



## Poland

### Rule of Law Overview

**Aleksandra Kustra-Rogatka, Nicolaus Copernicus University**  
**re:constitution fellow 2019/2020**

*This report on the rule of law in Poland, written by an expert in cooperation with Democracy Reporting International, is the first in a series that will cover all 27 EU member states.*

#### Summary

Since 2015, a rule of law crisis has been intensifying in Poland, with the government essentially seeking to subjugate the judiciary. After first capturing the Constitutional Tribunal, the ruling coalition then sought to assert control over the National Council of the Judiciary, the common and administrative courts and the Supreme Court. This has been attempted by introducing statutory laws that contradict a whole range of constitutional and European standards. The covid-19 pandemic has also had an impact on the rule of law, specifically in relation to unconstitutional decisions taken regarding the presidential election (originally planned for 10 May) and the political instrumentalisation of the electoral law.

At the domestic level the Polish Ombudsman, the vast majority of Polish constitutionalists and NGOs have severely criticised these reforms. At the international level, the number of cases at the Court of Justice of the European Union (CJEU) regarding judiciary reforms in Poland has been growing, including an infringement procedure that was launched by the European Commission. Furthermore, a procedure based on Article 7 of the Treaty on European Union (TEU) was initiated against Poland in December 2017 and is currently in the preliminary stage of preventive measures. Poland has also been placed under the monitoring procedure of the Council of Europe, which involves regular visits by two rapporteurs of the Parliamentary Assembly of the Council of Europe (PACE), ongoing dialogue with the na-

tional authorities, and periodic rule of law assessment. Meanwhile, Polish society is deeply divided politically; while the attack on the judiciary has led to mass protests, the government still enjoys high public support.

#### Poland's legal and political landscape

The political system of Poland is currently shaped by the 1997 Constitution, which replaced the Small Constitution of 1992 and partially the amended version of the socialist Constitution of 1952. Legislative power is vested in the two chambers of parliament: the Sejm (lower house) and the Senate (upper house), with the lower house having the stronger position. Parliamentary elections are held every four years. The executive branch is comprised of the government (the Council of Ministers) and the president, while the constitution provides that the government conducts internal and foreign state policy.

The way the competences are divided between the Council of Ministers and the President means that the Polish political system lies somewhere between a chancellor system and a semi-presidential one. The Council of Ministers, typically chosen from the majority party or coalition, is led by the prime minister. The president, as the head of state, is to act as a kind of political arbiter and guardian of the constitution, who may, inter alia, veto legislation (in which case the Sejm must outvote the presidential veto by a qualified majority of 3/5 votes) and initiate a constitutional review. However, apart from the 30 prerogatives enumerated in the constitution, all other official presidential acts require a countersignature from the prime minister. The president is elected for a five-year term with the possibility of one reelection.

The judiciary consists of courts (common, administrative, military and Supreme Court) and tribunals (the Constitutional Tribunal and State Tribunal). They are appointed by the president at the request of the National Council of the Judiciary – a body which, according to the constitution, is intended to safeguard the independence of the courts. Judges are appointed for an indefinite period of time, and their irremovability is guaranteed by the constitution.

Poland has a centralised model of judicial review. The Constitutional Tribunal has exclusive jurisdiction to review the constitutionality of law (including the resolution of constitutional complaints and legal questions of courts) and, inter alia, to consider jurisdictional disputes and examine whether the aims and activities of political parties are constitutional. The 15 judges of the Constitutional Tribunal are elected by the Sejm for 9-year terms from among individuals distinguished by legal knowledge.

The main political parties in Poland are Law and Justice, which since 2015 has been the leading party forming the ruling coalition in the Sejm (in the Senate the opposition has a small majority since the 2019 parliamentary elections) and the Civic Platform, which is still the main party of the rather fragmented parliamentary opposition.

The incumbent president is Andrzej Duda (formerly an MEP elected from the Law and Justice list) who was elected in May 2015.

## Recent developments on the rule of law in Poland

Since the Law and Justice party won the parliamentary elections in 2015, there has been a tendency towards democratic backsliding, exemplified by the rule of law crisis. In both the 2015 and 2019 parliamentary elections, Law and Justice won 235 seats in the Sejm – five more than the Sejm majority – and agreed on a coalition government with several smaller right-wing parties. Since they have been in power, President Duda has accepted Law and Justice legislation and policies and signed most of the controversial laws enacted by the Sejm. The few decisions to veto a bill have not fundamentally change the course of policy.

After the 2015 elections, it quickly became apparent that the government was seeking to subjugate the judiciary. The first target was the Constitutional

Tribunal. As the essential constitutional guarantor, if it had remained independent, it would have stood in the way of the undermining of the other parts of the judiciary. The next goals were the subordination of the National Council of the Judiciary, the common and administrative courts and the Supreme Court.

Changes in the political system were introduced by statutory laws contradicting numerous constitutional standards. The most important aspects of these controversial political changes are presented as far as November 2018 in a previous DRI report.<sup>1</sup> Since then, there have been a number of significant developments, outlined below.

### The Constitutional Tribunal

The Constitutional Tribunal is the constitutional court of Poland that reviews laws based on individual complaints or applications from specific bodies. It has been effectively hollowed out and captured. Its recent rulings, especially those with strong political context, indicate that it has become subservient to the government. In its judgment of 25 March 2019 the Tribunal declared that newly reformed National Council of the Judiciary was in compliance with the constitution.

In two other rulings – the judgment of 20 April 2020 and the resolution of 21 April 2020 – it de facto stood up against the implementation of the CJEU's judgment of 19 November 2019 regarding the legality of the Disciplinary Chamber of the Supreme Court and (indirectly) of the National Council of the Judiciary. Significantly, in these two rulings, the role of judge-rapporteur was played by former parliamentarians, who actively participated in pushing the reforms of the judicial bodies and are known for their radically negative opinions about Polish courts.

It has become increasingly apparent that the Constitutional Tribunal as well as the judicial authorities taken over by the government are being used by the ruling majority in purely political manoeuvres involving applications for constitutional review or settlement of constitutional disputes that have no legal basis, but rather rely on an appropriate (pro-government) reaction from the Constitutional Tribunal.

### The National Council of the Judiciary

The National Council of the Judiciary (NCJ) is a body which, as aforementioned, is intended to safeguard

<sup>1</sup> Democracy Reporting International, "[What is happening to Poland's Judges? Europe's Concern: The Polish Struggle over its Courts](#)," Berlin, last updated November 2018.

the independence of the courts and plays a crucial role in the process of judicial appointments in Poland. It has been captured by transferring the power to appoint the majority of its members from the judiciary to the parliament.<sup>2</sup> Those changes led to initiation of the expulsion procedure against the NCJ from the European Network of Councils for Judiciary.

A fundamental issue regarding the reform of the NCJ is the problem of the so-called letter of support for judges elected by the Sejm. Each of the judges elected by the Sejm should obtain a recommendation of a minimum of 25 other judges for his or her candidacy. The Chancellery of the Sejm, the body that supports the Polish legislature, has long resisted publicising letters of support. Finally, on 14 February 2020 the speaker of the Sejm decided to make the lists of support public. One list of support provoked serious legal controversy as several judges had subsequently announced their withdrawal of support before the Sejm elected the members of the NCJ. According to some commentators, this could mean that one of the judges did not have the required support.

Also controversial was the fact that the supporters of the candidates included some judges delegated to the Ministry of Justice (and therefore directly reporting to the Minister of Justice) as well as others who owed their promotion to the current government.

### Common courts

In early December 2019, the bill of an amendment to the two laws shaping the Polish judiciary was filed. It was quickly dubbed “the muzzle bill”<sup>3</sup> due to the fact that it was designed to increase limitations on the Polish judiciary. According to the amendments, it is unlawful to “show hostility to other authorities of the Republic of Poland and its constitutional organs or to criticise the basic principles of the Republic of Poland”<sup>4</sup> From the outset the ratio legis of this controversial legislation was to bar judges from questioning judicial appointments made by the president (at the request of the “reformed” NCJ), to forbid them from engaging in political activity, and to restrain them from directly applying the constitution and EU law.

After being pushed through in an urgent manner, on 20 December 2019 the bill was passed by the Sejm. The opposition-controlled Senate rejected the controversial draft law, yet it could only delay the inevitable. Despite mass protests, including “the march of a thousand robes” on 11 January 2020, the Sejm over-turned the Senate’s vote and approved the bill. The Law and Justice-aligned President signed the bill into law and it came into force on 14 February.

The muzzle law is just another, yet very radical, element of a gradual destruction of the independence of the judiciary. Already in June 2019, when the Disciplinary Chamber of the Supreme Court, a new chamber established in 2018, was not yet operational, the Minister of Justice appointed the Disciplinary Commissioner of the ordinary court judges and two of his deputies. They were called upon to investigate potential disciplinary offences committed by judges. In addition to their activities, the Minister himself also has the right to initiate disciplinary proceedings.

Shortly after their appointment, the Disciplinary Commissioner and his deputies started their first investigations. At first, “disobedient” (in other words, independent) judges were intimidated by disciplinary commissioners by being accused of trivial oversights committed in their past. In the last few months, the political (ab)use of the new disciplinary procedures has become increasingly blatant.<sup>5</sup>

### The Supreme Court

Already in 2018, the CJEU issued a safeguard proceeding regarding changes to the Supreme Court. It concerned controversial provisions pushed by the ruling coalition that reduced the retirement age of Supreme Court judges. Pursuant to these regulations, 27 out of 72 active judges of the Supreme Court were to retire, including the First President of the Supreme Court Małgorzata Gersdorf. The intended removal of judges by the creators of the new Act on the Supreme Court, due to having reached the age of 65, would have an impact on the individual chambers of the Supreme Court.

The CJEU approved the Commission’s request to restore the status of the Supreme Court before the entry into force of regulations for the lowering the retirement age of judges. Under the safeguard

2 Jakub Jaraczewski, “[Backgrounder: Upcoming CJEU Decision on Poland](#),” Democracy Reporting International, Berlin, November 2019.

3 Karolina Zbytniewska, “[Free Courts’ activists: Poland makes another big step towards Polesxit](#),” Euractiv, 20 December 2019.

4 Republic of Poland, “[Prawo o ustroju sądów powszechnych, ustawy o Sądzie Najwyższym oraz niektórych innych ustaw](#),” 20 December 2019.

5 Piotr Moduli, “[Attacking Judicial Independence Through New “Disciplinary” Procedures in Poland](#),” ICONnect Blog, 9 April 2019.

proceeding, judges who had already been retired under the new rules were reinstated. Non-compliance with EU law of the provisions reducing the retirement age of judges was confirmed in the CJEU judgment of 24 June 2019.<sup>6</sup>

In turn, in the judgment of 19 November 2019 regarding the status of the Disciplinary Chamber (one of two new chambers of the Supreme Court) and the status of the National Council of the Judiciary, the CJEU pointed to significant doubts as to the independence of the Disciplinary Chamber. The CJEU did not decide (as the Advocate General did) to state openly that the Disciplinary Chamber of the Supreme Court does not meet the EU standard of an independent and impartial tribunal within the meaning of Article 47 of the Charter of Fundamental Rights, yet considered<sup>7</sup> that the objective circumstances in which the Chamber was formed, its characteristics and the means by which its members have been appointed were capable of giving rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of that court to external factors, in particular, as to the direct or indirect influence of the legislature and the executive and its neutrality with respect to the interests before it.

The CJEU returned the case to the Supreme Court and pointed out that it is for the national court to determine, in the light of all the relevant factors, whether the Disciplinary Chamber meets the standard of an independent and impartial court. Moreover, the CJEU stated that if that is not the case, the principle of the primacy of EU law requires the national court to revert the relevant provisions of the Polish law.

Although immediately after the CJEU ruling, the Polish government claimed that “no law concerning the Chamber or the Council was found as violating EU standards” and that “the CJEU has no intention of barging into the internal matters of Polish judiciary”,<sup>8</sup> it was more than clear that the CJEU had handed the courts an immensely powerful instrument and that the struggle for an effective enforcement of this judgment had just begun. On 5 December 2019, the Supreme Court – sitting as a

bench of three judges – delivered a ruling in which it held that “the Disciplinary Chamber of the Supreme Court is not a court in the meaning of Article 47 of the Charter of Fundamental Rights and Article 6 of the Convention, as well as in the meaning of national law.”<sup>9</sup>

In spite of this, the Disciplinary Chamber continued to operate in a business-as-usual manner. Therefore, on 15 January 2020, the First President of the Supreme Court filed a motion regarding the resolution of the discrepancies in the interpretation of the law in the Supreme Court case law and to refer the matter to the three combined Chambers of the Supreme Court: the Civil, Criminal and Labour & Social Insurance Chambers (excluding the new Disciplinary and Extraordinary and Public Affairs Chambers). On 23 January 2020, the Supreme Court, sitting in the three chambers bench, followed the lines of argument given by the CJEU and held that rulings made by judges appointed under the new NCJ could be challenged.

On 8 April, the CJEU issued interim measures to suspend the activities of the Supreme Court Disciplinary Chamber.<sup>10</sup> The decision was taken at the European Commission request of 14 January and is a part of the infringement procedure brought before the Court by the Commission against Poland (case C-791/19). The CJEU held that the further operation of the Supreme Court Disciplinary Chamber denies the implementation of the CJEU judgment of 19 November 2019, creating a risk of irreparable damage for Polish judges and increasing the limitations imposed on the Polish judiciary.

Unfortunately, despite the CJEU's decision of 8 April 2020, cases concerning the waiver of the immunity of judges are still pending in the Disciplinary Chamber.<sup>11</sup> For its failure to comply, the CJEU may impose a large fine on Poland, which would further undermine confidence in the Polish judiciary.

Constitutional controversy was also caused by the election of the First President of the Supreme Court to replace Małgorzata Gersdorf, whose six-year term of office expired on 30 April 2020. In connection with the covid-19 health crisis in Poland, the

6 C-619/18, [European Commission v. Poland](#), ECLI:EU:C:2019:531.

7 C-585/18, C-624/18 and C-625/18, [AK v Krajowa Rada Sądownictwa, CP and DO v Sąd Najwyższy](#), ECLI:EU:C:2019:982.

8 Barbara Grabowska-Moroz, Jakub Jaraczewski, “[High Expectations: The CJEU Decision about the Independence of Polish Courts](#),” *Verfassungsblog*, 19 November 2019.

9 Rule of Law in Poland, “[Oral justification of the Supreme Court judgment in connection with the CJEU ruling regarding the Disciplinary Chamber and the National Council of the Judiciary](#),” 8 December 2019.

10 Jakub Jaraczewski, “[Backgrounder: European Commission requests interim measures in proceedings against Poland](#),” *Democracy Reporting International*, 16 January 2020.

11 Order of the Court in Case C-791/19, [Commission v Poland](#), ECLI:EU:C:2020:277.

outgoing First President did not decide to convene the General Assembly of Judges of the Supreme Court – an internal body of the Supreme Court, whose task is to nominate candidates (currently 5) for this position. After a controversial procedure, Małgorzata Manowska was appointed as the new first President of the Supreme Court and shortly after announced that she intends to “solve the problem” of the resolution of the three Chambers of the Supreme Court of 23 January 2020 that implemented the judgment of the CJEU of 19 November 2020.

### **Covid-19 and the presidential elections**

Due to the covid-19 pandemic the presidential elections originally planned for May did not take place and were postponed to 28 June 2020. The new law governing the presidential elections, adopted on 2 June 2020, raised many reservations as to its compliance with the constitution.<sup>12</sup> Existing candidates to the presidency, and their supporting election committees, have retained their rights in the new election. However, new candidates could also add their names to the ballot, although they had less time to register their election committees and collect the required 100,000 signatures.

Pursuant to the Act, postal voting is not conducted in countries where there is no organisational, technical or legal possibility to carry out the election in this form, and if within 48 hours of the end of voting abroad the results do not reach the appropriate committee in the home country, then voting there is considered to be null and void. This means depriving some citizens who reside abroad of their electoral rights.

### **Domestic, regional and international public opinion**

The rule of law is one of the EU common values and part of the common constitutional traditions of all member states. Therefore, EU institutions are responsible for guaranteeing the respect of the rule of law as a fundamental value of the EU and making sure that EU law, values and principles are respected. Two of the most important elements of the EU's rule of law toolbox are the Article 7 TEU procedure and the infringement procedure.

The first is an exceptional and last-resort measure to prevent or resolve a serious breach of the EU founding values by a member state. The mechanism is activated by the European Parliament, the Commission or one third of member states. On 20

December 2017, the European Commission triggered Article 7 for the first time in relation to the Polish judicial reforms. Since then, the Council has been dealing with the matter, but without concrete results to date.

The goal of the infringement procedure, in turn, is to ensure EU law is correctly implemented and respected at national level. It is a three-stage process between the Commission and EU member state, at the end of which the Commission can refer the matter to the European Court of Justice.

On 3 April 2019, the Commission launched an infringement procedure with regard to the new disciplinary regime claiming that it undermines judicial independence and violates the principle of effective judicial protection, as required by the CJEU. On 10 October 2019, the Commission referred this case to the CJEU. On 14 January 2020, the Commission asked the CJEU to impose interim measures on Poland, ordering it to suspend the functioning of the Disciplinary Chamber of the Supreme Court. On 8 April 2020, the CJEU confirmed the position of the Commission and ruled that Poland must immediately suspend the application of the national provisions on the powers of the Disciplinary Chamber of the Supreme Court with regard to disciplinary cases concerning judges. This order applies until the CJEU has rendered its final judgment in the infringement procedure, yet interim measures have still not been implemented by Poland.

The controversial character of the judicial reforms has caused Poland's place to fall in various international rule of law rankings. Data presented in the 2019 EU Justice Scoreboard, which is a comparative report on the effectiveness of national justice systems in the EU, shows a decline in guaranteed structural judicial independence in Poland (including safeguarding the proper composition of a court and the appointment, length of service and grounds for abstention, rejection and dismissal of its members, disciplinary proceedings regarding judges and the appointment of judges-members of the Council for the Judiciary).

In the World Justice Project 2019 rule of law ranking Poland came 28th, falling by one position in comparison to the previous year. The ranking is based on various factors such as check-and-balance guarantees, transparency, and judicial protection of fundamental rights; the largest decrease over the last five years was recorded in Poland and Egypt. Finally, in the latest Freedom House ranking “Nations in

<sup>12</sup> Aleksandra Kustra-Rogatka, “[Between Constitutional Tragedy and Political Farce: On the Postponement of the Presidential Elections in Poland](#)”, *Verfassungsblog*, 15 Mai 2020.

Transitions” Poland has already fallen for the fourth time in a row and has lost the status of a “consolidated democracy”. Currently, together with Bulgaria, Croatia and Romania, it is included in the category of “semi-consolidated democracies”.

At the domestic level the Polish Ombudsman Adam Bodnar has been very active in pointing out violations of the rule of law by current Polish authorities. However, his term of offices ends in 2020. The vast majority of Polish constitutionalists and NGOs also criticise the new disciplinary regime and judicial reforms introduced by the ruling coalition.<sup>13</sup>

On 28 January, the Parliamentary Assembly of the Council of Europe (PACE) voted to open a monitoring procedure for Poland over the functioning of its democratic institutions and the rule of law, declaring in a resolution that recent reforms “severely damage the independence of the judiciary and the rule of law”. This means that Poland has joined ten other Council of Europe member states currently under full monitoring, which involves regular visits by a pair of PACE rapporteurs, ongoing dialogue with the authorities, and periodic assessments of how far the state is honouring its Council of Europe obligations and commitments.

On 22 April 2020, the Board of the European Network of Councils for Judiciary (ENCJ) sent a draft position paper to the NCJ, setting out the proposed expulsion of the NCJ from the ENCJ. In an accompanying letter, the NCJ was given a month to state its response to the draft position paper. Based on the response of the NCJ the Board will then finalise the position paper and decide if and when to table the expulsion of the NCJ at a General Assembly meeting of the Association.

Polish society is politically deeply divided. The government still enjoys high public support, in part due to its decisions on significant social transfers – a key aspect of Law and Justice policy. However, the attack on the judiciary has led to mass protests in Poland.

In February 2020, in response to the question “Should the European Commission deal with the issue of judiciary reform in Poland?”, 36.6 percent of participants in the survey answered “Yes” and a further 22 percent stated “Yes, but the final decision on reform should belong to the Polish government”. 27.3 percent answered “No”, and 14.2 percent had no opinion on this matter.<sup>14</sup> In another survey, the

respondents were asked whether a mechanism should be put in place that would tie the amount of funds allocated from the EU to the state of the rule of law in the country.<sup>15</sup> According to 41.3 percent of respondents, the payment of EU funds should depend on the state of rule of law. 47.2 percent of those surveyed disagreed and 11.5 percent did not have an opinion. The answers were strongly linked to the respondents’ declared political views.

## Upcoming developments

The decisions of EU bodies will also influence the rule of law in Poland. At the CJEU, the number of cases concerning Polish reforms to the rule of law is increasing. The CJEU’s verdict in a case initiated by the Commission as part of the infringement procedure may be particularly relevant. Poland faces severe financial penalties in the event of failure to comply with the CJEU judgment. In contrast, the procedure provided for in Article 7 is more dependent on political factors and drawn out over time.

One factor that cannot be overlooked is the development of the covid-19 pandemic. It may contribute to a gradual decrease in support for the current government (among other things due to the inevitable negative economic consequences of the pandemic) as well as prompt the EU authorities to redirect their attention towards issues related to the creation of the so-called recovery plan for Europe, forsaking the protection of the rule of law in Poland and Hungary. One option for the EU bodies to have a real impact on the rule of law in Poland is the idea currently being discussed of making EU funds for the recovery plan dependent on compliance with the rule of law.

## Conclusion

Since 2015 the rule of law in Poland has been systematically deteriorating under the Law and Justice party. The controversial reforms of the judiciary have undermined the Constitutional Tribunal, the National Council of the Judiciary, the common and administrative courts, and the Supreme Court. The covid-19 pandemic and the ensuing chaotic and legally dubious unfoldment of the presidential elections have further undermined the rule of law.

These changes have been decried both in Poland and internationally, with the European Commission and the CJEU playing active roles to halt these

13 See e.g. Polish Association of Constitutional Law, “Polskie Towarzystwo Prawa Konstytucyjnego,” 14 September 2018, and Amnesty International, “Poland: The Judges Who Defend the Rule of Law,” February 2019.

14 This survey was run by SW Research for rp.pl, the online issue of Poland’s Rzeczpospolita daily newspaper.

15 This survey was commissioned by Rzeczpospolita and conducted by IBRIS in February 2020.

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changes. However, this situation has shown the need for a strong political response, both from within and beyond the EU's institutions, to put pressure on the Polish government and send a clear signal that the erosion of the rule of law is unacceptable. This pressure can come through a number of routes, the clearest of which is making funding from the EU conditional to clear adherence to the rule of law. Within Poland, the future of the rule of law may well be shaped by electors on 12 July.

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