

THE END OF AN ERA

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Petra Bárd

Adam Bodnar

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Summary

On 7 October 2021 the Polish Constitutional Court delivered its judgment in case K3/21, holding that the basic foundations of European integration, such as the primacy of EU law and the EU understanding of judicial independence, were contrary to the Polish Constitution. This paper explores the consequences of the ruling for the European project, with a special emphasis on the principles of mutual trust and mutual recognition in criminal cases. Contrary to what some academics believe, the judgment is short of a notification of intent to withdraw from the EU under Article 50 TEU. But it does have very serious implications beyond the borders of Poland for the common European project, and marks the end of judicial cooperation in the area of freedom, security and justice (AFSJ). EU institutions still try to uphold the semblance that specific judges were independent in the Polish anti-constitutional setting and force member states' judges to cooperate. But such an approach risks violating fundamental rights, especially the right to a fair trial. This in turn forces national courts to either disregard EU law, or compromise on fundamental rights and get into an open conflict with the European Convention on Human Rights (ECHR). The only way to resolve this tension is to openly acknowledge the end of the era of mutual trust and suspend mutual recognition-based laws.

Petra Bárd is Associate Professor at ELTE Faculty of Law, Budapest, Researcher at the Central European University, Budapest, and Fernand Braudel Fellow at the European University Institute, Florence. Adam Bodnar is Professor of Law at the SWPS University in Warsaw and former Ombudsman of Poland (September 2015-July 2021). This paper has been prepared in the context of the STREAM (Strengthening Trust in the European Criminal Justice Area through Mutual Recognition and the Streamlined Application of the European Arrest Warrant) project, funded by the European Union's Justice Programme (2014-2020). The content of this paper is the result of the authors' research and is their sole responsibility. The European Commission does not accept any responsibility for use that may be made of the information it contains. The authors would like to express their gratitude to Sergio Carrera and Steven Blockmans for their comments on an earlier version of this paper.

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1. The state of the rule of law in Poland: from bad to worse

Since the October 2021 judgment of the Polish Constitutional Tribunal (PCT), a huge question mark hangs over the sensibleness of any decent legal discussion about the rule of law in Poland. If the picture was dark before, it's now more devastating than ever.

- Poland is openly [not enforcing](#) judgments of the Court of Justice of the European Union (CJEU) or the European Court of Human Rights (ECtHR) concerning rule of law and judicial reforms.
- Non-enforcement of the interim measure concerning the coal-based power plant in [Turów](#) and a resulting conflict with the Czech Republic is indicative of Polish governmental policy and its disrespect towards the CJEU's role. Poland is obliged to pay €500,000 for each day of non-enforcement of the measure.
- The division in the application of law is growing and examples abound: the dubious status of the National Council of the Judiciary in its new composition ([neoNCJ](#)); the (non-)recognition of the status of judges appointed by the neoNCJ; or the repression of judges by way of disciplinary sanctions and procedures aimed at lifting judicial immunity.
- [Article 7\(1\)](#) TEU proceedings have long been pending against Poland; now the [EU Recovery Plan](#) is suspended with respect to the country.
- As things escalate, the legal dispute has moved to the streets; massive [demonstrations](#) backing EU membership took place on 10 October 2021 in more than 100 Polish towns and cities.

By openly questioning the basic foundations of European integration, such as the primacy of EU law and the EU understanding of judicial independence, the PCT's [judgment](#) of 7 October 2021 (K3/21) escalates the tensions between the Polish government and European values and EU law principles to a completely new level. The PCT judgment emphatically divides the legal community into those who support governmental policies and reforms (usually taking personal or financial advantage of those reforms) and those who defend the rule of law and EU membership. Most notably, the Legal Sciences Committee of the Polish Academy of Sciences issued a strong, unanimous [statement](#) on 12 October 2021 indicating the defective character of the PCT judgment. This statement has been supported by many deans of Polish law [faculties](#).

2. The importance of case K3/21

EU integration had already been undermined by a previous judgment of the PCT delivered on 14 July 2021 (P7/20). That motion, submitted by the Disciplinary Chamber of the Supreme Court, challenged the power of the CJEU to issue interim measures concerning the Polish judiciary. The PCT held that the use of such powers by the CJEU, on the basis of Article 19(1) TEU on the principle of effective legal protection, contravenes the Polish Constitution. The judgment was issued by just five judges, one of them dissenting. But the PCT decided to hear the similar case of K3/21 in a full panel.

The motion to challenge the provisions of the EU Treaty concerning the principle of effective legal protection (and their interpretation by the CJEU) was submitted to the PCT by the Prime

Minister. At the beginning, the case was heard in a panel of five judges. However, at a certain point the decision was taken to move the case to the full judicial panel. The review of the case has been postponed several times, most probably to leave sufficient time and space for political negotiations. The full judicial panel hearing the case included former politicians (such as Stanisław Piotrowicz and Krystyna Pawłowicz) who openly disrespect the EU or who are architects of Polish judicial ‘reforms’. Motions by the Ombudsman to exclude them from proceedings were rejected.

Contrary to often-voiced claims, this judgment cannot be compared to any ruling of other apex courts (such as the German Federal Constitutional Court) on the relation between EU and national laws, for various [reasons](#), most notably because the PCT is not independent (see Case of [Xero Flor w Polsce sp. Z o.o. v Poland](#), and [Reczkowicz v Poland](#)). This is so mainly because of the participation of the ‘double judges’ in the proceedings, i.e. judges appointed to already-taken positions on the PCT’s bench. Since the Polish Constitutional Court itself suffers from lack of independence, it is essentially, a captured court-rubber-stamped judicial capture by the government.

The institution that defended the principle of the supremacy of EU law – presenting the view of most of Polish (and European) legal scholarship – was the Ombudsman’s Office, represented by three prominent lawyers: Maciej Taborowski, Mirosław Wróblewski, and Paweł Filipek. They were also the ones who unsuccessfully tried to explain that the principle of judicial independence stems from both the Constitution and EU law, which point in the same direction.

The PCT claimed that Article 19(1) TEU, as interpreted by the CJEU, undermines national competences laid down in the Polish Constitution, which provides for a right to regulate the system of the judiciary. As Judge Piotr Pszczółkowski, one of the two dissenting judges, explained, the ruling “seeks, in essence, to legitimise the actions of the parliament and the government aimed at paralysing the possibility of challenging the legislative solutions adopted as part of the so-called reform of the judiciary, should they be found by the CJEU and the Polish courts to be incompatible with the Treaty obligations to ensure effective legal protection.”

The ruling party Law and Justice (PiS) is likely to present itself as the protector of the Constitution and enact new rules on the judicial structure in Poland, undermining judicial independence even further, under the pretext of serving the implementation of the judgment. Leader of the PiS party Jarosław Kaczyński has already announced his willingness to make further reforms of the judiciary, mostly concerning court structure, in a radio interview on 16 October 2021.

However flawed the constellation of the judicial panel and the proceedings, this judgment is published in the Official Journal and is thus binding. It will be relied upon by those courts and judges that want to keep the status quo and may be used to put further pressure on judges loyal to the Constitution and EU law. One can already see examples of disciplinary proceedings or decisions of the Minister of Justice and court presidents on the suspension of judges, just because they applied EU law (see the cases of Judges Adam Synakiewicz and Piotr Gąciarek, for example). With this judgment, relevant authorities will have a strong legal ground to continue this practice.

3. Consequences of the judgment for the AFSJ

Some are already talking about a formal '[Polexit](#)'. We strongly disagree with them. Legally speaking, the judgment is short of a notification of intent to withdraw from the EU under Article 50 TEU. Any contrary rhetoric is confusing key actors and shifting the focus from what is actually happening: a final confirmation of Poland's exit from the club of constitutional democracies based on the rule of law. This is a milestone in a long process of destruction. While EU institutions were standing by, and reactions came too little too late, funds kept on flowing to rule-of-law violators, even though the decline has serious implications beyond the borders of Poland for the common European project. Upholding – i.e. interpreting and applying – EU law can only be realised through the cooperation of the CJEU and domestic courts. Should national judges be subjected to disciplinary proceedings for inviting the CJEU to give an interpretation of EU law, as the Polish 'muzzle' law dictates, the EU legal system is fundamentally jeopardised. And the PCT has just rubber stamped such laws and judicial capture in general.

Lack of judicial independence also has a particular effect on the relation between judges at the various levels of the EU's system of multi-level constitutionalism, especially on the cooperation between domestic courts in the AFSJ. The principle of mutual trust underlying mutual recognition has a central role in the AFSJ. It assumes that, however different criminal and criminal procedural laws across EU member states are, all persons will get a fair trial by an independent judiciary. This optimistic starting point is backed up by the black-letter law of Article 2 TEU, the text of the Charter of Fundamental Rights, a series of secondary laws on criminal procedure, and standards on detention conditions. But it has also been reconfirmed by the CJEU on multiple occasions.

In [Opinion 2/13](#) the CJEU reiterated how crucial mutual trust was; in fact it was deemed to be of such essential importance that it appeared as one of the reasons why EU accession to the ECHR was not warranted. In a series of cases relating to the framework decision on the European Arrest Warrant, which foresees a simplified and expedited extradition within the AFSJ, the CJEU insisted that mutual trust as such must not be suspended, until the sanctioning prong of Article 7 TEU has not been applied (something which has never happened in EU history). It allowed domestic courts however, to deny surrender requests on fundamental rights grounds on a case-by-case basis ([Aranyosi and Căldăraru, LM](#)). According to the CJEU, executing national courts must first check whether there were systemic or generalised deficiencies with regard to judicial independence, and if there were, the national court must assess the impact of the respective deficiencies on the individual at the level of the requesting court. We have long [disagreed](#) with the imposition of the second part of the test, which places Herculean hurdles before the suspect, to show how a systemic deficiency would concern her individually. "Once the first step of the test is satisfied, the onus should shift to the stronger party, i.e. the state accused of rule of law violations, in light of the bedrock of the principle of a fair trial..."

But matters in Poland have gone from bad to worse since the judgment in *LM* was rendered, even by the CJEU's own account. Luxembourg denounced various elements of the Polish judicial 'reforms', from prematurely retiring judges to the muzzle law. In light of the latter, the

Amsterdam District Court invited the CJEU yet again to allow surrenders to be suspended in general, and not only on a case-by-case basis, given that the muzzle law is applicable to, and thus potentially has a chilling effect on, every single judge in Poland. But in [L and P](#), the CJEU upheld the test it had developed in *LM*.

With the October 2021 ruling, the PCT dashed all hopes that the presumption of mutual trust is justified. Poland departed from the European understanding of the rule of law and judicial independence, and every single judge in the country is to follow this reading. The *LM* test is no longer viable; its second prong of checking whether an individual court or a specific judge was still independent in the anti-constitutional setting is now redundant. The CJEU will have ample opportunities to make this finding, in pending preliminary ruling procedures with regard to the *LM* test (see the questions asked by the Irish Supreme Court in [C-480/21](#), and a novel [referral](#) by the Amsterdam District Court).

After the PCT ruling under scrutiny, mutual trust must be declared to be terminated with regard to Poland, at least until the rule of law is restored. Such a declaration should preferably take place via political EU institutions. A negative assessment of the rule of law health status in a given member state (based for example of the Commission's [Annual Rule of Law Reports](#) or any other monitoring tool) should lead not only to sanctions, but also to the suspension of legal instruments based on the presumption that EU member countries adhere to Article 2 TEU values. Until such a move is made, the CJEU could step in, and suspend mutual recognition-based laws in general. Thus far the CJEU does not seem to be willing to take up this role, for various reasons, not least because of a fear that a declaration of total judicial capture in Poland would mean that all Polish courts are non-courts for the sake of EU law, and thus they would be deprived of sending preliminary references to the CJEU. This would be one avenue to exercise some external control over the Polish executive harassing the judiciary. In the absence of EU institutions' willingness to generally suspend trust, a general suspension of mutual trust could be declared by member states' courts. This would risk the fragmentation of EU law, which is suboptimal, but still better than forcing national courts to perform the *LM* test on a case-by-case basis and – because of the difficulty of satisfying its second prong – potentially become complicit in HR violations, and moreover, creating a direct conflict with the ECHR. For the past 15 years the ECtHR has presumed that ECHR obligations are not violated when member states implement EU law, given that the protection of fundamental rights afforded by the EU was in principle equivalent to that of the Convention system ([Bosphorus v Ireland](#), [Michaud v France](#)). But the Bosphorus presumption is rebuttable, even if the threshold is high. The equivalency in human rights protection is rebutted only in the case of manifest deficiency.

Under the ECHR mutual trust must have its limits ([Avotiņš v Latvia](#)) and in the context of the execution of European arrest warrants, the mutual recognition mechanism should not be applied automatically and mechanically to the detriment of fundamental rights ([Romeo Castaño v Belgium](#) and in [Pirozzi v Belgium](#)). In [Bivolaru and Moldovan v France](#) a member state has for the first time been held responsible for not sufficiently respecting its ECHR obligations in a surrender case.

4. Conclusion

The devastating effects of the K3/21 judgment have multiple layers. State and judicial capture culminating in the PCT's ruling destroys the very foundation of EU law: the principle of primacy. It also dissolves the trust that is the basis of mutual recognition-based instruments, thus a whole set of EU laws must become suspended with regard to Poland, until the rule of law is restored. Revoking trust and suspending mutual recognition-based legal instruments in general, even temporarily, is a drastic step, and so far EU institutions are apparently not prepared to take it – although there are [some suggestions](#) in that regard. So, the CJEU is forced into performing the job political institutions should take accountability for. It is apparent from the CJEU's insistence on the LM test that it is unwilling to take over the role of other EU institutions. This in turn does not sufficiently consider the devastating consequences of a systemic rule of law decline for the individual. It forces national courts to either disregard EU law, or compromise on fundamental rights and get into an open conflict with the ECHR. Placing member states between a rock and a hard place, where they are forced to choose between their EU law and ECHR obligations, may lead to disregard and non-enforcement of Strasbourg judgments, which again – given the soft nature of the Strasbourg mechanism, which to a large extent depends on the voluntary compliance of states – may have devastating consequences for European human rights. The only way to resolve this tension would be to openly acknowledge the end of the era of mutual trust and suspend mutual recognition-based laws vis-à-vis Poland (and in fact any other member state similarly situated), until the rule of law is restored in the country.

This conflict is not only about Poland. It is about the future of Europe. Making constitutional democracies resilient and triggering the immune response of member states and EU institutions against backsliding is crucial for the whole of Europe. The 'vaccination' is needed in terms of both legal and political solutions. This means attaching legal consequences to backsliding – whether in the form of the sanctioning prong of Article 7 TEU, infringement procedures, or making use of the power of the purse – with a heavy emphasis on enforcement, and suspending certain legal institutions and concepts, such as mutual trust and the laws based on this principle. But the EU should also support civil society and judicial networks fighting for the rule of law. Leaving them to fight alone, agreeing to non-democratic practices, or silently legitimising rule-of-law decline as bystanders, will lead to the disease spreading to other EU member states and to more and more fields of EU law.