

# Threat of Rule of Law in Poland – Recent Developments

Thomas Wahl

## News

New actions and regulations initiated by the Polish ruling party to push through reforms in the justice system triggered further controversies between the country and European institutions/civil society organisations. An overview of the main recent events:

- 19 November 2019: The CJEU rules on the independence and impartiality of the new Disciplinary Chamber at the Polish Supreme Court, considering that the referring court may disapply national legislation if the body to which jurisdiction was conferred to hear a case where the EU law may be applied, does not meet the requirements of independence and impartiality ([see details in eucriM 3/2019, pp. 155-156.](#))
- 5 December 2019: The Labour Chamber of the Supreme Court concludes that the Disciplinary Chamber did not fulfil the requirements of an independent and impartial tribunal. Despite this judgment, the Disciplinary Chamber continued its activities.
- 11 January 2020: Thousands of people, including judges and lawyers from many EU Member States, [assemble for a march through Warsaw](#), in order to protest plans by the Polish government and ruling majority in parliament to discipline the judiciary in Poland. The event was tagged as “1,000 Robes March.”
- 16 January 2020: The European Parliament [adopts a resolution on the Art. 7 procedures against Poland and Hungary](#). It, *inter alia*, “notes with concern that the reports and statements by the Commission and international bodies, such as the UN, OSCE and the Council of Europe, indicate that the situation in both Poland and Hungary has deteriorated since the triggering of Article 7(1) of the TEU.” The resolution also criticizes the fact that the current Art. 7 procedure and the hearing conducted have not resulted in any significant progress by the two states. MEPs reiterate the need for a new EU mechanism on democracy, the rule of law and fundamental rights (see [eucriM 1/2019, p. 3](#)). Support is again given to the [proposed regulation](#) on the protection of the Union’s financial interests in case generalized deficiencies as regards the rule of law in Member States occur.
- 21 January 2020: The deputy discipline officer [initiates first disciplinary proceedings](#) against Polish judges having participated in the Robes March.
- 23 January 2020: [Poland’s Supreme Court said rulings](#) made by judges appointed under new government rules (affecting several hundred judges) could be challenged, resulting in a number of cases being postponed. The Supreme Court followed the lines of argument given by the CJEU.
- 23 January 2020: The Polish justice ministry – controlled by the ruling PIS party – reacts and declares that the Supreme Court’s judgment has no legal effects.
- 23 January 2020: The lower house of the Polish parliament (the Sejm) [passes a bill introducing further amendments into the Polish judiciary system](#), despite rejection by the opposition-controlled Senate

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- and [criticism by the CoE Venice Commission](#) (opinion of 16 January 2020). The amendments (already initiated in December 2019) included, *inter alia*, the prohibition of political activities for judges in addition to new disciplinary offences and sanctions for judges and court presidents. Furthermore, the bill declared that any person appointed by the President of the Republic is a lawful judge, and it is prohibited to question his/her legitimacy. Doing so is a disciplinary offence, potentially punishable with dismissal. Only the Extraordinary Chamber can decide whether a judge is independent and impartial. The Venice Commission stated in this context: “The [amendment bill] seems to be to make it impossible for any court (...) to question the legitimacy of any court established in accordance with the current legislation.” In the press, the law has been labelled “gagging bill” and “muzzle law”.
- 28 January 2020: [The Constitutional Tribunal suspends the Supreme Court’s resolution](#) of 23 January 2020. The Constitutional Tribunal declared, *inter alia*, that the Supreme Court could not limit the adjudication of judges appointed to office by the President of the Polish Republic. Judgments issued by benches which included said judges are binding.
  - 28 January 2020: The Parliamentary Assembly of the Council of Europe (PACE) votes to open a monitoring procedure for Poland over the functioning of its democratic institutions and the rule of law. [The resolution](#) declares that recent reforms “severely damage the independence of the judiciary and the rule of law.” PACE called on the Polish authorities to “revisit the total reform package for the judiciary and amend the relevant legislation and practice in line with Council of Europe recommendations.” The Assembly also called on all CoE Member States to ensure that the courts under their jurisdiction ascertain in all relevant criminal and civil cases – including with regard to European Arrest Warrants – whether fair legal proceedings in Poland, as defined under Art. 6 ECHR, can be guaranteed for the defendants. Poland is the first EU Member State to which the CoE monitoring procedure is being applied. The country shares this position with eight other CoE (but non-EU-) Member States, among them Russia, Turkey, and Ukraine.
  - 30 January 2020: The [CCBE publishes a statement on Poland](#) in which the lawyers’ organisation shares the criticism voiced by independent international bodies and organisations in reaction to the “muzzle law”. The statement calls on the Polish authorities not to proceed with the law.
  - 10 February 2020: 22 retired judges of the Constitutional Tribunal (including eight former presidents and vice-presidents) issue an open letter in which they note that the Constitutional Tribunal “has virtually been abolished.” They regret that the actions of the legislature and the executive since 2015 and the Constitutional Tribunal leadership since 2017, “have led to a dramatic decline in the significance and the prestige of this constitutional body, as well as to the inability to perform its constitutional tasks and duties.” The open letter also deals with the pending dispute on the Supreme Court resolution of 23 January 2020, particularly the participation of two former MPs in the bench, that compromise the Constitutional Tribunal’s independence.
  - 11 February 2020: Following the EP resolution of 16 January 2020, [the plenary of the EP again discusses](#) the situation on the rule-of-law threat in Poland. At the beginning, Commission Vice-President *Věra Jourová* informed MEPs on the current developments, and Justice Commissioner *Didier Reyniers* stressed that the Commission will apply all tools at its disposal to maintain the rule-of-law values in Poland. MEPs called on the Commission to take strong action against Poland. German MEP *Katarina Barley* (S&D) pointed out that Polish judges are in the unbearable situation of facing disciplinary sanctions if they apply EU law. She referred to concrete cases of recent repressions against judges.
  - 14 February 2020: [The “Muzzle Act” \(see above\) enters into force](#). Polish President *Andrzej Duda* signed the Act on 4 February 2020 despite continuing [protests](#) voiced by the European Commission, the Council of Europe, and civil society organisations.
  - 17 February 2020: In an unprecedented decision, the [Higher Regional Court of Karlsruhe suspends the execution of a European Arrest Warrant](#) issued by Poland, because the enacted muzzle law does not guarantee the defendant a fair trial. Although the German court sent a catalogue of questions on the

independence of the judiciary in Poland, it released the requested person based on the “high probability” that extradition would be unlawful at the moment (for more details on the decision, see the news in the category “European Arrest Warrant”).

- 24 February 2020: The President of GRECO, [Marin Mrčela](#), addresses a letter to the Polish Minister of Justice in which he calls on the Polish government to revise the muzzle law. *Mrčela* points out that the diminishing independence of justice may facilitate corruption. He also fully shares the critical opinion of the Venice Commission of 16 January 2020 on the draft bill of the muzzle law.
- 29 February 2020: The Association of Polish Judges “Iustitia” and association of prosecutors “Lex Super Omnia” publish an extensive [report detailing repressions](#) against Polish judges and prosecutors between 2015 and 2019. The report not only presents information on the investigations and disciplinary proceedings. It also refers to “soft repressions,” consisting, among other things, in the exercise of powers vested in court presidents, which bear features of harassment or mobbing. The report is to be completed with further cases in the future.
- 9 March 2020: Several experts specialised in the rule of law address an [open letter to Commission President Ursula von der Leyen](#). They criticized the European Commission for being too inactive and lenient towards Poland. Regarding the recent changes implemented by the muzzle law, the experts urge the Commission to take immediate action. This must include expedited infringement action against the muzzle law, and requests for additional interim measures to prevent the muzzle law from being enforced by connecting these measures to the already pending infringement action with respect to Poland’s new disciplinary regime for judges. The Commission should also tackle the rigging of rules as regards the selection of the next president of the Supreme Court, the changes at the Constitutional Tribunal, and the establishment of the National Council of the Judiciary.
- 26 March 2020: The Grand Chamber of the CJEU declares references for a preliminary ruling of two Polish district courts inadmissible, expressing doubt as to the compatibility of the new disciplinary regime introduced in Poland via judicial reforms in 2017 with Art. 19(1) subpara. 2 TEU ([Joined Cases C-558/18 and C-563/18 – Miasto Łowicz and Prokurator Generalny](#)). The CJEU follows the opinion of AG *Tanchev* of 24 September 2019 (see [eucrim 3/2019, p. 157](#)). The questions referred are general in nature, because they did not show a connecting factor between the dispute in the main proceedings and a provision of EU law for which interpretation is sought. In essence, the referring Polish judges sought a statement from the CJEU that the disciplinary procedures are a means of ousting judges if they take decisions that do not suit the legislative and executive branches. The CJEU clarified that the concept of preliminary rulings in Art. 267 TEU does not follow this purpose. The Grand Chamber clearly stated, however, that provisions of national law which expose national judges to disciplinary proceedings as a result of the fact that they submitted a reference to the Court for a preliminary ruling cannot be permitted. It is a key element of judicial independence that judges not be subjected to disciplinary proceedings/measures for having exercised their discretion to bring a matter before the CJEU.
- 8 April 2020: The CJEU [grants the Commission’s application for interim measures](#) against the powers of the Disciplinary Chamber of the Supreme Court with regard to disciplinary cases concerning judges. The powers are based on a 2017 judicial reform. The CJEU requests that Poland suspend the application of the relevant national provisions before its final judgment on the substance of the case ([C-791/19](#)). The final judgment will be delivered at a later date. The judges in Luxembourg point out that, although the organisation of justice falls within the competence of the Member States, disciplinary regimes applicable to national courts are part of the system of the legal remedies in the fields covered by EU law. Therefore, they must comply with the Union’s requirements on the independence of the judiciary. The mere prospect of Supreme Court judges or judges of the ordinary courts being the subject of disciplinary proceedings that may be referred to a body whose independence is not guaranteed is likely to affect judicial independence. By means of this line of argument, the CJEU confirms the

condition of urgency, which is required for granting interim relief. The lack of independence of the disciplinary chamber may cause serious and irreparable harm to the EU legal order.

- 29 April 2020: The European Commission [launches a new infringement procedure against Poland](#) regarding the “muzzle law” that entered into force on 14 February 2020 (see above). The Commission concludes in its letter of formal notice that several elements of the new law infringe Union law. This includes the established disciplinary regime that could be used as political control of the content of judicial decisions, thus violating Arts. 19, 47 CFR, which establish the right to an effective remedy before an independent and impartial court. In addition, several elements of the new law do not comply with the principle of the primacy of EU law. In this context, the Commission points out that the law prevents Polish courts from fulfilling their obligation to apply EU law or request preliminary rulings from the CJEU and from assessing the power to adjudicate cases by other judges. Ultimately, the new law is incompatible with the right to respect for private life and the right to the protection of personal data as guaranteed by the CFR and the GDPR, since it requires judges to disclose specific information about their non-professional activities. The Polish government now has two months to reply to the letter of formal notice.
  - 25 May 2020: At a [meeting of the LIBE Committee](#), MEP *Juan Fernando López Aguilar* (S&D, ES) presents a [draft interim report](#) that serves as a basis for an EP resolution on the way forward as regards the Article 7 procedure against Poland that was triggered by the European Commission in December 2017. The report (1) takes stock of the developments as regards the rule of law, democracy, and fundamental rights in Poland since 2015; and (2) urges the Commission and the Council to widen the scope of the Article 7(1) TEU procedure to include an assessment of clear risks of serious breaches of democracy and fundamental rights. During the discussions, most MEPs shared concerns over the systematic and continuing attacks against judicial independence and democratic institutions in Poland. They called on the Council and Commission to take decisive actions against Poland, including budgetary measures. The President of the European Association of Judges and a representative of the Polish judges association IUSTITIA reported on concrete examples of violations of judicial independence and disciplinary proceedings against Polish judges. They called for a “European Marshall Plan” to uphold the EU’s core values in Poland. The plenary of the EP is to vote on the proposed resolution in September 2020.
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