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Cesare Augusto Placanica

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Principle of Rule of Law and Constitutional Reforms in Poland on the Structure of the Judicial Power

*Cesare Augusto Placanica**

Abstract
The article, created as an intervention in the context of the International Conference, organized by the University of Padua, Center for Human Rights, entitled "Towards an inclusive governance of Eu fundamentals value" and within the discussion panel "in ruling the rule of law", concerns the reform of the judicial system that the Party, which won the political elections in Poland in 2015, has carried out in this country. The reforms that have been implemented with a series of laws since 2016 have affected all Polish judicial bodies. First the Constitutional Court, then the National Council of the Judiciary, the Supreme Court, and its disciplinary section, the office of Attorney General. This work first describes what the reforms and the interventions that the legislative power conducted, with a specific plan, consisted that of bringing all counter- majority powers back under the control of the executive, thus violating the Polish Constitution, which is a democratic Charter and affirms the separation of state powers. The speech underlines the reactions, which have taken place in the legal system of the European Union since the independence of the judiciary is an essential part of it, an indispensable tool for building the political and legal cohesion of the countries that belong to the Union. The reader is aware of how these reforms have been received in the enlarged common European space, the one in which the ECHR operates, and its most important guaranteed bodies, which is the European Court of Human Rights and the Venice Commission. We then draw conclusions relating to the need to implement the European rule of law, through political discussion and dialogue, like participating in an important international organization such as the Eu, which has protected peace, democracy social, and economic well-being in Europe. This task involves a strong moral cohesion between nations and peoples.

Keywords: *democracy, Poland, separation of powers, independence of the judiciary, European integration, common constitutional principles, prevalence of European law, political dialogue.*

* Attorney at law, email: cesare.a.placanica@libero.it.

1. Introduction

European public opinion these days is questioning itself on essential issues relating to *the rule of law* in Europe.

The issue of the independence of the judiciary and the office of *the Public Prosecutor* is also debated in Italian political institutions. Already in 1985, the *United Nations* had adopted a soft-law act *(a resolution*) in which it was hoped that, in acceding countries, the rule of law and the principle of the independence of the judicial and investigating judiciary, would be respected. In 1993 the *"Charter on the Statute of Judge*" was drafted and adopted by *the International Union of Magistrates,* which established relevant principles for the protection of the administration of justice and the judicial function.

The issue in the legal system of *the European Union* was only addressed with the *Lisbon Treaty*, since it was possible to apply, after his adoption, principles extrapolated from the provisions of *the Charter of Fundamental Rights* (Charter of Nice). In the system of the Council of Europe, which refers to the forms of protection to *the European Court of Human Rights*, the Governing Council of European Judges, in November 2010, adopted *the "Magna Carta dei Giudici".*

Then, within *the Committee of Minister's* recommendation CM Rec (2010) 12, was issued *"on Judges, independence, effectiveness and responsibility*" which in the reference regulatory system, represents a regulatory act, albeit a soft-law one. Important documents can also be found in the resolutions and opinions of *the Venice Commission*, a consultive body *of the Council of Europe*, which providing expertise in relation to the state-building proceedings, has addressed issues related to the independence of the Judiciary, especially in relation to a series of constitutional reforms that have recently affected some Eastern European countries, in particular *Poland, Hungry, the Czech Republic and Montenegro.*

Some of these states were also members of *the European Union*, so the related issues were the subject of judicial interventions by *the Luxembourg Court* as well as resolutions of *the European Commission*, in the form of *the infringement procedure* for noncompliance with the Treaties. In a recent paper (Cartabia 2018), the current *Italian Minister of Justice Prof. M. Cartabia*, referring to the countries *of Eastern Europe*, said that, unexpectedly, authoritative heads of governments, as supported by strong parliamentary majorities, have dismantled every limit that imposed respect for the rule of law.

The separation of powers, typical of the constitutional construction theorized by *Montesquieu*, has been eroded, and the rule of law and the

independence of the Judiciary; the latter is at risk in many *Eastern European Countries* (Cartabia said).

Many international actors have raised the alarm in the form of procedures to protect it, such as recommendations, resolutions, documents of denunciation, both by the institutions of *the European Union* and by *the Council of Europe*, and by *the Venice Commission.*

This paper intends to retrace these events, especially as regards the Polish reforms, as this country due to its demographic, social, and institutional importance, is one of those who, with the constitutional process undertaken, can most influence the political and legal construction of Europe.

2. The Polish Involution in Respect of the Rule of Law

The Polish *President Andrzej Duda* signed on December 20- 2017, two laws of parliamentary initiative, concerning *the National Council* of the judiciary and the *Supreme Court* (Ragone 2018). Already in July *the Parliament* had tried to approve two measures concerning the two constitutional bodies; the initiative had raised a long trail of protest organized in more than two hundred Polish cities, for which *the Head of state* had blocked the process through his *right of veto.*

Duda had proposed some marginal amendments, which in fact did not allow to overcome the most problematic aspects.

Later, when the emotions aroused in the country, have subsided, the laws were passed and promulgated without further problems.

Regarding to the *National Council of Judiciary (CNM)* a body corresponding roughly *to the Superior Council of the Italian Judiciary (CSM),* the news mainly concerned the methods of electing a substantial part of its members.

Pursuant to art. 187 of *the Constitution* of the Republic of Poland, *the CNM* is composed of three members of right (*the First President of the Supreme Court*, the President of *the High Administrative Court,* and *the Minister of Justice*), in addition to a member directly appointed by *the President of the Republic*, from *four Deputies* elected *by the lower Chamber (the Sejm), by two Senators* elected *by the Senate* as well as by fifteen Judges.

The law approved in December, in addition to having sanctioned the termination of office of all members of *the CNM*, within three months of its entry into force, had intervened on the procedures for the election of *the toga members*, who were traditionally elected by the judiciary; after the reforms, they were to be chosen by the *Sejm.*

The body that was supposed to guarantee the independence of the judiciary from the other powers of the state, saw an increased influence on its activity of the legislative power.

A few months after the renewal of *the CNM*, following this law, the majority party, due to the presence *of Minister of Justice* within the CNM, could have influenced the choice of twenty- two members (fifteen to gates and seven laypeople) out of a total of twenty-five.

On December 20 -2017 a second law was dismissed, which intervened on *the Polish Supreme Court*, providing *for a renewal* of its composition.

The reform lowered the retirement age of Judges *from seventy to sixty-five*, with the effect that about forty percent of the chief's magistrates, who made it up at that date, would have to be quarantined.

Was foreseen the possibility, that they could ask *the President of the Republic,* to be extended; the latter could take decision with his own unquestionable judgment and the renewal could only take place twice

The reform has given the executive power, which also includes *the President of the Republic* in *Poland,* a strong ability to influence the composition of the body.

The provision provided that the appointment of those who were being replaced *retired Judges* would be the responsibility of *the President of the Republic,* on the proposal of *the National Council* of the judiciary.

We have already said about the independence of this executive body, following the reforms, which have affected it.

The same procedure of appointment and choice also concerned *the Judges* who had to compose *the two new sections*, introduced by the reform, appointed to verify the regular conduct of electoral consultations and the disciplinary appeals of the Supreme Judges.

The justice reform had also involved changes to the discipline concerning ordinary Judges. With the law of November 16, 2016, it was provided that *the common Judges* upon reaching retirement age, could ask *the Minister of Justice,* to continue in the exercise of their functions. Therefore, *the Minister of Justice* recognized the discretionary power to decide whether to allow the common Judges, to continue their career or, instead, deny them this possibility.

3. Reactions in Poland and in European Union to the Reforms

Following the previous *Hungarian,* the new *Polish* leadership, which had won the parliamentary elections of 25 May, gradually and systematically,

began to bring the main counter-majority powers, under majority control, starting with *the Constitutional Tribunal* and continuing with the media and *the Prosecutor's Office.*

This reform plan of the ruling party *(PiS*) had been prepared for some time and then conducted with scientific rigor (Angeli et al. 2017 a).

The legislative interventions had raised more than the doubt of constitutional legitimacy, as they carried out clear interference by the legislative power on the judicial power, appearing in contrast with the principle of separation of powers, envisaged by the *Polish Constitution of 1997*, which in art. 10 paragraph 1 establishes that *"the organization of the Polish Republic must be based on the separation and balance between the legislative, executive and judicial powers*" (Ragone 2018b).

Other constitutional principles violated were constituted *by art. 180* of *the Constitution,* which provides for immovability for *Magistrates, art. 187 of the Constitution, paragraph 3*, which establishes that the mandate of the members of the *National Council of the Judiciary* is four years, while the reform provided that its members had to resign upon entry into force.

The supreme constitutional justice body was not put in a position to intervene to exercise the role of judicial guarantor of the constitutionality of the laws, since already, since 2015 *Kaczyński's party* had promoted a series of laws and provisions with which the Court, as a body of the protection of democracy was transformed into an institution for the protection of the majority party.

After the electoral victory of 2015, *the Parliament* appointed five new constitutional Judges out of fifteen, instead of the two allowed by the law.

In practice at the end of the previous legislature, *Parliament* had not limited itself to choosing *the three Judges* that would be due to it, but also optioned two more, anticipating the replacement of two of them at the end of their mandate.

Once the majority was obtained with new elections, the five appointments were considered illegitimate, with the replacement of all those nominated, by five *Magistrates* close to the winning party *"Law and Justice".*

Also in 2016, *the Parliament* had issued a series of provisions that tended to avoid the constitutionality check on newly enacted laws and make it difficult to reach a decision *by the Constitutional Court*, raising the decision quorum for some measures, from nine to thirteen Judges.Titolo

Furthermore, the work of *constitutional Magistrates* was subjected to political control, giving the lower house *(Sejm),* the power to remove constitutional Magistrates for disciplinary reasons. Part of these provisions was declared noncompliant with the supreme law, by the Constitutional Court, also due to the intervention of *the Venice Commission.*

The government reacted to the declarations of unconstitutionality, deeming the decisions of *the Constitutional Court* illegitimate, refusing publication in *the Official Gazette of Republic.*

Also at the end of 2016, other laws were issued that provided that *constitutional Judges* had to make a public declaration on their balance sheet and resign at the age of seventy unless they had produced *a medical certificate of eligibility* to continue the load.

On 21 December 2016, *the new President of the Constitutional Tribunal* was elected in the person of *Julia Przylębska*, who effectively ousted, following a spurious investigation *by the Ministry of Justice*, three *Judges*, appointed before the electoral victory of *"Law and Justice*", keeping thus serving a majority close to the ruling party. *Vice-President* of *the Constitutional Tribunal*, *Stanislaw Biernat*, disliked by the ruling party, was forced to use all past leave, before retirement, thus anticipating his retirement by two months.

As a result of these degenerations of the rule of law, a series of internal and external reactions took place. Massive street demonstrations were held in the main cities of Poland, organized by the opposition with public readings of *the Constitution.*

Furthermore, it was *the Judges* themselves who conducted vibrant protests. There are repeated appeals to respect the sentences of *the Constitutional Court*, despite their non-publication by *the Government.*

Ordinary Judges and *regional councils* undertook not to respect the sentences of three impostor *constitutional Judges*, and the same *CNM* intervened in support of *the Constitutional Court.*

The election of *the President of the Constitutional Court Julia Przylębska* was challenged before the ordinary courts.

When the reform of *the Constitutional Court*, came into effect the Judges (of all levels) were mobilized to conduct a widespread control of constitutionality. (Angeli et al. 2017 b)

On 29 July 2017, *the European Commission*, before the intervention of *President Duda,* which we discussed in the previous paragraph, sent a formal letter to *the Polish Government*, implementing the first step of *the infringement procedure.*

The concrete realization of *the European Union,* as an area of freedom security, and justice, without internal borders (*article 3, paragraph 2 TEU),* and the trust of all Union citizens and national authorities in the legal systems of all other member states, implies that "*aut simul stabunt aut simul cadunt.*"

When *the rule of law* or one of the fundamental values of *the Union*, is called into question, in one of the member states, the obligation and joint

responsibility of the institutions of *the Union* and the member states, to safeguard them, emerges.

This is an objective that must be achieved, with the instruments provided for by the *Treaties,* in compliance with the precepts of *art. 4 TEU third paragraph*, and therefore of loyal cooperation. The *Warsaw reforms* have been a problem for *the European Union* because citizens must be guaranteed *effective judicial protection (art. 19 TEU*), and therefore *Poland* must ensure that its courts, in ruling *on questions of interpretation* of European law, meet the requirements of *independence* and *impartiality.*

Principles are all reaffirmed by *article 47 second paragraph* of *the Charter of Nice* (right to an effective remedy and to an impartial Judge), as interpreted by the jurisprudence of *the Court of Justice of the European Union.* (Asero 2021a)

The Court of Luxembourg in the judgment *"Associação Sindical dos Juízes Portugueses*" (Parodi 2018, 985-992), reaffirmed that the principle of effective judicial protection, established by art. 19 par. 1 TEU *"constitutes a general principle of Union Law, that derives from the constitutional traditions, common to the member states, which has been sanctioned by art. 6 and 13 of the European Convention for the safeguarding of Human Rights and Fundamental Freedoms (……..) and which is currently affirmed by art. 47 of Charter".*

The ruling reaffirms that the role of *the Court of Justice* itself, in monitoring compliance with the rule of law by the member states, is significantly strengthened, given that, through the instrument *of preliminary ruling*, it will be able to rule on the compatibility or otherwise of national measures, with the value of the rule of law as declined by *the art. 19 TEU*, regardless of the existence of links with EU law.

On 9 April 2018, *the first vice–president of the European Commission*, *Franz Timmermans,* arrived *in Warsaw,* to open a dialogue with the government, and reiterate the need *for Warsaw* to contain the risks that threatened the rule of law in that country.

On March 1, *the European Parliament* had already given its approval "*pursuant to the art 7 first paragraph of the TEU*", to continue with the procedure aimed at ascertaining the existence of an evident serious risk, for the violation of the values referred to *in art. 2 TEU.*

This procedure requires a majority of four-fifths of the member's state of *the Council*, which could, considering the existence of its conditions, have made recommendations *to Poland.*

If *Poland* had stiffened, it would have passed to the application of *the second paragraph of art. 7,* according to which *the Commission* unanimously or a third of the member's states could no longer *detect a risk, but the*

actual existence of serious violations of the fundamental values of the EU, and consequently suspending its right to vote in *the Council.*

But neither *the first* paragraph nor *the second* paragraph *of art. 7*, were applied to *Poland*; this is because the majorities to be reached were too light, and *Poland* and *Hungary* and the other members of the *Vise grad group*, that make up the *European Commission*, had formally and mutually committed themselves, not to allow sanctions to be activated, in *the European bodies*, against them.

In the *opinion 892/2017* issued by *the Venice Commission* at request of *the Parliamentary Assembly* of *the Council of Europe*, there were strong critical issues for the respect of *the rule of law in Poland*, due to the reform of *the Prosecutor's Office*, implemented in 2016.

The new law established the unification of *the office of Attorney General,* with that of *Minister of Justice* (Mauri 2020).

It was noted that, from a procedural point of view, the use of the parliamentary instrument, posed problems in relation to the legality of the initiative, as a reform on a particular issue as the one in question, relating to *the independence of the judiciary*, would have required a responsible, and inclusive democratic process.

Therefore, the lack of public consultations and the absence of a true involvement of civil society, in the reform process, could only lead to a failure, to adapt to *the rule of law.*

On the merits, it was noted that *the Prosecutor's office*, should be kept in a position of independence and not of subordination, with respect to the executive power.

The modalities of the procedure for the appointment and removal of *the Attorney General,* also raised serious doubts, as they were exclusively dependent on Parliament.

The legislative body has penetrating powers in *the appointment of Ministers*; the appointment and removal of the *Attorney General* (who identifies with *the Minister of Justice)* became subject to changing political majorities, with influence on decisions that had to remain impartial.

The system of public prosecution was brought back to *the longa manus* of the executive, providing for the possibility that the *Attorney General* intervened on individual cases, entailing the risk of manipulation of the investigations, by a subject who was in effect a subject politic.

The opinion mentioned above suggested returning to *the old separation,* between the office of *the Attorney General* and the office of *the Minister of Justice.*

In the alternative it was suggested to modify the content of the functions of *the Attorney General*, excluding the possibility that he could influence

specific and individual investigations, limiting his activity to *the general administrative organization.*

The recent ruling of the *Polish Constitutional Court (October 7, 2021)* on the supremacy of the national law over European law, constitutes the last chapter of *the Polish festival* on the reforms of the judiciary in this country. Is not my intention to discuss in the strict sense, the relationship between national laws, European Union law, and the law of the European common space, but to illustrate, what *the reforms of the Judiciary* in Poland, have been, and how they conflict, with the implementation of the European rule of law. It is Known that the provisional order of *the Luxembourg Court (July 14, 2021)*, and the consequent sentence, taken *on appeal* by the *European Commission*, required Poland to modify the law relating to the organization of *ordinary Tribunals*, and the establishment of the disciplinary section of *the Supreme Court.*

Since *Poland* had not complied with these obligations *the Commission* had presented *a new appeal* asking that *the Eastern European country* be sentenced, to pay *a daily penalty*, which *the European Court* had determined at *one million euros* for each day of delay, in implementing what is required by *the European Court*. The sentence of *the Polish Constitutional Court* on the supremacy of domestic law intervened after this condemnation. Also, this body, because of the government's reform package, had seen its functioning and composition modified, so that if carried out the will of the government and lost its character of impartiality.

4. The Strasbourg Court and the Independence of the Judiciary

In a recent speech the President of *the European Court of Human Rights, Robert Spano* (Spano 2021), argued that the rule of law constitutes a constitutional principle, inherent in the system of protection of human rights, established within the legal space of *the Council of Europe* and that its normative origins go back to the preamble of *the Universal Declaration of Human Rights of 1948.*

The principle is relevant for *the protection of human rights* because it involves respect for *personal autonomy* and the exclusion of *arbitrary forms of governmental power*; its aim is to prevent citizens from going to the point of having to rebel against tyranny and oppression.

The power of the executive must be governed by law and not by whims of men and it requires that national laws be clear, not excessively vague, and not susceptible to abuse.

The *"Statute of the Council of Europe*" (1949) enshrines this principle on two occasions. First in *its preamble* and then *in art. 3*, according to which *"every member state of the Council of Europe recognizes the principle of the rule of the law".* It constitutes an integral part of *"European public order",* identifying its essence in the fundamental system of values on which the entire *Convention* stands, and to which *the Court* is bound pursuant *to art. 19* (establishment of the court) *and 32 (*powers of the court). Its expression is the independence of the judiciary, which must be expressed in the forms of *"de facto*" and *"de iure"* independence.

The Grand Chamber of *the European Court of Human Rights* has emphasized in its consistent case law, that *"the notion of separation of powers, between executive body and the judicial body, has assumed increasing importance in the court's jurisprudence and the same can be said about the importance of safeguard the independence of the judiciary."*

Therefore, the principle of the rule of law would be reduced to an empty reservoir, if there were no *independent courts* integrated within a democratic structure, aimed at preserving fundamental rights.

The rules themselves *(de iure independence*), must provide clear safeguards to oversee judicial activity, especially in relation to the acts of appointment, the guarantees of the mandate, and the procedures for removal, promotion, removability immunity, and disciplinary responsibility.

These developments in the business must be enforceable before *national courts* and in the system of conventional guarantees. In the latter, failure to comply with the law constitutes a violation *of art. 6 of the Convention (right to a fair trial),* especially about unlawful removal and disciplinary proceedings. Unjust and illegitimate removal can also constitute a violation *of art. 8 (right to respect for private life).*

If *the Judge* is removed, due to the opinions expressed in the exercise of his/her duties, by virtue of *art. 10 ECHR (freedom of expression*) the removal procedures, must consider, the value of the separation of the executive power from the legislative and the independence of the judiciary.

But formal independence alone is not sufficient to guarantee *the rule of law*, having to guarantee also *the "de facto*" one, avoiding undue pressure and influence exerted on *Judges*, through public declarations by politicians in the media, that have the aim of conditioning their activity.

5. Conclusions.

In *the two European systems* (the conventional one of *the Council of Europe*, which applies *the European Convention on Human Rights and* has as its body

of justice, *the European Court of Human Rights* of Strasbourg, and that of *the European Union* which applies *the Charter of Nice* and refers *the Court of Luxembourg*) the principles of *the rule of law* are now elements that cannot be rectified from a constitutional point of view.

In European systems there could be no question of adherence to recognized constitutional principles if full protection of human rights were not implemented; its essential element is *the independence of the judiciary.*

The Polish case constitutes a borderline situation in contrast whit the "*European rule of law."* We have seen how *procedural* and *quorum* problems, both the way of *infringement procedure* and that of *application of art. 7 TEU,* are difficult to implement.

The possible solution is therefore those of dialogue on the implementation of the *rule of law* and of the judicial control of the courts of the states and of the European Courts.

The President of *the European Commission, Ursula Van der Layen*, expressed the hope, in the document *"a more ambitious Union. My program for Europe*", that the discussion on *the rule of law*, will be rationalized and that the EU institutions, will exercise among themselves and whit the member states, a continuous and courageous discussion on this issue.

This is to prevent problems relating to *the rule of law,* from arising or worsening and to promote a solid culture within the Union. (Asero 2021 b, 103)

The control by *the international courts* cannot repair the systemic problems encountered unless their competence is strengthened by means of changes to the founding papers. Currently, only dialogue in *political fora,* can make up for the shortcomings, found *in Poland* and other countries.

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