

# POLITICS AND CONSTITUTIONALITY: THE CASE OF POLAND

*Ioana-Cristina VIDA\**

## **Abstract**

*At the European Union level, the situation in Poland has raised concerns about the violation of the rule of law. In particular, the European Union has appreciated that the violation of the rule of law was achieved through the lack of an independent and legitimate constitutional review and the adoption by the Polish Parliament of new legislation relating to the Polish judiciary which raises grave concerns as regards judicial independence and increases significantly the systemic threat to the rule of law in Poland: the law on the Supreme Court; approved by the Senate on 15 December 2017, the law amending the law on the Ordinary Courts Organisation, published in the Polish Official Journal on 28 July 2017 and in force since 12 August 2017, the law amending the law on the National Council for the Judiciary and certain other laws approved by the Senate on 15 December 2017, the law amending the law on the National School of Judiciary and Public Prosecution, the law on Ordinary Courts Organisation and certain other laws, published in the Polish Official Journal on 13 June 2017 and in force since 20 June 2017. In this paper we propose to follow only the evolution of the legislative framework that concerns the constitutional court in Poland, as well as the interpretation of these changes by the institutions of the European Union. The issues we are raising concern the constitutional and legislative changes in Poland, the deviations from the rule of law and the legislative and organizational reforms in the Polish constitutional context.*

**Keywords:** *Rule of law, Poland, European Union, constitutionality, politics*

**JEL Classification** [K1]

## **1. Introductory considerations**

The rule of law has, amongst other requirements established in a constitutional democracy, the balance between the legislative power, the executive power and the judiciary power, under the authority of the Constitutional Court. The disturbance of this balance is often caused by the illegitimate intervention of politics in the functioning of the state powers as the Constitutional Court, the courts of law and the state authorities.

The EU's orientations on the rule of law are enshrined in the Communication entitled "A new EU framework for the rule of law" (European Commission, 2014). The most important points concern situations in which the authorities of a Member State take measures or tolerate situations which may systematically and negatively affect the integrity, stability or good functioning

---

\* Associate Professor PhD., Faculty of Public Administration, National School of Political and Administrative Studies, Bucharest

of the institutions, as well as national rule-of-law safeguards (Commission Recommendation, 2017).

The EU framework for strengthening the rule of law acts in three stages (European Commission, 2014). The first stage involves an assessment by the Commission concerning the information that it considers relevant and which perform as clues that signals a continuous threat to the rule of law. In case any threat is identified, the Commission will transmit to the concerned State a "rule of law opinion". The second step occurs when the state concerned has not solved the situation as indicated by the Commission; in this case, the Commission may issue a 'rule of law recommendation' addressed to the Member State setting out a time limit for addressing the identified problems and asking the Member State to communicate the measures taken to the Commission. In the last step, the Commission monitors how the Member State has followed the recommendation. Starting from this framework document on strengthening the rule of law, the Commission has undertaken a dialogue with Poland, as reflected in the recommendations (EU) 2016/1374, (EU) 2017/146 and (EU) 2017/1520.

## **2. The factual situation in Poland**

The European Commission (Reasoned proposal, 2017) shows that on October the 8<sup>th</sup> 2015, before the general elections for Seim from October the 25<sup>th</sup> 2015, the old legislature nominated five persons to be appointed as Constitutional Court judges by the President of the Republic. Three judges would occupy seats vacant during the previous parliamentary term, and the other two would occupy vacant seats during the new parliamentary term that began on November the 12<sup>th</sup> 2015. Following the general election on November the 19<sup>th</sup> 2015, the Seim, through an accelerated procedure, amended the Constitutional Court Act, introducing the possibility to cancel the nominations of judges made by the previous legislature and to nominate five new judges. On November the 25<sup>th</sup> 2015, Seim adopted a motion to cancel the five nominations made by the previous legislature, and on December the 2<sup>nd</sup> there were nominated five new judges. The Constitutional Court was notified both of the decisions taken by the previous legislature and of the decisions taken by the new legislature. The Court delivered two judgments on December the 3<sup>rd</sup> and December the 9<sup>th</sup> 2015. In the judgment of December the 3<sup>rd</sup> 2015, the Constitutional Court ruled that the old Seim had the right to nominate three judges to replace those whose mandates had expired on December the 6<sup>th</sup>. At the same time, the Court clarified that the Sejm had no right to choose the two judges to replace those whose mandates expired in December. The judgment also clearly referred to the requirement that a judge elected by Seim should immediately take the oath to the President of the Republic. On December the 9<sup>th</sup> 2015, the Constitutional Court invalidated the legal basis for the nomination by

the new Seim of the three judges for vacant posts on November the 6<sup>th</sup> 2015, for which the previous legislature had already nominated judges.

The European Commission (Reasoned proposal, 2017) revealed that on December the 22<sup>nd</sup> 2015, Seim adopted the Law amending the Law of 25 June 2015 on the Constitutional Tribunal, which refers to the Court's functioning and the independence of its judges. As a result, on December the 23<sup>rd</sup> 2015, the Commission wrote to the Polish Government asking for information on the measures envisaged for the Constitutional Court's rulings. The Commission stated that it expects the law adopted on December the 22<sup>nd</sup> 2015 not to enter into force until its impact on the independence and functioning of the Court has been examined. The Commission has recommended that the Polish authorities work closely with the Venice Commission. On January the 11<sup>th</sup> the Commission received a response from the Polish Government that did not make the existing concerns disappear. The Polish Government requested the Venice Commission's opinion on the law passed on 22 December 2015, but the law was adopted by the Polish Parliament and published in the Official Gazette, which entered into force on December the 28<sup>th</sup> 2015.

The European Commission points out (Reasoned proposal, 2017) that in December 2015 and in January 2016, Seim adopted a series of new laws through an accelerated legislative procedure (the Audiovisual Law, the Public Administration Act, the Amendment of the Police Law and certain other laws and the Law on the Prosecutor's Office). On January the 19<sup>th</sup> 2016 the Commission wrote to the Polish Government, offering to contribute with expertise and to discuss issues related to the new audiovisual law. On January the 19<sup>th</sup> 2016, the Polish Government wrote to the Commission, presenting its views on the appointment of judges, and referring, among other things, to a constitutional custom related to the appointment of judges. On the 9<sup>th</sup> of March 2016, the Constitutional Court ruled that the law adopted on December the 22<sup>nd</sup> 2015 is unconstitutional. The decision was not published by the Government in the Official Gazette. The Government argued that the ruling should have been delivered by the Court with the quorum provided by the law, according to the provisions of the law that was declared unconstitutional. At that time, the Constitutional Court had only 12 lawfully appointed judges, and the other three judges appointed by Seim in October 2015 were to take the oath to the President of the republic

On 11 March 2016, the Venice Commission (Opinion no. 833/2015) said that the establishment of a high quorum, the requirement for a two-thirds majority for the adoption of decisions and the strict rule that made it impossible to resolve urgent cases could have contributed to creating an institutional blockage that would result in the constitutional court not being able to exercise duties. Correlatively, they showed that the refusal to publish the ruling of 9 March 2016 determines the deepening of the constitutional crisis in Poland (Opinion no. 833/2015).

The European Commission expose (Reasoned proposal, 2017) that following the ruling of 9 March 2016, the Constitutional Court resumed the hearings. The Polish Government did not participate in these proceedings. In addition, the Polish Government refused to publish rulings subsequently handed down by the Constitutional Court. On the 13<sup>th</sup> of April 2016, the European Parliament adopted a Resolution on the situation in Poland, urging the Polish Government to fully respect, publish and fully implement the Constitutional Court's judgment of 9 March 2016 and implement the judgments of 3 and 9 December 2015 and at the same time fully implement the recommendations of the Venice Commission. On April the 26<sup>th</sup> 2016, the General Assembly of the Supreme Court of Poland adopted a resolution confirming that the Constitutional Court's rulings were valid even if the Polish Government refused to publish them in the Official Gazette and on the 22<sup>nd</sup> of July 2016 Seim adopted a new law on the Constitutional Court, which was published in the Official Gazette on August the 1<sup>st</sup> 2016.

Subsequently, European Commission explained the circumstances in which decided on the 13 of January 2016 to examine the situation under the rule of law and in which it was adopted, on the 1<sup>st</sup> of June 2016, an opinion on the rule of law in Poland (first Recommendation, 2016). Therefore, it was recommended that the Polish authorities have to take appropriate measures to address the threat to the rule of law under emergency: (a) fully implement the Constitutional Court's rulings; (b) publish and fully implement the Constitutional Court's rulings; (c) ensure that any reform of the Constitutional Court Law respects its decisions and takes full account of the Venice Commission opinion; (d) ensure that the Constitutional Court can examine the compatibility of the new law adopted on 22 July 2016 on the Constitutional Court before it enters into force and publish and fully implement the Court's judgment to that effect; (e) refrain from actions or public statements that could undermine the legitimacy or effectiveness of the Constitutional Court (Recommendation, 2016). The Commission has given the Polish Government a period of three months to take the necessary action. In its reply of 27 October 2016, the Polish Government disagreed with any point of view from the position expressed in the Recommendation and did not announce any new measures designed to mitigate the problems of the rule of law signaled by the Commission.

The European Commission discovered that (Reasoned proposal, 2017) on the 30<sup>th</sup> of July 2016, the President of the Republic signed the law of July the 22<sup>nd</sup> 2016, which was published in the Official Gazette on the 1<sup>st</sup> of August 2016. On the 11<sup>th</sup> of August 2016, the Constitutional Court ruled on the law of 22 July 2016. The judgment stated that a number of provisions of the law, all of which were identified by the Commission in its Recommendation of July the 27<sup>th</sup> 2016 as a reason for concern, were unconstitutional. The Polish Government has not recognized the validity of this judgment and has not published it in the Official Gazette. On August the 16<sup>th</sup> 2016, the Polish

Government published 21 judgments of the Court that were passed between the 6<sup>th</sup> of April 2016 and the 19<sup>th</sup> of July 2016. However, the judgments from the 9<sup>th</sup> of March 2016 and the 11<sup>th</sup> of August 2016 were not published by the Government. The European Commission shows (Reasoned proposal, 2017) that on the 14<sup>th</sup> of September 2016, the European Parliament invited the Polish Government to cooperate with the Commission in accordance with the principle of loyal cooperation under the Treaty (European Parliament, Resolution, 2016). Also, the Venice Commission pointed out that the new law on the Constitutional Court is delaying and seriously obstructing the works of the Court. It also considers that this law can lead to ineffective and undermine the independence of the Court, by exerting excessive control over the legislative and executive functioning (2016). The opinion also criticized the system whereby candidates for the office of President of the Constitutional Court are proposed to the President of the Republic, which could lead to a situation where the proposed candidate that is not supported by a considerable number of judges is called (Venice Commission 2016). The opinion said that by adopting the law, the Polish Parliament assumed constitutional control powers, which it did not have when it acted as a lawmaker with ordinary status. In the opinion it was considered that the Parliament and the Government of Poland continued to challenge the position of the final arbitration tribunal in constitutional matters, and the two institutions themselves attributed this authority.

The European Commission ascertains (Reasoned proposal, 2017) that the Polish Government decided not to attend the Venice Commission meeting on the 14<sup>th</sup> of October 2016 because it considered that the Venice Commission opinion was biased and did not take into account the Government's position.

Also, the United Nations Human Rights Committee (Report, 2016) expressed concerns about the negative impact of the amendments to the Constitutional Court Act in November and December 2015 and July 2016 on non-compliance with Constitutional Court rulings and the independence of the Court and the implementation of the International Convention on Civil and Political Rights. The Committee reiterated the Commission's recommendations on the restoration of previous legislative situations.

The European Commission points out (Reasoned proposal, 2017) that on November 7, 2016, the Constitutional Court ruled on the constitutionality of the provisions of the Law of 22 July 2016 on the election of the President and Vice-President of the Court, stating that the Basic Law must be interpreted as meaning that the President of the Court is appointed by the President of the Republic among the candidates who obtained a majority of the votes in the General Court. Furthermore, on the 1<sup>st</sup> and 2<sup>nd</sup> of December 2016, the Senate adopted the Law of 30 November 2016 on the Legal Status of Judges of the Constitutional Court and the Law of 30 November 2016 on the Organization and Procedures within the Constitutional Court. On 14 December 2016, the European Parliament held a debate on the situation of the rule of law in Poland,

where the Commission urged the Polish authorities, as a matter of urgency, not to implement the new laws before their constitutionality examination by the Constitutional Court. In like manner, on 15 December 2016, the Senate adopted the Law of 13 December 2016 implementing the Law on Organization and Procedures and the Law on the Status of Judges. Additionally, on 19 December 2016, the President of the Republic signed the three new laws governing the functioning of the Constitutional Court, which were published in the Official Gazette. On the same day, the president of the republic called Judge J.P., elected by the new Seim, as interim president of the Constitutional Court. On December 20, 2016, Judge J.P. allowed the three judges appointed by the Seim's eighth legislature without a valid legal basis to take office in the Court and convened a General Assembly meeting for the same day. Given the short term, a judge could not attend the meeting and called for the postponement of the next day meeting, but Judge J. P. refused. Out of 14 judges present at the meeting voted only three judges illegally appointed and three judges appointed by the current government. Two candidates were elected: J. P. and M. M., and their candidatures were presented to the President of the republic. On December 21, 2016, the president of the republic called Judge J.P. as president of the Constitutional Court.

On the 21<sup>st</sup> of December 2016, the Commission adopted a second rule of law recommendation in Poland (Second Recommendation, 2016). The Commission has found that the procedure leading to the appointment of a new President of the Constitutional Court has raised serious concerns about the rule of law. The Commission called on the Polish Government to resolve the problems identified as emergency, within two months.

The European Commission denotes (Reasoned proposal, 2017) that on 20 February 2017, the Polish Government responded to the recommendation, expressing its disagreement and no action to address the problems identified by the Commission.

Also, the European Commission takes notes that on 10 January 2017, the Vice-President of the Constitutional Court was ordered by the newly-appointed President of the Court to use his remaining leave. On 24 March 2017, the compulsory leave period was extended until the end of June 2017, despite the Vice-President's request to resume work as a judge of the Court from 1 April 2017. On 12 January 2017, Justice Minister launched a procedure before the Constitutional Court to examine the constitutionality of the election in 2010 of three judges of the Court. Following this procedure, the three judges have not been assigned to the cause.

On 26 July 2017 the European Commission reiterated that the actions of the Polish government significantly increased the systemic threat to the rule of law. In particular, the Commission has recommended the Polish authorities to reinstate the independence and legitimacy of the Constitutional Court as a guarantor of the Polish Constitution and to publish and fully implement the

Constitutional Court's rulings of 9 March 2016, 11 August 2016 and 7 November 2016 (3<sup>rd</sup> Recommendation).

Over and above, the European Commission points out (Reasoned proposal, 2017) that on the 31<sup>st</sup> of July 2017 Seim was formally notified of the President's decision to reject the Law on the Amendment of the Law on the National Judicial Council and the Law on the Supreme Court. Also, on August the 4<sup>th</sup> and August the 16<sup>th</sup> 2017, the Polish government wrote to the Commission asking for clarifications on its recommendation of 26 July 2017, to which the Commission responded by letters of 8 August and 21 August 2017. On August the 28<sup>th</sup> 2017, the Polish Government responded to the Recommendation of 26 July 2017, expressing disagreement with all the assessments in the Recommendation. On the 11<sup>th</sup> of September 2017, the Constitutional Court, in a panel of five judges, declared unconstitutional certain provisions of the Code of Civil Procedure that allow the ordinary courts and the Supreme Court to appreciate the legality of the appointment of the President and Vice-President of the Court. Also, on September the 15<sup>th</sup> 2017, Seim appointed a person in a position already occupied by a judge of the Constitutional Court, and the president of the republic accepted the oath on 18 September 2017.

On the 25<sup>th</sup> of September 2017, the Commission informed the Council of the situation of the rule of law in Poland.

On 11 October 2017, the Parliamentary Assembly of the Council of Europe adopted a resolution on the new threats to the rule of law in member states of the Council of Europe, in which it also expressed its concern about developments in Poland endangering compliance the rule of law and, in particular, the independence of the judiciary and the principle of the separation of powers (Council of Europe, Resolution, 2017).

The European Commission reveals (Reasoned proposal, 2017) that on the 24<sup>th</sup> of October 2017, the Constitutional Court, in a panel that included two illegally appointed judges, declared the unconstitutionality of the provisions of the Supreme Court law, on the basis of which, among other things, had been named the current prime minister of the Supreme Court. On the 24<sup>th</sup> of October 2017, The Constitutional Court, in a panel of two judges illegally appointed, declared the constitutionality of the provisions of the three Constitutional Court Laws of December 2016, including the provisions on which the two judges appointed unlawfully to resolve the case had been authorized to rule in the Constitutional Court. The Polish People's Advocate's motion regarding the recusal of the two judges illegally appointed for this reason had been rejected by the Constitutional Court.

On the 15<sup>th</sup> of November 2017, the European Parliament expressed its support for the recommendations issued by the Commission as well as for the infringement procedure, given that the current situation in Poland represents a clear

### 3. The state of law

The effectiveness of constitutional justice has been called into question by amending the structure of the Constitutional Court by adopting six consecutive legislative acts. Also, the constitutionality control depends on the legitimacy of the Constitutional Court's decisions related to their implementation. In the event that certain decisions of the Constitutional Court have not been published, the question of the *de facto* effectiveness of the Constitutional Court is questioned, as compliance with the judgments and the production of legal effects is a democratic requirement.

Last but not least, the successive adoption of three laws changing the nomination procedure of the President of the Constitutional Court in one year puts into question the legal certainty and even the legitimacy of the Court. The European Commission asks whether the composition of the Constitutional Court does not enjoy legitimacy, how can the constitutionality of the Polish laws be guaranteed?

This issue accompanied by a number of other legislative changes that alerted and worried the European institutions, prompted the European Commission to propose to the Council on the 20<sup>th</sup> of December 2017 the activation of Art. 7 par. (1) TEU and to establish the existence of a clear risk of serious misconduct of the values set out in Art. 2 TEU by Poland.

On 1<sup>th</sup> of March 2018, the European Parliament adopted the European Commission Decision and the activation of Art. 7 par. (1) TEU regarding the situation in Poland (European Parliament resolution, 2018). The European Parliament has a decisive role in this situation because its acceptance gives the Council unhindered path to start the steps to investigate whether there is a clear risk of violating the values of the European Union in Poland. The procedure will be lasting and will certainly create new controversy in the development of the relationship between national law and European Union law.

On our side, we consider that to respect the rule of law is one of the fundamental European values as they are listed in the primary law of the European Union. In our opinion, the risk of serious violation of the rule of law should only be understood as threatening or prejudicing the stability of law and the legal security in a Member State or the European Union, as a whole.

### Bibliography

1. Commission Recommendation (EU) 2017/1520 of 26 July 2017 regarding the rule of law in Poland complementary to Recommendation (EU) 2016/1374 and (EU) 2017/146 (OJ L 228, 2.9.2017, p. 19).
2. Communication from the Commission to the European Parliament and the Council of 11 March 2014, 'A new EU Framework to Strengthen the Rule of Law', COM(2014) 158 final.
3. Council of Europe, PACE, 11 October 2017, Resolution 2188 (2017), New threats to the rule of law in Council of Europe member States: selected examples.

4. European Parliament resolution of 1 March 2018 on the Commission's decision to activate Article 7(1) TEU as regards the situation in Poland (2018/2541(RSP)).
5. European Parliament resolution of 14 September 2016 on the recent developments in Poland and their impact on fundamental rights as laid down in the Charter of Fundamental Rights of the European Union (2016/2774(RSP)).
6. European Parliament resolution of 15 November 2017 on the situation of the rule of law and democracy in Poland (2017/2931(RSP)).
7. First EU Commission Recommendation (EU) 2016/1374 on the rule of law on the 27<sup>th</sup> of July 2016
8. Reasoned proposal in accordance with article 7(1) of The Treaty on European Union regarding the Rule Of Law in Poland - Proposal for a COUNCIL DECISION on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, COM (2017) 835.
9. Second "Rule of law" Recommendation (EU) 2016/146.
10. United Nations Human Rights Committee Report: Concluding observations on the seventh periodic report of Poland, 2016.
11. Venice Commission Opinion no. 833/2015, CDL-AD(2016)001 ('CDL-AD(2016)001.
12. Venice Commission Opinion no. 860/2016, CDL-AD(2016)026 ('CDL-AD(2016)026')