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**POLAND, THE RULE OF LAW AND HUMAN  
RIGHTS. HOW CAN NATIONAL CRISES BE  
ADDRESSED AT THE EUROPEAN UNION  
LEVEL?**

Margarita Anna Schuster

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**Europa-Kolleg Hamburg  
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# **POLAND, THE RULE OF LAW AND HUMAN RIGHTS. HOW CAN NATIONAL CRISES BE ADDRESSED AT THE EUROPEAN UNION LEVEL?**

Margarita Anna Schuster\*

## **Abstract**

Democracy, human rights, and the rule of law are among the core principles the European Union is built upon. A Member State that disrespects these values puts the functioning of European integration, co-operation, and mutual trust at risk.

With reference to the Polish judicial reforms, this thesis demonstrates why impediments to judicial independence could result in a national crisis that is to be addressed at the European Union level. The proceedings against the Republic of Poland under Art. 7 TEU and the potential suspension of mutual recognition under the European Arrest Warrant are used as an approach to assess which tools there are at the European Union level to address such a crisis. It is found that different tools are available. They can be legal (Art. 258 TFEU) or political (Art. 7 TEU). Rulings of the CJEU, however, are hard to be imposed against the will of a government, while isolating the country by suspending their voting rights under Art. 7 TEU could have unwanted consequences. Therefore, this thesis asserts that the EU should address the rule of law crisis in Poland using a combination of legal and political instruments.

**Key words:** Rule of Law – EU values – Poland – constitutional crisis – judicial reforms – judicial independence – European Arrest Warrant – Article 7 TEU – Article 258 TFEU – Celmer – Aranyosi and Căldăraru.

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## List of Abbreviations

AG	Advocate General
Art(s).	Article(s)
CJEU	Court of Justice of the European Union
EAW	European Arrest Warrant
ECHR	European Convention on Human Rights
EU	European Union
EU Charter	Charter of Fundamental Rights of the European Union
EU Commission	European Commission
EU Parliament	European Parliament
EU Treaties	Treaties of the European Union
GRECO	Council of Europe Group of States against Corruption
ICJ	International Commission of Jurists
NCJ	National Council for the Judiciary
NGO	Non-governmental Organization
OSCE	Organization for Security and Co-operation in Europe
Para(s).	Paragraph(s)
PiS	Prawo i Sprawiedliwość (Law and Justice)
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations

## A. INTRODUCTION

### I. Background and Purpose

For the achievement of multilateral action and international participation in integration, the European Union (EU) requires its own legal order, including carefully structured interrelations with national law. While it is true that, for the sake of a functioning legal system, control over state autonomy is to some extent handed over to a supranational level, it is not the purpose of EU law to deprive the Member States of their sovereignty. Mainly, EU law aims at ensuring that the aspirations of a modern and developed world are met, which can be done by monitoring whether the set of values that is common to the Union's Members is being respected throughout the Union. Progress in European integration has made a significant contribution not only to the maintenance of peace in Europe, but also to the consolidation of democracy, human rights, and the rule of law. These and other values that the EU is founded upon and that are laid down in Art. 2 of the Treaty on European Union (TEU) are of vital importance for the functioning of the internal market as well as for the Union's external action.<sup>1</sup>

The aforementioned values – democracy, human rights, and the rule of law – might be, historically speaking, the three most important values that the EU has tried to promote also beyond its borders – not least because they make up the backbone of a modern constitutional society.<sup>2</sup> Even if the EU treaties lack a clear definition of these values and shaping them has been, indeed, mostly up to the institutions of the EU, a minimum standard has been established commonly. Within the framework defined by this minimum standard, representative democracy describes a governmental system in which the officials' authority is legitimized through free and regular elections. The rule of law, in the EU, represents a set of legal principles such as legality, legal certainty, and access to courts that are independent and

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<sup>1</sup> Egan/Pech, *Respect for Human Rights as a General Objective of the EU's External Action*, p. 3.

<sup>2</sup> European Commission, *Communication from the Commission to the European Parliament and the Council. A new EU Framework to strengthen the Rule of Law*. COM(2014) 158 final, p. 1; Office for official publications of the European Communities, *Declaration on European Identity*, p. 118.

impartial. Respect for human rights implies legal guarantees and remedies regarding individual civil, political, economic, and social rights.<sup>3</sup>

Again, turning to the Treaties of the European Union (EU Treaties), Art. 21 TEU states that the values on which the Union is based shall guide its action on the international scene.<sup>4</sup> It underpins that respect for the promotion of the Union's values is one of the main objectives in its foreign policy. The importance of this objective will, of course, not be challenged by this thesis.

In this connection, we should, however, critically point out the fact that some of the states that are already members of the EU have experienced or are currently experiencing a backlash regarding their respect for the EU's values<sup>5</sup> – there are thus internal obstacles that make it fairly complicated to promote these values in external dimensions. Despite the European Commission's (EU Commission's) power to take legal action against any Member State, in fact even having the possibility to take the respective Member State before the Court of Justice of the European Union (CJEU)<sup>6</sup>, the limitations on the EU's authority to effectively resolve these or similar problems involving EU Member States are striking. The process of taking legal action against a Member State is tedious; it could, thus, take years for sanctions to be imposed by the CJEU.

The EU Treaties, however, also contain other – more radical – mechanisms that can be activated either in case a Member State seriously and persistently breaches (one of) the Union's values<sup>7</sup> or even in the case of a mere risk of a breach.<sup>8</sup> Both mechanisms are set out in Art. 7 TEU.

In theory, the EU may thus impose sanctions on any of its Member States if a state is either clearly risking to breach EU values or actually doing so. In reality, however, the thresholds for imposing consequences under Art. 7 TEU are very high

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<sup>3</sup> Pech, Laurent (2018). Lecture “*Fundamental Values of the EU: The European Union as a Community of Values*”.

<sup>4</sup> Art. 21(1) TEU.

<sup>5</sup> Already in 2013, former EU Justice Commissioner Reding gave a warning referring to the 2010 Roma crisis in France, the 2011 Hungarian crisis, and the 2012 Romanian rule of law crisis (see Speech of Reding, Viviane “*The EU and the Rule of Law – What next?*”, 2013).

<sup>6</sup> Arts. 258 and 260 TFEU.

<sup>7</sup> Art. 7(2) TEU.

<sup>8</sup> Art. 7(1) TEU.

and nearly impossible to reach. It is required, for instance, that the European Council determines unanimously<sup>9</sup> the existence of a serious and persistent breach of the values laid down in Art. 2 TEU<sup>10</sup> – which is, of course, a target that is difficult to reach.

Problems in connection with rule of law or democratic backsliding have been on the increase all over Europe for some years already. Given this development, it would be more urgent than ever for the EU to exercise its power to act and to intervene in its Member States' affairs. Especially in light of the recent reforms and changes brought about by the current government of the Republic of Poland, described by many as the "Constitutional Crisis"<sup>11</sup>, it has become apparent that the Union has to take action. Otherwise, the undermining of its common values will not only result in a standstill of European integration, but also lead to an adjournment of cooperation, mutual recognition, and trust among the Member States.

## II. Research Question, Method, and Outline

This thesis aims at drawing the connecting lines between the constitutional crisis in Poland, the rule of law, and human, respective fundamental, rights in order to examine the EU's possibilities to ensure that these values are duly respected in its Member States. As mentioned above, there are different possibilities to achieve this aim. They can be either legal or political. As far as legal instruments are concerned, there is a history of case law where infringement procedures have been launched under Art. 258 TFEU. Concerning political tools, triggering Art. 7 TEU is without precedent. Both paths are, however, worth examining.

In essence, this thesis is aimed at finding reasonable answers to the question that arises in this context: how should a national crisis be addressed at Union level? In order to be able to come up with an answer, it has to be proven that the Union is competent and in a position to act in the first place. We will thus have to take a

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<sup>9</sup> Emphasis added.

<sup>10</sup> Art. 7(2) TEU.

<sup>11</sup> Matczak: *Poland's Constitutional Crisis. Facts and Interpretations*.

closer look at the common principles which are the basic foundation of the EU, other aspects such as mutual recognition and innovations regarding infringement procedures against Member States as well as EU mechanisms to respond to threats to the rule of law.

As it is essential to have at least a rough understanding of the state of affairs in Poland, a summary of the reformative steps taken by the Polish Government with regard to the Polish judicial system will be given at the beginning of this thesis. The following chapter is dedicated to the principle of judicial independence, aiming at clarifying the prerequisites for judicial independence as well as its importance in a functioning democratic community. Subsequently, these two chapters will be combined in an examination of the factors that result in an erosion of the independence of the Polish judicial system.

In order to connect these observations with recent developments in the area of mutual recognition and co-operation at the European level, the next chapter will then examine the validity of the European Arrest Warrant in the light of the Polish judicial reforms. The relation between the constitutional crisis at the national level and the EU will be further defined by determining the impact it has at the international level as well as discussing existing international reactions to it.

Finally, the possibilities available at EU level for responding to such a situation will be reviewed in order to establish whether there are suitable means to address a national constitutional crisis affecting the Union beyond the respective country's national borders.

### III. Relevant Cases and Judgments

Since I refer to some cases and judgments issued by the CJEU throughout the thesis, I would like to introduce these cases and judgments at this point.

In the context of mutual recognition, many difficulties arose in connection with the possible extradition of *A. Celmer* (usually referred to as *LM*)<sup>12</sup>, a Polish citizen and

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<sup>12</sup> Judgment in *LM*, Case C-216/18 PPU, ECR, EU:C:2018:586.

crime suspect sought by the Republic of Poland pursuant to a European Arrest Warrant (hereinafter referred to as EAW). *Mr. Celmer* was held in custody in the Republic of Ireland, where the judge of the High Court expressed severe doubts regarding the execution of the EAW issued by the Polish authorities. The Irish judge therefore referred questions to the CJEU for a preliminary ruling in order to assess whether the obligation to surrender the suspect to the issuing authority remained unaffected by the ongoing reforms of the Polish judicial system. The key question of this matter was whether an impediment of the principle of the rule of law, found by one Member State's court, may justify the non-execution of a warrant issued by another Member State. This landmark case serves as a good example to show which impact such a crisis can have beyond the national level.

Another case referred to in the development of this thesis is that of *Aranyosi and Căldăraru* (Joined Cases C-404/15 and C-659/15 PPU), which also concerns doubts regarding the execution of arrest warrants.<sup>13</sup> In both cases, the individuals were sought to be subject to criminal prosecutions in Hungary and Romania, and the Higher Regional Court of Bremen stopped the extradition due to severe concerns regarding the circumstances of detention in the respective countries. The Higher Regional Court of Bremen consequently referred to the CJEU the question whether a judicial authority has the obligation to refuse a surrender in case there are strong indications that the prison conditions in the issuing Member State are not in accordance with European minimum standards, hence violating the individual's rights under Art. 4 of the Charter of Fundamental Rights of the European Union (hereinafter referred to as EU Charter).

Lastly, it is important to introduce the recent judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses* (C- 64/16, EU:C:2018:117, hereinafter referred to as *Associação Sindical*). After the Portuguese legislature had temporarily reduced the remuneration of public administration employees, concerns were raised by the Court of Auditors with regard to the principle of judicial independence. Since judicial independence is not only enshrined in the Portuguese constitution but is also one of the EU's fundamental principles, the Portuguese

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<sup>13</sup> Judgment in *Aranyosi and Căldăraru*, Joined Cases C-404/15 and C-659/15 PPU, ECR, EU:C:2016:198.

Supreme Administrative Court referred the matter to the CJEU for a preliminary ruling.

## B. JUDICIAL REFORMS IN POLAND

In order to be able to examine the constitutionality of the Polish reforms as well as the new or adapted national law's conformity with EU law, it is necessary to provide an overview of the changes that have been carried through in Poland since the elections in spring and autumn of 2015.

In May 2015, *Andrzej Duda*, the candidate of the national-conservative party *Prawo i Sprawiedliwość (PiS / Law and Justice)*, obtained enough votes to win the Polish presidential election.<sup>14</sup> In October of the same year, parliamentary elections took place in Poland. *PiS* reached absolute majorities in the *Sejm* and the *Senate* – the lower and upper houses of the Polish parliament.<sup>15</sup>

Following that victory, *PiS* has carried through a series of contentious adaptations of legislation relating to Poland's judicial system and its structure. By summer of 2018, the *PiS* government had introduced more than a dozen legislative acts to change the judicial system. One of the key figures pushing forward these changes has been Poland's Minister of Justice *Zbigniew Ziobro*. The reforms can be divided roughly into two phases.<sup>16</sup>

During the first stage, the *Trybunał Konstytucyjny* (Constitutional Tribunal, hereinafter referred to as Tribunal) was brought under the control of the ruling majority, making it possible to introduce extensive changes of Poland's judicial system irrespective of their constitutionality. In the second stage of the reform program, the Government adopted several legislative acts that altered the composition as well as the functioning of the common court system, the *Sąd*

<sup>14</sup> 51.5% in the second round (Państwowa Komisja Wyborcza (2015). *Wybory Prezydenta Rzeczypospolitej Polskiej*).

<sup>15</sup> Barteczko/Goettig (2015). *Poland's Eurosceptics win outright majority in parliament*.

<sup>16</sup> Gajcy/Szuldryński (2016). *Kaczyński: Nie chcę większości w TK*.

*Najwyższy* (Supreme Court) and the *Krajowa Rada Sądownictwa* (National Council of the Judiciary, hereinafter referred to as NCJ).<sup>17</sup>

This process has attracted attention not only at a national level. Several international platforms and actors have voiced their concerns about the course of the judiciary reforms in Poland, some of which will be discussed later in this thesis. The criticism usually focuses on the increasing concerns with regard to the political and legal dispute concerning the Tribunal, the new retirement scheme affecting Supreme Court and ordinary court judges, the new appeal procedure within the Supreme Court, the appointment and dismissal of judges-members of the NCJ as well as that of presidents of ordinary courts.<sup>18</sup>

## I. The Constitutional Tribunal

The essential reforms affecting the Tribunal have been the “double” appointment of five of its judges, the refusal on the Government’s part to publish judgments issued by the Tribunal, and the adoption of several acts that completely alter the nature of the Tribunal.

### 1. *Double Appointment of Judges*

Already at the beginning of the mandate of the incoming legislature of the *Sejm* (that commenced on 12 November 2015), disputes had arisen regarding the nomination of five persons to be appointed as judges by the President of the Republic. All five of them were nominated on 8 October 2015 by the previous parliamentary majority, even though only three judges had to be replaced while the running *Sejm* was still active in their mandate. The other two judges would take seats only after the incoming legislature had assumed office. The *Sejm* based the

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<sup>17</sup> United Nations General Assembly (2018). *Report of the Special Rapporteur on the independence of judges and lawyers on his mission to Poland*, para. 15.

<sup>18</sup> European Commission (2017). *Commission Proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law*. COM(2017) 835 final, paras. 32-33, 47, 75-76 and 80.

nomination on the *Act on the Constitutional Tribunal* that it had adopted on 25 June 2015.<sup>19</sup>

*President Duda* refused to take oaths from any of the five persons nominated (the “October judges”) – which is not in conformity with the Constitution of the Republic of Poland, which provides that “[t]he Constitutional Tribunal shall be composed of 15 judges chosen individually by the *Sejm*”.<sup>20</sup>

On 19 November 2015, only seven days after the beginning of the new term of office, the *Sejm* amended the law on the Tribunal, including, amongst others, a change so that a judge’s term shall only begin once the President has taken his oath and the possibility to declare the judicial nominations made by the previous legislature void. By 2 December 2015, the *Sejm* had annulled all five previous nominations and put forward new candidates (all of them were connected to the leading party *PiS*), whom *President Duda* swore in immediately (the “December judges”).

Two judgements (K 34/15 and K 35/15) were delivered on this issue by the Tribunal on 3 and 9 December 2015. In a nutshell, the Tribunal held that the nomination of three of the October judges by the previous legislature of the *Sejm* was lawful, as they were to replace judges whose seats would have been empty by 6 November 2015 (thus, before the term of office of the incoming *Sejm* began). It also ruled that the replacement of the two judges whose term expired in December was not valid.<sup>21</sup> *Inter alia* it held that the nomination of three of the December judges by the new legislature of the *Sejm* lacked any legal basis, since these vacancies had already been lawfully filled during the previous mandate.<sup>22</sup> The two judges that were lawfully appointed on 2 December 2015 were allowed to take seat on 12 January 2016, so that the bench then comprised twelve judges. The dispute

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<sup>19</sup> Art. 137 *The Constitutional Tribunal Act of 25 June 2015*, Journal of Laws of the Republic of Poland 2015, item 1064.

<sup>20</sup> Art. 194(1) *The Constitution of the Republic Of Poland*. The President must immediately take the oath from judges elected by the *Sejm*, an obligation underpinned by para. 6(15) of the Judgment in Case K 34/15 of 3 December 2015 of the Constitutional Tribunal, where the Tribunal held that a vacant judgeship at the Tribunal shall be filled forthwith.

<sup>21</sup> Judgment *K 34/15* of 3 December 2015 of the Constitutional Tribunal of Poland (not published), para. 12.

<sup>22</sup> Judgment *K 35/15* of 9 December 2015 of the Constitutional Tribunal of Poland (not published), para. 7.2.

about the three vacant seats remained unsolved, as *President Duda* refused to execute the Tribunal's rulings of the aforementioned cases.

## 2. *Publication of the Judgments of the Constitutional Tribunal*

On 22 December 2015, the *Sejm* passed an amendment to the Law of June 2015 on the Constitutional Tribunal. This new law entered into force without *vacatio legis* and had severe repercussions on the functioning of the Tribunal as it changed, for instance, the composition of benches, the majorities required for decision-making as well as the terms for terminating judges' mandates and launching disciplinary proceedings against judges.<sup>23</sup> Furthermore, certain provisions contained in the Law of 25 June 2015 were completely deleted, including the provisions setting out the independence of judges<sup>24</sup>, the composition of, and impossibility of re-election to the Tribunal<sup>25</sup>, and the proceedings to examine whether the capacity of exercising his office of the President of the Republic is impaired.<sup>26</sup>

On 9 March 2016, the Tribunal (composed of twelve instead of fifteen judges, as *President Duda* still refused to swear in the remaining three October judges) ruled that the law adopted on 22 December 2015 was unconstitutional.<sup>27</sup> The Government subsequently refused to publish the judgement in the Official Journal in order to prevent it from becoming legally effective. As a justification for the non-publication of the judgment – which is a violation of the Constitution<sup>28</sup> – the Government referred to a provision in the law mentioned above, namely, that the prescribed quorum, thirteen judges<sup>29</sup>, for delivering judgments was not met by the

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<sup>23</sup> Venice Commission (2016). *Opinion 833/2015 on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland*, para. 30.

<sup>24</sup> Art. 16. *The Constitutional Tribunal Act of 25 June 2015*, Journal of Laws of the Republic of Poland 2015, item 1064.

<sup>25</sup> Art. 17(1) and (2) *The Constitutional Tribunal Act of 25 June 2015*, Journal of Laws of the Republic of Poland 2015, item 1064.

<sup>26</sup> Chapter 10 *The Constitutional Tribunal Act of 25 June 2015*, Journal of Laws of the Republic of Poland 2015, item 1064.

<sup>27</sup> Judgment *K 47/15* of 9 March 2016 of the Constitutional Tribunal of Poland, Journal of Laws of the Republic of Poland 2018, item 1077.

<sup>28</sup> Art. 190(2) *The Constitution of the Republic Of Poland*.

<sup>29</sup> Art. 1(9.3.3) Judgment *K 47/15* of 9 March 2016 of the Constitutional Tribunal of Poland, Journal of Laws of the Republic of Poland 2018, item 1077.

Tribunal.<sup>30</sup> While the Government also refused to publish ensuing judgments delivered by the Tribunal, the General Assembly of the Supreme Court of Poland decided that the rulings of the Tribunal should be considered valid, even if not published in the Official Journal.<sup>31</sup>

Against the advice given in the first recommendation of the EU Commission, the Act of 22 July 2016<sup>32</sup> repealed the Act of 25 June 2015 and was signed and published before the Tribunal had reviewed its compatibility with the Constitution.<sup>33</sup> In its judgment of 11 August 2016, the Tribunal held that some of the provisions of that law were indeed unconstitutional. It specifically addressed principles such as the separation of and balance between legislative, executive and judicial powers, the independence of judges of the Tribunal from other branches of power<sup>34</sup>, the principle of integrity as well as efficiency of public bodies.<sup>35</sup> The Government did not acknowledge the validity of this judgment and thus again refused to publish it in the Official Journal. It did publish 21 judgments issued between 6 April and 19 July 2016, even though they were, from the Government's point of view, made in violation of the Act on the Constitutional Tribunal of 25 June 2015.<sup>36</sup>

### 3. *The December Acts*

In November and in December 2016, respectively, the *Sejm* adopted three acts on the Tribunal whose key provisions entered into force immediately (again without *vacatio legis*). They affected the organization and proceedings before the

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<sup>30</sup> European Commission (2017). *Commission Proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law*. COM(2017) 835 final, para. 17.

<sup>31</sup> Sąd Najwyższy (2016). *Uchwała Zgromadzenia Ogólnego Sędziów Sądu Najwyższego*.

<sup>32</sup> As published in the Official Journal of Law of the Republic of Poland on 1 August 2016, item 1157.

<sup>33</sup> European Commission (2016). *Commission Recommendation regarding the rule of law in Poland*. (EU) 2016/1374, para. 63.

<sup>34</sup> Judgment *K 39/16* of 11 August 2016 of the Constitutional Tribunal of Poland, Journal of Laws of the Republic of Poland 2018, item 1078, para. 3.

<sup>35</sup> Judgment *K 39/16* of 11 August 2016 of the Constitutional Tribunal of Poland, Journal of Laws of the Republic of Poland 2018, item 1078, para. 8.

<sup>36</sup> European Commission (2016). *Commission Recommendation regarding the rule of law in Poland complementary to Recommendation (EU) 2016/1374*. (EU) 2017/146, para. 11.

Tribunal<sup>37</sup>, as well as the legal status of its judges<sup>38</sup> who, according to the new legislation, can only take office once they have taken the oath before the President of the Republic.<sup>39</sup> Also, the grounds on which disciplinary proceedings can be carried out against (retired) judges as well as the way in which such proceedings can be initiated have been reformed.<sup>40</sup> The Constitutional Tribunal Act of 22 July 2016 ceased to exist by virtue of the Act of 13 December 2016 (the “Implementing Act”).<sup>41</sup> The same act also introduced the possibility of early retirement for Tribunal judges, and provided, under certain circumstances, that the President of the Republic shall have the power to elect an “acting President” of the Tribunal<sup>42</sup> who would be equipped with a wide range of powers, including the capacity to enable those December judges that had been unlawfully elected “to perform their judicial duties”.<sup>43</sup>

It was also in this period that the term of office of *Andrzej Rzepliński*, the former president of the Tribunal, expired. On the same day, *Julia Przyłębska* was appointed by *President Duda* as the “acting President” of the Tribunal. Judge *Przyłębska* is one of the two December judges that had been lawfully appointed, and, on her first day in office, admitted the unlawfully elected judges to take up their functions. On that day, she also called for a meeting of the General Assembly, which is responsible for presenting candidates for the position of the President of

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<sup>37</sup> *The Act of 30 November 2016 on the Organisation of the Constitutional Tribunal and the Mode of Proceedings Before the Constitutional Tribunal*, Journal of Laws of the Republic of Poland 2016, item 2072.

<sup>38</sup> *The Act of 30 November 2016 on the Status of the Judges of the Constitutional Tribunal*, Journal of Laws of the Republic of Poland 2016, item 2073.

<sup>39</sup> Art. 5 in conjunction with Art. 6 *The Act of 30 November 2016 on the Status of the Judges of the Constitutional Tribunal*, Journal of Laws of the Republic of Poland 2016, item 2073.

<sup>40</sup> Art. 24ff *The Act of 30 November 2016 on the Status of the Judges of the Constitutional Tribunal*, Journal of Laws of the Republic of Poland 2016, item 2073.

<sup>41</sup> Art. 5 *The Act of 13 December 2016 on the Introductory Provisions to the Act on the Organisation of the Constitutional Tribunal and the Act on the Status of the Judges of the Constitutional Tribunal*, Journal of Laws of the Republic of Poland 2016, item 2074.

<sup>42</sup> Art. 16 in conjunction with Arts. 17 and 21 *The Act of 13 December 2016 on the Introductory Provisions to the Act on the Organisation of the Constitutional Tribunal and the Act on the Status of the Judges of the Constitutional Tribunal*, Journal of Laws of the Republic of Poland 2016, item 2074.

<sup>43</sup> Art. 18(2) *The Act of 13 December 2016 on the Introductory Provisions to the Act on the Organisation of the Constitutional Tribunal and the Act on the Status of the Judges of the Constitutional Tribunal*, Journal of Laws of the Republic of Poland 2016, item 2074.

the Tribunal to the President of the Republic.<sup>44</sup> This meeting was boycotted by all but six judges. The day after, she was appointed to the position of President of the Constitutional Tribunal.<sup>45</sup>

In the beginning of 2017, the Vice-President of the Tribunal was forced to take his remaining leave and was not allowed to resume his work until his mandate ended in July 2017. *President Duda* then appointed one of the unlawfully appointed December judges to become the new Vice-President.<sup>46</sup> In September 2017, *President Duda* accepted the oath from a person that had been appointed by the *Sejm* to a seat that had already been occupied.

Within two years, and outside the usual constitutional process, the Constitutional Tribunal has thus been completely reshuffled.

## II. The Common Court System, the Supreme Court, and the National Council of the Judiciary

The second phase of reforms in Poland concerns the judicial system, comprising three bills that have been signed into law by the end of 2017. In this phase, the composition and functioning of ordinary courts as well as that of the Supreme Court and the National Council of the Judiciary (NCJ) are affected.

The first bill, the *Law on the Ordinary Courts Organisation*<sup>47</sup>, was signed on 24 July 2017 by *President Duda*, while he, due to massive public protests, vetoed the other two bills. The two draft acts he then presented in September had, however, remained largely unaltered regarding the general direction of their content when compared to the two bills he had vetoed before.

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<sup>44</sup> Art. 16 *The Act of 13 December 2016 on the Introductory Provisions to the Act on the Organisation of the Constitutional Tribunal and the Act on the Status of the Judges of the Constitutional Tribunal*, Journal of Laws of the Republic of Poland 2016, item 2074.

<sup>45</sup> Prezydenta Rzeczypospolitej Polskiej (2016). *Postanowienie nr 1131.24.2016 Prezydenta Rzeczypospolitej Polskiej z dnia 20 grudnia 2016 r. o powierzeniu pełnienia obowiązków Prezesa Trybunału Konstytucyjnego*.

<sup>46</sup> European Commission (2017). *Commission Proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law*. COM(2017) 835 final, para. 48.

<sup>47</sup> *Law of 12 July 2017 on the Ordinary Courts Organisation*, Journal of Laws of the Republic of Poland 2017, item 1452.

### 1. Amendments affecting the Ordinary Courts Organisation

According to the Constitution, “[t]he common courts shall implement the administration of justice concerning all matters save for those statutorily reserved to other courts.”<sup>48</sup> It can be derived from this that common courts have a wide range of competences pertaining to criminal, civil, family and juvenile, commercial, labour and social security laws.<sup>49</sup>

The *Law on the Ordinary Courts Organisation* equips the Minister of Justice with extensive and discretionary powers regarding the appointment and dismissal of court presidents.<sup>50</sup> Within half a year of the bill’s entry into force, the Minister of Justice was empowered to dismiss current and appoint new presidents and vice-presidents of the ordinary courts, without any judicial review. After this period of six months, the Minister of Justice may still dismiss court presidents, but the NCJ is, in theory, able to block this decision. The threshold for such a block is very high, however, since a qualified majority of two thirds of the members of the NCJ is needed.<sup>51</sup>

Also, a new retirement scheme was introduced for common court judges, according to which the retirement age was lowered to 65 years for male and to 60 years for female judges.<sup>52</sup> Again, it remained at the Minister of Justice’s discretion to prolong mandates until the age of 70. Some provisions were amended, however, since it is now possible for female judges to remain sitting until the age of 65 without having to file a request, the handling of which is now within the competence of the NCJ.<sup>53</sup>

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<sup>48</sup> Art. 177 *The Constitution of the Republic Of Poland*.

<sup>49</sup> United Nations General Assembly (2018). *Report of the Special Rapporteur on the independence of judges and lawyers on his mission to Poland*, para. 47.

<sup>50</sup> Art. 17 *Law of 12 July 2017 on the Ordinary Courts Organisation*, Journal of Laws of the Republic of Poland 2017, item 1452.

<sup>51</sup> Art. 27(4) *Law of 12 July 2017 on the Ordinary Courts Organisation*, Journal of Laws of the Republic of Poland 2017, item 1452.

<sup>52</sup> Art. 13 (1.a) *Law of 12 July 2017 on the Ordinary Courts Organisation*, Journal of Laws of the Republic of Poland 2017, item 1452.

<sup>53</sup> Adamski (2018). *Nowelizacje ustaw o ustroju sądów powszechnych, Krajowej Radzie Sądownictwa i Sądzie Najwyższym z podpisem prezydenta*.

## 2. Amendments affecting the Supreme Court

Officially, the reform aims at “decommunizing” the Supreme Court from judges who are accused of having been involved with the previous regime.<sup>54</sup> This goal is pursued by lowering the mandatory retirement age for Supreme Court judges from 70 to 65 years, which would result in the early retirement of almost half of the sitting judges. Also, the president of the Supreme Court, *Małgorzata Gersdorf*, is affected by this provision. Judges wishing to extend their term beyond the retirement age depend, according to the new act, on the consent of the President of the Republic who may individually decide to prolong their term.<sup>55</sup> This is the subject of one of the main disputes around the judicial reform, as many judges, as well as the president of the Supreme Court, refuse to accept the new law, as the length of their term is laid down in the constitution.

Replacements for vacant seats will also be appointed by the President of the Republic depending on a recommendation issued by the NCJ (that has also been changed by the Act of 12 April 2018).<sup>56</sup> Another power of the President of the Republic that has been introduced with the reforms is the capacity of appointing a temporary acting First President of the Court<sup>57</sup> as well as chamber presidents in case their seats are vacated prematurely.

The Act also includes a deep structural reorganization of the Supreme Court by abolishing the Military Chamber and creating the Extraordinary Control and Public Affairs Chamber and the Disciplinary Chamber<sup>58</sup>, both being composed by people

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<sup>54</sup> The Chancellery of the Prime Minister of Poland (2018). *White Paper on the Reform of the Polish Judiciary*, para. 96.

<sup>55</sup> Art. 3.2 *Act of 12 April 2018 amending the Law on the System of the Common Courts, the Act on the National Council of the Judiciary and the Act on the Supreme Court*, Journal of Laws of the Republic of Poland 2018, item 848.

<sup>56</sup> Art. 3.1 *Act of 12 April 2018 amending the Law on the System of the Common Courts, the Act on the National Council of the Judiciary and the Act on the Supreme Court*, Journal of Laws of the Republic of Poland 2018, item 848

<sup>57</sup> Art 1.8 *Act of 12 April 2018 amending the Act on the Supreme Court*, Journal of Laws of the Republic of Poland 2018, item 847.

<sup>58</sup> Art. 3 *Law of 8 December 2017 on the Supreme Court*, Journal of Laws of the Republic of Poland 2018, item 5.

appointed by the President of the Republic.<sup>59</sup> The numerous concerns raised by the overall situation brought about by the Polish judicial reform will be discussed later in this thesis.

### 3. *Amendments affecting the National Council of the Judiciary*

According to the Constitution, the NCJ has the task to “safeguard the independence of courts and judges.”<sup>60</sup> It consists of 25 members, 15 of which are judges. The Constitution provides they shall be “chosen from amongst the judges of the Supreme Court, common courts, administrative courts and military courts”<sup>61</sup> in a manner that is to be specified by statute.<sup>62</sup> Until recently, this meant that the 15 judicial members were elected by other judges.<sup>63</sup> By virtue of the amended Law on the National Council of the Judiciary, the selection procedure of the judicial members of this institution was amended. The new procedure provides that the *Sejm* will be responsible for electing those members. At the same time, the mandate of all judicial members of the NCJ will end prematurely as soon as new members are elected.

## C. INDEPENDENCE OF THE JUDICIAL SYSTEM

A judicial system builds on characteristics like independence, accuracy, fast decision making, and consistency. For the purpose of this thesis, I will mainly focus on judicial independence.

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<sup>59</sup> Art. 4 *Law of 8 December 2017 on the Supreme Court*, Journal of Laws of the Republic of Poland 2018, item 5.

<sup>60</sup> Art. 186(1) *The Constitution of the Republic Of Poland*.

<sup>61</sup> Art. 187(1.2) *The Constitution of the Republic Of Poland*.

<sup>62</sup> Art. 187(4) *The Constitution of the Republic Of Poland*.

<sup>63</sup> Art. 11 *Act of 12 May 2011 on the National Council of the Judiciary*, Journal of Laws of the Republic of Poland 2016, item 976.

## I. The Concept of Judicial Independence

While determining the extent to which a judicial body depends on political or external pressure is convenient and typically the chosen approach to any examination in this field, it is by far more complicated to determine and prove the independence of a judicial body, be it an individual judge, a tribunal, or a court.<sup>64</sup> In other words, as Ginsburg (2010) argues, “[j]udicial independence has become like freedom: everyone wants it but no one knows quite what it looks like, and it is easiest to observe in its absence.”<sup>65</sup>

Being a convoluted and controversially discussed concept, judicial independence is based on the capability of courts to decide cases without any influence other than the law, and without any hierarchical pressure that could potentially impair a judgment or a decision.<sup>66</sup> The separation of powers, as explained in subchapter C.V., also plays an important role in this connection.

Judicial independence is not only important for enforcing the rule of law, the effective implementation of which guarantees the equal treatment of all subjects under the law. It also accounts for judicial quality in great part. Judiciaries under governmental influence will be likely to decide cases in ways that are not legally justified, harming their reputation regarding independence and quality.<sup>67</sup>

Additionally, the protection of fundamental freedoms and human rights can only be ensured within an impartial, independent, efficient judicial system. The independence of judicial systems is therefore laid down in numerous treaties, providing that everyone enjoys the right “to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.”<sup>68</sup> When a country is party to these treaties, it is obliged to take all the measures that are necessary to guarantee that the prerequisites for an independent judiciary are met.

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<sup>64</sup> Ginsburg/Melton: *Does De Jure Judicial Independence Really Matter? A Reevaluation of Explanations for Judicial Independence*, p. 188.

<sup>65</sup> Ginsburg: *Judicial Independence in East Asia: Implications for China*, p. 2.

<sup>66</sup> Judgment in *Associação Sindical dos Juizes Portugueses*, Case C-64/16, ECR, EU:C:2018:117, para. 44.

<sup>67</sup> Vanberg: *The Politics of Constitutional Review in Germany*, p. 52.

<sup>68</sup> Art. 47 EU Charter. See also, for example, Art. 6 ECHR.

## II. Prerequisites for an Independent Judiciary

The rule of law does not guarantee a “favorable” outcome, it stands for a fair trial. When defining the concept of judicial independence that effectively exists for the benefit of a country’s citizens and not for that of its government, the most important factors can be divided into two dimensions. The first dimension, adjudicative independence, implies that every judge at their individual level must be free in the sense that they must be isolated from any influence or supervision, and they must be obliged to decide on their own.<sup>69</sup> Only when judges are granted the freedom to decide impartially and honestly, can justice be done to all the parties involved. Any concern, control, influence or fear thereof is a hindrance to that. Such a state of independence can be reached by laying down, in a country’s constitution or laws, procedures for appointing judges and provisions governing their security of tenure as well as provisions governing promotion, suspension, and other variables related to a judge’s working life.<sup>70</sup>

Moreover, the *de facto* independence from political interference also has to be ensured. The second dimension is thus interrelated with the separation of powers, providing the independence of judicial institutions through a separate administration of justice.<sup>71</sup> As the Human Rights Committee of the European Court of Human Rights explained in their general comment No. 32 (2007), a judicial authority is no longer independent when its functions or competences can no longer be distinguished from that of the executive or when it is under the control of the latter.<sup>72</sup>

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<sup>69</sup> Canadian Judicial Council (2016). *Why is Judicial Independence Important to you?* p. 10.

<sup>70</sup> United Nations General Assembly (2018). *Report of the Special Rapporteur on the independence of judges and lawyers on his mission to Poland*, para. 8.

<sup>71</sup> Canadian Judicial Council (2016). *Why is Judicial Independence Important to you?* p. 10.

<sup>72</sup> Human Rights Committee of the United Nations (2007). *General Comment No. 32 on the Right to Equality before Courts and Tribunals and to a Fair Trial*, para 19.

### III. Constitutional Judicial Independence

Today, many constitutions contain provisions explicitly declaring the independence of the judiciary. While those provisions vary in their appearance, they usually fix details related to tenures as well as the salaries of judges and limit the roles of the other branches of power in the selection process, promotion and removal of judges.<sup>73</sup> A violation of these provisions would require the involvement of several constitutional actors, who are, of course, unlikely to accept a situation in which their rights are prejudiced. This is why the provisions have to some extent proven to be self-enforcing.<sup>74</sup>

The Basic Principles on the Independence of the Judiciary, as published by the United Nations (UN) in 1985, lay down the measures which governments should respect within their national legislative framework and practice and which were defined to help Member States to secure and promote judicial independence. Specific importance is attached to the requirement that the independence of the judiciary shall be provided for in the respective countries' constitutions or laws.<sup>75</sup>

If we look beyond Europe, however, it is noteworthy that the demand for an independent judiciary being laid down in the constitution is not at an equal level worldwide. Depending on the form of government, there will be a genuine wish to enshrine discrete powers of the judiciary into the constitution, or not.<sup>76</sup> While there will be no interest in being constrained by an independent judiciary in a dictatorship, it is a matter-of-course that democracies, as they are interested in having an impartial adjudication, are characterized by a separation of powers.<sup>77</sup>

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<sup>73</sup> See, for example, Chapter VIII *The Constitution of the Republic Of Poland*.

<sup>74</sup> Ginsburg/Melton: *Does De Jure Judicial Independence Really Matter? A Reevaluation of Explanations for Judicial Independence*, p. 190.

<sup>75</sup> United Nations General Assembly (1985). *Basic Principles on the Independence of the Judiciary*, para. 1.

<sup>76</sup> Moustafa/Ginsburg: *Rule by Law: The Politics of Courts in Authoritarian Regimes*, p.12; Toharia: *Judicial Independence in an Authoritarian Regime: The Case of Contemporary Spain*, p. 487.

<sup>77</sup> Ginsburg/Melton: *Does De Jure Judicial Independence Really Matter? A Reevaluation of Explanations for Judicial Independence*, p. 192.

#### IV. Judicial Independence and the EU

The EU, holding an enhanced observer status at the UN, supports its values and principles by and large, especially those regarding democracy, freedom, and human rights.<sup>78</sup> Since the influence of international legislation on domestic legal developments is growing, the related provisions enshrined in EU law also need to be taken into consideration.

Initially, the principles of judicial independence were pursued at the national level. Now, however, EU law refers to it in two separate areas, the first being derived from the principle of the *Rechtsstaat* (democratic legal state) and the second one being linked to the right of access to court.<sup>79</sup>

The TEU, listing the values on which the EU is founded, explicitly mentions – amongst others – human rights as well as the rule of law<sup>80</sup>, and so does the preamble to the Treaty, again confirming the EU's commitment to the rule of law. Addressing the interpretation of the term rule of law, it can be assumed that it should be congruent with the notion of *Rechtsstaat*, as mentioned above.

The other relevant area, the right of access to court, relates to Art. 6 TEU, according to which the rights, freedoms, and principles set out in the EU Charter shall enjoy the same legal value as the Treaties. In said article it is also stated that the Union shall accede to what is the European Convention on Human Rights (ECHR)<sup>81</sup> today, accepting the principles of fundamental freedoms set forth therein as general principles of Union law.<sup>82</sup>

Art. 47 of the EU Charter provides everyone whose rights or freedoms, as guaranteed by EU law, have been violated with the right to effective remedy, *id est* a fair and public hearing, within reasonable time and before an independent and impartial tribunal. In parallel to this, Art. 19 TEU demands that Member States

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<sup>78</sup> As enshrined in the EU Treaties.

<sup>79</sup> Zawistowski: *The Independence of the Courts and Judicial Independence from the European Union Law Perspective*, p. 8.

<sup>80</sup> Art. 2 TEU.

<sup>81</sup> Art. 6(2) TEU.

<sup>82</sup> Art. 6(3) TEU.

provide appropriate remedies to ensure effective legal protection in the fields covered by Union law.

## V. Executive, Legislative, and Judiciary Powers

Another critical principle that is part of the concept of the independence of the judiciary is the organizational and functional separation of powers. This principle defines three separate and independent branches of government: the legislature, executive, and judiciary.<sup>83</sup> The main idea behind this principle is the prevention of a concentration of power, which could result in an abuse of power.<sup>84</sup> Together with judicial independence, the separation of power makes up the bedrock of the rule of law. According to this principle, a country's constitution, laws, and policies must provide for the true independence of the justice system from other branches of government, and actors of the justice system must be able to fulfil their professional duties and must be protected, *de jure* and *de facto*, from any interference in the form of harassment, attack, or persecution by other sectors.<sup>85</sup>

The separation of powers involves a system of checks and balances. At the same time, it provides that, between the powers, competences are mutually recognized and cooperation is ensured. Where the main common obligation is to ensure that the judiciary can function independently, neither of the other two powers is allowed to interfere with a courts' adjudication.<sup>86</sup>

Additionally, a difference in the functioning of judicial independence and that of the other powers must be noted, since the power of both, the legislative and the executive depends on the number of powers respectively assigned to them. They gain control with each additional power that is granted to them, thus increasing their political power. Judicial independence, however, implies constitutional

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<sup>83</sup> United Nations General Assembly (2018). *Report of the Special Rapporteur on the independence of judges and lawyers on his mission to Poland*, para. 7.

<sup>84</sup> Zawistowski: *The Independence of the Courts and Judicial Independence from the European Union Law Perspective*, p. 9.

<sup>85</sup> United Nations General Assembly (2018). *Report of the Special Rapporteur on the independence of judges and lawyers on his mission to Poland*, para. 7.

<sup>86</sup> Zawistowski: *The Independence of the Courts and Judicial Independence from the European Union Law Perspective*, p. 9.

protection, rather than the conferral of powers, to enhance the autonomy of the judiciary in exercising its tasks.<sup>87</sup> Any loophole in that protection provides the branches of a government with an opportunity to exploit each other.<sup>88</sup>

As effective enforcers of the constitution, courts must therefore be independent of the other branches of government. At times, it can, however, be hard to tell whether there is interference or not, as it is possible that a supreme court free of political influence and pressure is ideologically lined up with a government in a way that it will not rule against this government in important cases.<sup>89</sup>

## VI. Constitutional and EU Law Enforcement

Examining Art. 19(1) TEU and Art. 47 EU Charter in compliance with settled case-law<sup>90</sup>, two aspects can be identified within the concept of independence.<sup>91</sup>

The first aspect, which has an external nature, deals with the protection of judicial authorities against interference and pressure originating from external sources that could jeopardise the independence of judgments issued by members of judicial authorities.

The second aspect, which is internal, is closely related to impartiality and requires objectivity. It is necessary that the judges of a court have no interest in the outcome of a proceeding other than the strict application of the rule of law. Therefore, in order to lawfully enforce the constitution, courts have to be able and allowed to maintain their independence and neutrality.

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<sup>87</sup> Elkins et al.: *Constitutional Constraints on Executive Lawmaking*, p. 23.

<sup>88</sup> Ginsburg/Melton: *Does De Jure Judicial Independence Really Matter? A Reevaluation of Explanations for Judicial Independence*, p. 193.

<sup>89</sup> Ginsburg/Melton: *Does De Jure Judicial Independence Really Matter? A Reevaluation of Explanations for Judicial Independence*, p. 190

<sup>90</sup> Judgment in *Wilson*, Case C- 506/04, ECR, EU:C:2006:587, para. 51; Judgment in *Margarit Panicello*, Case C- 503/15, ECR, EU:C:2017:126, para. 37; Judgment in *Associação Sindical dos Juizes Portugueses*, EU:C:2018:117, para. 44; Judgment in *LM*, EU:C:2018:586, para. 64.

<sup>91</sup> Opinion of Advocate General Tanchev in *LM*, Case C-216/18 PPU, EU:C:2018:517, para. 89; Stefan Batory Foundation (ed.): *The Polish Law on the Supreme Court in light of Rulings of the Court of Justice of the European Union*, para. 4.

In order to ensure that judicial authorities are not exposed to the influence of external and internal factors, it is necessary to define rules that determine parameters regarding, for example, the composition of and appointment to judicial bodies as well as the terms of service, rejection, and dismissal of judges.<sup>92</sup>

In addition to that, since national courts are in a position to make decisions regarding the interpretation of EU law, their independence is an essential requirement when they refer questions to the CJEU for preliminary rulings<sup>93</sup>, as highlighted by the CJEU in the judgments of *Associação Sindical*<sup>94</sup> and *LM*.<sup>95</sup>

Examining the current Polish judicial reforms against the backdrop of the foregoing, severe concerns arise regarding not only their compatibility with EU law that Polish courts are called upon to implement but also regarding the question whether the rule of law is still working properly in Poland. Those considerations are essential, since a guaranteed independence is essential for adjudication both at EU and Member State level, as pointed out in the *Associação Sindical* judgment.<sup>96</sup>

In the *LM* judgment, the Court elaborates on the fact that judicial independence is at the core of the fundamental right to a fair trial, which itself is essential since it guarantees the protection of all rights derived from EU law.<sup>97</sup> As *First Vice-President of the Commission Frans Timmerman* put it, Polish judicial authorities need to be independent in judgments at a regional or national level, but also when they are acting as ‘judges of the EU’.<sup>98</sup>

#### **D. POLITICAL DEPENDENCE OF THE POLISH JUDICIAL SYSTEM**

The importance of a politically independent judicial system can be further demonstrated by the example and in the context of the current reforms and

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<sup>92</sup> Opinion of Advocate General Tanchev in *LM*, EU:C:2018:517, para. 89.

<sup>93</sup> Biernat (2018). *How to Assess the Independence of Member State Courts?*

<sup>94</sup> Judgment in *Associação Sindical dos Juizes Portugueses*, EU:C:2018:117, para. 40.

<sup>95</sup> Judgment in *LM*, EU:C:2018:586, para 54.

<sup>96</sup> Paras. 41-42 Judgment in *Associação Sindical dos Juizes Portugueses*, EU:C:2018:117.

<sup>97</sup> Judgment in *LM*, EU:C:2018:586, para. 48.

<sup>98</sup> Speech of First Vice-President Frans Timmermans “*Opening remarks: College readout on grave concerns about the clear risks for independence of the judiciary in Poland*”.

developments of the Polish system of justice. To establish in which way the Polish judiciary has ceased to enjoy its status as a separate power is essential for the further development of this thesis. Since breaches of core principles are intertwined with constitutional breaches, violations of the Polish Constitution will also be discussed in this chapter.

## I. Accession to the EU

Countries preparing for accession to the EU have to make sure they fulfil the Copenhagen Criteria, which include stable democratic institutions as well as respect for the rule of law. During the accession process, the national laws of the acceding state are assessed to identify differences to EU law, and, in the end, the country is required to have implemented the *acquis communautaire*.

The countries acceding to the EU within the framework of the Eastern Enlargement between 2004 and 2013 only had a short record of democracy and the rule of law; hence, their democratic systems were not as stable as those of the countries that had already been members to the EU for some time.<sup>99</sup> Some of the countries only had a short period of time to pass extensive legal reforms in order to fit into the EU's framework of values and principles.

Poland, being one of the countries that acceded to the EU in 2004, had to include in its constitution several provisions that guaranteed judicial independence in the country. Bearing this in mind, some of the articles contained in the Polish constitution should be briefly discussed.

According to the constitution, the governmental system of Poland operates in conformity with the principle of the separation of legislative, executive, and judicial powers.<sup>100</sup> Emphasis is placed upon the fact that judicial power, which is embodied in courts and tribunals<sup>101</sup>, shall not only enjoy a separate status but shall also be independent of other branches of power.<sup>102</sup> The principle of the separation of powers and the independence of the judiciary are further elaborated on in the

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<sup>99</sup> Gutmann/Voigt: *Judicial Independence in the EU - A Puzzle*, p. 4.

<sup>100</sup> Art. 10(1) *The Constitution of the Republic Of Poland*.

<sup>101</sup> Art. 10(2) *The Constitution of the Republic Of Poland*.

<sup>102</sup> Art. 173 *The Constitution of the Republic Of Poland*.

provisions concerning the appointment of judges<sup>103</sup>, their right to remuneration in coherence with the dignity of their tasks<sup>104</sup>, the exclusion of the possibility to move or remove them<sup>105</sup>, and their judicial immunity.<sup>106</sup>

Other provisions ensuring judicial independence establish the NCJ's competence to safeguard the independence of courts and judges<sup>107</sup> and, in accordance with Union law, lay down that Poland shall be a democratic state ruled by law<sup>108</sup> and that the right to a fair and public hearing before an impartial and independent court is accessible to everyone.<sup>109</sup>

Since the elections of 2015, the judicial structure of Poland has been hit by more than thirteen consecutive laws amending provisions relating to the Constitutional Tribunal, the Supreme Court, and the ordinary courts, the NCJ, and higher levels. Step by step, the other branches of power have been put in a position where they are now able to interfere with the functioning of the judiciary.<sup>110</sup>

The present analysis was built upon and in conjunction with detailed reviews and statements on the matter that have been published by various actors, be it international or regional, of the human rights mechanism. Amongst them are the EU Commission, which has addressed the threat to the rule of law in Poland in no less than three recommendations (and one opinion), the Commissioner for Human Rights of the Council of Europe<sup>111</sup>, the Special Rapporteur on the independence of judges and lawyers of the United Nations<sup>112</sup>, the European Commission for Democracy

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<sup>103</sup> Art. 179 *The Constitution of the Republic Of Poland*.

<sup>104</sup> Art. 178(2) *The Constitution of the Republic Of Poland*.

<sup>105</sup> Art. 180 *The Constitution of the Republic Of Poland*.

<sup>106</sup> Art. 181 *The Constitution of the Republic Of Poland*.

<sup>107</sup> Art. 186(1) *The Constitution of the Republic Of Poland*.

<sup>108</sup> Art. 2 *The Constitution of the Republic Of Poland*.

<sup>109</sup> Art. 45(1) *The Constitution of the Republic Of Poland*.

<sup>110</sup> European Commission, (2017). *Fact Sheet. Commission Action on the Rule of Law in Poland: Questions & Answers*, p. 2.

<sup>111</sup> Council of Europe (2016). *Report of Commissioner for Human Rights Nils Muižnieks on his visit to Poland (9–12 February 2016)*.

<sup>112</sup> United Nations General Assembly (2018). *Report of the Special Rapporteur on the independence of judges and lawyers on his mission to Poland*.

through Law (the Venice Commission)<sup>113</sup>, and the Organization for Security and Co-operation in Europe (OSCE).<sup>114</sup>

## II. The Constitutional Tribunal

The Tribunal's task should be to review the conformity of statutes, international agreements, and legal provisions issued by central State organs with legal norms laid down in the Constitution or ratified international treaties.<sup>115</sup> As the Tribunal has the power to carry out the final assessment of constitutional conformity, its rulings are universally binding.<sup>116</sup> This competence, which is unique to the Constitutional Tribunal, should not be exercised by any other judicial body – let alone by any other government branch.<sup>117</sup>

Since the Tribunal plays an essential part in guaranteeing that human rights are respected, that the rule of law is observed, and that democratic principles are adhered to, it is even more alarming that the judicial reforms increasingly prevented it from fulfilling its tasks.

When *President Duda* elected an “acting President” of the Tribunal, he already interfered with the principle of separation of powers, in a procedure that in fact was unlawful, as the Constitution does not provide for any function such as that of an “acting President” of the Constitutional Tribunal.

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<sup>113</sup> Venice Commission (2016). *Opinion 833/2015 on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland*; Venice Commission (2016). *Opinion 860/2016 on the Act on the Constitutional Tribunal*; Venice Commission (2017). *Opinion 904/2017 on the Draft Act amending the Act on the National Council of the Judiciary, on the Draft Act amending the Act on the Supreme Court, Proposed by the President of Poland, and on the Act on the Organization of Ordinary Courts*.

<sup>114</sup> OSCE (2017). *Opinion on Draft Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland*; OSCE (2017), *Opinion on certain Provisions of the Draft Act on the Supreme Court of Poland (as of 26 September 2017)*.

<sup>115</sup> Art. 188 *The Constitution of the Republic Of Poland*.

<sup>116</sup> Art. 190 *The Constitution of the Republic Of Poland*.

<sup>117</sup> Zawistowski: *The Independence of the Courts and Judicial Independence from the European Union Law Perspective*, p. 9.

By making it possible for the “acting President” to enable the unlawfully elected December judges to work as constitutional judges<sup>118</sup>, the judgement<sup>119</sup> of the Tribunal was overruled – which, as discussed above, is actually prohibited by the Constitution.<sup>120</sup>

By the time the “acting President” *Przylębska* called for the General Assembly to elect candidates for the position of the President of the Tribunal that would be presented to *President Duda*, the six judges that did not boycott the meeting had all been installed in the Tribunal by the new *Sejm*. This fact might already raise some concerns, but it should be noted that the new system of proposing candidates has a high potential of resulting in a situation in which the appointed candidates are not supported by a substantial number of judges.<sup>121</sup> Also, it is incompatible with the judgment K-44/16 of 7 November 2016<sup>122</sup>, in which the Tribunal ruled upon the interpretation of Art. 194(2) of the Constitution and came to the conclusion that obtaining a majority vote in the General Assembly was necessary for a candidate to be presented to the President of the Republic.

Another issue that has led to the deterioration of judicial independence in Poland consists in the fact that, despite the judgments issued by the Tribunal on 3 and 9 December 2015<sup>123</sup>, the three October judges that the previous *Sejm* had lawfully nominated have not had their oath taken by *President Duda* and thus have not been able to take up their functions as judges of the Tribunal. At the same time, the three illegitimate December judges were allowed to take seat as judges on 20 December 2016 under “acting President” *Przylębska*.<sup>124</sup> Preventing the legitimately nominated persons from taking up their functions as judges is a violation of the Constitution,

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<sup>118</sup> Art. 18(2) *The Act of 13 December 2016 on the Introductory Provisions to the Act on the Organisation of the Constitutional Tribunal and the Act on the Status of the Judges of the Constitutional Tribunal*, Journal of Laws of the Republic of Poland 2016, item 2074.

<sup>119</sup> Judgment K 35/15 of 9 December 2015 of the Constitutional Tribunal of Poland (not published)

<sup>120</sup> Art. 190(1) *The Constitution of the Republic Of Poland*.

<sup>121</sup> European Commission (2017). *Commission Proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law*. COM(2017) 835 final, para. 32.

<sup>122</sup> Not (yet) published in *Dziennik Ustaw*.

<sup>123</sup> Judgment K 34/15 of 3 December 2015 of the Constitutional Tribunal of Poland (not published); Judgment K 35/15 of 9 December 2015 of the Constitutional Tribunal of Poland (not published).

<sup>124</sup> European Commission (2017). *Commission Proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law*. COM(2017) 835 final, para. 92.

in which it is laid down that the judges of the Tribunal shall be chosen individually by the *Sejm* –*id est* that they shall be chosen by the *Sejm* that is in the position to do so, as previously discussed.<sup>125</sup> On top of this, one of the December judges was appointed as Vice-President of the Tribunal after his predecessor had been forced into retirement.<sup>126</sup> Since the process of him becoming a judge at the Tribunal was found unconstitutional in the first place, there is no legitimate legal basis for him taking up the function as a Vice-President – *ex iniuria ius non oritur*.

Finally, by refusing to publish judgments issued by the Tribunal in *Dziennik Ustaw*, the Official Journal, the validity of judgments seems to depend on the goodwill of the government.<sup>127</sup> This step has not only taken the publishing of judgments out of the hands of the Tribunal, but has also interfered with the finality that these judgments shall enjoy<sup>128</sup>, thus resulting in another violation of the Constitution.

From the aforementioned it becomes apparent that the independence and the legitimacy of the Tribunal have been seriously undermined, as has also been found by the EU Commission.<sup>129</sup> The reforms have resulted in a newly composed Tribunal, without following the usual constitutional process, however. Consequently, judgments issued by the Tribunal no longer provide for a reliable constitutional review. Their validity is now dependent on the executive and legislative branch that have adopted several sensitive laws in the meantime. But since there is no possibility for an independent constitutional review, there is no more guarantee for the constitutionality of Polish laws.<sup>130</sup>

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<sup>125</sup> See part B.I.1 of this paper.

<sup>126</sup> European Commission (2017). *Commission Proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law*. COM(2017) 835 final, para. 105.

<sup>127</sup> United Nations General Assembly (2018). *Report of the Special Rapporteur on the independence of judges and lawyers on his mission to Poland*, para. 36.

<sup>128</sup> Art. 190.1 and 190.2 *The Constitution of the Republic Of Poland*.

<sup>129</sup> European Commission (2017). *Commission Proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law*. COM(2017) 835 final, para. 57.

<sup>130</sup> United Nations General Assembly (2018). *Report of the Special Rapporteur on the independence of judges and lawyers on his mission to Poland*, para. 45.

### III. The National Council of the Judiciary

The NCJ has the power to act as the guardian of judicial independence and enjoys specific competences concerning the filling of judicial vacancies, since it can recommend persons to the President of the Republic and request that they be appointed as judges. Also, upon its request, the Tribunal shall assess the conformity of a legal act with the Constitution.<sup>131</sup>

The composition of the NCJ has already been touched upon briefly in this thesis<sup>132</sup> – 15 out of 25 members of the NCJ are judges who are chosen by other judges.<sup>133</sup> The other members are the First President of the Supreme Court, the Minister of Justice, the President of the Supreme Administrative Court, a representative chosen by the President of the Republic, four members chosen by the *Sejm*, and two members chosen by the Senate.<sup>134</sup>

According to the law of 8 December 2017, the 15 judges-members are now to be chosen by the *Sejm*, while the mandate of all current judges-members of the NCJ was prematurely terminated. As a consequence, the NCJ now has 21 members that were appointed by the legislative and one that was chosen by the executive branch.

As pointed out by the UN Special Rapporteur, the new method of electing members to the NCJ is not in conformity with the relevant international or regional standards.<sup>135</sup> Even considering the fact that the NCJ does not carry out judicial functions, it is nevertheless responsible for safeguarding judicial independence and, hence, must not be dependent on the executive and legislative branches.<sup>136</sup>

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<sup>131</sup> Zawistowski: *The Independence of the Courts and Judicial Independence from the European Union Law Perspective*, p. 11.

<sup>132</sup> See part B.II.3.

<sup>133</sup> Art. 187(1.2) *The Constitution of the Republic Of Poland*.

<sup>134</sup> Art 187(1.1) *The Constitution of the Republic Of Poland*.

<sup>135</sup> United Nations General Assembly (2018). *Report of the Special Rapporteur on the independence of judges and lawyers on his mission to Poland*, para. 68.

<sup>136</sup> United Nations General Assembly (2018). *Report of the Special Rapporteur on the independence of judges and lawyers on his mission to Poland*, para. 68.

#### IV. The Supreme Court

The amendments made to the existing law on the Supreme Court put it under extensive control of the executive power for several reasons.

First, the provisions now include the possibility to block the appointment of the First President of the Supreme Court.<sup>137</sup> The President of the Republic may appoint a “judge acting as the President of the Court” who will be in charge of representing the Supreme Court until the First President of the Supreme Court has been appointed. This process, according to the new laws, involves the NCJ, a majority of whose members is chosen by the executive and legislative branches.

By creating the position of a “judge acting as the President of the Court”, the Constitution has again been violated since it contains no such provision. Similarly to the appointment of the President of the Constitutional Tribunal in 2016, this seems to be another step towards making one of the most important courts in Poland dependent on the political will.<sup>138</sup>

Second, if we recall the principle of guaranteed tenures, it must be emphasized that one of the main pillars of judicial independence consists in the irremovability of judges.<sup>139</sup> Not only is it laid down in the Constitution<sup>140</sup>, it can also be found in Union law<sup>141</sup> and in the UN Basic Principles on the Independence of the Judiciary.<sup>142</sup> It is also provided for in law that judges shall be suspended or removed only in cases of incapacity or serious misconduct.<sup>143</sup>

These laws do not contain any provision that suggests the retrospective introduction of a mandatory retirement age, especially not if it has the effect of

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<sup>137</sup> Helsinki Foundation for Human Rights (2018). *Statement on the draft Acts on the Supreme Court, the Constitutional Tribunal and the System of Ordinary Courts adopted by the Parliament*, para. 2.

<sup>138</sup> Helsinki Foundation for Human Rights (2018). *Statement on the draft Acts on the Supreme Court, the Constitutional Tribunal and the System of Ordinary Courts adopted by the Parliament*, para. 2.

<sup>139</sup> International Commission for Jurists (2018). *Forced retirement of 27 Supreme Court Justices*, p. 2

<sup>140</sup> Art. 179 *The Constitution of the Republic Of Poland*.

<sup>141</sup> Art. 19(2) TEU.

<sup>142</sup> Principle 12.

<sup>143</sup> Principle 18.

prematurely ending ongoing appointments and provides an official of the executive governmental branch with the discretion of prolonging appointments or not.<sup>144</sup>

The above-described dismissal procedure resulted in the immediate retirement of 27 judges<sup>145</sup>, many of them refusing to ask *President Duda* for a prolongation of their term, as they considered it to be protected by Arts. 2 and 180(1) of the Constitution.<sup>146</sup> Others that asked for a prolongation have not (yet) received a positive answer. At the moment, *President Duda* has the power to arbitrarily decide who will be able to remain in their function and who will not. A situation in which a judge has to fear their early retirement in case the President of the Republic or another representative of the executive power does not agree with his judgments is a situation in which neither the separation of powers nor the independence of the judiciary is guaranteed any longer.<sup>147</sup>

The appointment of all new Supreme Court judges by *President Duda* will happen on the recommendation of the politicized NCJ – thus, the independence of the Supreme Court is no longer in place. Due to the many competences the Supreme Court enjoys, this will heavily affect not only Polish, but also European citizens in areas such as elections or social security rights.<sup>148</sup>

## V. The Minister of Justice

The Minister of Justice enjoys similar powers. First, it should be noted that his functions have been merged with those of the Prosecutor General.<sup>149</sup> Since legislation that is to be reviewed by the Tribunal will often have been proposed by the Ministry of Justice or other ministries, it can be assumed that the Minister of

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<sup>144</sup> International Commission for Jurists (2018). *Forced retirement of 27 Supreme Court Justices*, p. 2.

<sup>145</sup> International Commission for Jurists (2018). *Forced retirement of 27 Supreme Court Justices*.

<sup>146</sup> Ejchart-Dubois et al.: *Devastation of Poland's Supreme Court and judicial independence: the situation now*, p. 2.

<sup>147</sup> International Commission for Jurists (2018). *Forced retirement of 27 Supreme Court Justices*, p. 2.

<sup>148</sup> European Commission, (2017). *Fact Sheet. Commission Action on the Rule of Law in Poland: Questions & Answers*, p. 3.

<sup>149</sup> Art. 1(2) *Act on the Public Prosecutor's Office*, Official Journal of the Republic of Poland 2016, item 177.

Justice has a direct interest in the Tribunal's proceedings. Therefore, a person holding the post of the Minister of Justice should not be able to influence the proceedings in any way. It is, however, now required by law that the Prosecutor General be present in cases that are held before the full bench<sup>150</sup>, meaning that it is possible for the Minister of Justice to prevent hearings by staying away from them.

Furthermore, the new law on the Ordinary Courts Organisation<sup>151</sup> has granted the Minister of Justice the right to appoint and dismiss court presidents without any obligation to comply with any specific criteria and without the judiciary having possibilities to veto these decisions.<sup>152</sup> Since court presidents themselves are able to influence the judges of their courts, a certain kind of chain reaction is started as soon as the Minister of Justice also has an indirect power over these judges.<sup>153</sup>

Between 2017 and 2018, the Minister of Justice was given six months in which he was allowed to dismiss and appoint presidents as well as vice-presidents of courts without having to comply with any specific procedure or being required to present valid arguments for the changes.<sup>154</sup> He has made excessive use of this right, dismissing presidents and vice-presidents of about one third of all courts.

In fact, the NCJ has the competence to check the dismissals of court presidents. Under the current circumstances, however, this will hardly have any effect, since a dismissal could only be vetoed by a two-thirds-majority. This threshold, which is already very high, seems to become impossible to reach considering the new composition of the NCJ. Members representing the same political majority as the Minister of Justice, and this is currently the case for a majority of the NCJ's members, will most likely not veto his decision to dismiss a court president.<sup>155</sup>

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<sup>150</sup> Art. 30(5) *The Constitutional Tribunal Act of 22 July 2016*, as published in the Official Journal of Law of the Republic of Poland on 1 August 2016, item 1157.

<sup>151</sup> *Law of 12 July 2017 on the Ordinary Courts Organisation*, Journal of Laws of the Republic of Poland 2017, item 1452.

<sup>152</sup> Speech of First Vice-President Frans Timmermans "Opening remarks: College readout on grave concerns about the clear risks for independence of the judiciary in Poland".

<sup>153</sup> Biernat (2018). *How to Assess the Independence of Member State Courts?*

<sup>154</sup> Art. 17(1) and 18(1) *Law of 12 July 2017 on the Ordinary Courts Organisation*, Journal of Laws of the Republic of Poland 2017, item 1452.

<sup>155</sup> Venice Commission (2016). *Opinion 833/2015 on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland*, para. 106.

The interference of the legislative and executive powers with the work and system of common courts, tribunals, and even the Supreme Court gives rise to serious concerns. Any judges or court presidents working on a politically sensitive case might feel pressured to decide in a way that is favourable for government authorities, as, otherwise, they will run the risk of either being denied a promotion or even dismissed.<sup>156</sup> Due to the current reforms, judges will now depend on the other two government branches throughout their whole careers, as has been illustrated by the *Batory Foundation*.<sup>157</sup> While making it easy for the Minister of Justice or the President of the Republic to put pressure on individual actors within the judiciary, these factors, at the same time, compromise their independence and impartiality.

It must be noted that, in a community like the European Union, the impact of a damaged judicial system will not only be felt within the national borders. The consequences of such developments will rather spill over to the other Member States. This can be demonstrated by the recent incident concerning the execution of a European Arrest Warrant issued by Poland.

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<sup>156</sup> United Nations General Assembly (2018). *Report of the Special Rapporteur on the independence of judges and lawyers on his mission to Poland*, para. 49; Ginsburg/Melton: *Does De Jure Judicial Independence Really Matter? A Reevaluation of Explanations for Judicial Independence*, p. 193.

<sup>157</sup> Stefan Batory Foundation: *Where the law ends. The collapse of the rule of law in Poland - and what to do*.

## E. THE END OF MUTUAL RECOGNITION?

### I. The European Arrest Warrant

Among some of the Member States, cooperation in the field of extradition has already been in place since the late fifties, thus long before the system of the European Arrest Warrant was even established. Based on the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States<sup>158</sup>, as amended by the Council Framework Decision 2009/299/JHA of 26 February 2009<sup>159</sup> (‘the Framework Decision’), the principle of mutual recognition, however, requires Member States to execute any EAW – that is, any judicial decision issued by one Member State, requesting the arrest and surrender by another Member State of a person in order to carry out a criminal prosecution or execute a custodial sentence or detention order.<sup>160</sup>

As indicated above, the EAW is based on a high level of confidence and mutual trust between Member States<sup>161</sup>, requiring each of them to expect other Member States to comply with the EU Treaties and respect, in particular, the fundamental rights laid down therein.<sup>162</sup> That the principle of mutual recognition is at the core of judicial cooperation<sup>163</sup> is not only emphasized in the Framework Decision, but also results from the development of European integration *per se* that has been accompanied by faith in a community based on mutual trust since long ago.

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<sup>158</sup> Council of the European Union (2002). *Council Framework Decision on the European arrest warrant and the surrender procedures between Member States*.

<sup>159</sup> Council of the European Union (2009). *Council Framework Decision amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial*.

<sup>160</sup> Art. 1(1-2) Council of the European Union (2002). *Council Framework Decision on the European arrest warrant and the surrender procedures between Member States*.

<sup>161</sup> Recital 10 Council of the European Union (2002). *Council Framework Decision on the European arrest warrant and the surrender procedures between Member States*.

<sup>162</sup> Foundation of Ordo Iuris Institute for Legal Culture (2018). *Amicus Curiae Opinion in the Case C-216/18 PPU Minister for Justice and Equality*, para. 4; Opinion 2/13 of the CJEU, EU:C:2014:2454, para. 191.

<sup>163</sup> Recital 6 Council of the European Union (2002). *Council Framework Decision on the European arrest warrant and the surrender procedures between Member States*.

Initially, the idea of mutual trust was an important part of internal market legislation, when the European Community had only recently evolved. With the CJEU referring to mutual recognition for the first time in its landmark case *Cassis de Dijon*<sup>164</sup>, it was soon applied not only to all of the four freedoms of the internal market, but subsequently also to other EU policies.<sup>165</sup> The idea behind it was to create, in all of these spheres, an area without internal borders. As a consequence, the idea of mutual trust and recognition was spread by the EU institutions and, with the creation of the third pillar of the EU (later transformed into the AFSJ), eventually gained fundamental importance.

The preamble of the Framework Decision states that the implementation of the EAW may only be suspended in case the Council finds, in accordance with the procedures laid down in Art. 7 TEU, that a Member State seriously and persistently breaches the principles laid down in Art. 6 TEU.<sup>166</sup> Other circumstances allowing the executing judicial authority to refuse the execution of such a warrant are described by the cases of mandatory non-execution, exhaustively listed in Art. 3 as well as by cases of optional non-execution provided for in Art. 4 of the Framework Decision.<sup>167</sup>

Taking into account the evolution of EU law, it should be mentioned that since the Framework Decision has been adopted, the EU Charter has become binding and the values of the EU as well as their enforcement mechanisms have been further developed.<sup>168</sup> An interpretation of Recital 10 EAW should, therefore, not be merely textual or historical, but should also take into consideration these alterations.

The EAW may only be set aside in very exceptional cases; hence the spirit of mutual trust has to be balanced carefully against regular mutual control. Every Member State has to consider all the other Member States' compliance with EU law, especially with the core values and fundamental rights laid down therein. A

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<sup>164</sup> Judgment in *Cassis de Dijon*, Case C-120/78, ECR, EU:C:1979:42.

<sup>165</sup> Wischmeyer: *Generating Trust Through Law? Judicial Cooperation in the European Union and the "Principle of Mutual Trust"*.

<sup>166</sup> Recital 10 Council of the European Union (2002). *Council Framework Decision on the European arrest warrant and the surrender procedures between Member States*

<sup>167</sup> Arts. 3-4 Council of the European Union (2002). *Council Framework Decision on the European arrest warrant and the surrender procedures between Member States*.

<sup>168</sup> Bárd/van Ballegooij (2018). *Judicial Independence as Precondition for Mutual Trust*.

regular monitoring of judicial decisions issued in other Member States would be detrimental to the idea of mutual trust, potentially impairing intra-community co-operation in the long term.<sup>169</sup>

## II. Cases

Extradition based on the EAW is a heavily discussed topic in the field of European constitutional law. In addition to numerous constitutional or supreme courts, the CJEU has also issued some landmark judgments on the topic.<sup>170</sup> The disputes arising around the EAW are often related to the circumstances under which the executing state is obliged not to execute the EAW and demonstrate the sensibility of fundamental rights within the Area of Freedom, Security and Justice.<sup>171</sup>

Lately, a central question has been at which point the automatic assumption that the other Member State is acting in accordance with EU principles and values has to be abandoned. This is relevant for the current discussion since, in the end, it is connected to the question to which extent one Member State, in the course of executing an arrest warrant, should examine another Member State's compliance with fundamental principles of the EU.<sup>172</sup>

In connection with this question it is useful to examine two judgments issued by the CJEU, namely the aforementioned *Aranyosi and Căldăraru* and *LM* decisions.

### 1. *Aranyosi and Căldăraru*

In the judgment of *Aranyosi and Căldăraru*<sup>173</sup>, the CJEU acknowledged the

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<sup>169</sup> Frąckowiak-Adamska (2018). *Drawing Red Lines With No (Significant) Bite – Why an Individual Test Is Not Appropriate in the LM Case*.

<sup>170</sup> Judgment in *Melloni*, Case C- 399/11, ECR, EU:C:2013:107; Judgment in *Aranyosi and Căldăraru*, EU:C:2016:198.

<sup>171</sup> Wendel (2018). *Die Rechtsstaatlichkeitskrise vor Gericht: der Anfang vom Ende gegenseitigen Vertrauens*.

<sup>172</sup> Wendel (2018). *Die Rechtsstaatlichkeitskrise vor Gericht: der Anfang vom Ende gegenseitigen Vertrauens*.

<sup>173</sup> EU:C:2016:198.

possibility to postpone the execution of a warrant in case the executing judicial authority finds that, following the execution, the individual that is subject of the EAW would be exposed to a real risk of inhuman or degrading treatment as defined and prohibited under Art. 4 EU Charter.<sup>174</sup>

According to this ruling, the executing state would act in violation of fundamental rights when knowingly exposing an individual to such a situation. The protection and guarantee of fundamental rights is thus the responsibility of the executing state.<sup>175</sup>

In the same judgment, the CJEU, however, put a limitation on the possibilities to postpone the execution of EAWs by introducing a two-stage test that has to be conducted by the executing state. The first step of the so-called *Aranyosi* test is for the executing judicial authority to find out if there is a real risk of a flagrant denial of justice in the issuing Member State, resulting from deficiencies in its justice system. In the second step, it has to be examined whether the individual that is subject to the arrest warrant would be exposed to such a risk and thus have their rights violated in case of an extradition.

## 2. *Celmer (LM)*

When the High Court of Ireland referred questions in connection with the *LM* case to the CJEU for a preliminary ruling, the CJEU was given the chance to elaborate on a question it had not answered up to that point.

The Irish Court asked, *inter alia*, whether the suspension of mutual trust can be triggered by rule of law violations. In this context, it is important to note that the Irish High Court did not find a real risk of a violation of the rights granted to the individual by Art. 4 EU Charter. Its focus rather lies on the fact that the systemic impediment of the rule of law obliterated the basic conditions for a fair trial in Poland. This approach differs from what had to be assessed in *Aranyosi* insofar as,

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<sup>174</sup> Judgment in *Aranyosi and Căldăraru*, EU:C:2016:198, para 98.

<sup>175</sup> Wendel (2018). *Die Rechtsstaatlichkeitskrise vor Gericht: der Anfang vom Ende gegenseitigen Vertrauens*.

instead of concerning an absolute right (Art 4 EU Charter), it concerned a derogable right (Art. 47 EU Charter) in the *LM* case.

Since the possibility to exercise one's right to a fair trial requires a functioning and independent judicial system, that derogable right is, however, connected to the rule of law and is, in fact, at risk of being violated because of the current crisis the Polish judicial system is experiencing. Therefore, the Irish High Court suggested in its request that a preliminary ruling deviate from the two-step examination established in *Aranyosi* in a way that would relieve the individual concerned – *LM* – from the burden of having to prove that he would be personally affected by the deficiencies of the Polish judicial system. If the *Aranyosi* test was applied to the *LM* case, the outcome would be negative as it is nearly impossible for an individual to prove the malfunctioning of a whole judicial system. Applying the *Aranyosi* test here could be considered as equivalent to passing on the responsibility of finding whether the situation is in a breach of Union principles to another actor.

Another difference between *Aranyosi* and *LM* that has to be taken into account here is that, in the case of the former, the court in Germany could rely on and refer to several rulings issued by the European Court of Human Rights, stating that a detention in overpopulated jails in the respective countries would be in violation of human rights principles.<sup>176</sup> It was therefore clear that, by executing an arrest warrant issued by these countries, the adjudicating judge would bear indirect responsibility for a breach of human rights. In case of *LM*, the circumstances were different, however. Instead of rulings issued by the CJEU, the Irish judge could only rely upon materials issued by the EU Commission.

The judgment issued by the CJEU in the *LM* case, however, maintains the view it had adopted in *Aranyosi and Căldăraru* by ruling that it is the executing authority's task to determine whether there are substantial grounds to assume that the surrendered individual will run the risk of a breach of their fundamental right to a fair trial.<sup>177</sup> For this reason, this thesis argues that the court's ruling in the *LM* case was almost too careful, since it let pass the opportunity for passing a landmark

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<sup>176</sup> Art. 3 ECHR.

<sup>177</sup> Judgment in *LM*, EU:C:2018:586, para 80.

ruling by sticking to case law that had been made in a similar, albeit not identical, situation.

The decision of the CJEU, however, gives rise to the question in which way judicial authorities of one Member State should get involved to ensure compliance with the principles of democracy, rule of law, and fundamental rights in another Member State.<sup>178</sup> On the one hand, when a person's right to a fair trial are at stake, it is in the responsibility of the judicial authorities to stop the execution of arrest warrants, if necessary. On the other hand, however, it is the responsibility of democratically elected institutions to balance EU constitutional principles.<sup>179</sup>

### III. The Rule of Law and the Right to a Fair Trial

In his written opinion of 28 June 2018, Advocate General Tanchev stresses the differentiation between the rule of law and the right to a fair trial.<sup>180</sup> Derogating from *Aranyosi and Căldăraru*, the absolute right granted under Art. 4 EU Charter should, however, be added as a third “category” in order to complete the picture. Since in the current judicial crisis in Poland a risk of breach of Art. 4 EU Charter is not the subject of discussion, it will not be excessively elaborated on in this thesis. It is, however, not only absolute rights that are to be protected in this matter.

The connecting point between the rule of law and the right to a fair trial is judicial independence, which can be addressed from two perspectives: as an independent component of the rule of law, but also from a fundamental rights perspective.<sup>181</sup> It is correct to state that there is a difference between the protection of the independence of the judiciary on the one hand and the safeguarding of fundamental rights on the other hand. This, however, does not imply that the right to a fair trial is not closely related to the independence of the judiciary<sup>182</sup>, and while the former is important in individual cases, the latter remains indispensable, not only to ensure

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<sup>178</sup> Bárd/van Ballegooij (2018). *Judicial Independence as Precondition for Mutual Trust*.

<sup>179</sup> Bárd/van Ballegooij (2018). *Judicial Independence as Precondition for Mutual Trust*.

<sup>180</sup> Opinion of Advocate General Tanchev in *LM*, EU:C:2018:51, para. 38.

<sup>181</sup> Bárd /van Ballegooij (2018). *Judicial Independence as Precondition for Mutual Trust*.

<sup>182</sup> Biernat (2018). *How to Assess the Independence of Member State Courts?*

a functioning balance between public and private interests, but also to safeguard efficient legal protection. It seems that the solutions found will differ depending on the way in which the legal nature and the scope of the problem are defined.

The careful differentiation between the obligations to respect both the rule of law and the right to a fair trial reveals that there are two dimensions according to which potential violations of these two aspects have to be assessed. This assertion has been underpinned by the judgment in the *LM* case, where the CJEU ruled that the Irish High Court had to decide, according to the test established in *Aranyosi and Căldăraru*, whether the person in respect of whom the EAW had been issued would run the risk of a breach of their fundamental right to a fair trial. With this ruling, the CJEU confirms that the obligation to determine violations of fundamental rights of individuals lies with the executing judicial authorities.

The Irish High Court is, however, not in the position to generally suspend the EAW in connection with Poland. It can only do so on a case-by-case basis, each time assessing the risk of a breach of an individual's right to a fair trial, and is bound by the strict rules established by case law. This finding opens the second dimension, consisting in assessments that have to be carried out by an institution other than a Member State's judicial authority – namely the European Council.

While the Irish High Court is competent to examine the potentiality of a real risk of breach of a fundamental right, the European Council, under Art. 7(1) TEU, may find whether there is a real risk of breach of the common values of the EU. Hence, the objects of the respective assessments differ, with the effect that the findings or judgments of the two authorities will not have the same consequences.

Compared to the Irish High Court's assessment as carried out according to the *Aranyosi* test (for now ignoring the fact that, following the two-stage test, the Irish High Court will probably be unable to suspend the extradition in the case at stake), the Council's finding that the rule of law is malfunctioning in Poland and that there is not only a risk of a serious breach of the values referred to in Art. 2 TEU, but a real and persistent and serious breach of those values, will have more far-reaching effects. Such a finding, in essence, enables the Council to suspend some of the

rights of the Member State concerned<sup>183</sup>, including the EAW that may be generally suspended in order to protect, amongst others, the right of individuals to a fair trial, until mutual recognition can be restored.

While the Irish High Court has to decide on potential deficiencies concerning the guarantee of the right to a fair trial, this examination must thus be carried out on a case-by-case basis and must not be generalized. The Irish High Court is not competent to judge the rule of law of another Member State in general is concerned, since this lies within the responsibility of the Council.

In connection with the findings that have been made in this thesis so far, the next chapter aims at delivering a summary as to why the issues arising as a consequence of the Polish judicial reforms are a matter of concern not only for national, but also for European stakeholders, and why the letter should better get involved in solving them, instead of leaving these issues to be solved merely at the national level.

## **F. WHY IS THIS MATTER TO BE ADDRESSED AT EU LEVEL?**

### **I. The Principles**

The rule of law crisis in Poland is, by far, not merely national anymore. With the EU Commission becoming active and the Irish High Court referring to the CJEU for a preliminary ruling in the *LM* case, it has rather evolved into a conflict with the European Union, more precisely with EU institutions and other EU Member States.<sup>184</sup> This conflict is the result of the progressive de-Europeanization that has been taking place in Poland over the past few years, and shows a clear discord between several points on the political agenda of the Polish Government and those on the EU's agenda.

Poland, however, is a Member not only to a vast array of international and regional agreements and organizations but, most importantly, of the EU. Therefore, as has

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<sup>183</sup> Art. 7(3) TEU.

<sup>184</sup> Buras: *Polen in der Europäischen Union: Konflikte und falsche Ansätze*, p. 2.

already been discussed in this thesis, the country is obliged to respect the principles that have been enshrined in the EU Treaties. Far from being overly moralised, it is crucial to persistently refer to the EU's founding principles in the Polish context. Those are the values that the EU has been founded upon; hence they make up the core of European solidarity and define the Union as a whole.

Attention has to be paid to the fact that no matter which track the *PiS* government will choose for the further development of the state's political and judicial landscape, it will definitely have an impact on the EU that must not be ignored.

## II. International Impact of the Rule of Law Crisis

Since Poland is embedded in the EU, it is important to examine the precise (past and potential future) effects of the rule of law crisis on the Union and on other Member States. This concerns not only violations of EU law, but also and foremost the implications that a malfunctioning judicial system in one Member State will have for the rest of the Union. The process of de-Europeanizing Poland by putting national before Community interests has had a high price: tensions between Poland and other Member States are growing and sometimes even result in open conflicts.<sup>185</sup>

When analyzing the impact at the European level, the most important thing is first and foremost not how the EU institutions have been reacting or which sanctions might be applied according to EU law. It is rather the way in which EU citizens, legal experts, and ordinary courts perceive the Polish judiciary – whether they assume that it is independent and functioning or not.<sup>186</sup>

As can be derived from the incident of *LM*, with a national court of one Member State referring to the CJEU for a statement before executing an EAW issued by another Member State, the principle of mutual trust is not applied infinitely. Furthermore, even if reported on excessively in the media, this is not the only occasion on which the independence of Polish courts has been called into question.

<sup>185</sup> Buras: *Polen in der Europäischen Union: Konflikte und falsche Ansätze*, p. 2.

<sup>186</sup> Bachmann: *Eine Justizreform, die Brüchen verbrennt*, p. 4.

When the German TV channel *Das Zweite Deutsche Fernsehen (ZDF)* challenged a judgement issued against it by the Polish appellate court<sup>187</sup>, its arguments were based on a lack of independence of Polish courts.<sup>188</sup> Based on this argumentation, the judgment was scrutinized by a German civil court, which is very uncommon given the fact that judgments issued by civil courts of Member States are usually recognized within the EU. Currently, in cases connected to Poland, it is at the discretion of every penal and civil court in the EU whether or not a decision issued by a Polish court shall be recognized and put into action. Therefore, every lawyer fearing a disadvantage for their client in case a decision of a Polish court is put through could argue that the rule of law in Poland was dysfunctional, making every penal or civil process a process on the condition of the Polish judiciary.<sup>189</sup> In case a large amount of those judgments come to a negative conclusion when assessing the protection of the rights of individuals under the rule of law in Poland, judicial co-operation between Poland and other Member States, not to mention states outside the EU, could come to a standstill, leading to the end of mutual recognition and trust in relation to Poland.

The crisis will not only have an impact within the field of Justice and Home Affairs. The ongoing conflict and the underlying dismantling of the rule of law will also reduce the credibility of Poland as a political partner and as a place for investments and doing business, leading to a gradual exclusion of Poland from the common market, thus, also putting the functioning of the Single Market at stake.<sup>190</sup> After WWII, the creation of a Single Market resulted in the development of European integration and long-term political stability – both of which are now becoming endangered by the Polish Government's assaults on the judiciary.

It is thus clear that the effects of the erosion of judicial independence by the executive and legislative branches of the government of one of the EU's Member

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<sup>187</sup> Judgment *I ACa 1080/16* of 22 December 2016 of the Appellate Court in Cracow on the Protection of Personal Rights.

<sup>188</sup> Bachmann: *Eine Justizreform, die Brüchen verbrennt*, p. 4; Radio Poland (2017). *ZDF will sich nicht für „polnische Konzentrationslager“ entschuldigen*.

<sup>189</sup> Bachmann: *Eine Justizreform, die Brüchen verbrennt*, p. 4.

<sup>190</sup> Buras: *Polen in der Europäischen Union: Konflikte und falsche Ansätze*, p. 4; European Commission, (2017). *Fact Sheet. Commission Action on the Rule of Law in Poland: Questions & Answers*, p. 3.

States will not be confined to that Member State. In a community like the EU which is founded on mutual trust, openness, and recognition all the other members will be affected in the same way.<sup>191</sup> Neglecting the rule of law, in the way Poland is doing it at the moment, shakes the very foundations of the European legal community. It must not be ignored outside Poland, but has to be countered before others are inspired by the fatal undermining of the law and common values.<sup>192</sup>

### III. (Inter)national Reactions to the Rule of Law Crisis

This opinion is shared in many analyses and warnings that have been issued since the beginning of the judicial reforms with regard to the increasingly critical situation, many of them also making recommendations to the government of Poland. The fact that these analyses were written by individuals and institutions not only from Poland but from all over Europe demonstrates the alarming extent to which this topic has become an issue of international concern. The platforms used for this discourse range from civil platforms to EU institutions.

As of November 2015, several dozen essays have been published on *Verfassungsblog.de*, a journalistic and academic blog that is used by renowned scholars, lawyers, and professors to debate current events and developments in the field of constitutional law and politics in Europe. All essays published on *Verfassungsblog.de* on the topic of the constitutional reforms are highly critical of these reforms, issuing warnings as to the consequences of a politicized judiciary and discussing the possibilities of the EU to intervene.

Another institution that has been serving as a platform for the assessment of the situation in Poland is the *Bundeszentrale für politische Bildung (bpb)*, which runs a series called *Länder-Analysen* (“country analyses”). Different essays talking about the decline of judicial independence and the take-over of the executive have been published there.

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<sup>191</sup> Wendel (2018). *Die Rechtsstaatlichkeitskrise vor Gericht: der Anfang vom Ende gegenseitigen Vertrauens*.

<sup>192</sup> Stefan Batory Foundation: *Where the law ends. The collapse of the rule of law in Poland - and what to do*, p. 2.

Numerous non-governmental organizations (NGOs) have released reports on the Polish Government's actions, amongst them the *Stefan Batory Foundation*, which was originally founded in the 1980s to assist in preparing the Polish society for the transition to an open democracy<sup>193</sup>; the *International Commission of Jurists (ICJ)*, a group composed of 60 jurists, including academics, attorneys, and senior judges who are dedicated to increasing the respect for international human rights standards through law<sup>194</sup>; or the *Helsinki Foundation for Human Rights (HFHR)*, a long-time actor in the field of human rights protection in Poland.<sup>195</sup> *Amnesty International*, also placing its focus on the human rights perspective of the issue, has made a submission to the Human Rights Committee of the UN in which it recommended several measures to be taken by the Polish authorities in order to restore judicial independence.<sup>196</sup> Next to the *ICJ*, the Polish Association of Judges *IUSTITIA* and *The Council of Bars and Law Societies of Europe (CCBE)*, an association of bar associations of European countries, have also spoken up, voicing their worries regarding the impediment of judicial independence.<sup>197</sup>

Moreover, officials of the United Nations and the European Union have also participated in this debate. After his mission to Poland, the United Nations Special Rapporteur on the independence of judges and lawyers issued a report that culminates in several recommendations aiming at restoring the independence and legitimacy of the Tribunal and bringing the Laws on the Common Courts Organization, on the Supreme Court, and on the National Council of the Judiciary back in line with the Constitution.<sup>198</sup> In the recommendations issued, the Special Rapporteur *inter alia* refers to the statements made by the *OSCE*, the *Office for Democratic Institutions and Human Rights* of which had issued an opinion on,

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<sup>193</sup> Stefan Batory Foundation: *Where the law ends. The collapse of the rule of law in Poland - and what to do.*

<sup>194</sup> International Commission for Jurists (2018). *Forced retirement of 27 Supreme Court Justices*

<sup>195</sup> Helsinki Foundation for Human Rights (2018). *Statement on the draft Acts on the Supreme Court, the Constitutional Tribunal and the System of Ordinary Courts adopted by the Parliament.*

<sup>196</sup> Amnesty International (2016). *Submission to the United Nations Human Rights Committee 118th Session.*

<sup>197</sup> Mokry (2018). *Statement from the President of the CCBE regarding the situation in Poland; IUSTITIA (2018). Statement of the Association of Polish Judges "Iustitia" of 14 July 2018.*

<sup>198</sup> United Nations General Assembly (2018). *Report of the Special Rapporteur on the independence of judges and lawyers on his mission to Poland*, paras. 76-85.

amongst others, the amendments to the act on the national council of the judiciary, also concluding in several recommendations addressed to the Polish Government.

At the time when numerous discussions about the controversies surrounding the Tribunal started, the Venice Commission adopted two opinions regarding the amendments of the law of the Tribunal in which it emphasized *inter alia* their unconstitutionality.<sup>199</sup> Later on during the judicial reforms, another opinion was adopted by the Venice Commission, this time addressing the draft laws on the NCJ, the Supreme Court, and the Organization of Ordinary Courts.<sup>200</sup> In this opinion and in its opinion on the Law on the Public Prosecutor's Office<sup>201</sup>, it was stated that the legislative and the executive branch of the government had been enabled to severely and extensively interfere with the administration of justice, resulting in a serious threat to judicial independence which is a key element of the rule of law. The Venice Commission especially highlights the damage done by the cumulative effects of all amendments that have been made to the laws on the Polish judicial system, giving clear recommendations to the Polish Government on how to address these issues.

Several statements have also been made on the part of the anti-corruption body of the Council of Europe, the so-called Group of States against Corruption (GRECO), that, following the assessment of legislative and other measures taken by the Polish Government in the context of the judicial reforms, decided to apply Rule 34 of its Rules of Procedure at the end of 2017. Rule 34 is an ad hoc procedure available to the GRECO under exceptional circumstances. Thus, when an institutional reform or a legislative initiative threatens to result in a violation of the anti-corruption standards of the Council of Europe, Rule 34 can be applied. After additional information had been provided by the competent Polish authorities in January

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<sup>199</sup> Venice Commission (2016). *Opinion 833/2015 on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland*;

<sup>200</sup> Venice Commission (2017). *Opinion 904/2017 on the Draft Act amending the Act on the National Council of the Judiciary, on the Draft Act amending the Act on the Supreme Court, Proposed by the President of Poland, and on the Act on the Organization of Ordinary Courts*.

<sup>201</sup> Venice Commission (2017). *Opinion 892/2017 on the Act on the Prosecutor's Office as amended*.

2018, GRECO adopted an ad hoc report on amendments to the Law on the Supreme Court and the Law on the NCJ based on this information.<sup>202</sup>

GRECO concluded that the basic principles of the judicial system had been badly impaired.<sup>203</sup> As a consequence, a GRECO evaluation team was sent to Poland in order to carry out an on-site inspection. The findings made there were published in an Addendum to the Evaluation Report that had been issued earlier as a matter of routine.

In the Addendum, GRECO addresses several recommendations to the Polish Government, addressing the election procedure to the NCJ<sup>204</sup>, the establishment of two new chambers within the Supreme Court as well as the involvement of the executive in the Supreme Court's internal organization<sup>205</sup>, the new retirement age insofar as it shall not be an obligatory measure to be applied to currently sitting judges<sup>206</sup>, disciplinary procedures applicable to Supreme Court judges and ordinary court judges<sup>207</sup>, and the procedures for appointing and dismissing presidents as well as vice-presidents of ordinary courts.<sup>208</sup> Similar to the Venice Commission, GRECO remains very straight-forward in its concluding recommendations.

If such bodies issue statements, this does not automatically mean that it is a matter of the EU, but they refer to arguments that show that it is a matter of international interest. Additionally, even the Polish Supreme Court, when it was threatened by another amendment to the law on the Supreme Court, has, in an attempt to defend itself against the erosion of the judiciary by the executive and legislative branches, referred to the CJEU questions regarding the compatibility of some of the provisions adopted with the new law with EU law. In the five questions referred to the CJEU the Supreme Court focuses mainly on the forced retirement of a great number of senior judges and other impediments to judicial independence,

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<sup>202</sup> GRECO (2018). *Ad hoc Report on Poland (Rule 34)*.

<sup>203</sup> GRECO (2018). *Ad hoc Report on Poland (Rule 34)*, para. 57.

<sup>204</sup> GRECO (2018). *Addendum to the Fourth Round Evaluation Report on Poland (Rule 34)*, para. 29.

<sup>205</sup> GRECO (2018). *Addendum to the Fourth Round Evaluation Report on Poland (Rule 34)*, para. 33.

<sup>206</sup> GRECO (2018). *Addendum to the Fourth Round Evaluation Report on Poland (Rule 34)*, para. 36.

<sup>207</sup> GRECO (2018). *Addendum to the Fourth Round Evaluation Report on Poland (Rule 34)*, paras. 39 and 50.

<sup>208</sup> GRECO (2018). *Addendum to the Fourth Round Evaluation Report on Poland (Rule 34)*, para. 45.

requesting the CJEU to give its opinion on the irremovability of judges as an element of judicial independence.

Several politicians with a connection to *PiS*, as well as other party loyalists, have indicated that the referral made by the Supreme Court is not admissible, since the questions were irrelevant for resolving the dispute of the main proceedings.<sup>209</sup>

Indeed, the referral arises out of a case that, regarding its factual basis, is not related to judicial independence, since the main proceedings concern the coordination of the social security systems of Slovakia and Poland. Two members of the panel adjudicating in these proceedings are judges aged 65 years or above. According to the newly amended Act on the Supreme Court, they are thus assumed to be retired. The constitutionality of this law is, however, widely called into question. Therefore, the Supreme Court decided that in order to be able to proceed with the case, the legal status of the judges had to be clarified and thus referred five questions to the CJEU. In essence, the Supreme Court asked the CJEU to rule on the compatibility of the forced retirement of a majority of senior judges with EU law and other infringements.

As mentioned above, several individuals have criticized the referral as inadmissible. There are, however, arguments against this view. First, the CJEU has to follow the principle of presumed relevance that has been referred to in numerous judgments. When the questions submitted to the CJEU are to be answered by interpreting EU law, the Court is – in principle – obliged to issue a judgment.

This obligation may be suspended only in exceptional cases, when it is obvious that the questions referred to the CJEU are of no relevance to the actual case or are largely hypothetical.<sup>210</sup> Second, the CJEU has, in its case law, increasingly tended to interpret the relevance of preliminary questions related to the main proceedings

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<sup>209</sup> Biernat/Kawczyńska (2018). *Why the Polish Supreme Court's Reference on Judicial Independence to the CJEU is Admissible after all.*

<sup>210</sup> See, for example, Judgment in *Melloni*, Case C- 399/11, ECR, EU:C:2013:107.

in a more liberal way since, otherwise, too many procedural questions would be rendered inadmissible<sup>211</sup>.

The CJEU also reserves the right to explain to national courts provisions of EU law relevant for solving uncertainties regarding jurisdiction.<sup>212</sup> The scope of Art. 267 TFEU is therefore extended in order to also cover situations in which a national court considers that a preliminary ruling by the CJEU is necessary in order to enable it to judge a case.<sup>213</sup> Lastly, the independence of national courts has already been considered by the CJEU in previous cases, be it concerning the rules determining the composition of appellant bodies<sup>214</sup> or changes in salary pose an impediment to judicial independence of national judges.<sup>215</sup>

While the referral of the Polish Supreme Court does not show substantial relevance for the main proceedings as requested for in the traditional sense, the referral of the questions to the CJEU is still admissible. The link might deviate from typical situations of the past, but it shows a functional relationship. Since only independent courts are in the position to provide for effective legal protection and the correct application of EU law, it is legitimate to resort to a preliminary ruling by the CJEU, in particular under circumstances under which the independence of a national court is in doubt, which is even noticed by the court itself. It can therefore be argued that there are fair reasons for the referral of the Polish Supreme Court to be considered admissible.

Finally, it must be noted that in view of the many reform steps the government has taken as regards the Polish judicial system, there have been only a few reactions by the latter to defend itself against the constitutional erosion that it has fallen victim to. While Polish citizens have been protesting in the streets, trying to put an end to the violations of the Constitution and the impediment of fundamental rights, there

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<sup>211</sup> Biernat/Kawczyńska (2018). *Why the Polish Supreme Court's Reference on Judicial Independence to the CJEU is Admissible after all*; Judgment in *Weryński*, Case C-283/09, ECR, EU:C:2011:85, para. 41.

<sup>212</sup> Judgment in *Bozzetti*, Case C-179/84, ECR, EU:C:1985:306, para. 18; Judgment in *SEIM*, Case C-446/93, ECR, EU:C:1996:10, para. 33; Judgment in *IN.CO.GE.'90 Srl*, Joined Cases C-10/97 to C-22/97, ECR, EU:C:1998:498, para. 15.

<sup>213</sup> Judgment in *Salonia*, Case C-126/80, ECR, EU:C:1981:136, para. 7.

<sup>214</sup> Judgment in *Wilson*, EU:C:2006:587.

<sup>215</sup> Judgment in *Associação Sindical dos Juizes Portugueses*, EU:C:2018:117.

have neither been applications to the European Court of Human Rights, nor have there been direct referrals to the CJEU.

Recently, three Polish judges have spoken out publicly against the judicial reforms and consequently were subject to proceedings initiated against them by disciplinary bodies of the judiciary.<sup>216</sup> Hence, it seems that the legal system in Poland has reached a point where it is no longer capable of defending itself, resulting in the need for another actor to become active to ensure its protection. In a community of values, this clearly is a task to be fulfilled at EU level.

## **G. EU TOOLS TO ADDRESS A NATIONAL CRISIS**

In July 2017, *First Vice-President of the Commission Frans Timmermans*, who also holds the position of the Commissioner for Better Regulation, Interinstitutional Relations, the Rule of Law and the Charter of Fundamental Rights, gave a speech on the “systemic threat to the rule of law in Poland”, openly stating that the adoption of the new laws would lead to a serious erosion of the independence of the Polish judiciary, putting it under the full political control of the executive.<sup>217</sup> In doing so, he got into line with the many other international actors voicing their concerns regarding the situation in Poland. The impediments to the judicial system, however, cannot be resolved by mere sympathy. In order to be able to act, the EU needs a legal basis justified by the EU Treaties, secondary and case law.

### **I. Article 258 TFEU**

Conflicts between the Member States and “Brussels” are very common in European integration. Often, they arise when the numerous acts adopted by the EU institutions have to be transferred into the national legal systems. A failure to comply with this requirement can result in legal consequences, which may

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<sup>216</sup> Strzelecki (2018). *Poland Starts to Discipline Judges Criticizing Court Reforms*.

<sup>217</sup> Speech of First Vice-President Frans Timmermans “*Opening remarks: College readout on grave concerns about the clear risks for independence of the judiciary in Poland*”.

culminate in infringement procedures initiated by the EU Commission. In case the EU Commission is not successful in enforcing the application of EU law in the Member States' legal systems, it can refer the matter to the CJEU which may, ultimately, impose a fine on the Member State in question.<sup>218</sup>

It is laid down in the TFEU that an infringement procedure cannot be initiated immediately. First, a dialog has to take place between the EU Commission and the Member State concerned, giving the latter the possibility to react to a reasoned opinion the former has issued.<sup>219</sup> Only in case the respective State fails to comply with the EU Commission's opinion, the matter can be brought before the CJEU.<sup>220</sup>

The Member State concerned has to become active after a ruling has been issued, since the CJEU is not in a position to invalidate national legal acts. It can only resort to a sanctions regime under Art. 260 TFEU which provides for financial sanctions against non-complying Member States. If the State concerned still fails to comply, Art. 280 TFEU in conjunction with Art. 299 TFEU provides that judgments issued by the CJEU that "impose a pecuniary obligation on persons other than States, shall be enforceable".<sup>221</sup> The enforceability of judgments against Member States is, however, controversially discussed since, in the absence of willingness on the part of the State concerned, there is no way to directly enforce judgments, there are only indirect means.

There have been cases in which infringement procedures based on Art. 258 TFEU initiated by the EU Commission constituted an important step in dissolving rule of law concerns.<sup>222</sup> The basis for judicial review by the CJEU as part of these procedures has to be understood in a rather broad sense, thus comprising any failure to fulfil an obligation under EU law, also including secondary sources thereof. Notably, the EU Commission is only in the position to launch an infringement procedure under Art. 258 TFEU, if the national concerns also

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<sup>218</sup> Arts. 258 and 260 TFEU.

<sup>219</sup> Art. 258(1) TFEU.

<sup>220</sup> Art. 258(2) TFEU.

<sup>221</sup> Art. 299(1) TFEU.

<sup>222</sup> Judgment in *Commission v Hungary*, Case C- 286/12, ECR, EU:C:2012:687; Judgment in *Commission v Germany*, Case C-518/07, ECR, EU:C:2010:125; Judgment in *Commission v Austria*, Case C-614/10, ECR, EU:C:2012:631.

constitute a breach of EU law.<sup>223</sup> Hence, even with the EU Commission being determined to ensure the protection of fundamental rights, in this case especially concerning Art. 47 EU Charter, providing an effective remedy before an independent tribunal to everyone whose rights guaranteed by EU law have been violated, it can only proceed against a Member State if the implementation and protection of Union law are at stake.<sup>224</sup>

Therefore, according to existing case law of the CJEU<sup>225</sup>, it would be necessary, albeit quite difficult at the same time, to specify the exact element of EU law that provides a legitimate basis for the CJEU to pronounce a judgment. Contrary to other matters, where there is a direct connection to a specific secondary legal act, the EU Commission can, in the case of the Polish judicial reforms, only argue based on the role of national courts in the legal system of the EU.

Despite the high thresholds, the EU Commission is very actively using this procedure. In 2016, 986 new infringement proceedings against EU Member States were launched by the EU Commission. In 2017, the count stood at 716, Germany being the country having the most infringement procedures addressed at.<sup>226</sup> Even though the same infringement procedure is used for the failure of complying with all kinds of EU law, the political weight or relevance of each conflict for the application of EU law may, however, vary from case to case.<sup>227</sup>

## II. Article 7 TEU

In certain situations, a systemic threat to the rule of law can be considered as falling outside the scope of EU law and is thus not to be handled as a breach of

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<sup>223</sup> European Commission, *Communication from the Commission to the European Parliament and the Council. A new EU Framework to strengthen the Rule of Law*. COM(2014) 158 final, p. 5.

<sup>224</sup> Art. 51 EU Charter; European Commission, *Communication from the Commission to the European Parliament and the Council. A new EU Framework to strengthen the Rule of Law*. COM(2014) 158 final, p. 5.

<sup>225</sup> See for example Judgment in *Kreshnik Ymeraga and others*, Case C-87/12, ECR, EU:C:2013:291; Judgment in *Pringle*, Case C-370/12, ECR, EU:C:2012:756.

<sup>226</sup> Secretariat-General of the European Commission (2017). *2016 Commission report and factsheets on monitoring the application of EU law*; Secretariat-General of the European Commission (2018). *2017 Commission report and factsheets on monitoring the application of EU law*.

<sup>227</sup> Buras: *Polen in der Europäischen Union: Konflikte und falsche Ansätze*, p. 3.

obligations under the Treaties, even though it might pose an impediment to the values of the EU. If this is the case, jurisdiction shifts from the CJEU to the other EU institutions and, ultimately, the European Council.

Since there is no provision in EU law according to which a Member State that persistently violates the fundamental values of the EU could be expelled from the Union, the last available resort is a sort of quarantine under which the State concerned is deprived of their voting rights in European institutions. This sanction is laid down in Art. 7 TEU and can be divided into two mechanisms: an early-warning mechanism in case “a clear risk of a serious breach by a Member State of the values referred to in Article 2 [TEU]” can be determined<sup>228</sup> and a sanctioning mechanism that can be used against a Member State when it seriously and persistently breaches the values referred to above.<sup>229</sup>

Art. 7 TEU was introduced by the Treaty of Amsterdam (1999), when the EU was faced with the accession of a significant number of former communist countries. By including Art. 7 in the TEU, it was shown that the new Member States were not only expected to respect the values of the Union, but that there would also be consequences if they did not. The procedure is, of course, not only reserved for “new” Member States, however. The introduction of the Article also had the goal to enhance the Union’s options for intervention when its core values were violated by *any* of its Member States. Following the elections in Austria in 1999, at which a far-right party under the lead of *Jörg Haider* obtained a high percentage of the votes (26,9%), the provisions of Art. 7 TEU were amended by the Treaty of Nice (2001), allowing for a preventive approach, thus the possibility to intervene before core principles are actually breached.

The EU Commission, amongst other actors, is entitled to issue a reasoned proposal in order to trigger the preventive and sanctioning mechanisms.<sup>230</sup> Art. 7 TEU creates a possibility for the EU to intervene in areas where Member States usually act autonomously; these interventions are justified by the purpose of protecting of the rule of law – since a serious breach of the fundamental values of the EU is

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<sup>228</sup> Art. 7(1) TEU.

<sup>229</sup> Art. 7(2 and 3) TEU.

<sup>230</sup> Art. 7(1) TEU.

tantamount to undermining the very foundation of it, at the same time jeopardizing mutual trust between Member States.<sup>231</sup>

Nevertheless, the thresholds for the mechanisms to be triggered and especially for sanctions to be imposed under Art. 7(3) TEU are very high. This is due to Art. 7(2) TEU, where it is laid down that a serious and persistent breach of the values referred to in Art. 2 TEU committed by a Member State has to be unanimously determined by the European Council, a prerequisite underpinning the seriousness of this measure that is often referred to as the “nuclear option”.

For a long time, the triggering of Art. 7 TEU has been dismissed by some as being too radical and politically impracticable, while EU law scholars have insisted on the fact that this is nothing more than inaction, excused by political concern. In order to make it easier to address threats to the rule of law, the Union had to come up with another tool that would be less “radical” and thus easier to apply.

### III. The new EU Framework to strengthen the Rule of Law

In spring 2014, the EU Commission adopted a new Framework<sup>232</sup> that provides guidance for a dialog in order to address systemic threats to the rule of law within the European Union and in this way helps to prevent an escalation of such threats. The Framework can be resorted to under circumstances where it is likely that the integrity, stability, or proper functioning of the institutions and that of the safeguard mechanisms to secure the rule of law at a national level is systematically and adversely affected.<sup>233</sup>

This Framework was created in order to fill a gap, since the provisions set out therein provide the possibility of resolving situations in which there is a potential

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<sup>231</sup> European Commission, *Communication from the Commission to the European Parliament and the Council. A new EU Framework to strengthen the Rule of Law*. COM(2014) 158 final, p. 5; European Commission (2003). *Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union. Respect for and promotion of the values on which the Union is based*, p. 5.

<sup>232</sup> European Commission, *Communication from the Commission to the European Parliament and the Council. A new EU Framework to strengthen the Rule of Law*. COM(2014) 158 final.

<sup>233</sup> European Commission, *Communication from the Commission to the European Parliament and the Council. A new EU Framework to strengthen the Rule of Law*. COM(2014) 158 final, p. 6.

impediment to the rule of law in a Member State, not yet meeting the conditions that would justify the activation of the mechanisms according to Art. 7 TEU. It enables the EU Commission to act quicker and in a more efficient way – or at least this was the objective of the Framework. In fact, it consists of a three-step mechanism that has to be followed through before it is even possible to act under Art. 7 TEU. It is thus complementary to other existing mechanisms to protect the rule of law.<sup>234</sup>

The EU Commission has stressed explicitly that the Framework will not be triggered by individual breaches of fundamental rights as long as there are (national) judicial systems that can deal with it, but rather by a systemic threat to the rule of law in a State.<sup>235</sup> In a preliminary assessment, the EU Commission will examine relevant information material in order to determine whether there is an indication of such a systemic impediment. If the assessment finds that the rule of law is under threat, the EU Commission will initiate the first step of the Framework mechanism and a dialog with the Member State concerned by sending a “rule of law opinion” and giving the State the opportunity to explain the respective situation and to take measures to improve the situation.

If the Member State is not able to resolve the matter, the EU Commission will initiate the second stage by issuing a “rule of law recommendation” in which the reasons for the concerns shall be stated clearly, together with a recommendation addressed to the respective State to solve the matter until a fixed deadline.

During the third stage, the EU Commission will monitor the progress made by the respective Member State concerning the recommendation issued before. If the EU Commission believes that the measures taken based on the recommendation have not been satisfactory, it may resort to the mechanisms laid down in Art. 7 TEU.

Thus, following a lengthy process of assessment, recommendation and monitoring, the EU Commission can resort to Art. 7 TEU only in case the process provided for in the Rule of Law Framework fails to solve the problems in the Member State

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<sup>234</sup> European Commission, *Communication from the Commission to the European Parliament and the Council. A new EU Framework to strengthen the Rule of Law*. COM(2014) 158 final, p. 6.

<sup>235</sup> European Commission, *Communication from the Commission to the European Parliament and the Council. A new EU Framework to strengthen the Rule of Law*. COM(2014) 158 final, p. 7.

concerned. Even though the Framework was meant to enhance the EU's possibilities to protect the rule of law, recent developments have shown that the available mechanisms are not always working appropriately when it is necessary to respond quickly to impediments threatening the rule of law in a Member State.

## **H. WHICH PATH TO CHOOSE?**

As discussed earlier, the judicial reforms in Poland recently have been the subject of many discussions, and individuals as well as institutional actors, ranging from civil society to members of the Polish judiciary, have tried to oppose the Polish Government. At the national level, the objections of the Constitutional Tribunal had not been heard until it had been too late. The same holds true for the National Council of the Judiciary, where most of the objecting members were replaced. The Supreme Court has been fighting an ongoing struggle for more than two years. Following the early retirement of most of its judges, there will be a large number of unconstitutionally elected judges. Despite the strong domestic opposition, *PiS* has thus been able to render the Polish system of justice incapable of defending itself against the measures taken.

It is not only domestic opposition that has failed to prevent the Government from deepening the crisis. The Polish Government has also ignored international watchdogs and organizations that have asked for the respect of fundamental rights and the rule of law. This has raised the legitimate question whether there is any benefit of being part to treaties, conventions, and international court systems when the independence of judicial systems still cannot be protected with their help. Therefore, the available possibilities should be carefully pondered, examining their potential outcome and side effects.

### **I. The Court of Justice of the European Union**

As described earlier, the CJEU has been rather strict in its case law regarding the

possibilities of courts to refer to it a potential infringement of constitutional values. In recent judgments it seems to have adopted a different point of view towards this issue, however.

In its judgment *Associação Sindical*, the CJEU has made far reaching findings, potentially with precedent-setting character that could be of constitutional importance for the Union as well as its Member States.<sup>236</sup> The CJEU has underlined the important role of the national judiciary in the interpretation and application of EU law<sup>237</sup> and, basing its arguments on Art. 19(1) TEU, has created the possibility to rely upon the EU principle of effective judicial protection before national courts. It thus entrusted itself with the competence to assess the judicial independence of the national courts involved in the application of EU law, finding that the existence of the mere possibility that a court will apply EU law, is already sufficient for the CJEU to have such a competence under the EU Treaties.

On another note, in relation to the execution of arrest warrants, the CJEU established in its *LM* judgment the obligation for national courts to examine in detail whether the fundamental rights of an individual that is subject to such a warrant will be protected if the extradition was carried out if a reasoned proposal regarding the issuing Member State has been adopted by the EU Commission pursuant to Art. 7(1) TEU.<sup>238</sup> By virtue of this ruling, the CJEU has put pressure on the Member State that is in violation of the values of the EU with the help of national courts of other EU Member States.

However, even *post-Associação Sindical*, the CJEU may judge upon violations of the principle of judicial independence, but is not in the position to make evaluations on the rule of law in any Member State. This is a competence that has been exclusively reserved for the Council or the European Council, thus for the Member States themselves, according to the procedure laid down in Art. 7 TEU. This argument is backed by the principle of conferral, another fundamental principle of the EU laid down in Art. 5 TEU. According to the principle of

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<sup>236</sup> Taborowski (2018). *CJEU Opens the Door for the Commission to Reconsider Charges against Poland*.

<sup>237</sup> Judgment in *Associação Sindical dos Juizes Portugueses*, EU:C:2018:117, para. 33.

<sup>238</sup> Judgment in *LM*, EU:C:2018:586, paras. 68-69.

conferral, the Union's competences are limited to those that the Member States have conferred upon it, while those competences not conferred upon the EU remain with the Member States. Although the current issue relates to the judicial system and to the rule of law, the suspension of mutual trust as a consequence of violations of the latter is ultimately a political decision; and the Member States did not confer the competence to take this decision upon the CJEU when the Treaties were drafted. If the CJEU disregarded this limitation to its competences, it would bypass the procedures of Art. 7 TEU, so that its actions themselves would be in violation of the principle of the rule of law.

## II. Prospect of Success under Article 7 TEU

In connection with the findings regarding the jurisdiction of the CJEU and the principle of conferral, it has become apparent that only the Member States, acting as the Council or the European Council, may determine what was proposed by the EU Commission in its reasoned proposal – the “clear risk of a serious breach”, or the “existence of a serious and persistent breach” of the values set out in Art. 2 TEU.

Additionally, again with reference to the *LM* case, only the Member States are entitled to suspend the principle of mutual trust following the Council's finding that there is a serious and persistent breach. This, again, would imply the suspension of the EAW with regard to the Member State concerned.

### 1. Pre-Article 7

When the judicial reforms started in late 2015, the EU Commission was quick to act under the Rule of Law Framework, seeking to enter into a constructive dialog with the Polish Government. It extensively reverted to using the methods provided for in the Framework, emphasizing its concerns in one Rule of Law Opinion and

three Rule of Law Recommendations.<sup>239</sup> Before the first Rule of Law Recommendation was issued, many meetings were held between the EU Commission and the Polish authorities.

When the Polish Government failed to publish the judgments K 34/15 and K 35/15 of the Tribunal, the EU Commission addressed the issue on 23 December 2015, recommending the Government to work in close co-operation with the Venice Commission.<sup>240</sup> On 19 January 2016, the EU Commission expressed its concerns about the new media law to the Polish Government.<sup>241</sup> The European Parliament (hereinafter referred to as EU Parliament) urged the Government in a Resolution on the situation in Poland, issued on 13 April 2016, to publish and implement the Tribunal's judgments.<sup>242</sup> Since the Polish Government was unable to resolve the matters of concern, the EU Commission adopted a Rule of Law Opinion on 1 June 2016<sup>243</sup> and a Rule of Law Recommendation on 27 July 2016.<sup>244</sup> On 14 September 2016, the EU Parliament called upon the Polish Government to comply with the recommendations the EU Commission had issued.<sup>245</sup> The EU Commission issued the second Rule of Law Recommendation on 21 December 2016, after serious doubts arose regarding the procedure of appointing the new President of the Constitutional Tribunal.<sup>246</sup> On 13 July 2017, on the occasion of the adoption of the

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<sup>239</sup> European Commission (2017). *Commission Proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law*. COM(2017) 835 final, para. 8.

<sup>240</sup> European Commission (2017). *Commission Proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law*. COM(2017) 835 final, para. 12.

<sup>241</sup> European Commission (2017). *Commission Proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law*. COM(2017) 835 final, para. 16.

<sup>242</sup> European Commission (2017). *Commission Proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law*. COM(2017) 835 final, para. 20.

<sup>243</sup> European Commission (2017). *Commission Proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law*. COM(2017) 835 final, para. 23.

<sup>244</sup> European Commission (2017). *Commission Proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law*. COM(2017) 835 final, para. 26.

<sup>245</sup> European Commission (2017). *Commission Proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law*. COM(2017) 835 final, para. 31.

<sup>246</sup> European Commission (2017). *Commission Proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law*. COM(2017) 835 final, para. 40.

new laws governing the Supreme Court, the EU Commission again expressed its concerns in a letter to the Polish Government and, subsequently, since the Government did not act in a way that would have resolved the matters, issued its third Rule of Law Recommendation.<sup>247</sup>

Despite the actions taken within the Framework that is subject to the principle of sincere cooperation as laid down in Art. 4(3) TEU<sup>248</sup>, the Polish Government, however, failed to comply with the recommendations set out in no less than 25 letters it had received from the EU Commission.<sup>249</sup> The EU Commission subsequently found that the systemic threat to the rule of law in Poland had worsened and reached a serious state and that there was no possibility to solve it using the methods available under the Rule of Law Framework. As a consequence, it submitted a reasoned proposal to the Council on 20 December 2017, asking for a determination of a clear risk of a serious breach of the rule of law by the Republic of Poland and thus initiated the procedure provided for in Art. 7(1) TEU.

## 2. *Effects and Implications*

Subsequent to the Reasoned Proposal issued by the EU Commission, a General Affairs Council hearing on the rule of law in Poland was held on 26 June 2018. In this hearing, no indication could be found that the Polish authorities were planning to adopt measures in order to alleviate the situation. Therefore, on 27 June 2018, *First Vice-President Frans Timmermans* was authorized to launch the infringement procedure under Art. 7(1) TEU. On 2 July 2018, the EU Commission released a Letter of Formal Notice, again in regard to its legal concerns.

Since the invocation of Art. 7 TEU is without precedence, there is no way to precisely predict the potential implications there could be in political, legal, or even

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<sup>247</sup> European Commission (2017). *Commission Proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law*. COM(2017) 835 final, para. 50.

<sup>248</sup> European Commission, *Communication from the Commission to the European Parliament and the Council. A new EU Framework to strengthen the Rule of Law*. COM(2014) 158 final, p. 8.

<sup>249</sup> European Commission (2017). *Commission Proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law*. COM(2017) 835 final, para. 8.

economic spheres. A logical consequence would, *inter alia*, consist in the negative impact on political and diplomatic relations, though.

Triggering the first subparagraph of Art. 7 TEU can be interpreted as a warning sign of the EU in order to persuade Poland to finally comply with its recommendations. Art. 7(1) TEU is, however, *lex imperfecta*, meaning that it does not automatically provide for legal consequences or sanctions after a real risk of a serious breach of the Union's values has been found. The sanctioning process would have to be invoked under the second and third subparagraphs of Art. 7 TEU, a successful activation of which, even the mere attempt of activating them, could potentially shatter the political relations between Poland and other Member States or the EU institutions.

It has become apparent that, contrary to the situation when actions were taken under the Rule of Law Framework, the European actors based in Brussels are hesitant to make quick moves in this regard, since any measure taken against Poland could be used as a basis for propaganda by *PiS*, in the worst case culminating in a debacle similar to what the EU has been experiencing in connection with Brexit.

All in all, the process provided for in Art. 7 TEU is not only cumbersome in a way that is typical for mechanisms established by the EU, but it is also likely to damage existing political relations between Poland, other Member States, and the EU institutions.

Moreover, when assessing the potential effects that triggering Art. 7 TEU may have, other current political developments in the EU have to be taken into account. More specifically, attention has to be given to other countries that might experience similar problems at the moment.

This consideration does not come as a surprise given the situation Hungary has been in for almost a decade now. Since 2010, the government of *Viktor Orbán*, the Hungarian Prime Minister, has eagerly worked towards the deterioration of

independent media, curtailing the scope of action of civil society and non-governmental organizations and, at the same time, taking control of the judiciary.<sup>250</sup>

Ignoring protests of the opposition, *Prime Minister Orbán* has, *inter alia*, pushed through a new constitution and amended the electoral system in a manner that makes it easier for him to maintain his political power. The EU Commission has tried to prevent him from consolidating his power further, but agreed to compromises that were not suitable to stop this development in the early years of his term of office.

The chances to reach a satisfying outcome under Art. 7 TEU are very low, since the existence of a serious and persistent breach of fundamental values has to be determined unanimously<sup>251</sup>, and Hungary has already pledged to veto any try to remove Poland's voting rights in the EU, which is the ultimate measure that can be taken. The actions taken under Art. 7 TEU would therefore be very likely to fail in the second stage.

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<sup>250</sup> Bloomberg Opinion Editorial Board (2018). *The Right Way to Handle Hungary's Illiberalism*.

<sup>251</sup> Art. 7(2) TEU.

## I. CONCLUSION

### I. Final Remarks

In connection with the findings regarding the potential imposition of sanctions on Poland under Art. 7(3) TEU, it should be added that, on 12 September 2018 the EU Parliament agreed to open the door for Art. 7 procedures also against Hungary.<sup>252</sup> This might change the overall situation for the benefit of the EU, since the Member State that has promised solidarity to Poland in the proceedings concerning its rule of law crisis is now itself in the spotlight for the same reason.

If the EU was eager to help restore the rule of law in both Member States, it could now find a way to make use of the fact that a clear risk of a serious breach of the Union's core principles has been established regarding both countries, Poland and Hungary. It could be argued, for instance, that a Member State that is suffering from a damaged rule of law system itself is not capable of judging upon the situation of the rule of law in another Member State. In this way, Poland and Hungary could both be excluded from the voting procedures under Art. 7(2) TEU that require unanimity, making the threat of political sanctions much more realistic.

Actually isolating a government that still has been democratically elected, will, however, probably do no good for the overall support of the citizens of the affected countries for the EU. But this does not render the EU powerless, as the process before punitive measures under Art. 7(3) TEU are imposed could turn out to have a higher potential of success than the ultimate decision to impose a sanction. Therefore, while the EU should not yet aim to single out Poland by depriving it of its voting rights, it should use Art. 7 TEU as a tool to put pressure on the Polish Government. Given recent developments, the EU is now equipped with the possibility to make use of the ongoing proceedings under Art. 7 TEU as a means to persuade Poland of acting in coherence with rulings of the CJEU. In this way,

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<sup>252</sup> Cuddy (2018). *European Parliament votes to trigger Article 7 sanctions procedure against Hungary*.

coordinated measures could prove most efficient with only a minimum negative impact on political relations within the EU.

## II. Summary and Outlook

In the course of a few months, the Polish Government has rendered the judicial system of its country incapable of working in accordance with the provisions laid down in the Polish Constitution and EU law. The distortion of the composition of the Constitutional Tribunal and the failure to publish some of its judgments were part of a process of gradually impeding the Tribunal's work, up to a point at which judgments issued by this body could not be seen as lawful anymore; the country is thus lacking its "constitutional guardian". By altering the laws on the Public Prosecutor's Office, the National Council of the Judiciary, the Supreme Court, and many more, the Government has further deteriorated the independence of the judicial system.

Judicial independence, based on the capability of courts to judge cases without being subject to any hierarchical pressure, is not only important for the protection of fundamental freedoms and human rights, but it is also a necessary tool for the implementation of the rule of law. Fundamental rights and the rule of law are the core values that the EU is built upon. In making the Polish judicial system subject to the aforementioned changes the Polish Government has severely violated the fundamental principles of European integration and co-operation, since the separation of powers is no longer guaranteed, nor is the independence of the judiciary.

Problems have occurred in connection with the execution of the European Arrest Warrant, since this extradition system is based on a high level of confidence, and a country governed in violation of the rule of law has a high potential of being excluded from the principle of mutual recognition and trust. The possibility of suspending an arrest warrant shows the degree of uncertainty regarding international competences to address such a national crisis. It demonstrates that, even if the protection of the rule of law is interrelated with the protection of fundamental rights, violations thereof have to be addressed in different ways.

Either way, there are several indicators that it is best to solve the Polish constitutional crisis at EU level, most importantly the fact that the Polish national judicial system has been completely eroded. Furthermore, it is not only national values that are at stake, but the core values of the EU. The spill-over effects of a rule of law crisis in one Member State could moreover easily damage the rest of the Union.

Therefore, it is important to examine how the EU can act. Next to the possibility to solve the matters in a diplomatic way by engaging in a dialog with the Member State that is in breach of the EU's principles, there are two formal paths provided for in the EU Treaties. In the legal sense, a termination of the violations can be enforced within the scope of 258 TFEU via the CJEU. In the political sense there is, eventually, the possibility of threatening to suspend or actually suspending the country's voting rights under Art. 7 TEU – a decision that has to be taken unanimously by the Heads of States and Governments of the EU.

In conclusion, this thesis asserts that the highest possibility of success lies in a combination of both the legal and the political path, as it is hard to impose rulings of the CJEU against the will of a government. Furthermore, merely isolating a country by virtue of Art. 7 TEU could have undesired consequences, be it at the diplomatic level of international relations, or within the country where the government could further polarize the citizens' opinions by distorting the facts and blaming the EU. It is, however, necessary for the EU institutions as well as for the Member States to stop their hesitant behaviour and make use of the possibilities granted to them by the EU Treaties. The manner in which the EU is approaching and in which it will hopefully solve current problems regarding the respect for the rule of law in Poland and, now officially, in Hungary, will show whether Europeans are actually ready to live together in a community of values and mutual trust.

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