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Down the rabbit hole? Rule of law crisis in Poland and the reaction of the European Union under the EU Treaty infringement and conditionality mechanisms

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Dismantling rule of law in Poland

- parliamentary elections in October 2015 won by "Law and Justice" party
- political subordination of selected institutions (Constitutional Court, Prosecutor's office, public media, secret services)
 - salami tactics (one slice after the other)
 - Constitutional Court: marginalization as an instrument for opposition to control parliamentary majority; after 2019 major instrument of power
 - Chilling effect – changing the natural constitutional role of certain state institutions
- Attack on judicial independence
 - after five years: two new chambers in the Supreme Court (Disciplinary Chamber and the Extraordinary Control Chamber)
 - new method of electing the National Council of Judiciary (15 judges elected by *Sejm* and not by peers)
 - packing in courts with newly appointed judges; appointment of loyal court presidents
 - suspension of judges (e.g. Judge Tuleya); operation of the disciplinary mechanism against judges

Institutional „checks and balances” in Poland after 2019

- 2019-2023: second parliamentary term of the “Law and Justice”
 - active role of the Constitutional Court in dismantling rule of law and achievement of political objectives (access to abortion, membership in the EU, interim powers of the Ombudsman); notion of “constitutional identity”
 - further pressure on courts, including suspensions
 - the *Senate* controlled by the opposition: delaying the legislative process by 30 days (but no “veto” power)
 - independent role of the President of the Supreme Audit Chamber (former politician of ruling camp)
 - independent Ombudsman (also since 2021)
 - integral position of majority of common courts’ judges (despite the risk)
 - pressure by the EU on the enforcement of CJEU judgments
 - potential new role of the President (the term reaching over 2023): veto to #LexTVN and to #LexCzarnek; active role in the diplomatic response to the war in Ukraine

European Union response

- Legal instruments

- Preliminary questions by Polish courts – CJEU judgments
- Infringement actions by the European Commission, including interim measures
- European Arrest Warrant cases and CJEU judgments
- Result: CJEU judgments on the rule of law – most have been won by Polish judges and lawyers

- Political instruments

- Article 7 TEU procedure – permanent bilateral veto by Hungary and Poland
- Rule of Law reports (two editions)
- Conditionality Regulation (“money for rule of law”)
- Suspension of the EU Recovery Fund
- Bilateral pressure by some EU Member States

CJEU case-law in Polish judicial independence cases

- C-192/18, independence of ordinary courts
- C-619/18, early retirement for Supreme Court judges (the only case that was enforced by Polish authorities)
- C-791/19, operation of the Disciplinary Chamber of the Supreme Court (including the interim measure of 8 April 2020), judgment of 15 July 2021
- C-824/18, lack of judicial review from decisions of the National Council of Judiciary concerning appointment of judges (so-called „kamikaze judges”)
- C-585/18, C-624/18 and C-625/18, status of judicial nominations made by the new National Council of Judiciary
- *L and P*, joined Cases C-354/20 PPU and C-412/20 PPU), European Arrest Warrant cases

Polish cases before ECHR

- *Xero Flor v. Poland* – double-judges in the Supreme Court
- *Reczkowicz v. Poland* – operation of the Disciplinary Chamber of the Supreme Court with respect to legal advisors / attorneys
- *Broda and Bojara v. Poland* – dismissed presidents of courts
- *Dolińska-Ficek and Ozimek v. Poland* – status of the Extraordinary Control Chamber of the Supreme Court
- *Advance Pharma v. Poland* – adjudication in a case of a judge appointed by the neo-National Council of Judiciary
- *Grzęda v. Poland* – status of the judge – member of the National Council of Judiciary (in previous composition); shortening of the constitutional term
- Disciplinary cases of Polish judges waiting in the pipeline (e.g. *Tuleya, Żurek, Juszczyzyn*)
- Confirmation of systemic deficiency in the process of judicial nominations – neo-NCJ as a cancer in the legal system

Response by the Polish Constitutional Court

- Response to the jurisprudence of the EU Court of Justice
 - 14 July 2021, P 7/20 – compliance with interim measures issued by CJEU
 - 7 October 2021, K 3/21 – Article 19 TEU as being contrary to the constitutional provisions on organization of judiciary (full judicial panel)
- Response to the jurisprudence of the European Court of Human Rights
 - Judgment of 24 October 2021, K 6/21
 - Judgment of 10 March 2022, K 7/21
 - Article 6 of the Convention, as interpreted by the ECtHR, contrary to the Polish Constitution
- Polish Constitutional Court as a political instrument of legal pressure
- Attempt to redefine a „constitutional identity”
- Sensitive position of judges with respect to jurisprudence by the Constitutional Court
- 11 May 2022 – hearing on the case concerning financial penalties (and suspension of funds) by the EU institutions – motion by the Prosecutor General

Conditionality Regulation

- Regulation 2020/2092 – annulment action by Poland and Hungary
- Judgments of 16 February 2022, C-156/21 and C-157/21; rejection of arguments by Polish and Hungarian government
- Definition of common values and identity of the EU – reference to rule of law and solidarity, position of candidate states vs. member states
- Sound management of the EU budget cannot be compromised by rule of law violations; conditionality regulation is not a circumvention of Article 7 TEU;
- Applicability of conditionality regulation:
 - a genuine link between a breach of rule of law and an effect or serious risk of effect on the sound financial management of the Union or the financial interests of the Union
 - such a breach must concern a situation or conduct that is attributable to an authority of a Member State and relevant to the proper implementation of the Union budget
 - principle of proportionality

Conditionality regulation – ctd.

- success by Polish and Hungarian government in delaying applicability of the Regulation; a new argument on horizon: “please unblock the EU Recovery Fund, because now there is the Conditionality Regulation”
- use of the Conditionality Regulation depends on the Commission and the Council (political element)
- real application of the Conditionality Regulation will take additional months/years, when further legal changes are achieved
- „genuine link”, principle of proportionality – the real impact may be limited

CJEU and ECtHR dialogue on rule of law

- CJEU and ECtHR are in a constant dialogue as regards shaping standards of right to fair trial, access to tribunal and legal aid
- The principle of mutual trust and recognition of judgments require common standards concerning judicial independence in different Member States
- Rule of law crisis in Poland and Hungary opened the gate for shaping standards of judicial independence that should be applicable to courts in EU Member States
- The ECtHR seems to go further than the CJEU (status of the National Council of Judiciary and the position of the Constitutional Court); however, the ECtHR lacks strong mechanisms of pressure

Down the rabbit hole?

- institutional safeguards may not be strong enough to defend rule of law, when:
 - legal culture is weak
 - the ruling party refers to so-called will of dominant majority
 - people enjoy economic prosperity
- Poland still did not enforce binding judgments of the CJEU. Those judgments require the fulfilment of three conditions:
 - Elimination of the Disciplinary Chamber
 - Reintroduction of suspended judges
 - Non-penalization of judges for making preliminary references
- The draft law submitted by the President Andrzej Duda only partially addresses those issues; it does not provide response to the problem with the National Council of Judiciary
- Changes introduced after 24 February 2022 still undermine the rule of law:
 - newly appointed judges; new elections to the National Council of Judiciary
 - Judgment of 10 March 2022 on the European Convention on Human Rights (on the day of exit of Russia from the EU)
- Political argumentation: due to the war in Ukraine, pending issues should be closed and the European Union should start payments from the EU Recovery Plan
- Competitive authoritarianism in action, but still preservation of different spaces of pluralism and discussion
- *Is it all enough to compete on equal and fair terms in upcoming 2023 parliamentary elections?*

Challenges for the European Union law

- How long the EU may suspend payments from the EU Recovery Plan?
- Can the Conditionality Regulation be really effective tool?
- Can we count on fair elections to the European Parliament, when standards of free media are seriously undermined?
- How the EU may support the Council of Europe and the European Court of Human Rights (especially after kicking out Russia)? Should the EU finally become the party to the European Convention on Human Rights?
- What the EU may do when the Member State continuously undermines rule of law, when there is no political willingness to apply common standards? How the future EU may operate with such Member States on the board?

Thank you for your attention

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