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The rule of law in Poland or the false argument about the primacy of European law

On 24 November, the [Polish Constitutional Tribunal](#) ruled that the European Convention on Human Rights was partially incompatible with the country's constitution. In July and October, it had issued similar rulings on the Treaty on European Union (TEU). This double decision comes as the European Commission suspended the approval of Poland's €36 billion recovery plan, including €23.9 billion in EU grants, due to concerns about the rule of law. On 19 November, the Commission also sent a letter to the Polish government as a prelude to the launch of a procedure that could lead to the suspension of EU funds under the budgetary conditionality regulation.

The confrontation between the Polish government and the European institutions, primarily the Commission and the European Court of Justice, has been presented by the Polish government as a struggle of principle between the primacy of European law, which was allegedly being imposed excessively on Member States, with *"the national legal order and the supreme force of the Constitution"* being under threat. The Polish Prime Minister, Mateusz Morawiecki, explained that the implementation of EU law, as requested by the CJEU, would lead to *"a fundamental lowering of the constitutional standards of judicial protection of Polish citizens, and unimaginable legal chaos"*.

Beyond the grandstanding and responses in support of an effort to defend the sovereignty of peoples, it appears that the weakening of these constitutional norms in recent years in Poland is precisely what has led the Constitutional Tribunal to partly denounce the TEU (European Union) and the European Convention on Human Rights (Council of Europe), and that the quarrel over the primacy of European law is essentially a smokescreen to hide this situation.

THE CONSTITUTIONAL TRIBUNAL'S DECISION

On 7 October the [Polish Constitutional Tribunal](#) deemed that the TEU was in part incompatible with the country's Constitution. It rejected the paragraphs 1 and 2 of article 1, whereby the Member States establish the European Union, granting *"it competences to obtain objectives they have in common"* and aiming to create *"an ever closer union"*. It rejected article 2 which defines the Union's values, as well as article 19 §1 al.2 which obliges Member States to establish *"the remedies sufficient to ensure effective judicial protection in the fields covered by Union law"*.

The case was brought before the Tribunal by the Prime Minister who challenged decisions of the Court of Justice (CJEU), in particular a [judgment](#) dated March 2021 which allowed Polish judges, under the principle of primacy of EU law, not to apply certain provisions introduced in 2018 and 2019 regarding the appointment of judges, which severely restricted the right of appeal of unsuccessful candidates.

The members of the Tribunal considered that Article 19, as interpreted by the CJEU, was incompatible with the Polish Constitution if used to challenge recent reforms of the judicial system. They did not reject the EU treaties as a whole or challenge the primacy of EU law as a matter of principle. But by considering, without proving it, that the Union has entered a *"new stage"* and is acting *"outside the scope of the competences conferred upon it"* by Poland, they have claimed the right to define, at the request of the government, the areas in which the Polish authorities consider themselves exempt from the European treaties and laws that they helped to draft and adopt.

In speaking out against what its president considered to be *"the interference of the CJEU in the Polish legal system"*, the tribunal unilaterally decided that the organisation of the Polish judicial

system should be autonomous from that of the European judicial system, even though the courts of the Member States are responsible for applying European law equally to all.

In an [open letter](#), 26 former members of the tribunal, including four presidents, found that it is wrong to claim that EU law and case law challenge the primacy of the Constitution in the Polish legal order or force Polish judges to ignore the Constitution. They also found that the court had exceeded its jurisdiction and that its decision had no legal effect other than to put pressure on judges by threatening disciplinary proceedings.

THE QUESTION OF THE PRIMACY OF EUROPEAN LAW

Addressing the European Parliament on 19 October, [Mateusz Morawiecki](#) spoke of the spectre of a Union becoming a "*centrally administered parastatal organism, whose institutions may force upon its 'provinces' whatever they consider right*". This argument may carry weight with public opinion, which is torn by the uncertainties and vulnerabilities of the present times, while the European Union remains a complex construction, based on both the delegation and pooling of sovereignty, without being totally supranational.

Indeed, the question of the primacy of European law, although asserted since the 1960s ([Costa vs Enel](#) case), continues to fuel dialogue between the national courts and the CJEU. It essentially revolves around the notion of national and constitutional identity, recognised by Article 4 TEU to mark the limits of the Union's competences, and is regularly invoked by the national courts.

Thus, in its so-called Solange I and Solange II rulings in 1974 and 1986, the German Constitutional Court gave itself the right to ensure that the fundamental rights recognised by the Union were equivalent to those protected by the German Constitution. It also [re-iterated](#) in 2009, during the review of the Lisbon Treaty, that Germany '*does not recognise an absolute primacy of application of Union law*'.

The Karlsruhe judges have also reserved the right to rule that the CJEU acts ultra vires, i.e. outside its competence. In April 2020, they thus [expressed](#) their disagreement with the CJEU which had validated the ECB's OMT asset purchase plan while leaving it open to the ECB to demonstrate the proportionality of its action. This decision led the European Commission to open an infringement procedure against Germany in the name of

defending the primacy of EU law.

Also recently, the Italian Constitutional Court in 2017 challenged a CJEU ruling on a VAT fraud case, citing the supreme principles of the Italian constitutional order. In a second judgment in response to these objections, the CJEU [accepted](#) that the obligation to protect the Union's financial interests had to be reconciled with respect for the principle that offences and penalties must be defined by law.

In practice, therefore, the primacy of European law is neither absolute nor used as a dogma. The issue raised by the Polish decision is however at another level. Unlike the German ruling of 2020 with which it is often compared, the decision of the Polish judges does not simply call into question a European law or its interpretation by the CJEU. For the first time, national judges are challenging the provisions of a European treaty that has already been ratified and applied for 13 years. There is therefore a difference in degree and nature, which leads to destabilising potential for the European Union.

In France, the Constitutional Council has laid down the rule that "*the transposition of a directive may not run counter to a rule or principle inherent in the constitutional identity of France, except with the consent of the constituent*". But as [stressed](#) by the constitutional expert Anne Levade, it also considers that "*the compatibility with the Constitution of a ratified treaty cannot be called into question, even on the occasion of the review of an amending treaty or of the law ratifying the latter*".

In 2005, when [speaking](#) of the constitutionality of Poland's membership treaty to the Union, the Constitutional Tribunal ruled out any "*alleged inconsistency between the scope of the CJEU (...) and the principle of sovereignty of the Republic of Poland, the supremacy of its Constitution in the Polish legal system*". In 2010, it [deemed](#) that the now challenged Articles 1 and 2 TEU, were in conformity with the Constitution.

A CONSCIOUS STRATEGY

The decision of 7 October is not an error of appreciation by the Polish constitutional judges, but the expression of a conscious strategy on the part of the government that requested it. On 14 July, the Constitutional Tribunal had already [deemed](#) that the CJEU had exceeded its jurisdiction by [ordering](#) in 2020 the suspension of the disciplinary chamber of the Supreme Court,

and that European law in this case did not take precedence over Polish law. The Tribunal found that Article 4.3 TEU, which states that "*in accordance with the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other*", was contrary to the Constitution.

The decision of 24 November follows this logic. The Constitutional Tribunal rejected Article 6 of the European Convention on Human Rights, which guarantees the right to a fair trial before an "*independent and impartial tribunal established by law*", and stated that the European Court of Human Rights (ECHR) had no jurisdiction to assess whether it fulfils this condition.

The ECHR has so far registered 57 complaints, mainly on the part of Polish judges who are victims of the reforms, and has already ruled on four occasions[1]. It has ruled that the composition of the Constitutional Tribunal was "irregular", that the Disciplinary Chamber of the Supreme Court was not a "court established by law" and that the Extraordinary Control and Public Affairs Chamber of the Supreme Court was not an "*independent and impartial tribunal established by law*", and also that dismissed magistrates had been deprived of their right of access to a court.

The fact that the Polish government and judges are also targeting an institution outside the European Union underlines, if it were necessary, that their main concern is not the organisation and rules of the Union through the question of the rule of its law. What the three court decisions have in common is that they aim to protect the Polish government from judicial review of its justice reforms and their consequences for judges.

Since November 2015, the government led by the Law and Justice party (PiS) has passed more than 30 laws to reform all courts and tribunals, as well as appoint, transfer, dismiss, control and sanction judges[2]. The most controversial legislation is the disciplinary regime for judges, which was introduced in two stages. A first law, which came into force in 2018, automatically retired all Supreme Court judges from the age of 65, shortened the term of office of the first President, established a new disciplinary regime for judges, and created two extraordinary chambers, composed only of new judges: the Extraordinary Control and Public Affairs Chamber and the Disciplinary Chamber.

A second law, which was passed in 2019 and came into force in February 2020, strengthened the powers of the Disciplinary

Chamber, obliged judges to declare their political or associative affiliation, and allowed disciplinary proceedings against judges who apply certain provisions of European law or refer preliminary questions to the Court of Justice.

Referred to by the European Commission, the CJEU has repeatedly condemned these reforms, which continue to be used to transfer or dismiss judges. In 2019, it [deemed](#) that the retirement of Supreme Court judges violated the principles of security of tenure and judicial independence. In 2020, it called for the immediate suspension of the powers of the Disciplinary Chamber with regard to the disciplinary regime of judges.

On 15 July 2021 it [deemed](#) that the disciplinary regime for judges introduced in 2018 did not comply with EU law and that the independence and impartiality of the Disciplinary Chamber was not guaranteed.

In a procedure that is still ongoing regarding the second law, on 14 July 2021 the CJEU [asked](#) for the immediate suspension of the provisions empowering the Disciplinary Chamber to rule on requests for the waiver of judicial immunity, as well as those prohibiting judges, on pain of punishment, from submitting preliminary questions to the Court.

THE ISSUE OF PRELIMINARY RULINGS

The possibility for Polish judges to submit preliminary questions to their colleagues in Luxembourg is central to the struggle between the Polish government and the CJEU.

Preliminary rulings are a normal tool of European law, provided for in Article 267 of the Treaty on the Functioning of the European Union (TFEU), which contributes to the harmonisation of the application of law and the development of case law in all areas covered by the Treaties, and is increasingly used by national judges. 2,768 questions have been sent to the Court in the last five years[3].

Since 2018, 37 judicial applications concerning justice reforms have been submitted to the CJEU by Polish judges, of which 24 are still under consideration[4]. The Court issued three judgments, including the one in March 2021 which triggered the referral of the case to the Constitutional Tribunal by the government. In addition to the rulings resulting from the infringement proceedings initiated by the Commission, a [case](#)

[1] Figures established on 8 November 2021 by Professor Laurent Pech.

[2] A complete [chronology](#) has been established by the Polish legal group Wolne Sady (Free Courts)

[3] Figure given by the President of the Court of Justice in a [speech](#) on 4 November 2021.

[4] Figures [established](#) on 16 November 2021 by Professor Laurent Pech. Read also his recent [study](#) on the respect of the rule of law in the case law of the Court of Justice

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[law](#) on the rule of law has been developed in the framework of the classic preliminary ruling procedure.

It was via a [judgment](#) in response to a request from Portuguese judges, in 2018, that the CJEU established a general obligation for Member States to guarantee and respect the independence of their national courts and tribunals on the basis of a combined reading of Article 19.1 TEU and Articles 2 and 4.3 TEU. The case law on the rule of law has thus largely developed at the request of European and, in particular, Polish judges, and not through an *ultra vires* self-referral by the Court itself, as suggested by the Polish government and constitutional judges.

The fact that this case law is recent does not demonstrate that the CJEU, or that the Union as a whole, has unduly extended its competences. It reflects recent developments in some Member States, where the rules, principles and values of the *acquis communautaire* are no longer consistently respected. The CJEU, whose role is to ensure the interpretation and application of the Treaties, has not been called upon until now to rule in such detail on the rule of law and the independence of the judiciary. The fact that it is now doing so is not an extension, but an implementation of its competences under the Treaties.

By preventing Polish judges from turning to the CJEU for judicial reforms, the government is trying to isolate the national judiciary and to make the judicial system function as a closed system, in which courts set up by the government validate the government's reforms that remove control mechanisms. In this system of self-legitimation, the preliminary questions and the implementation of the answers of the CJEU by Polish judges constitute a negation of the fiction elaborated by the government of an independent and impartial judiciary.

QUESTIONABLE AND FLAWED REFORMS

To do this, the Polish government relies on a court established in violation of European law and the Polish Constitution. In 2015-2016, the composition and rules of the Constitutional Tribunal were changed, in violation of the Constitution and the judgments of the Tribunal itself in its then composition^[5]. Three judges currently on the bench were appointed in 2015 in violation of a Tribunal decision. Several 2016 laws governing its operation were also found to be partially unconstitutional, in decisions that the government refused to publish in the Official Gazette. At the end of 2016, the current President and her Vice-President, himself

being one of the 3 illegally appointed judges, were appointed in violation of the rules in force and a decision of the Tribunal.

This flawed reform was the primary reason for the triggering of the Article 7 procedure by the European Commission in 2017. In its [2021 report](#) on the rule of law, the Commission notes that its concerns "*have not yet been resolved*". Since a judgement of May 2021, the Tribunal is no longer considered a "*court established by law*" by the European Court of Human Rights. It was after this ruling that the Minister of Justice and Prosecutor General, Zbigniew Ziobro, initiated the procedure that led to the 24 November decision.

The politicised reformatting of the Constitutional Tribunal, the Supreme Court and the judiciary as a whole relies on another government-instrumented body, the National Council of the Judiciary, which is at the centre of the proceedings before the CJEU.

The National Council of the Judiciary (NCJ) is responsible for proposing to the President of the Republic the appointment of judges at all levels of the judiciary and for ensuring the independence of the judiciary. However, in 2017, the government passed a law terminating the mandate of all members of the NCJ and allowing parliament, in violation of the Constitution, to appoint members previously chosen from among magistrates. This reform led the Polish Supreme Court to [deem](#) in December 2019 that the NCJ was neither impartial nor independent, the CJEU to [consider](#) that there are "legitimate doubts" about its independence, and the [European Court of Human Rights to deem in July 2021](#) that it does not offer sufficient guarantees of independence. On 28 October 2021, the [European Network of Councils for the Judiciary expelled](#) the NCJ, which it had already suspended in 2018, on the grounds that it is no longer independent of the executive and legislative branches and no longer protects the independence of the judiciary.

A POLISH AND EUROPEAN ISSUE

In support of its reforms and its challenge to European law, the Polish government emphasises national sovereignty and the defence of the people. However, Polish support for these issues seems limited. According to a 2021 Eurobarometer [survey](#), 56% of Poles consider the level of independence of their courts to be "fairly bad" or "very bad", while only 2% consider it to be "very

^[5] The chronicle of events is detailed in the [Proposal](#) published by the Commission in December 2017.

good". For 51.3% of respondents, *"interference or pressure from the government and politicians"* is the main cause of the low level of independence. [In a poll published](#) at the end of October by the daily Rzeczpospolita, 40.8 % of respondents believed that the government should end the conflict with the European Union by accepting its conditions, 32.5% supported the quest for a compromise by giving in only on certain issues, only 23% wanted the government to defend its position even at the cost of freezing EU funds. In another poll, [published](#) on 24 November, respondents said they trusted the CJEU (49%) or the Commission (46%) more than the Constitutional Tribunal (21%) or the Polish government (19%).

In his speech to MEPs, the Polish Prime Minister stated that *"there can be no talk of the rule of law without several conditions. Without the principle of separation of powers, without independent courts, without respecting the principle that each power has limited competences, and without respecting the hierarchy of sources of law"*.

Since the PiS came to power in 2015, the Minister of Justice has become Prosecutor General, judges elected by their peers have been replaced by judges elected by politicians, judicial appeals against decisions of the Council of the Judiciary have been limited, laws reforming the judiciary have been adopted in violation of the Constitution.

The question raised by the questioning of European texts is therefore that of the rule of law in Poland, rather than that of the primacy of European law. In a community such as the European Union, based on law and the voluntary accession of states, this is an issue that concerns all Europeans, together with the Poles.

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