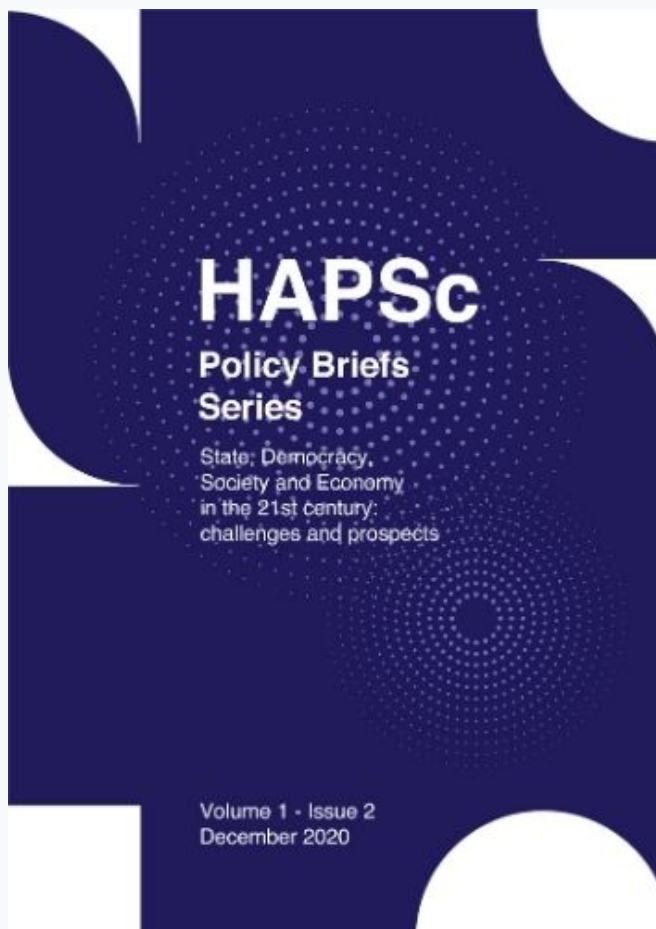


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### Crisis of the Rule of Law in the EU through the Case Law of the ECJ: The Case of Poland

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# Crisis of the Rule of Law in the EU through the Case Law of the ECJ: The Case of Poland<sup>1</sup>

Kassiani Oikonomou<sup>2</sup>

## Abstract

This article describes the rule of law crisis in Poland through the case law of the ECJ. In particular, the country in 2018 adopted the law on the Supreme Court, bringing about two changes; the reduction of the retirement age for judges and secondly, it gave the President of the Republic of Poland the discretion to extend the active judicial service of judges of the Supreme Court. This article concerns the case C-619/18 *Commission v Republic of Poland*, in which the Commission in 2018 pursuant to Article 258 TFEU appealed to the Court of Justice of the European Union, seeking to prove that this law violates the obligations of Article 19 (1) paragraph 47 TEU in conjunction with Article 47 of the Charter, with the Commission claiming that these provisions infringe both the principle of permanence and the principle of the independence of judges.

**Keywords:** rule of law crisis; Poland; EU; European Commission; ECJ; Article 19(1) TEU; Article 47 of the Charter; Article 258 TFEU.

## Introduction

During the economic crisis in the EU, the rule of law crisis appeared in some of its Member States, such as Poland (2016), which violated this principle and the fundamental values of Art. 2 TEU, taking on a "systematic character". According to Art. 2 TEU, the EU is based on "the values of respect for the human dignity of liberty, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities" (Metaxas, 2017). As Chrysomallis (2019: 4) points out: The principle of the rule of law is paramount to the above-mentioned "constitutional foundations" - which constitutes the liberal value identity of the Union-obliging the Member States and the institutions to respect it during the performance of their duties. This respect is very important because it is an element of the EU decision-making process but also "generates" mutual trust between the Member States and between European citizens, on which the legal EU structure is based after the establishment of the AFSJ.

The EU has adopted the term rule of law backsliding (Konciewicz, 2018; Pech and Scheppele, 2017), to better describe this phenomenon, "of a global nature, the systematic weakening of constitutional checks and balances by a new generation of elected but authoritarian leaders (Kaczynski, Orban,)

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(Chrysomallis, 2019: 5; Scheppele, 2017). A term that shows the continuous slippage of some EU countries (Poland, Hungary, Romania) from the liberal and democratic model of governance—something that is a precondition for EU membership—in more anti-liberal forms of government (illiberalism). Pech and Scheppele (2018) aptly define the rule of law regression as: "the process through which elected public authorities deliberately implement governmental blueprints which aim to systematically weaken, annihilate or capture internal checks on power with the view of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party."

According to Chrysomallis (2016; 2019: 5): A common feature of all these government plans for the weakening of the rule of law, which have manifested themselves in a number of Member States of the European Union in the last decade, are the interventions in the judiciary, with the aim of imposing restrictions on its independence as well as its impartiality. In addition, targets of equal importance are the system of judicial review and especially the constitutional courts, wherever such an institution exists.

## **Background**

From 2017 onwards, with legislation that took place in Poland, the new Polish law on the Supreme Court (hereinafter the law on the Supreme Court), which entered into force on 3/4/18 concerned: the reduction of the retirement age of judges (from 70 to 65 years), who were appointed before 3/4/18, with the possibility of extension of the active judicial service of the judges of the particular court beyond the age of 65, provided that a declaration of desire for further performance of the duties is submitted by the judge concerned, accompanied by the submission of a certificate of good health of the defendant and the consent of the President of the Republic of Poland to the judges of the Supreme Court. Also, a very important element for the granting of this consent is that: (i) the President of the Republic of Poland was not bound by any criteria with this decision not to be subject to any judicial review and (ii) national measures gave the President of the Republic of Poland the discretion to extend the active judicial service of judges of the Supreme Court, thus violating the principle of judicial independence and, consequently, EU law.

## **Case Commission v Republic of Poland**

### **Commission Actions**

The Commission on 20/12/17 initiated the procedure of Art. 7 TEU against Poland also mentioned it to the Council to ascertain violation of the values set out in Article 2 TEU by Poland while at the

same time on 2/10/18 appeal to the ECJ according to the article. 258 TFEU for non-compliance of Poland with the obligations arising from Article. 19 (1) TEU and in conjunction with those of Article 47 of the Charter. The Commission has also filed a separate application for interim measures that they can be taken in accordance with Article 279 TFEU and Articles 160 (1) and 7 of the Rules of Procedure, pending a decision by the Court on the substance.

On 15/11/18 and in the context of the Commission's appeal, the President of the Court ordered Case C-619/18 to be expedited under Article 23A of the Statute of the Court however, Poland has asked the Court to dismiss the Commission's action as unfounded.

### **The judgment of the Court**

In its judgment on 24/6/19, the Court initially recalled that Union law is based on the fundamental assumption that Member States share common values as derived from Art. 2 TEU which they accept. Recognition which means the existence of mutual trust between the Member States but especially their courts as regards the recognition of these values which the Union upholds and "among which the principle of the rule of law is chosen", i.e. the observance of EU law.

Although the organization of justice, falls within the competence of the Member States, they themselves, in the exercise of that competence, must comply with their obligations under EU law. They are required to provide for legal remedies, as well as the means necessary to ensure effective judicial protection within the meaning of the Charter and in areas governed by EU law. Specifically, each Member State owes in accordance with Art. 19 (1) TEU "to ensure that bodies which are part of the 'courts' within the meaning of Union law, in the national system of legal remedies in areas governed by Union law, meet the requirements for effective judicial protection". To ensure that a court -the Supreme Court in this case- can provide this protection by ensuring the independence of the body, an independence is of the utmost importance.

The Court has repeatedly emphasized that the necessary freedom of judges from any external interference or pressure imposes certain guarantees in order to protect the persons entrusted with the judicial task, such as life tenure service. The Court's assessment of the first complaint represents the innovative part of the decision. The Court makes it clear that the principle of the equality of judges is not absolute and exceptions are allowed provided that they are based on legitimate and compelling reasons. Reasons which are subject to the principle of proportionality.

Finally, it defined the legal and imperative reasons, stating that: first, the measure must have a legitimate aim, second, it must be proportionate and "inasmuch as it is not such as to raise reasonable

doubt in the minds of individuals as to the imperviousness of the court concerned to external factors and its neutrality with respect to the interests before it".

Poland's arguments concerning the reduction of the retirement age for judges of this court to 65 were aimed at harmonizing this age with the general retirement age, which applies to all officials in Poland. With the explanatory memorandum of the draft law of the Supreme Court, the introduction of a new mechanism that will allow the President of the Republic of Poland to decide "at his discretion" to extend the active judicial service which was reduced by the above law but also the fact that this measure was applied to about 1/3 of the members of the current court (this includes the first President whose term guaranteed by the Constitution was shortened to 6 years) it is something that can raise reasonable doubts as to the real aims of this reform, insofar as it is neither "appropriate" for the attainment of Poland's aims nor proportionate. The Court also held that (the grounds for justification put forward by Poland) this measure of reduction of the retirement age is not justified by a legitimate aim, at the same time infringing the principle of the removability of judges, a principle which is inherent in their independence.

The Court also considered whether the extension procedure provides sufficient guarantees for the protection of the judiciary from political influence, as well as for the elimination of any doubts as to its independence and impartiality, emphasizing in this way the positive obligation of the Member States as it follows from Art. 19 TEU (Simonelli, 2019). Therefore, since the opinion of the National Judicial Council on the request for an extension are not reasoned and the body itself cannot be considered independent, the Court has concluded that: "the discretion held by the President of the Republic for the purposes of authorizing, twice and each time for a 3-year term, between the ages of 65 and 71, a judge of a national supreme court such as the Sąd Najwyższy (Supreme Court)". It was ruled that this power could give rise to reasonable doubts, especially among citizens, as regards in particular the impartiality of the judges concerned by external elements and their neutrality with regard to the interests of those before whom they may be challenged.

## Conclusions

This case underscored the Court's clear position on the question of the Union principle, but also the role of the judge in European integration, making it increasingly important. The Court was called upon to reconsider its attitude towards national judicial systems in order to respond to the rule of law judgment brought before it. For the first time, it declared the incompatibility of a national legislative provision with EU law due to the violation of Art. 19 TEU, going even further in the judgment (Pech and Platon, 2019; Simonelli, 2019) of its decision in a previous case (ASJP).

Consolidating the conditions necessary to ensure judicial independence in accordance with Art. 19 (1) TEU, the Court referred to the conditions that national measures must meet in order not to affect the above principle which guarantees effective judicial protection. The Court (as in ASJP) also considered Art. 19 (1) TEU and not the application of Art. 47 of the Charter, clarifying here the “independent protection of judicial independence”, and emphasizing the principle of equality of judges as a key factor in ensuring the independence of the judiciary.

The regression of the rule of law in Member States is a risk both at the political level where they are linked to "the weakening of the legitimacy of the Union's decision-making system by the participation of governments that do not respect its values" (Chrysomallis, 2019: 6; Kochenov and Bárd, 2018: 10-11, 13-17, 19-21, 24-26) and at the legal level for the evolution of European integration, of the EU legal order. Also, a matter of particular importance is the Member States' respect of the rule of law, because it "generates" mutual trust between the Member States and between European citizens where the legal structure of the Union is based after the establishment of the AFSJ, which is based on the principle of mutual recognition of judicial decisions.

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