



Final act

The repression of the judiciary in Poland

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The ruling of the European Court of Justice on the controversial reform of the Supreme Court of Poland was a victory for liberal opponents of PiS. Then came the judgment of the German Constitutional Court, and the prospects for the independence of the Polish judiciary have again worsened. On the latest escalation of a longstanding conflict.

As the situation of the judiciary in Poland develops, what was already a conundrum threatens to become completely incomprehensible. Nevertheless, it is crucial that the conflict between the European Union and the Polish government over the ongoing justice reforms is not seen as a mere technicality. On the contrary, it is a major arena in the broader conflict of values in the Union, and for that reason needs to be understood.

Until the beginning of May this year, the situation seemed positive for those hopeful of mobilizing the force of international commitments against the disassembly of the rule of law in Poland. The EU, or more specifically the Commission and the Parliament, was insisting on the prevalence of European law, particularly standards of judicial independence, over non-compliant actions of a member state. This culminated in the ruling of 8 April 2020, concerning the controversial reform of the Supreme Court of Poland. At the request of the European Commission, the ECJ granted a provisional suspension of national provisions. Although the case is still pending, the wording of the ruling could only be interpreted as a signal that the Court's assessment of the situation in Polish Supreme Court and in the Polish judiciary in general is far from positive.

The ruling of the German Constitutional Court on 5 May 2020 may well complicate this simple picture. In its ruling on the European Central Bank's Public Sector Purchase Programme, the German Constitutional Court questioned the exclusive competence of the ECJ in matters of European law. This was effectively to declare the matter within the German court's jurisdiction, despite an unprecedented statement by the ECJ to the contrary. [1] The predictable response from the Polish government to this highly controversial decision was not long in coming. In a letter to *Frankfurter Allgemeine Sonntagszeitung*, the Polish prime minister Mateusz Morawiecki praised the German ruling, as 'one of the most important judgments in the history of the European Union'. It



set clear limitations to the powers of the EU bodies, he argued, and upheld the authority of national constitutions. [2]

The German judgment could not have come at worse time. Even though Poland has not been hit as hard as many other European countries by the COVID-19 pandemic, the presidential elections that were initially scheduled for 10 May 2020 had to be postponed. After a long and confusing debate, the election took on a bizarre form of 'ghost elections' with no voting involved. [3] As of today, the new election date has not been announced. However, after four years in office, the PiS-nominated president Andrzej Duda continues to enjoy great popularity and will very probably be re-elected. This will encourage PiS to pursue its reforms, regardless of what the EU does. Despite the protestations of members of the German Constitutional Court, its ruling will only serve to provide PiS with cover for the further repression of the Polish judiciary.

Judges of the Polish Supreme Court 2019 (centre: Małgorzata Gersdorf). Photo by Stefan Maszewski. Via Maciej Zaborowski from [Wikimedia Commons](#) / CC BY-SA

The judiciary before the latest attack

Before looking at the current situation in more detail, some recapitulation is necessary. The repression of the judiciary in Poland has taken place in three stages. The first was the hijacking of the Constitutional Tribunal (Trybunał Konstytucyjny). The PiS launched its attack immediately after taking office and pushed through its scheme by late 2016 in spite of protests in Poland and explicit criticism from the European Union, the Venice Commission and many other international organisations. This cleared the way for the second stage, a radical restructuring of the judicial system. The PiS curtailed the independence of judges and put the judiciary under the control of the executive. There were more protests at home and abroad, and this time the European Union reacted in a more emphatic manner. Nevertheless, this stage concluded in April 2018 with the entry into force of laws that collectively constituted a 'reform package'.

A few days before the parliamentary elections in autumn 2019, Zbigniew Ziobro, the minister of justice, announced the next stage of the 'reform'. After the elections, just as this new phase was supposed to be starting, the conflict between the judiciary and the executive intensified with the European Court of Justice response to a question referred by the Polish Supreme Court. The tension between the Polish government and the EU Commission also increased. The next move in this escalation was the so-called 'muzzle law', which was passed by the Sejm on 20 December 2019 and entered into force on 14 February 2020, of which more later.

Immediately after the elections the government also began to attack the independence of judges. It did so on the basis of the laws it had passed in 2017. These laws had already significantly extended the influence of the executive over the judiciary, notably by enabling the minister of justice to make sweeping interventions in judicial matters.

The National Council of the Judiciary

Underlying the reforms that have been introduced since the parliamentary elections of



2019, and in particular for the so-called muzzle law, are the amended procedures for appointments to the National Council of the Judiciary and the jurisdiction of the newly-created chambers of the Supreme Court. These two closely related developments, which have been underway since 2018 and 2017 respectively, are central to the current proceedings against Poland before the ECJ.

The National Council of the Judiciary is a constitutional body that is responsible for nominating candidates to be appointed as judges, with appointments then being made by the president. It has 25 members, of whom four are *ex officio*. Under the law as amended by the PiS in 2018, the remaining 21 members (which under Art. 187 of the Polish constitution comprise two senators, four MPs in the Sejm and 15 judges of all levels) are elected by parliament. The new law requires candidates for judicial posts to have the support of at least 2000 citizens or 25 sitting judges. When the appointment of individuals to seats reserved for judges came before the Council, the election was boycotted by a large proportion of the judiciary. Only 18 candidates applied for the 15 places, and most of them came from the Minister of Justice's entourage.

After the election in 2019, the 'new Council of the Judiciary' immediately began work, even though one of its newly-elected members was suspected not to have had the required minimum support of the 25 judges. The lists of the names of those supporting the candidacy of the new Council members have so far not been published, despite this having been requested on many occasions and the Supreme Administrative Court (Naczelny Sąd Administracyjny) having ruled in late June 2019 that the request should be granted.

For all these reasons, critics of the new Council of the Judiciary consider its procedures and the circumstances relating to its composition to be fundamentally unconstitutional; they also point out that the appointments to the Council breached the law under which they were made, which was itself already constitutionally problematic. However, the Council is exercising its functions, as are judges in many courts, including the Supreme Court, who were nominated by the National Council of the Judiciary in its new configuration.

As well as changing procedures for appointments to the National Council, PiS has also fundamentally restructured the Supreme Court. Under a law dated 8 December 2017, two new chambers were created: a Disciplinary Chamber and a Chamber for Extraordinary Control and Public Affairs. The two new chambers consist exclusively of judges appointed by the new Council of the Judiciary. The Disciplinary Chamber is responsible for disciplinary proceedings against judges and at the same time is the court of appeal for proceedings against members of other legal professions. It is thus the highest instance of a separate, institutionalized disciplinary court system. The Minister of Justice has had a decisive influence on disciplinary proceedings.

The ECJ judgment of November 2019

During the first phase of the judicial reforms in Poland, the European Union failed to find a way of exerting an influence. The PiS pushed through the repression of the Constitutional Tribunal before the EU had time to react. It took until 20 December 2017 for the EU to decide to launch legal proceedings against Poland under Article 7 of the EU



Treaty. Nonetheless, with no operational Constitutional Tribunal in place, Poland's EU membership became the main bulwark in the defence of the rule of law.

On 2 August 2019, the Supreme Court Labour Law Chamber asked the ECJ to rule on whether proceedings before the new Disciplinary Chamber safeguard the right to an independent and impartial tribunal as set out in Article 47 of the EU Charter of Fundamental Rights. The referral to the ECJ was based on doubts about the independence and impartiality of the Disciplinary Chamber, which had arisen above all as a result of the manner in which the new Council of the Judiciary had been appointed. This in turn is the body responsible for nominating all the judges sitting on the Disciplinary Chamber. [4]

On 19 November 2019, the long-awaited judgement was delivered. Those who had hoped that the ECJ would comment explicitly on the legality of the new Council of the Judiciary or the independence of the Disciplinary Chamber were disappointed. The ECJ found that the decision about whether the chamber was a judicial body under EU law was a matter for the Polish courts. [5]

But the ECJ set out detailed criteria for evaluating the independence of the court and which must be fulfilled in order for such evaluation to comply with EU law. The ECJ emphasized that assessment of a judge's independence should take account both of the procedure for selecting judges for Disciplinary Chamber - as well as the procedure for making appointments to the National Council of the Judiciary, which is responsible for appointing judges to the Chamber - and the specific application of that procedure. [6] The ECJ summarized as follows:

It is for the referring court to ascertain whether or not the KRS [National Council of the Judiciary] offers sufficient guarantees of independence in relation to the legislature and the executive, having regard to all of the relevant points of law and fact relating both to the circumstances in which the members of that body are appointed and the way in which that body actually exercises its role. [7]

In accordance with the ECJ judgement, every court in Poland could now decide for itself whether the Disciplinary Chamber of the Supreme Court was independent or not. The implications became clear immediately. Just one day after its delivery, thirteen organizations campaigning for the rule of law in Poland published an opinion saying that the Polish courts should refuse to apply all legislation enabling judges nominated by the National Council of the Judiciary to preside over cases.

This interpretation was taken up by a judge acting in the Olsztyn district court, who directly invoked the ECJ judgement. On 25 November 2019, the Olsztyn judge ordered that the lists of supporters of candidates for the new Council of the Judiciary to be disclosed, so that he could decide on the legality of the appointment of a judge who had delivered a judgement in a case for which the court of first instance was Olsztyn.

Then, on 5 December 2019, the Supreme Court Labour Chamber, which had originally referred the issue to the ECJ, delivered a judgement stating that 'the National Council of the Judiciary's procedures for appointing judges ... do not adequately guarantee the



independence of the organs of the legislature and the executive’.

The Chamber’s resolution, based on the ECJ criteria, ‘clearly and unequivocally’ stated that ‘the Disciplinary Chamber of the Supreme Court is not a court’ as defined in the international treaties by which Poland is bound, or in the Polish constitution. In January 2020, at the request of the Prime Minister of Poland, the Constitutional Tribunal declared this resolution to be unconstitutional and in violation of a number of laws, including the Treaty on European Union.

The ECJ will very probably take into account the guidelines which it formulated in November 2019 in its consideration of the action brought before it by the European Commission on 25 October 2019, concerning the new disciplinary system for judges in Poland. There is no reason to suppose that the ECJ will reach a different conclusion from that reached by the Polish Supreme Court Employment Chamber in its judgement of 5 December.

This assumption was strengthened by the ECJ interim judgment 8 April 2020, calling on Poland to provisionally suspend the Disciplinary Chamber. Initially, Poland complied with this ruling. In the meantime, however, there has been a significant change at the Supreme Court: Małgorzata Gersdorf, who as the First President of the Court had become something of an icon of resistance against the PiS reforms and who implemented the ECJ ruling, retired in April 2020.

The Commissioner appointed by president Andrzej Duda pending the nomination of the next President of the Supreme Court immediately reversed the lockdown of the Disciplinary Chamber and allowed it to operate, except for new disciplinary cases. These were deemed directly affected by the ECJ ruling, and delayed until either the final decision of the ECJ on the Disciplinary Chamber, or the response of the Polish Constitutional Tribunal to the question posed by the Disciplinary Chamber in April 2020. Here, the Tribunal was asked to decide whether the provisions of the Treaty on European Union on which the ECJ’s ruling is ultimately based are in accordance with the Polish Constitution and, consequently, whether the ECJ ruling applies at all. The recent judgment of the German Constitutional Court will undoubtedly aid the decision of the Polish Tribunal in this matter.

After a prolonged nomination procedure that was contested by a number of authorities on constitutional law, president Andrzej Duda appointed Małgorzata Manowska as the new President of the Supreme Court. Her term began on 26 May 2020. It remains to be seen how the situation develops under her leadership.

Małgorzata Gersdorf (2018). Photo by Adrian Grycuk from [Wikimedia Commons](#) Adrian Grycuk / CC BY-SA 3.0 PL

The ‘muzzle law’ of December 2019

Poland’s justice minister Zbigniew Ziobro described the ECJ judgement of 19 November 2019 as a ‘very good judgement’. The ECJ had decided, he said, ‘that it is not responsible for pronouncing on questions of how the Polish judiciary is organized’, and had ‘put the



ball back in Poland's court'. Under the Polish constitution, he went on, the body that has the final say on the judiciary in Poland was the Constitutional Court. 'This is a defeat for those who brought the action and a victory for the government – it has been Poland's view from the beginning that the ECJ cannot unilaterally decide what our national judiciary should look like.'

On 12 December 2019, shortly after the unexpected consequences of the ECJ judgement finally became clear, the PiS proposed a law that soon became known as the 'muzzle law'. The law was passed on 20 December 2019, just before parliament left for the recess, in only 24 hours, in three readings conducted by government representatives, almost without a break. The changes were intended to prevent judges from drawing on the ECJ judgement of 18 November 2019. The law is designed to prohibit scrutiny of the lawfulness of judicial appointments. These restrictions preclude scrutiny of patently unlawful procedures for appointing judges.

The entire process has in effect been removed from judicial oversight. The law also introduces extensive changes to the disciplinary rules. New disciplinary offences have been framed, for instance actions or lack thereof that could significantly impede the judicial system; the questioning of a judicial appointment and its efficacy; or engaging in political activities.

The Chamber for Extraordinary Control and Public Affairs has also been given new powers. Under the 'muzzle law', it now rules on requests to suspend judges and selects the court that will handle proceedings against judges accused of partiality. The Chamber is thus given extraordinary power, since its decisions on the impartiality of judges and the independence of courts will be binding on all other chambers.

In other words, a chamber that the new National Council of the Judiciary was involved with establishing is being given a monopoly over the scrutiny of appointments to the same, as well as to the two new Supreme Court chambers – including itself. In practice it would not be bound by the Supreme Court judgement of 5 December 2019, and this would create an 'extraordinary court'.

Whilst the Sejm was working on the draft law, the PiS dropped the provision that contravened EU law most heavily. This threatened judges with disciplinary action where they failed to apply legal provisions whose incompatibility with the constitution had not been established by the Constitutional Court. In other words, judges would have been punished for independently interpreting the constitution. But the prohibition on legal challenges to courts and judges established as part of the judicial reforms of 2017 was retained.

The muzzle law also means that the administrative judiciary, which had previously been largely protected, now shares the fate of the Supreme Court and the common courts. The president's new powers to take disciplinary action against judges in the administrative courts suggest that they will be repressed in the same way as the common courts.

The immediate goal of the muzzle law was to clamp down on challenges to the new order established in previous years. But the law goes much further, and represses the entire judiciary. Many judges who have openly declared that the PiS judicial reforms run



counter to the constitution and undermine the rule of law have been subject to disciplinary procedures or have faced repercussions for their careers.

The European Parliament observed in its resolution of 16.1.2020, 'that the situation both in Poland and Hungary has deteriorated since the triggering of Article 7(1)'. [8] Thus far, the PiS strategy of reacting to criticism by making minor adjustments seems to be paying off. The party continues to have the support of a significant proportion of the population – as much as 38.5% according to the recent opinion polls. No domestic political force seems to be able to put up a fight. Only the EU can still prevent the PiS from taking the final step towards abolishing an independent judiciary in Poland. But after ruling of the German Constitutional Court, the European Union may have more pressing matters on its agenda.

Footnotes

1. ECJ statement, online at:
<https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-05/cp200058en.pdf>
2. See Konrad Schuller, 'Richter gegen Richter', *Frankfurter Allgemeine Sonntagszeitung*, 10.05.2020.
3. See Marta Bucholc and Maciej Komornik, 'Die PiS, das Virus und die Macht. Präsidentschaftswahlen in Zeiten der Pandemie', *Osteuropa* 3-4/2020: 49-64. Online at:
<https://www.zeitschrift-osteuropa.de/hefte/2020/3-4/die-pis-das-virus-und-die-macht/>
4. ECJ judgement, online at:
<http://curia.europa.eu/juris/document/document.jsf?jsessionid=C8F044F4BFF85227F4724254FD6CAF5E?text=&docid=220770&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3413113>, note 45.
5. Ibid. recital 132.
6. Ibid. recital 139.
7. Ibid. recital 140.
8. European Parliament press release: 'Rule of law in Poland and Hungary has worsened'; online at: <https://www.europarl.europa.eu/news/en/press-room/20200109IPR69907/rule-of-law-in-poland-and-hungary-has-worsened>

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