

Poland's Extended Disciplinary System

Til Leichsenring

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The [judgement](#) of the European Court of Justice (ECJ) on June 5, 2023 (C-204/21) has added a new chapter to the rule of law crisis in Poland. The outcome was [largely expected](#) given the well-established jurisdiction of the ECJ on matters of the rule of law. However, the judgment is arguably notable for recognizing some of the more insidious ways in which Poland has undermined judicial independence. Specifically, I argue that the ECJ's ruling constitutes a promising first step towards fashioning a legal response to the Polish government's suppression of judicial independence through public intimidation and stigmatization of judges.

Four Unsurprising Results

In the infringement proceedings, the Commission's first claim challenged the prohibition introduced by the Amending Law („muzzle law“), which prevented Polish judges from verifying whether a judgment had been rendered by an independent court. The exclusive competence for this verification now lies with the newly created „Chamber for Extraordinary Control and Public Affairs.“ It also challenged the fact that breaches of this provision are treated as disciplinary offenses. Furthermore, the Commission's claims were directed against the far-reaching jurisdiction of the Disciplinary Tribunal, whose decisions can directly impact the status of judges (complaints 1-4). The fifth complaint focused on a provision that requires judges to disclose information about their memberships in associations, foundations, and political parties, which is then published on the internet.

The Commission's opposition to these strict provisions were motivated by the fact that the ECJ not only made it clear that [it has competence](#) to assess the independence of national courts, but also that [national courts are obliged](#) to review the independence of courts on the basis of Article 19 (1) subparagraph (2) TEU, Article 47 CFR and Article 267 TFEU. The Polish government apparently aimed to counteract a [division of the Polish judiciary](#) into pro-EU and pro-government judges by strictly suppressing the corresponding application of EU law.

The current judgment first focused on the Polish Disciplinary Chamber, a key tool used by the Polish government to suppress independent justice. The establishment of the Chamber in a particular context, including the appointment of the National Council of Justice and the introduction of a stricter disciplinary code along with its extensive powers (such as waiving criminal immunity, reducing remuneration, and enforcing early retirement), constituted a violation of this obligation. Importantly, the ECJ concluded that the mere prospect of being judged by this chamber was sufficient to undermine the independence of judges ([paras. 91-103](#)).

Furthermore, the exclusive jurisdiction of the „Chamber for Extraordinary Control and Public Affairs“ regarding appeals on the independence of judges was deemed a

violation of Article 19(1) TEU and Article 267 TFEU ([paras. 263-292](#)). While granting exclusive authority to a judicial body was not seen as inherently objectionable ([para. 265](#)), the ECJ identified a problematic underlying intention in this case: It contravened the obligation for courts to [assess their own independence and that of their fellow judges](#). Specifically, establishing a Central Chamber solely responsible for controlling complaints about judicial independence would likely discourage other judges from fulfilling their duty to review the independence of themselves and their colleagues.

The same goal clearly underpinned the „[muzzle law](#)’s“ prohibition and sanctions on the review of judicial independence by Polish judges. [As decided before](#), based on the overall context of the Polish judicial reform and their broad and imprecise character, the Court found the provisions likely to deter judges from complying with the Union’s obligations ([paras. 104-231](#)). As such, they were held to be in breach of Article 19 (1) TEU in conjunction with Article 47 CFR as well as Article 267 TFEU.

These findings are hardly surprising. After all, the ECJ had already found the points to be highly likely to violate Union law in its [interim order of 14.7.2021](#) and now simply provided additional substantiation of its reasoning.

Recognizing the “Extended Disciplinary System”

In contrast, the ECJ examined, for the first time, the requirement for Polish judges to disclose their affiliations with associations, foundations, and political parties, which is then publicly accessible online (cf. Article 88a(4) Amended Ordinary Courts Act). This obligation was found to violate [Article 6\(1\)\(c\), \(e\), \(3\), and Art. 9\(1\) of the GDPR](#), as well as the right to privacy, family life, and personal data protection ([Art. 7 and Art. 8\(1\) CFR](#)).

Despite the government claiming that this measure protected judicial independence, the ECJ determined that it actually served to stigmatize and intimidate judges. The requirement to publish this information was particularly problematic, as it significantly interfered with the privacy of judges and carried a high risk of intimidation. This contradicted the alleged purpose of the law ([paras. 375-385](#)), thereby violating Article 6(3) of the GDPR. Although not explicitly addressed, public access to this sensitive information is also likely to facilitate defamation and intimidation of judges.

Accordingly, the (particularly serious) encroachment on the rights of judges under Article 7 and Article 8 (1) CFR cannot be justified either. After all, a regulation which in reality primarily serves to stigmatize judges cannot be construed to possess a legitimate purpose that serves to justify encroachments on fundamental rights according to Article 52 (1) CFR.

Through its comprehensive analysis of the objectives behind the information and publication obligation, the ECJ has taken a crucial step in addressing what can be called the “extended disciplinary system” that the Polish government has put in place to enhance its grip on the judiciary. By this, I mean the government’s use of public stigmatization and defamation to intimidate judges critical of the regime. Examples

include a [troll campaign](#) led by the former Vice-Ministry of Justice, a [poster and TV campaign promoting the 2017 judicial “reform” in Poland](#), and frequent negative reporting about judges on public television. These measures, alongside the threat of legal sanctions, hold the potential to influence judges and thereby jeopardize judicial independence. Public statements and exposure can significantly intimidate judges, as evident from a [recent survey of 15,821 European judges conducted by the ENCJ](#), where judges across most European jurisdictions reported feeling pressured by media comments. While sustained criticism of those in power is important for a democracy, it becomes problematic when it transforms into inappropriate pressure used by political forces to indirectly control the judiciary and limit its independence. When judges fear public attacks for issuing critical rulings against the government, public pressure can pose a threat to judicial independence on par with disciplinary sanctions.

Against this backdrop, the ECJ's determination that the information obligation fails to fulfill its claimed purpose of protecting judicial independence and contributes to the stigmatization of judges instead is of particular significance. It evinces the ECJ's recognition that the stigmatization of judges and the resulting public pressure can also jeopardize judicial independence.

The Problem of Indirect Threats to Judicial Independence

However, in its recent ruling, the ECJ based the illegality of the information obligations on the specific requirements of the GDPR and the individual rights of judges (Art. 7, 8(1) CFR) rather than on obligations pertaining to the rule of law. This was to be expected, given that the ECJ was constrained in its argumentation by the binding nature of the preliminary proceedings. However, if given the opportunity in future proceedings, the ECJ should recognize that the stigmatization of judges might also be in contravention of the general rule of law obligation outlined in the treaties.

Thus, for one, there is no longer any doubt that the rule of law value from Article 2 TEU creates a comprehensive and enforceable obligation for member states to refrain from acts that raise justifiable doubts about the independence of judges. In this respect, the ECJ has repeatedly demonstrated sensitivity not just to direct attacks but also indirect impairments of judicial independence. In particular, it declared that national rules must exclude „also types of influence which are more indirect and which are liable to have an effect on the decisions of the judges concerned“ ([para. 197](#)). In a similar vein, it has also recognized the impact public statements might have on judicial decisions, [in a ruling regarding the execution of European arrest warrants](#). In particular, it held that where the warrants emanate from countries with systematic flaws in the rule of law, judges should also assess the concrete risk of influence on the proceedings based on “statements by public authorities which are liable to interfere with how an individual case is handled” (para. 61) in the issuing state. The ECtHR has been even more explicit in this respect, classifying very negative statements by government politicians about a certain outcome of the proceedings as a violation of the right to a fair trial ([paras. 86](#)). This

matters insofar as the ECJ in its rule of law case law also refers to the right to a fair trial under Article 47 CFR, whose scope it must interpret taking account of the ECtHR, pursuant to Article 52 (3) CFR and Article 6 (3) TEU.

At the same time, the [ECJ has repeatedly opposed measures that might have chilling effects for judicial independence](#) as incompatible with a Member State's [rule of law obligations](#). For example, the „mere prospect“ ([para. 90](#)) of being disciplined by a non-independent chamber is an impairment of judicial independence under Art. 2 TEU. This was also confirmed in the current judgement ([para. 101](#)). Similarly, it recognized in an obiter dictum that the “mere prospect” ([para. 58](#)) of disciplinary sanctions due to the initiation of a preliminary ruling procedure is incompatible with the meaning of the preliminary ruling procedure under Art. 267 TFEU. While these rulings addressed the chilling effect of disciplinary legal sanctions, there is no reason in law or logic why the same reasoning cannot also apply to the chilling effects of public stigmatization.

As a result, the existing legal framework and case law allow for the consideration of stigmatization and intimidating public statements as infringements on judicial independence under the general rule of law obligation outlined in the treaties, without having to break any absolute „new legal ground“. Considering the Commission's success in blocking the Polish' governments use of legal sanctions to undermine the independence of the Polish judiciary, there is a legitimate concern that the Polish government may now resort to non-legal tactics, such as public stigmatization. As a result, it is incumbent upon the Commission to expand its legal rationale, enabling the ECJ to have comprehensive jurisdiction in addressing such issues.

A Promising First Step

By unequivocally condemning the provisions of the „muzzle law,“ the exclusive competence of the Chamber for Extraordinary Control and Public Affairs, and the Disciplinary Chamber, the ECJ has reiterated its sensitivity to encroachments on judicial independence through legal obligations. The focus should now shift to addressing attacks on judicial independence that occur outside the realm of the law, including through measures of public stigmatization. Recognizing and acknowledging a problem is crucial in order to effectively combat it. With its clear finding that the publication of judges' personal data can lead to their stigmatization, the ECJ has taken an important initial step in this direction. The ruling thereby paves the way for a more comprehensive response to the attacks on the independence of the Polish judiciary. It is imperative that the Commission acknowledges this dimension of impairment to judicial independence and responds accordingly. Given the comprehensive assault on the rule of law in Poland, a comprehensive countermeasure is needed.

