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Poland within the EU – Dealing with the Populist Agenda

I. Introduction

In late modernity or "liquid modernity", as *Zygmunt Bauman* theorized[1], the pluralism of moral rules has exposed people to feelings and fears of uncertainty and ambivalence. In consequence, pluralism has caused chaos among moral values. The world full of almost non-limited freedom and overwhelming responsibility for peoples' own choices has created a crisis of morality. In such circumstances, the strong demand for stable, solid and firm values provided by authority is on the rise. This need creates fertile soil and space for various robust ideas, e. g. populist morality and populism. Putting this into the political science context, one can observe the creation of strong transformative power. In effect, this power brings about legal changes in the scope of liberal constitutional democracy. Those changes affect different dimensions of state activity. In the scope of this paper, the mutual relation between Poland and the European Union (EU) will be analysed.

This paper is structured as follows: firstly, the populist morality will be presented (II). Next, its transformative face – the illiberal constitutionalism (III.) with a formal understanding of the rule of law (IV.) will be elaborated. Subsequently, the international (the Venice Commission and the United Nations) and supranational (the European Union) reactions in the scope of the rule of law will be discussed (V.). Furthermore, the current actions dismembering the rule of law in Poland will be described (VI.), and finally, the findings will be summarized in a brief manner (VII.).

II. Populist morality

Jan-Werner Muller[2] observes the worldwide wave of populism and argues that populism cannot be perceived as an authentic part of modern democratic politics or a kind of pathology caused by irrational citizens. For him, populism is a permanent shadow of representative politics. According to populists, only they themselves are legitimate representatives of the society. At the same time, populists are anti-pluralist. Referring to *J. W. Muller's* thesis, the populists claim that they alone represent the people perceived as a moral and homogeneous entity. Other political options and competitors (opposition or government dependent on the election results, even international or supranational organizations and their officials, or people who do not share the populist political ideas) are illegitimate, immoral and outside the margin of society (they are not an appropriate category of citizens). Therefore, the will of the people, to which the populists constantly refer, is not built on a genuine process of the will-formation, because the non-inclusive rhetoric of the populists by definition cannot affect increasing participation in politics. Evidently, the civil society is under suppression in the state governed by populists. Various and different opinions are clearly discarded and rejected.

One should agree with *J. W. Muller's* observation that populists engage mass clientelism and corruption in occupying the state. Furthermore, they intend to appropriate all state organs with the abuse of legal means (in relation to this, the hasty and bogus legislative process is the most visible one). For them, these practices are moral as openly

[1] *Z. Bauman*, Etyka ponowoczesna (The late modern ethics), Warszawa 2012.

[2] *J. W. Muller*, What is populism?, Pennsylvania 2016.

declared. In effect, such populist's morality can be reflected in a constitution as well as in the constitutional practice, especially when they did not gain the constitutional majority in Parliament.

As long as populism constitutes merely an indication in pointing out that parts of the population remain unrepresented, this approach could be acceptable. But, in case of building the new reality by misusing the constitutional norms and the constitution-making process, the idea of populism should be assessed as a threat to liberal democracy. The reason is simple and clear: populism is rooted in a certain intention that from the very beginning is the weakening of liberal and democratic values. In practice, the populist morality leads to the point that the state becomes a place only for the "real people" clearly excluding plurality. The "real people" and the populist state are in sharp contrast with others, such as the political opponents, the parliamentary opposition and eventually the European Union[3]. Therefore, for populists, the capture of the state and its organs (e. g. constitutional courts) is not enough. They create a new system – an illiberal democracy with a formal understanding of the rule of law. In consequence, one of the core values of the European Union is relativized. Poland, following Hungary, constitutes an evident example of such populist approach.

III. Illiberal constitutionalism[4]

Since the general elections in 2015, despite almost 30 years of democratic development, a democratic dicey development has become visible in Poland. Its presence has been exemplified inter alia by unfettered political leaders[5], packing the Constitutional Tribunal (CT), discrediting independent institutions (common courts, especially under the July 2017 amendment of law on common courts[6]). Consequently, the current political majority has positioned itself outside liberal constitutionalism by disregarding and breaching the constitutional provisions, as it has not obtained the necessary political support for the formal amendment of the 1997 Constitution. In a short period of time, an illiberal system has been created, mainly as a result of informal hasty changes.

One should agree that both illiberal constitution and illiberal constitutionalism are the results of a peaceful constitutional development, in which democracy, the rule of law and human rights are not respected in the same way as before, in the context of a liberal constitutional democracy.[7] But, this understanding is not connected to the adjective it-

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[3] It is visible when we consider the 27:1 voting on candidature of *Donald Tusk* for the President of the European Council or the statement of the Bureau of the Constitutional Tribunal in relation to the opinion of the First Vice-President of the European Commission*, Frans Timmermans* on 15 November 2017 (according to the statement: none of the legal acts does authorizes the European Commission to shape the legal order of a sovereign state), http://trybunal.gov.pl/wiadomosci/uroczystosci-spotkania-wyklady/art/9934-oswiadczenie-biura-trybunalu-konstytucyjnego-w-zwiazku-z-wypowiedzia-wiceprzewodniczacego-komis/.

[4] More in a comparative context: *T. Drinóczi*/*A. Bień-Kacała*, Constitutions and constitutionalism captured: shaping illiberal democracies in Hungary and Poland (in publication).

[5] Using the example of the international relations, the approach of the populist leaders can be described a behaviour full of anger and emotions, the strength projection that operates "off the equilibrium path" and finally the delegitimization of the EU and the EU leaders, *Daniel W. Drezner*, The Angry Populist as Foreign Policy Leader: Real Change or Just Hot Air, 41 Fletcher F. World Aff. 23–44 (2017).

[6] Ustawa z dnia 12 lipca 2017 r. o zmianie ustawy – Prawo o ustroju sądów powszechnych oraz niektórych innych ustaw (Law of 12 July 2017 amending Act to the Law on common courts and some other acts), Dz.U. 2017, item 1452., http://dziennikustaw.gov.pl/du/2017/1452/1.

[7] Similarly, see *M. F. Plattner*, Populism, pluralism, and liberal democracy, Journal of Democracy Vol. 21, 1|2010, p. 91.

self.[8] In this relation, the most important issue is the selective and arbitrary application of the Constitution. In Poland, the illiberal democracy is formed by a legal capture of the constitution and constitutionalism. The actions have been implemented by the populist political majority that led to an informal constitutional change[9] and packing the constitutional court. The last of the mentioned problems resulted from the refusal to swear in the judges, appointing the judges above the constitutional number as well as from not publishing the CT's judgements (capture de facto)[10]. In consequence, Poland faces the "judicialization of politics",[11] which means that the constitutional court can be perceived as a servant of the ruling political party.

In the analysis, special emphasis should be put on the common European values – the rule of law, human rights and democracy. Since 2015, the poor implementation and enforcement of these principles has been observed. This leads to identifying constitutional democracy in a formal sense. The notion indicates that the constitution, which is more than a facade constitution of an autocratic system, still exists, because of maintaining and functioning, to a certain extent, the constitutional review mechanisms. Although Poland formally maintains the rule of law and formal democracy in the majoritarian sense, there is no respect to procedural guarantees and individual rights. The reason of such disregard is twofold: firstly, those values might contradict the will of the majority, as argued by the leading populist party; secondly, they might slow down the decision-making process that is expected to be fast and efficient to prove the capability and strength of the state, and thus its populist leader. Furthermore, the disrespect towards the implementation of human rights may be pointed out (e. g. freedom of assembly[12]), especially in politically prominent issues. This approach is not met in the case of the protection of rights that have no or only low political importance.

Summarising, illiberal democracy is viewed as a functioning of public authority which upholds the main constitutional structure but lacks normative commitment to constraints on the public power. Consequently, in illiberal democracy the main traditional constitutional values are relativized or only partially observed. In result, although each element of liberal democracy, such as the rule of law, democracy, and human rights is present, none of them is protected entirely.

IV. The formal understanding of the rule of law

In the European context, the rule of law should be described taking into account the values of the Council of Europe (CoE) and the European Union. Its importance is em-

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[8] One can agree with the findings of *D. Collier*/*S. Levitsky*, Democracy with Adjectives: Conceptual Innovation in Comparative Research, World Politics Vol. 49, 3|1997, pp. 430–451, and follow their thought on the parsimony and avoidance of an excessive proliferation of new terms and concepts.

[9] *A. Bień-Kacała*, Informal constitutional change. The case of Poland, Przegląd Prawa Konstytucyjnego 6/2017, pp. 199–218.

[10] See more on this: *A. Bień-Kacała*, Polish Constitutional Tribunal: a systemic reform or a hasty political change, 1 DPCE online (2016); *U. Jaremba*, The Rule of the Majority vs. the Rule of Law: How Poland Has Become the New Enfant Terrible of the European Union, 2016 Tijdschrift voor Constitutioneel Recht, pp. 262–274 (2016) or *M. Wyrzykowski*, Antigone in Warsaw, in: Human rights in contemporary world, edited by M. Zubik, Warszawa 2017, pp. 370–390.

[11] *A. Mazmanyan*, Judicialization of politics: The post-Soviet way, 13 I-CON 1/ 2015, pp. 200–218.

[12] Concerning preference to the cyclical assemblies. See the judgement of the Constitutional Tribunal of 16 March 2017 (Kp 1/17) on conformity to the Constitution and comments: *A. Bień-Kacała*, Gloss to the judgement of Constitutional Tribunal of 16 March 2017 (Kp 1/17), Przegląd Prawa Konstytucyjnego 4 |2017, pp. 255–262.

phasized by the academic elaboration from theoretical[13] and comparative perspectives[14]. The rule of law seems to be the central value for both organizations, which is fundamentally linked to the respect of democracy and fundamental rights. The commonly recognized principles in the scope of the rule of law are the following: the supremacy of law, the institutional balance, the judicial review, the (procedural) fundamental rights, including the right to a judicial remedy, as well as the principles of equality and proportionality. For further elaboration, we should refer to the definition of the rule of law as recognized by the Council of Europe documents and the European Union legal provisions.

The Council of Europe understands the rule of law as limiting and independently reviewing the exercise of public powers[15]. The rule of law promotes democracy by establishing accountability of public power and by safeguarding human rights, which protect minorities against arbitrary majority rules. It is strictly connected to the quality of laws. Legal provisions must be, inter alia, clear and predictable, and non-discriminatory, and they must be applied by courts under procedural guarantees. In this respect, the independence of judiciary plays primary role. According to the CoE standards, such independence means that the judiciary and judges are free from external pressure, and are not subjects to political influence or manipulation, particularly by the executive branch of government or the public prosecutor's office. The apolitical manner of the judges' appointment seems to be relevant as well. Those requirements are an integral part of the fundamental democratic principle of the separation of powers.

In the case of Poland, the standard connected to the National Council of Judiciary seems to be crucial. The Council of Europe pointed out that the appropriate method for guaranteeing the independence of the judiciary is the existence of an independent judicial council and its decisive influence on the decisions concerning appointments and careers of the judges. Moreover, such judicial council should have a pluralistic and balanced composition with a substantial part of the members-judges. The threats jeopardizing the judicial council might be rooted in political branches of government (the executive and Parliament) as well as in the judiciary. Therefore, as far as the composition of judicial councils is concerned, both politicization and corporatism must be avoided.

Moving to the European Union, one should notice that in 2014 the new EU Framework to strengthen the rule of law[16] was verbalized. According to this document, the rule of law is the pillar of any modern constitutional democracy[17]. It is one of the founding principles stemming from the common constitutional traditions of all the Member States of the EU[18] and, at the same time, one of the main values upon which the Union is based[19]. The way in which the rule of law is implemented at national level plays a crucial role in the EU development, being an area of freedom, security and justice without internal frontiers.

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[13] The Enforcement of EU Law and Values Ensuring Member States' Compliance, edited by A. Jakab and D. Kochenov, Oxford University Press, 2017.

[14] Ius Gentium, Comparative Perspectives on Law and Justice, Vol. 3, edited by M. Sellers and T. Tomaszewski, Springer, 2010.

[15] See the standards collected in: European Commission for Democracy through Law (Venice Commission), Rule of Law checklist, CDL-AD(2016)007.

[16] A new EU Framework to strengthen the Rule of Law, COM(2014) 158 final/2.

[17] The concept of rule of law was clarified by *A. Magen*, Cracks in the Foundations: Understanding the Great Rule of Law Debate in the EU, JCMS 2016, Vol. 54, Nu. 5, pp.1051–1055.

[18] It is also a precondition of the EU membership according article 49 of the Treaty on European Union (TEU).

[19] Article 2 TEU.

The EU values have been listed in Article 2 TEU. Analysing this provision, one should remember that the core meaning of the rule of law[20] includes legality implying a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review including respect for fundamental rights; and equality before the law. Those principles are not purely formal and procedural requirements. They are the vehicle for ensuring compliance with and respect for democracy and human rights. The rule of law is therefore perceived as a constitutional principle with both formal and substantive components.

In the context of the events that took place in Poland in 2017, the most relevant elements of the rule of law are the independent and impartial courts as well as the independent judicial council. Nevertheless, the relativization of rule of law had started two years earlier. Undeniably, since 2015 Poland has been facing systemic changes. Firstly, the Constitutional Tribunal was captured, and its systemic position was de facto degraded[21]. Simultaneously, the Prosecutor General was included to the executive branch of government (since March 2016, the Minister of Justice has been acting as the Prosecutor General[22]). The Law on Common Courts was amended in July 2017[23]. According to the new provisions, inter alia, the presidents of courts are almost subordinated to the Minister of Justice. Around the end of 2017, we can observe changes in the scope of the Supreme Court and the National Council of Justice. It is worth mentioning that administrative courts and the Supreme Administrative Court have not been politically affected yet[24]. Additionally, one can assess the legislative process as non-inclusive[25] and unjustifiably rapid. Nevertheless, one can say that the CT exercises its constitutional competences formally (delivering judgements), the judiciary is still not explicitly subordinated to the political powers and the legislative process, even though hastily, complies with the constitutional rules.

This leads to the conclusion that from the formal point of view it can be said that the rule of law is being respected. Nevertheless, by the mentioned techniques, the political majorities can successfully relativize the principles of either the rule of law or democracy and human rights. Considering the CT crisis alone, one can notice that the rule of law and human rights are not protected if the CT cannot properly fulfil its tasks; the democracy is impaired as the democratic legitimacy chain regarding the CT (in which judges are chosen by the representative body which is elected by the people) is not adequately executed. The idea which supports all these actions is one of the cornerstones of the illiberal constitutionalism: a strong reference to the principle of democracy and popular

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[20] Annexes to a new EU Framework to strengthen the Rule of Law, COM(2014) 158.

[21] It is clear that in the process of a desperate struggle for the Constitutional Tribunal position, all fundaments and mythology of its apolitical and impartial status fell down as *A. Młynarska-Sobaczewska* argues, Polish Constitutional Tribunal Crisis: Political Dispute or Falling Kelsenian Dogma of Constitutional Review, European Public Law Vol. 23, 3|2017, pp. 489–506. The constitutional crisis opened the gate to the judicialization of politics as described by *A. Mazmanyan*, Judicialization of politics: The post-Soviet way, 13 I-CON 1/2015, pp. 200–218.

[22] Article 1 paragraph 2 of statute dated on 28 January 2016 – law on prosecution (Dz. U. z 2017, poz. 1767.).

[23] Ustawa z dnia 12 lipca 2017 r. o zmianie ustawy – Prawo o ustroju sądów powszechnych oraz niektórych innych ustaw (Amending Act to the Law on common courts and some other acts of 12 July 2017), Dz.U. 2017, poz. 1452., http://dziennikustaw.gov.pl/du/2017/1452/1.

[24] The reason is uncertain. It might result from the fact that the competences of administrative courts are exercised in the scope of politically non-sensitive cases or the changes in the scope of administrative courts are to be planned but not yet decided.

[25] Especially in the politically important issues such as the judiciary reform.

sovereignty, insofar as it either remains formal or can heavily be influenced by undue measures. It justifies all the governmental actions no matter what kind of obligations stem from international and supranational level. At once, it cannot be outbalanced by the rule of law or human rights considerations because those would impose undue constraints on the sovereignty of the people. It is however not about the governance 'by'/'for'/'of' the people, but the hegemony of a democratically elected party invoking the rule of law only if it helps to transform the system and exclude political opponents[26]. Obviously, such situation causes strong international and supranational reaction.

V. International and supranational reaction in the scope of rule of law

From the very beginning, the changes occurring in Poland arouse interests of the international institutions and the European Union[27]. The reservations concerned first and foremost the ruthless treatment of the constitutional institution, i. e. the CT. The conduct undertaken towards the Tribunal cannot be justified even by the reasonable doubts as to the activities of the previous Sejm (2011–2015) confirmed by the CT's decision[28] and the doctrine[29]. This follows from the fact that the Sejm, whose term of office began in 2015, did not wait for the Tribunal's verdict and destroyed the authority of this body by hasty actions. After the said events, a series of legislative actions started that aimed at capturing the judiciary and the NCJ, and which was further supported by the CT[30]. Since some of the amendments have been vetoed, this process is in progress.

1. The Venice Commission opinions

So far, the Venice Commission (VC) has considered the Polish case twice: in March 2016[31] and October 2016[32]. Both opinions were connected to the constitutional crisis and the Constitutional Tribunal[33]. The VC stated that if the crisis remains unsettled and if the Constitutional Tribunal cannot carry out its work in an efficient manner, not only is the rule of law in danger, but so is democracy and human rights: democracy – because of the absence of a central part of checks and balances, human rights – because the access of individuals to the CT could be slowed down to a level resulting in the denial of justice; and the rule of law – because the CT, which is a central part of the judiciary in Poland,

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[26] *J. Ruprik*, Emerging illiberalism in the East, Journal of Democracy Vol. 27, 4|2016, p. 80.

[27] In the scope of this article, only the aspects connected with the rule of law will be discussed; the issues concerning different matters will be omitted, such as the cases about the relocation – on 14 June 2017 the European Commission launched infringement procedures against the Czech Republic, Hungary and Poland for non-compliance with their obligations under the 2015 Council Decisions on relocation (http://europa.eu/rapid/press-release_MEMO-17-1577_en.htm).

[28] The CT judgement dated on 3 December 2015 (K 34/15).

[29] *Młynarska-Sobaczewska*, fn. 21, pp. 489–506.

[30] The CT judgement dated on 20 June 2017 (K 5/17) in case of National Council of Judiciary.

[31] Opinion no. 833/2015CDL-AD(2016)001, 11 March 2016, on amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland.

[32] Opinion 860/2016CDL-AD(2016)026, 14 October 2016, on the Act on the Constitutional Tribunal.

[33] During the procedure conducted by the VC, its preliminary statement was criticized by a Polish expert, *B. Szmulik*, Opinia w sprawie uwag do nowelizacji ustawy z dnia 25 czerwca2015 r. o Trybunale Konstytucyjnym przygotowanych przez Komisję Wenecką (Opinion on the comments on the amendment of the Act of 25 June 2015 on the Constitutional Tribunal prepared by the Venice Commission), Przegląd Sejmowy 5|2016, p. 81–100.

would become ineffective. In the second opinion, the VC highlighted that the Parliament and Government continue to challenge the Tribunal's position as the final arbiter of constitutional issues and attribute this authority to themselves. Instead of resolving the crisis, they have created new obstacles to the effective functioning of the Tribunal and have acted to further undermine its independence. In consequence, the Constitutional Tribunal cannot play its constitutional role as the guardian of democracy, the rule of law and human rights. Thus, the assessment of the VC is still valid. Despite the VC's advice, the situation in Poland concerning the rule of law has not changed.

2. The United Nations preliminary observations

In October 2017, so one year after the VC had provided its opinions, the Special Rapporteur of the United Nations delivered the preliminary observations on the independence of judges and lawyers in Poland[34]. In the scope of the remarks, it was underlined that the principle of the independent judiciary derives from the basic principles of the rule of law, particularly from the separation of powers. According to this principle, the executive, the legislature and the judiciary constitute three separate and independent branches of government. The Constitution, laws and policies of a country must ensure that the justice system is truly independent from other branches of the State. Obviously, one should add that the independence of the judiciary can be undermined not only by the legislation but also by a variety of events. Therefore, it can be said that the observations relate to two important dimensions of the analysis: the transformation of system and the populist morality.

As far as the transformation is concerned, the Special Rapporteur related to the constitutional crisis and the current situation in common courts as well as to the President's bills on the Supreme Court and the National Council of Judiciary. One should agree with the opinion that the legislation process must be fair, open and transparent. It should involve not only the parliamentary majority and the opposition, but also the judiciary, the Office of the Ombudsman and civil society actors. Any reform of the judiciary should aim at strengthening, not at undermining, the independence of the justice system and its actors. Of course, it must be added that the participation in the legislative process should be real and not bogus. Otherwise, the changes should be assessed as abusive.

The populist morality reviled itself in a communication campaign launched by the Polish National Foundation, where a number of TV commercials and billboards depict judges as "the enemy" of Polish people and the "evil" within the Polish society. Although indirectly, the campaign is linked with the ruling party. Clearly, such events undermine the foundations of democracy, human rights and, finally, the rule of law, especially the component of the independent and impartial judiciary. Undoubtedly, they could not be unnoticed by the supranational community.

3. The European Union measures

Since 2004 Poland has been a Member State of the European Union. After the beginning of the transition to democracy period in 1989, the membership in this organization became very significant for Poland. By its nature, the European Union was perceived as the most efficient economic organization and, at the same time, space where common democratic values are recognized and developed.

[34] http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22313&LangID=E.

To protect democratic European values including the rule of law, several mechanisms have been created. The examples include: the new Framework procedure[35], the measures of Article 7 TEU (the so called "nuclear option") and the infringement tools of Articles 258 to 260 of the Treaty on the Functioning of the European Union (TFEU). The procedures provided by the new Framework on strengthening the rule of law seek to resolve future threats to the rule of law in the Member States, before the conditions for activating the mechanisms foreseen in Article 7 TEU and Article 258 TFEU would be met. In case of a systemic threat to the rule of law, the preventive and sanctioning mechanisms provided in Article 7 TEU may apply. The preventive mechanism (Article 7(1) TEU) can be activated only in case of a "clear risk of a serious breach", whereas the sanctioning mechanism (Article 7(2) TEU) only in case of a "serious and persistent breach by a Member State" of the values set out in Article 2 TEU. The thresholds for activating both mechanisms of Article 7 TEU are very high and underline the nature of these instruments of last resort. As far as the infringement procedures based on Articles 258–260 TFEU are concerned, it should be indicated that these tools require a breach of a specific provision of EU law[36].

The provided procedures are highly political in nature, mainly because the political actors dominate[37]. For now, they seem to be ineffective, especially "the nuclear option" that has never been triggered to deal with the populist and illiberal politics[38].The results of its activation could be destructive for the EU which already suffers from its own crisis (the economic condition of Greece, Brexit). Therefore, the need to re-articulate EU mechanisms concerning enforcement of the values is still very important. For example, a new institution to remedy the EU's current democracy protection deficit is discussed. It could be called the Copenhagen Commission (referring to the EU's Copenhagen criteria for accession to the Union)[39] perceived as a tool of militant democracy with an authority to sanction (fines mainly or cut funds) the government of the Member State. However, the problem might not be the mechanism as such but the effectiveness of the European Union as the supranational community. In such doubts every procedure, mechanism and tool could fail and could be assessed as politically and legally inefficient with only shame effect, like in the case of the new mechanism established in 2014. The new EU Framework to strengthen the Rule of Law established the process consisting of three stages: the Commission's assessment, the Commission's recommendation and the follow-up to the recommendation.

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[35] A new EU Framework to strengthen the Rule of Law, http://eur-lex.europa.eu/legal-content/ENG/?uri=CELEX:52014DC0158

[36] See, for example, the cases C-286/12 Commission v Hungary (equal treatment as regards the compulsory retirement of judges and public prosecutors); C-518/07 Commission v Germany [2010] ECR I-01885 and C-614/10 Commission v Austria (independence of data protection authorities).

[37] *L. Besselink*, The Bite, the Bark, and the Howl: Article 7 TEU and the Rule of Law Initiatives, in: The Enforcement of EU Law and Values Ensuring Member States' Compliance, edited by A. Jakab and D. Kochenov, Oxford 2017, pp. 128–132.

[38] Cases of Austria and Hungary. Especially, the Hungarian constitutional changes have challenged the EU, testing its capacity and ability to protect the rule of law in the Member States, *Z. Szente*, Challenging the Basic Values – The Problems of the Rule of Law in Hungary and the Failure of the European Union to Tackle Them, in: The Enforcement of EU Law and Values Ensuring Member States' Compliance, edited by A. Jakab and D. Kochenov, Oxford 2017, pp. 456–475.

[39] *J.-W. Müller,* A Democracy Commission of One's Own, or What it would take for the EU to safeguard Liberal Democracy in its Member States, in: The Enforcement of EU Law and Values Ensuring Member States' Compliance, edited by A. Jakab and D. Kochenov, Oxford 2017, pp. 234–251.

Having the problem of the EU effectiveness in mind, we should move to the current procedures which have been launched in the case of Poland. The Commission assessment started in 2015 with the letter to the Polish Government[40]. The Commission asked to be informed about the constitutional crisis around the Constitutional Tribunal and about the proposed reforms to the governance of Poland's Public State Broadcasters. With this letter a dialogue regarding the respect of the rule of law has been started. The Commission also recommended to the Polish authorities to work closely with the Council of Europe's Venice Commission.

After almost half a yearlong dialogue, in June 2016, the European Commission adopted the Opinion concerning the rule of law in Poland[41]. This means that the first step of the new Framework has been completed. The Opinion related to the appointment of judges to the Constitutional Tribunal, the functioning of the CT and the effectiveness of constitutional review of the new legislation (media law and other laws)[42]. The Polish authorities were invited to submit their observations on the Opinion. At the same time, the dialogue with the Polish government was continued, however, with not satisfactory results.

Due to the fact that the first part of the dialogue failed, the second phase of the new Framework was launched. The Commission adopted its Recommendation in July 2016[43]. The document related to the rule of law and concentrated around the issues designated in the Opinion. The Commission stated that there is a situation of a systemic threat to the rule of law in Poland. The fact that the Constitutional Tribunal is prevented from fully ensuring an effective constitutional review adversely affects its integrity, stability and proper functioning, which is one of the essential safeguards of the rule of law. The Commission added that in case of establishing a constitutional justice system, its effectiveness is a key-component of the rule of law.

A few months later, in December 2016, the Commission concluded that the Complementary Recommendation regarding the rule of law in Poland should be adopted[44]. Moreover, the further threats were indicated. Firstly, the rule of law was presented as a critical prerequisite for upholding all rights and obligations deriving from the Treaties and from international law, and for establishing mutual trust of citizens, businesses and national authorities in the legal systems of all other Member States. Additionally, the legislative process in Poland was assessed as "legislative activism" conducted without proper consultation of all the stakeholders concerned and without a spirit of loyal cooperation required between state authorities. Such observation applies not only to the statutes on the CT.

One year after the first recommendation, in July 2017 the Commission provided the Complementary Recommendation[45]. With regards to the rule of law, the Commission listed new concerns, referring among others, to the adoption by the Polish Parliament the new legislation relating to the judiciary. In respect to the Council for the judiciary, the

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40 Detailed information: http://europa.eu/rapid/press-release_MEMO-16-62_en.htm.

41 http://europa.eu/rapid/press-release_IP-16-2015_en.htm.

42 http://europa.eu/rapid/press-release_MEMO-16-2017_en.htm.

43 C(2016) 5703 the Commission Recommendation, http://ec.europa.eu/justice/effective-justice/files/recommendation-rule-of-law-poland-20160727_en.pdf.

44 The Commission Complementary Recommendation 2017/146, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017H0146&from=PL.

45 C(2017) 5320 the Commission Complementary Recommendation, https://www.google.pl/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwizxubq8OPXAhWDYZoKHadhDBAQFggpMAA&url=https%3A%2F%2Fec.europa.eu%2Fnewsroom%2Fdocument.cfm%3Fdoc_id%3D46116&usg=AOvVaw1IAIDpbeLYZ4ElmF2zf8o9.

Commission underlined that the role of this body is to safeguard judicial independence. At the same time, the independence of such Council for Judiciary must be guaranteed in line with the European standards.

The Commission's procedure was supported by the European Parliament in its resolutions: of 13 April 2016 on the situation in Poland[46] and 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[47]. The most important, however, is the last European Parliament's resolution of 15 November 2017 on the situation of the rule of law and democracy in Poland[48]. The resolution directly relates to the current situation in the state and assesses the events as bringing a clear risk of a serious breach of the values referred to in Article 2 of the TEU. In addition, the European Parliament instructed its Committee on Civil Liberties, Justice and Home Affairs to draw up a specific report with a view to hold a plenary vote on a reasoned proposal calling on the Council to act pursuant to Article 7(1) of the TEU.

The intentions of the European Parliament have been expressed clearly and decidedly. On the one hand, this shows that the Polish government persistently avoids complying with the European Union standards. On the other hand, one can notice that the new Framework procedure, with its primary role of a structured dialogue, is not an effective way to deal with the rule of law threats and infringements. The actors speak different languages. The European institutions estimate the dialogue conducted in an impartial, evidence-based and cooperative manner. But dealing with the populist politicians in a dialogical way cannot be successful by its nature[49]. This follows from the fact that the consensus and compromise, which should result from a dialogue, do not exist in the populist agenda[50]. There is no space for consideration of other arguments[51]. In consequence, the populist leaders, using the populist morality, can transform their constitutional systems in a hasty and bogus way.

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[46] http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2016-0123&language=EN&ring=B8-2016-0461.

[47] http://www.europarl.europa.eu/sides/getDoc.do?pubRef=%2F%2FEP%2F%2FTEXT%2BTA%2BP8-TA-2016-0344%2B0%2BDOC%2BXML%2BV0%2F%2FEN&language=EN.

[48] http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-20170442&format=XML&language=EN.

[49] As *T. T. Koncewicz* argues basing on the Hungarian example, The Polish Crisis as an European Crisis: A Letter to Mr Jean-Claude Juncker, VerfBlog, 2017/10/16, http://verfassungsblog.de/the-polish-crisis-as-a-european-crisis-aletter-to-mr-jean-claude-juncker/, DOI: 10.17176/20171016-104806.

[50] This kind of attitude and the language full of humiliation towards the EU officials and values was identified by *L. Pech*/*K. Scheppele*, Poland and the European Commission, Part III: Requiem for the Rule of Law, VerfBlog, 2017/3/03, http://verfassungsblog.de/poland-and-the-european-commision part-iii-requiem-for-the-rule-of-law/, DOI: http://dx.doi.org/10.17176/20170303-131734.

[51] See the statement of Poland presented to the European Commission in the dialogue procedure – letters of: 11 January 2016 from the Minister of Justice *Mr Ziobro* to the First Vice-President *Timmermans*; 19 January 2016 from the Minister of Justice *Mr Ziobro* to the First Vice-President *Timmermans*; 29 February 2016 from the Minister of Foreign Affairs *Mr Waszczykowski* to the First Vice-President *Timmermans*; 24 June 2016 from the Minister of Foreign Affairs *Mr Waszczykowski* to the First Vice-President *Timmermans*. Furthermore, it should be also referred to the Polish position on the Recommendation of the European Commission of 27 July 2016 about the rule of law in Poland, according to which "Poland hoping for an objective and constructive dialogue with the European Commission, regretfully notes that these principles have not been observed in the process of preparing the Recommendation. As a result, the Polish side cannot see any legal possibilities to implement the Recommendation, resulting primarily from the fact that their implementation would mean a violation of the current Constitution and legislation by state authorities".

At the same time, they provide explanations and their own understanding of the rule of law to the responses of the European Commission and European Parliament. This assessment is valid even after launching art. 7 (1) TEU by the Commission.[52]

VI. Current actions dismembering the rule of law in Poland

As has been already pointed out, the systemic changes and strengthening illiberal democracy in Poland have been supported by the populist morality. These changes have been introduced despite the harsh criticism from international and supranational bodies. Therefore, the populist morality in practice should be presented, especially in the EU context, to consequently come to the legislative changes concerning the judiciary and the NCJ.

1. Populist morality in practice – the case of Białowieża Forest

The case of *Białowieża Forrest* shows again how the populist morality operates. First and foremost, the last CJEU Order of 20 November 2017[53] regarding a temporary measure should be taken into consideration. The procedure was started on the application of the European Commission on 20 July 2017, which aimed at demonstrating the violation of EU law by Poland. The case regards the tree felling in the *Białowieża Forest*, violating Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora and the Directive 2009/147/EC on the conservation of wild birds. Although the Court adopted an interim measure on 27 July 2017 which banned on logging in the Forest[54], the decision has not been respected and the activities continued after the order had been delivered to Poland. In the supplementary application of 13 September 2017, the Commission concluded that the actions that had been banned were still carried out, which violated the interim measures imposed in July 2017. In response, Poland declared in a general way that the order had been fully respected and that the activities undertaken after its announcement only aimed at ensuring public safety.

Therefore, on the one hand we can observe a lack of respect toward the CJEU decision, which in itself constitutes a violation of EU law and the values under Art. 2 TEU[55], and on the other hand revealing intentions of the Polish authorities. The purposes seem to be clear and aim at fulfilling the political agenda, regardless of any binding legal norms. The argument of public safety was used to achieve own goals by means of the accomplished facts. It seems that the Minister of Environment had decided the logging in advance, without respecting EU law. When the goals of the forest management had been achieved, the felling was stopped. This is actually the only reason that could explain the radical change in behaviour and withdrawing all harvesters from the *Białowieża Forest*

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52 See: Reasoned proposal in accrdance with art. 7(1) of the Treaty on European Union regarding the rule of law in Poland 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, 20.12.2017, COM(2017) 835 final, 2017/0360 (APP) and http://europa.eu/rapid/press-release_MEMO-17-5368_en.htm.

53 C-441/17 R (ECLI:EU:C:2017:877), http://curia.europa.eu/juris/document/document.jsf?text=&docid=&docid=196944&pageIndex=0&doclang=pl&mode=req&dir=&occ=first&part=1&cid=1216735. The main case will be considered on 12 December 2017.

54 (EU:C:2017:622).

55 As described by *D. Sarmiento*, Provisional (And Extraordinary) Measures in the Name of the Rule of Law, VerfBlog, 2017/11/24, http://verfassungsblog.de/provisional-and-extraordinary-measures-in-the-name-ofthe-rule-of-law/.

in the context of the Court decision on 20 November 2017. If the very intention of the Polish authorities had been abiding by EU law, then the actions would have been already stopped in July 2017. Thus, it may be concluded that in this case, the populist morality was addressed, according to which the Polish government was right, because it protected the "the good of nature and the safety of people". This position has been precisely indicated in one of the statements of the Minister of Environment[56]. The European Commission and the CJEU[57], in turn, only intent to unreasonably attack the government.

Therefore, Poland meets all the EU obligations, respects EU law and the decisions of its bodies[58]. Practically however it runs its own forest management regardless of the EU regulations and reactions of the EU bodies. This situation clearly shows the intentions and morality of the populists and their leaders.

2. The judiciary threatened

With respect to the judicial branch of government, one can identify the mixture of the populist morality and transformative power. According to general opinion, the Polish judiciary needs a reform. However, the reform should not rely only on the personal replacement of judges. It should rather provide real mechanisms to increase legal protection of individuals and access to court.

The controversial judiciary reform concerning common courts, the Supreme Court and the National Council of the Judiciary was drafted by the Minister of Justice and brought by the government to the Sejm in April 2017. It came through the legislative process in the company of protests of the opposition and the society. The acts on the Supreme Court and the National Council of the Judiciary were vetoed by the President in July 2017, whereas the amendment to the Law on Common Courts has been signed and published. Due to the fact that it is impossible to present all the legal doubts concerning the judiciary reform, the most important problems in the context of the populist morality and transformative power will be discussed.

The populist morality is evident and ostensive when we consider the manner of the legislative procedure on drafts concerning the Supreme Court and the National Council of Judiciary[59]. The bills were prepared by the President after his veto and introduced to the Sejm in September 2017. It was clear for the ruling majority that the President's bill differed from the previous vetoed legislation, thus would not be acceptable. In consequence, the President's draft was consulted with *J. Kaczyński* without reviling the content of the agreed future-to-be amendments to the opposition and public opinion. This means that participation in the inclusive legislative process is almost impossible.

Since 2015, such behaviour has been usual for the ruling majority in the scope of the system transformation.

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[56] https://www.mos.gov.pl/en/news/details/news/statement-of-the-ministry-of-environment/.

[57] Nevertheless, the risk of politicization of the CJEU in the Polish case was identified, *R. Grzeszczak/I. P. Karolewski*, Bialowieza Forest, the Spruce Bark Beetle and the EU Law Controversy in Poland, VerfBlog, 2017/11/27, http://verfassungsblog.de/bialowiezaforest-the-spruce-bark-beetle-and-the-eu-law-controversy-in-poland/, DOI: https://dx.doi.org/10.17176/20171127-182151.

[58] https://www.mos.gov.pl/aktualnosci/szczegoly/news/prof-szyszko-ws-puszczy-bialowieskiej/.

[59] See the recent comments: *W. Sadurski*, Judicial "Reform" in Poland: The President's Bills are as Unconstitutional as the Ones he Vetoed, VerfBlog, 2017/11/28, http://verfassungsblog.de/judicial-reform-inpoland-the-presidents-bills-are-as-unconstitutional-as-the-ones-he-vetoed/, DOI: https://dx.doi.org/10.17176/20171128-122808.

In addition, when we consider that the Constitutional Tribunal is captured, we then realize that the changes in the scope of the judiciary would be permanent. Taking into account the judicialization of politics, it is almost certain that the CT would adjudge the conformity of the newly enacted legislation with the Constitution.

a) Ordinary courts

According to the amendment to Law on common courts[60], passed in July 2017, the Minister of Justice received a tool to affect the judiciary[61] in the form of appointing the presidents of courts. Pursuant to the statutory provisions[62] the President of the Court is appointed by the Minister of Justice. After appointing the President of the Court, the Minister is only obliged to announce his choice to the relevant General Assembly of judges. The requirement to consult the Assembly was removed from the procedure for appointing the Presidents. Taking into account that the opinion as a legal instrument is not binding, the removal of this requirement clearly indicates the intentions of the Minister. He does not even have the will to use the non-binding instrument when appointing the Court's President. His activities took on the arbitrariness. It is additionally strengthened by an opportunity to dismiss the President of the Court[63], especially on a vague ground introduced by the amendment, i. e. the low effectiveness of activities in the field of an administrative supervision or organization of work in court or lower courts. The requirement creates the necessity of a special loyalty link between the Court's President and the Minister.

Nevertheless, the particular doubts arouse with regards to the competence of the Minister of Justice introduced in Art. 17 of the Act amending the Law on common courts[64]. This regulation authorizes the Minister to change the Presidents of Courts within six months from the amendments' entry into force. The persons appointed by the Minister in such a way should, in turn, review the subordinate managerial functions in a given court and make personal changes to these posts. Therefore, the exchange of personnel is clear and evident, which in effect leads to the capture of courts. The principles of independence and impartiality of the judiciary and judges are at least threatened. Additionally, the separation of powers between the judiciary and the executive becomes blurred.

b) The Supreme Court

With regards to the drafted regulation concerning the Supreme Court, doubts may arise in the context of retirement of judges of this Court upon the Act's entry into force. According to the transitional regulation[65], judges who turned 65 before the Act's entry into force, shall be automatically retired. However, these judges might still hold the post upon their statement about the will to continue to adjudicate, further approved by the Presi-

[60] Law on common courts of 27 July 2001, Dz.U. of 2016, item 2062 with further amendments.

[61] In the report of October 2017, the United Nations Special Rapporteur *Mr. Diego García-Sayán* submitted wide concerns about the reform of the organisation of the common court system introduced in July 2017.

[62] Articles 23–25 of law on common courts.

[63] Article 27 of law on common courts.

[64] Law 12 July 2017 amending Act to the Law on common courts and some other acts of, Dz.U. of 2017, item 1452.

[65] Article 108 of the bill, http://orka.sejm.gov.pl/Druki8ka.nsf/0/5AB89A44A408C3CC12581D800339FED/%24File/2003.pdf.

dent. This regulation does not require an objective premise in the form of health certificate, as with regards to those judges who will turn 65 after the Act's entry into force. Therefore, the element of discretion has been increased in respect to the 65-years-old judges holding their posts in the moment of the Act's entry into force.

This regulation and the problems connected with it are already known in the European Union. At this point, attention should be paid to the CJEU decision in the Hungarian case[66]. In this decision, the Court delivered that the Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation had been breached. The controversies may be even higher if we consider the retirement of the First President of the Supreme Court who turned 65 before the end of the constitutionally[67] determined 6-year term of office. This situation is similar to the case of the President of the Supreme Court *Mr. Baka v. Hungary*[68], recently decided by the European Court of Human Rights. The problem of the regulation concerning the retirement age of the Supreme Court's judges as well as those of ordinary courts[69] was also pointed out by the United Nations Special Rapporteur *Mr. Diego García-Sayán*[70]. It is thus clear that the drafter of the Act is aware of the legal defects of the proposed legal solutions. Nevertheless, being aware of the fact that the international and supranational procedures are ineffective, he decides to ignore them.

3. The National Council of Judiciary

The judiciary reform in Poland also relates to the National Council of Judiciary. However, in the case of this body, the party in power used another option to justify its plans. Because of the criticism connected with the judiciary reform[71], the captured CT[72] was used to deliver an explanation and provide an official justification for changing the NCJ's character[73].

The first reforming bill that was vetoed by the President, intended to change the constitutional character of the National Council of Judiciary (NCJ), the terms of office of its

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66 Decision of 6 November 2012, ECLI:EU:C:2012:687.

67 Article 183 (3) of the 1997 Constitution.

68 Judgement 23 June 2016 (20261/12), https://www.icj.org/wp- content/uploads/2016/06/Hungary-CASE-OF-BAKA-v.-HUNGARY.pdf.

69 In this respect, it is also significant that in July 2017 the European Commission launched the infringement procedure against Poland concerning the judiciary measures. According to the Commission, the key concern identified in the Law on the organisation of ordinary courts, related to the discrimination on the basis of gender, due to the introduction of different retirement ages for female judges (60 years) and male judges (65 years). This is contrary to Article 157 Treaty on the Functioning of the European Union (TFEU) and the Directive 2006/54 on gender equality in employment.

70 Additionally, in his opinion another problematic aspect of the draft presented by President *Duda* relates to the possible creation of two new chambers of the Supreme Court, namely the Chamber of Extraordinary Control and the Public Affairs and the Disciplinary Chamber. If created, both chambers would raise a number of the rule of law concerns, in particular with regard to the principles of independence of the judiciary, separation of powers and *ne bis in idem*.

71 This reform has been slowed down by the veto of the President in July 2017, http://www.president.pl/en/news/art,508,president-to-veto-two-judicial-bills-says-will-sign-bill-on-common-courts.html. At the moment of writing the paper (November 2017), the reform is proceeded in Sejm.

72 Judgement of 20 June 2017 (K 5/17).

73 *M. Matczak*, How to Demolish an Independent Judiciary with the Help of a Constitutional Court, VerfBlog, 2017/6/23, http://verfassungsblog.de/how-to-demolish-an-independent-judiciary-with-the-help-of-a-constitutional-court/, DOI: https://dx.doi.org/10.17176/20170623-103309.

members and its internal organization. Taking into consideration that the Constitution only contains provisions regulating the main role of the NCJ (i. e. to safeguard the independence of the courts and judges)[74] and determines its composition[75], such reform would be legally possible. The detailed regulations are to be adopted by Parliament[76]. Nevertheless, it must be emphasized that according to the CoJ and the EU standards, only an independent and politically non-biased organ can safeguard independence of the courts and judges. In the case of Poland however the first (vetoed) reform might have politically influenced the NCJ, because the draft intended to create two units within this body – a political (composed of, for example, the Minister of Justice, an individual appointed by the President, 4 Deputies and 2 Senators) and a judicial (composed of judges elected by politicians, for example the Sejm which indirectly means the party in power). The draft legislation on the reform (especially in scope of the NCJ) had been criticized by different entities (e. g. the Ombudsman) from a constitutional perspective. Therefore, on a motion of the Prosecutor General (simultaneously acting as the Minister of Justice who prepared the draft legislation of the reform), the CT delivered the judgement concerning currently binding regulations. In the ruling K 5/17, the CT created a legal basis for the reform. According to the interpretation of the Constitution, the legislative power is authorized to create an almost totally different organ from the current NCJ as intended in the draft.

The abovementioned situation equals an informal constitutional change by means of constitutional interpretation, and it is also a perfect example of the judicialization of politics. At the same time, it shows how the populist morality operates and transforms the constitutional system. The intensity of changes increases with the responses of members of the body that is being reformed. Thus, the NCJ decision refusing permission to appoint the judicial assessors by the Minister of Justice seems to be encouraging further reforms[77].

VII. Summary

The analysis conducted in this article indicates that the populists do not limit themselves to populist morality but intend to transform the liberal democracy into an illiberal system. The most prominent aspect is the relativization of the rule of law. This article has indicated what changes have been occurring in the scope of its component regarding the judiciary.

All the above-presented facts, actions and the narration of the Polish ruling majority indicate that launching the Article 7 TEU procedure on 20 December 2017 was justified. The populist morality in combination with formal democracy and the rule of law understanding is clearly reviled in the dialogue between Poland and both the European Commission and the Council of Europe. The situation has not changed even after the new Polish government appointment on 11 December 2017. The determination of the EU institutions, especially the Commission and the Parliament, is visible.

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74 Article 186(1) of the Constitution of 1997.

75 Article 187 of the Constitution of 1997.

76 Article 187(4) of the Constitution of 1997 – The organizational structure, the scope of activity and procedures for work of the National Council of the Judiciary, as well as the manner of choosing its members, shall be specified by statute.

77 The NCJ refused the consent in case of all 265 assessors.

Nevertheless, as proven by the Hungarian example, the EU mechanisms used to safeguard the rule of law are ineffective. For that reason, the implementation of the procedures of Art. 7 TEU and Arts. 258–260 TFEU will not be conclusive. Furthermore, in a situation of invoking one of these mechanisms, the hypothetical sanctions may be disregarded and discredited by Polish government. Taking the foregoing into consideration, it should be considered whether the relativization of the rule of law does not thereby shift to the supranational level.