of the Polish justice system, including the judiciary and prosecution.

Early in 2016, the positions of the Public Prosecutor General and the Minister of Justice were merged. The prosecution offices at each organizational level (district, regional, appellate, and general) became parts of a hierarchically centralized system headed by the Prosecutor General, who simultaneously serves as the Minister of Justice. Under the new alignment, the Prosecutor General is authorized to interfere with any investigation conducted by an individual prosecutor through binding instructions. He may order new investigation, terminate it or modify the scope and targets of any existing investigation.¹⁰ Prosecutors who protested such interference, especially in politically motivated cases, were subjected to disciplinary sanctions, downgraded, transferred to locations distant from their places of residence or even removed from the office.

Simultaneously, the governing parliamentary majority approved amendments to the Law on Public Broadcasting that allowed the ruling party to assume control over state-owned radio and television, now staffed exclusively by individuals loyal to and endorsed by the *Law and Justice* party after the independent journalists were fired. The impact on the state-controlled media has become an important factor in strengthening governmental power in Poland because the news is saturated with official propaganda; for a significant part of the country's population, state-controlled media is its only source of information. This transformation is particularly important during election campaigning cycles. Opposition parties are deprived of equal media access to potential electors because the state media promote only government-endorsed candidates while opposition candidates are exposed to defamation and smear campaigns.¹¹

This new Law on Public Broadcasting was assessed by the Constitutional Court prior to the appointment of new judges loyal to the governing party. The court found that the

8 Case no. 8/21, <https://trybunal.gov.pl/postepowanie-i-orzeczenia/wokanda/art/11943-okresowa-kara-finansowa-lub-ryczalt-nakladany-przez-tsue-srodkitymczasowe-odnoszace-sie-do-ksztaltu-ustroju-i-funkcjonowania-konstytucyjnych-organow-rzeczypospolitej-polskiej>.

9 https://ec.europa.eu/commission/presscorner/detail/en/ip_21_7070.

10 See: Venice Commission, *Poland: Opinion on the Act on the Public Prosecutor's Office as Amended*, Council of Europe, (Dec. 11, 2017), [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2017\)028-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)028-e) [<https://perma.cc/9FNZ-54K7>].

11 See: *Report Office for Democratic Institutions & Human Rights [ODIHR], ORG. FOR SEC. & COOP. IN EUR. [OSCE], REPUBLIC OF POLAND: PRESIDENTIAL ELECTION 28 JUNE AND 12 JULY 2020*, <https://www.osce.org/files/f/documents/6/2/464601.pdf> [<https://perma.cc/F9DY-75NF>].

provisions authorizing the government to select candidates for senior management positions in the state-controlled media were unconstitutional.¹² However, the government ignored the court's judgment. Non-enforcement of judgments that conflict with the predilections of the government has become a routine practice.

Taking effective control of the Constitutional Court enabled the governing party to proceed with controversial amendments of the laws related to the judiciary, including the procedural codes. These changes undermined judicial independence by increasing political influence on judges, especially in their appointments and promotions. Continuous weakening of judicial independence led to another infringement procedure launched by the European Commission against Poland.¹³ The systemic threat to judicial independence has been also confirmed in numerous judgments of the European Court of Human Rights and the Court of Justice of the European Union. They were initiated on various levels, by the European Commission, courts from Poland and other member states, and by individual Polish judges, personally affected by the pseudo-reforms enforced by the governing party.¹⁴

The core of the problem with the judicial independence in Poland lies with the National Council of the Judiciary (NCJ),¹⁵ the body constitutionally mandated to protect independence of courts and judges. The NCJ also plays a crucial role in the selection and promotion of judges. It comprises 25 members who should represent all branches of government, including fifteen judges. Until 2016, the judicial members were elected by their peers consistent with the traditional interpretation of the Constitution and with international standards. In 2018, the Parliamentary majority led by the *Law and Justice* party altered the rules of electing the judicial members and terminated the appointments of existing NCJ members. Judicial members of the NCJ now are elected by the Sejm, the lower chamber of Parliament, exclusively by the governing party, because the opposition boycotts this procedure as violating constitutional principles of the judicial independence and checks and balances.

The status of the NCJ has been contested at the EU level and in proceedings before the Court of Justice of the European Union. The CJEU ruled that the NCJ failed to fulfil its function as a guardian of the judicial independence and expressed serious concerns as to its politicization.¹⁶ The same reasoning was also invoked by the European Network

12 Judgment of the Constitutional Tribunal 13 December 2016 (No. K 13/16) (Pol.). See Press Release, Trybunał Konstytucyjny, Press Release After the Hearing: The Act Amending the Broadcasting Act (Dec. 13, 2016), <https://trybunal.gov.pl/en/news/press-releases/after-the-hearing/art/9516-ustawa-o-zmianie-ustawy-o-radiofonii-i-telewizji> [<https://perma.cc/GYG9-8URS>].

13 https://ec.europa.eu/commission/presscorner/detail/en/ip_20_772.

14 F.e. ECHR judgements: from 08 February 2022, Dolińska - Ficek and Ozimek v. Poland, (Applications nos. 49868/19 and 57511/19), [https://hudoc.echr.coe.int/fre#{%22itemid%22:\[%22001-213200%22\]}](https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-213200%22]}); from 22 November 2021, Reczkowicz v. Poland, (Application no. 43447/19), [https://hudoc.echr.coe.int/fre#{%7B%22itemid%22:\[%22001-211127%22\]}%7D](https://hudoc.echr.coe.int/fre#{%7B%22itemid%22:[%22001-211127%22]}%7D); from 3 February 2022, Advance Pharma sp. z o.o. v. Poland, (Application no. 1469/20) [https://hudoc.echr.coe.int/fre#{%22itemid%22:\[%22002-13549%22\]}](https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22002-13549%22]}).

15 F.e. Commission Recommendation (EU) 2018/103 of December 2017 regarding the rule of law in Poland complementary to Recommendations (EU) 2016/1374, (EU) 2017/146 and (EU) 2017/1520, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32018H0103>.

16 Judgment of the CJEU from 15 July 2021, case C-791/19, <https://curia.europa.eu/juris/document/document.jsf?jsessionid=F6BD9677066B9B841119594A1BF096F7?text=&docid=244185&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1477615>, p. 101–108.

of Councils of Judiciary (ENCJ) when, in Autumn of last year, it took action to deprive the NCJ's membership. In its statement, the ENCJ underlined that the NCJ "does not safeguard the independence of the Judiciary, it does not defend the Judiciary, or individual judges, in a manner consistent with its role as guarantor, in the face of any measures which threaten to compromise the core values of independence and autonomy."¹⁷

Politicization of the NCJ is particularly visible in judicial appointments; the general perception among the Poles is that only candidates supporting the governing party can secure judicial appointments and promotions to higher courts. No performance review standards exist to assess their professional qualifications, and competences; neither is their integrity reviewed. Consequently, numerous controversial and professionally flawed candidates are nominated, especially for the Supreme Court. By established ECHR jurisprudential standards, many candidates fail to meet the European requirements for courts of law.¹⁸ As already mentioned, the ECHR's docket is increasingly crowded by cases originating in Poland alleging violations fair-trial rights based on the unlawful composition of the court.

The far-reaching adverse consequences of this situation are not limited to the number of rulings against the Polish government by European courts or the damages. The worst effect is the risk of the Polish judiciary culminating in a split that results in two parallel judicial systems, wreaking havoc on the country's legal framework. This risk of dual systems of courts is particularly visible at the level of the Supreme Court where old judges, appointed before the politicization of the NCJ, now refuse to sit in panels with so-called "neo-judges", nominated by the politically subservient NCJ. Furthermore, it affects individual cases, as trial court decisions issued by unqualified neo-judges may be later annulled by higher courts based on grounds that the composition of the trial court fails to meet both domestic and international standards.

Another important element that adversely affects judges in Poland is the disciplinary regime used to intimidate them. It has become possible, because "disciplinary prosecutors" or judges empowered to initiate and conduct disciplinary proceedings against their colleagues are appointed by the Minister of Justice/Prosecutor General, triggering serious concern as to their independence. Additionally, both the CJEU the ECHR agreed that the Disciplinary Chamber of the Supreme Court failed to meet the minimum requirements of an independent court established by law on similar grounds that judicial nominations are generated by the politicized NCJ.¹⁹ This Chamber, which operates largely independently of the Supreme Court, is viewed by judicial experts both domestically and internationally as violating the Polish Constitution's prohibition against the creation of special courts.

Under pressure from the European Commission which restricted access to resources designated for Poland in the EU Recovery Fund, the Disciplinary Chamber of the Supreme Court has been replaced by the Chamber of Professional Liability. However,

¹⁷ <https://www.encj.eu/node/605>.

¹⁸ F.e. ECHR judgements: from 08 February 2022, Dolińska - Ficek and Ozimek v. Poland, (Applications nos. 49868/19 and 57511/19), <https://hudoc.echr.coe.int/fre#%7B%22itemid%22:%5B%22001-213200%22%5D%7D>; from 22 November 2021, Reczkowicz v. Poland, (Application no. 43447/19), <https://hudoc.echr.coe.int/fre#%7B%22itemid%22:%5B%22001-211127%22%5D%7D>; from 3 February 2022, Advance Pharma sp. z o.o. v. Poland, (Application no. 1469/20) <https://hudoc.echr.coe.int/fre#%7B%22itemid%22:%5B%22002-13549%22%5D%7D>.

¹⁹ Judgment of the CJEU from 15 July 2021, case C-791/19, p. 134–158.

even with the name change, the issue of politicized judicial nominations persists.²⁰ Moreover, maintaining of this discredited disciplinary regime costs Poland one million euros per day in fines imposed by the CJEU; the total outstanding already exceeds 250 million in total. The unpaid fines are being deducted from the EU funds allocated to Poland.

The disciplinary system effectively serves as a coercive tool to influence judicial decision making by targeting judges who oppose to the politicized judicial environment, defend, and promote judicial independence and who courageously challenge threats from politicians. Despite numerous CJEU and ECHR decisions reprimanding Poland for perpetuating a disciplinary regime and ordering it be abolished, some judges, including Igor Tuleya, remain suspended from performing their judicial functions after more than two years. Their alleged offences were to issue judicial decisions that contravened governing party's expectations and preferences. Moreover, final decisions by court presidents ordering those judges be restored forthwith to active status have not been implemented. Similarly, the CJEU judgment related to the Disciplinary Chamber was ignored.²¹

In 2020, the Parliament adopted a new law prohibiting Polish judges from applying European courts' jurisprudence in judicial independence cases whose judgments condemned the Poland's Government. This law has become known as "the muzzle law." It bars judges from rendering judgments that affirm the right to a fair trial and that guarantee rights deriving from the EU Treaties, including effective judicial protection. It prevents judges from revisiting the validity of judicial appointments and from criticizing political authorities. Judges who dare to do so face disciplinary proceedings and a variety of adverse sanctions. Some have been suspended or transferred against their will to other departments in courts, often requiring a different specialization, which is blatant intimidation. Such tactics have a paralyzing effect on other judges.²²

Backsliding of the rule of law in Poland and undermining judicial independence continues unabated. Judgements of both European and Polish courts aimed at restoring these two principles are ignored. The resulting legal chaos is deepening with the emergence of two categories of judges (old and newly appointed) who increasingly chose not to recognize each other's decisions. This situation has a corrosive and polarizing impact not only on Poland, but also on the European Union where mutual recognition and trust are preconditions for effective cooperation and maintenance of the EU legal system. Nevertheless, hope remains that EU pressure to reform combined with the courage and resistance of many Polish judges will eventually reverse negative developments, assuming the informed populace is prepared to exert its collective will in favor of change and reform.

20 See: <https://www.euronews.com/my-europe/2022/07/01/brussels-questions-polands-judicial-reforms-to-unlock-eu-recovery-funds>.

21 See: Poland. Rule of law report for 2021. Submitted in public consultations on January 24th, 2022 by civil society organizations. https://www.batory.org.pl/wp-content/uploads/2022/02/Rule-of-law-report__CSOs_Poland_submission.pdf, p. 4–5.

22 A. Bodnar, "Polish Road Toward and Illiberal State: Methods and Resistance" w: *Indiana Law Journal*, Vol. 96, Issue 4, Summer 2021, p. 1061; Open letter to the President of the European Commission regarding Poland's "muzzle law", <https://verfassungsblog.de/open-letter-to-the-president-of-the-european-commission-regarding-polands-muzzle-law/>.

COMPETING INTERESTS

The author has no competing interests to declare.

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