

The Rule of Law and Democratic Commitment within the EU  
Legal Community: Resilience in Times of Crisis



# Legal Methods and Factors Against Rule of Law Deterioration in Poland

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## *Abstract*

This chapter provides an insight into the background and nature of the 2015–2023 crisis of the rule of law, as well as the main extra-normative and normative methods and factors relevant to defending the rule of law in Poland. The first section describes the main methods, symptoms and motivations behind the processes devastating the rule of law, the problem of weak legal culture of Polish society, the immanent ineffectiveness of mechanisms protecting the rule of law and the societal landscape surrounding the deterioration processes. The second and the third sections discuss, respectively, certain extra-normative methods or characteristics pertaining to the protection of the rule of law in Poland and the normative methods or factors relevant to inhibiting the processes impairing the rule of law. Finally, the third section presents reflections on the existing deficits and possible improvements likely to contribute towards the strengthening of the rule of law if the challenges reoccur.

## *1. Introduction and Background*

The process of the deterioration of the rule of law in Poland in 2015–2023 has not been fully completed or comprehensively remedied so far – to say the least. Neither has it been fully unique when compared to other processes of democratic backsliding worldwide (e.g. in Hungary as the most obvious example). It has been extensively reported and vividly debated by legal scholars.<sup>1</sup> But certainly, bitterly aware of the possible future undemocratic developments in certain jurisdictions, one could be interested in a sort of

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1 E.g. W. Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press, 2019); Komisja Europejska, *Przedstawicielstwo w Polsce*, J. Barcz, A. Grzelak and R. Szynd-

inventory of legal methods or social factors. Those could be important tools against the deterioration of the rule of law in this ‘laboratory of illiberal constitutionalism’ – a role which has been infamously played by Poland for eight years of the rule of the far-right government.

This chapter presents, first of all, the background of the topical process, being certain legal and socio-legal phenomena pre-existing the episode of 2015–2023. Further, it takes inventory of legal methods against the rule of law deterioration, while distinguishing between normative methods (such as methods of interpretation and adjudication or legal procedures employed) and extra-normative methods being the social environment surrounding the normative developments and retarding the ambitions and projects aimed at by the political branches of government in Poland (e.g. the blooming of civil society structures defending the rule of law). Thirdly, this chapter will also provide a list of deficits or deficiencies that have not been overcome and which are likely to burden the future efforts against possible restoration of the non-democratic *Ancien Régime* as well as the processes of restoration of the rule of law now taking place in Poland. None of these lists is probably exhaustive, but in the author’s view (being himself an insider, a practising lawyer and member of the Euro-constitutional academia at the same time), they are aimed at indicating the most relevant factors.

In this chapter, the author briefly presents the process of the deterioration of the rule of law as well as certain factors defining the background which made the whole process possible to accomplish by some eager politicians.

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lauer, *Problem praworządności w Polsce w świetle dokumentów Komisji Europejskiej: okres „dialogu politycznego” 2016–2017* [The problem of the rule of law in Poland in the light of the European Commission documents: the period of “political dialogue” 2016–2017] (Urząd Publikacji, 2020); European Commission: Representation in Poland, J. Barcz, A. Grzelak and R. Szyndlauer, *Problem praworządności w Polsce w świetle orzecznictwa Trybunału Sprawiedliwości UE (2018–2020)* [The problem of the rule of law in Poland in the light of the case law of the Court of Justice of the EU (2018–2020)] (Publications Office of the European Union 2021); J. Barcz and A. Grzelak, *Problem praworządności w Polsce w świetle orzecznictwa TSUE. Tom IV (2022–2023)* [The problem of the rule of law in Poland in the light of the case law of the European Court of Justice. Volume IV (2022–2023)] (Dom Wydawniczy Elipsa, 2024); A. Bień-Kacała and T. Drinóczi, *Rule of Law, Common Values, and Illiberal Constitutionalism. Poland and Hungary Within the European Union* (Routledge, 2021).

## 1.1 How the Rule of Law was Deteriorated in Poland – Methods, Symptoms and Motivations

The deterioration of the rule of law in Poland began as early as in autumn 2015, after the Law and Justice party, a far-right populist movement, won the general election. Already before the election, the then-ruling liberal coalition elected five judges to the Constitutional Court, including three lawfully elected judges to replace those whose terms had elapsed and two more “in advance” in order to take positions of judges whose terms had still been pending on the day of the election of their successors.<sup>2</sup> The winners of the 2015 general election in turn decided to adopt a parliamentary resolution declaring the ineffectiveness of the election of all these judges (including those three lawfully elected) and to elect five judges to the Constitutional Court, consequently including three so-called “doubles” (i.e. unlawfully elected for the positions already occupied), as well as to amend the Law on the Constitutional Court. The latter amendment was opined by the Venice Commission, which found, among others, that:

“The provisions of the Amendments of 22 December 2015, affecting the efficiency of the Constitutional Tribunal, would have endangered not only the rule of law, but also the functioning of the democratic system, as set out above. They cannot be justified as a remedial action against an absence of ‘pluralism’ in the composition of the Tribunal. Rather than speeding up the work of the Tribunal these amendments, notably when taken together, could lead to a serious slow-down of the activity of the Tribunal and could make it ineffective as a guardian of the Constitution.”<sup>3</sup>

That, together with gradual supplementation of the Constitutional Court with lawfully elected but ‘exotic’ judges whose predominant common feature was political dependence on the political powers of the State, allowed the ruling majority to ‘switch off’ the Constitutional Court, meaning that instead of strictly scrutinising the legislation, it became the “guardian of

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2 Constitutional Court of Poland, judgment of 3 December 2015, K 34/15 (items 8 (b) and (c)).

3 Opinion on amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11–12 March 2016), CDL-AD(2016)001-e, item 137.

the interests of the parliamentary majority”<sup>4</sup>. Having accomplished that, the ruling majority could adopt any laws it wished, knowing that there was no effective constitutional review capable of scrutinising it.

Further developments appeared a logical consequence of the absence of constitutional scrutiny: re-subordinating the public prosecution to the politician being the minister of justice (who became again the head of the prosecution), which allowed the ruling party to freely choose which prosecutions would be pursued and which of them would be denied or discontinued,<sup>5</sup> appointing disciplinary officers for judges in order to persecute those unwilling to satisfy expectations of the political majority in the performance of their judicial duties,<sup>6</sup> or extending the illegal surveillance of citizens aimed at suppressing the opposition.<sup>7</sup> At the same time, the majority re-channelled the public subsidies to NGOs according to the political criteria,<sup>8</sup> or turned the public media into a ‘political mouthpiece’ spreading hate speech and the government’s propaganda.<sup>9</sup>

## 1.2 Constitutional Background: Immanent Ineffectiveness

Foreigners observing the events happening in Poland from 2015 to 2023 may have a wrong impression that the entire society opposed the devasta-

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4 M. Pyziak-Szafnicka, ‘Trybunał Konstytucyjny *à rebours*’ (2020) [M. Pyziak-Szafnicka, ‘Constitutional Tribunal *à rebours*’], 5 *Państwo i Prawo*, 25. The author noted that, contrary to the constitutional function of the Court: “Indeed, the ruling majority is a guardian of the law it creates”, 44.

5 *Zurek v. Poland* App no 39650/18 (ECtHR, 2022).

6 *Tuleya v. Poland* App no 21181/19; 51751/20 (ECtHR, 2023); Case C-791/19 *Commission v. Poland*, [2021] CJEU ECLI:EU:C:2021:596.

7 *Brejza and 8 other applicants v. Poland* App no 27830/23 (ECtHR, 22 July 2024).

8 Rządowy projekt ustawy o Narodowym Instytucie Wolności – Centrum Rozwoju Obywatelskiego wykonawczych, Druk Sejmu RP VIII kadencji nr 1713, Załącznik nr 1, Zestawienie uwag zgłoszonych w toku konsultacji publicznych do projektu ustawy o Narodowym Centrum Rozwoju Społeczeństwa Obywatelskiego, [Government bill on the National Institute of Freedom – Centre for the Development of Civic Society executive, Sejm Print No. 1713, Appendix No. 1, Summary of comments submitted during public consultations on the bill on the National Centre for the Development of Civil Society] <https://orka.sejm.gov.pl/Druki8ka.nsf/0/C57CFC456352A1B5C1258155005FF00E/%24File/1713.pdf> <accessed 17 February 2025.

9 A. Ambroziak and A. Szcześniak, ‘Landmark ruling of the CJEU in the case against public broadcaster TVP’ (*Rule of Law*, 12 January 2023) <<https://ruleoflaw.pl/landmark-ruling-of-the-cjeu-in-the-case-against-public-broadcaster-tvp/>> accessed 10 December 2024.

tion of the rule of law and the ruling party lost their support gradually while it was deteriorating the democracy. In fact, their gain in the 2015 elections was 37.58%, and four years later (after they already attacked the Constitutional Court, politicised the prosecution and attempted to politically colonise the Supreme Court and the common courts) the popularity rose to 43.59%. In the meantime, in 2018 they won the local elections, getting 34.13% of the votes to regional councils (*sejmiki*). In 2019 they also won the election to the European Parliament, obtaining a share of 45.38%. In 2023 they lost the majority in the parliament but still got the highest share of votes (35.38%) and they defeated the liberals in the regional elections in 2024 (34.27%).

While maintaining their popularity, the far-right exploited the argument that the “reforms” they proposed were supported by the society. Their main theme was that they represent the ‘sovereign’ (i.e. the society). And actually, this argument is hardly rebuttable, even if one connotes it with the infamous decisionism of Carl Schmitt. The truth is therefore that the rule of law – ridiculed by the far-right by labelling it ‘impossibilism’ (i.e. inherent non-openness to accept unbridled choices of the *voluntas politica*) – is inevitably ineffective when faced with the will of the society.

### 1.3 The Society Deeply Divided with Large Societal Sectors Underprivileged and Discriminated

It would be a tremendous oversimplification to believe that the Constitutional Court existing prior to the 2015–2023 democratic backsliding had been a courageous and uncompromised defender of the rule of law, fundamental rights and democratic foundations of the republic. In reality, this institution was rather conservative and concentrated on preserving the privileges of some and the general state’s interests rather than individuals’ rights and freedoms. Just to mention some examples: The Constitutional Court ruled in 1997 that the rule of law excludes allowing for termination of pregnancy on grounds of difficult living conditions or a difficult personal situation of a pregnant woman.<sup>10</sup> The same Constitutional Court held in 2005 that there is a constitutional rule of treating marriage as a union between a man and a woman.<sup>11</sup> In 2015 it confirmed the constitutionality

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10 Constitutional Court of Poland, judgment of 28 May 1997, K 26/96.

11 Constitutional Court of Poland, judgment of 11 May 2005, K 18/04, item III.16.5.

of depenalisation of ‘offending religious feelings’ (understood in practice as the crime of blasphemy) and held that the application of the *nullum crimen sine lege certa* rule did not affect that stance.<sup>12</sup> It was also the same Constitutional Court that held that the one-time change in the pension indexation method (violating the principle of protection of acquired rights) was compatible with the Constitution because “the ideas of social equality and solidarity require that the burden of the economic crisis falls on all social classes and does not affect only some of them in a special way”<sup>13</sup> and that taking away funds accumulated by citizens in their individual retirement accounts did not violate the Constitution because otherwise the public debt would be excessive.<sup>14</sup> It was, finally, the same Constitutional Court that did not find the violation of the Constitution in the ‘collective responsibility’ of former communist state officers whose pensions were reduced for political reasons.<sup>15</sup>

This is against this background that the far-right campaigned against the independent Constitutional Court. One should understand that large sectors of the Polish society could see no reasons to defend this court.

#### 1.4 Very Weak Legal Culture and Deep Distrust of State Institutions

Before the far-right formed their government in 2015, the social trust in courts was already relatively weak in Poland. In the preceding six years (2010–2015), it varied between 20% and 26% of those who expressed their positive opinion about the functioning of courts, whereas negative opinions constantly dominated, varying between 36% and 64%.<sup>16</sup> The overall level of social trust (whether other people generally can be trusted?) varied

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12 Constitutional Court of Poland, judgment of 6 October 2015, SK 54/13, item III.4.3.3. The Constitutional Court held that “the understanding of the object of religious worship in relation to the religions commonly practiced in a given cultural environment is specified in the social perception, that is, on the linguistic level”. Thus, it was presumed *a contrario*, that the protection of “religious feelings” of believers of other religions than the Roman Catholic one did not result from the disputed penal provision; *Rabczewska v Poland* App no 8257/13 (ECtHR, 2015).

13 Constitutional Court of Poland, judgment of 19 December 2012, K 9/12, item III.6.1.23.

14 Constitutional Court of Poland, judgment of 4 November 2015, K 1/14, item III.2.3.

15 Constitutional Court of Poland, judgment of 24 February 2010, K 6/09.

16 Centrum Badań Opinii Społecznej, ‘Komunikat z badań nr 131/2015. Ocena instytucji publicznych’ [Public Opinion Research Center, ‘Research Report No. 131/2015.

between 2002 and 2022 from only 17% to 26%, whereas the general distrust was expressed between an overriding majority of 72% up to 81%.<sup>17</sup> Also, the level of ‘legal culture’ of the society, characterised by the approaches to the functioning of law and legal institutions, has been very low.<sup>18</sup> In fact, according to the latter study,<sup>19</sup> the results of the opinion surveys show deep popular distrust of the state institutions (including courts), a declared sense of vagueness of law, or the lack of fairness of court proceedings. One should add, out of one’s own experience, the lack of awareness of legal procedures and the lack of understanding of basic institutions of law. That, again, may explain the relative easiness of impairing the rule of law by the far-right during the times of democratic backsliding.

## *2. Relevant Methods and Factors*

In this chapter, extra-normative and normative factors relevant in Poland to prevent or inhibit the violations of the rule of law shall be presented. The chapter is composed of two parts, the first part discussing certain extra-normative methods (methods other than pertaining to the use of legal procedures), and the second part focused on normative methods.

### *2.1 Extra-normative Methods and Factors*

Amongst the methods applied to prevent the demolition of the rule of law, extra-normative methods (or socio-legal characteristics) were perhaps the most important. This is because, when the mechanisms of the rule of law were seriously affected by political decisions they became – to a significant extent – dysfunctional. Therefore, extra-normative defences, i.e. social phenomena constituting the environment in which law operates, gained special

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Assessment of Public Institutions’] (2015), < [www.cbos.pl/SPISKOM.POL/2015/K\\_131\\_15.PDF](http://www.cbos.pl/SPISKOM.POL/2015/K_131_15.PDF)> accessed 13 December 2024, 14.

17 Centrum Badań Opinii Społecznej, ‘Komunikat z badań 37/2022. Zaufanie społeczne’ [Public Opinion Research Center, ‘Research Announcement 37/2022. Social Trust’] (2015), <[www.cbos.pl/SPISKOM.POL/2022/K\\_037\\_22.PDF](http://www.cbos.pl/SPISKOM.POL/2022/K_037_22.PDF)> accessed 13 December 2024, 2.

18 M. Pękala, R. Zyzik, ‘Społeczny obraz prawa. Opis obszaru badań i wyniki pilotażu’ [The social image of law. Description of the research area and pilot results] (2018) 18 *Zeszyty Prawnicze*, 35.

19 M. Pękala and R. Zyzik, see n. 18, 57–58.

significance. Certain extra-normative tools used for the defence of the rule of law shall be described below.

### 2.1.1 Social Networking of the Civil Society

In spite of political pressure, the professional organisations of lawyers – predominantly judges,<sup>20</sup> but also other legal professions<sup>21</sup> – resisted against the demolition of the rule of law by organising strategic litigations, defending their members, publishing manifestos or educating the general public in the framework of regular open lectures on constitutional matters. Their crucial role was manifested e.g. in providing *pro bono* legal aid for parties or submitting third-party observations in court proceedings<sup>22</sup> or in publishing reports which influenced the reasoning of courts.<sup>23</sup> These structures of social networking also included NGOs, informal collectives<sup>24</sup> and individuals acting in defence of democratic rules, such as Mr. Bart Staszewski who campaigned against the so-called “non-LGBT zones”<sup>25</sup>. Resolutions adopted by different levels of local and regional government expressing their hostility towards LGBT persons and proclaiming their intentions to defend ‘traditional families’.

The relevance of social networking did not only manifest in the actions undertaken by institutions of civil society, but also in making the impression that social circles independent from the far-right government were broad and gathered large numbers of citizens.

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20 Two main organisations of judges were *Stowarzyszenie Sędziów Polskich Iustitia* and *Themis*.

21 For instance the prosecutors’ association *Lex Super Omnia*.

22 *Grzęda v Poland* App no 43572/18, §§ 222–226 (ECtHR, 2022); *Advance Pharma sp. z o.o. v Poland* App no 1469/20, §§ 281–286 (ECtHR, 2022).

23 E.g. Polish Supreme Court, judgment of 19 September 2018, III PO 9/18, on the reference for preliminary ruling concerning the discrimination of judges on grounds of age, § 32.

24 E.g. the „Dziewuchy Dziewuchom” (literally „Guls for Guls”) collectively organising protests against violations of reproductive rights.

25 P. Nodzyńska, “Masowy atak na jednego obywatela.” Bart Staszewski wygrał w sądzie z TVP’ [P. Nodzyńska, “Mass attack on one citizen.” Bart Staszewski won in court against TVP’] *Wyborcza.pl* (17 October 2024) <<https://wyborcza.pl/7,75398,31392689,zmasowany-atak-na-jednego-obywatela-aktywista-lgbt-wygral.html>> accessed 9 January 2025.

### 2.1.2 Relatively Strong Private Sector

The private sector in Poland is relatively strong: Prior to 2015 it generated around 80% of the GDP<sup>26</sup> as well as jobs.<sup>27</sup> After the far-right won the elections in autumn 2015, they fired thousands of people from state institutions. This replacement was not limited to strictly political jobs but extended to many at least relatively well-paid state jobs. Those who could not be fired, due to the uniqueness of their qualifications, had to manifest their loyalty towards the party and its government, or at least, to keep indifferent in relation to political affairs. Any public manifestation of opposition or independent views was punished with firing from work or some sort of persecution (e.g. disciplinary proceedings).

Nonetheless, thanks to rapidly shrinking unemployment (having now one of the lowest rates EU-wide) and a variety of options available in the strong private sector, people could remain independent and simply disregard expectations of political supervisors or quit the public sector jobs.

Obviously, the correlation between the powerfulness of the private sector and democracy exemplified by the situation in Poland does not need to be a rule applicable everywhere and in any context. As exemplified by outrageous comments made publicly by the IT tycoon Elon Musk about extremist movements and international relations, the private sector is not enough to protect democracy because much depends on who owns the capital. But in the particular Polish context, the strength of the private sector contributed to protecting the rule of law.

### 2.1.3 Independent Media

A crucial element for the protection of the rule of law in Poland was the pluralism of media. The far-right government was well aware of that and therefore it attempted to suppress media pluralism in several ways. First of all, after gaining control over the public media (Polish Television and

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26 Główny Urząd Statystyczny, *Zatrudnienie i wynagrodzenia w gospodarce narodowej w 2014 r.* [Central Statistical Office, *Employment and wages in the national economy in 2014*], (Główny Urząd Statystyczny, 2015), 13.

27 Główny Urząd Statystyczny, *Rocznik Statystyczny Rzeczypospolitej Polskiej 2016* [Central Statistical Office, *Statistical Yearbook of the Republic of Poland 2016*], (Główny Urząd Statystyczny, 2016), 700.

Polish Radio),<sup>28</sup> they rechannelled the stream of public (or quasi-public i.e. from state-controlled enterprises) advertising money exclusively to media controlled by the far-right.<sup>29</sup> Secondly, they purchased (via the state-owned Orlen company) the Polska Press company, the publisher of some 140 local and regional newspapers, from the German Verlagsgruppe Passau, turning the local media into a propaganda mouthpiece of the government. Thirdly, they tried to reject the extension of broadcasting licences for independent (owned by American Discovery) TVN television and imposed unsubstantiated sanctions on independent broadcasters.

Nevertheless, the majority of opinion-making newspapers remained (more or less) independent.<sup>30</sup> Also, Internet news portals and television channels (except for the public broadcaster) remained beyond the control of the government.<sup>31</sup> For example, main channels of independent television broadcasters (Polsat and TVN groups) maintained their share of some 30% of average daily viewership, whereas the state-owned broadcasting group TVP reached approximately 20% of average daily viewership in 2021 and 2022.<sup>32</sup> The relative media independence – when compared to

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28 A. Wójcik, 'Restoring Poland's Media Freedom' (*verfassungsblog.de*, 20 October 2023), <<https://verfassungsblog.de/restoring-polands-media-freedom/>> accessed 17 January 2025.

29 Media Freedom Rapid Response (MFRR), 'Media freedom at a crossroads: Journalism in Poland faces uncertain future ahead of election' *MFRR* (5 October 2023) <[www.ecpmf.eu/media-freedom-at-a-crossroads-journalism-in-poland-faces-uncertain-future-ahead-of-election/](http://www.ecpmf.eu/media-freedom-at-a-crossroads-journalism-in-poland-faces-uncertain-future-ahead-of-election/)> accessed 17 January 2025, 5, where authors found that "private media are denied access to state advertising income, weaponised by PiS to fund favourable media outlets and undermine independent journalism. The move exacerbates the financial pressure on media, particularly print, that are still developing new and sustainable income streams to support the digital transition".

30 All nine principal nationwide newspapers in 2023 were owned by private companies – see 'Wzrosła sprzedaż "Gazety Wyborczej". Liderem pozostał "Fakt"' *bankier.pl* (12 February 2024) <[www.bankier.pl/wiadomosc/Sprzedaz-dziennikow-w-IV-kw-2023-r-wyniosla-334-tys-sztuk-8693871.html](http://www.bankier.pl/wiadomosc/Sprzedaz-dziennikow-w-IV-kw-2023-r-wyniosla-334-tys-sztuk-8693871.html)> accessed 17 February 2025.

31 *interaktywnie.com*, *Oto najpopularniejsze portale internetowe i aplikacje w polskim internecie* [Here are the most popular web portals and applications on the Polish Internet] <<https://interaktywnie.com/oto-najpopularniejsze-portale-internetowe-i-aplikacje-w-polskim-internecie/>> accessed 17 February 2025 (information for December 2023).

32 Michał Kurdupski, 'TVPI liderem w 2022 roku w 4+, TVN na czele w 16–49. Duże wzrosty TVN24, TVP Info i Polsat News' [TVPI the leader in 2022 in 4+, TVN in the lead in 16–49. big increases for TVN24, TVP Info and Polsat News] *Wirtualnemedia.pl* (9 January 2023) <[www.wirtualnemedia.pl/artykul/ogladalnosc-telewizja-2022-rok-lider-tvpi-tvn-liderzy-hity](http://www.wirtualnemedia.pl/artykul/ogladalnosc-telewizja-2022-rok-lider-tvpi-tvn-liderzy-hity)> accessed 17 February 2025.

Czechia, Hungary or Romania – was the result of the fact that “one of the distinguishing factors of the Polish market is that, unlike other CEE countries, there remains a strong presence of foreign investors.”<sup>33</sup> This was an important element of resisting the democratic backsliding. The public debate remained pluralistic and presented multiple views, unlike e.g. in Hungary.

## 2.2 Normative Methods and Factors

The normative methods against the deterioration of the rule of law in Poland were employed by different actors, i.e. international courts (CJEU and ECtHR) and national courts, but also by private individuals and NGOs. Some of them are briefly discussed below.

### 2.2.1 Dispersed Constitutionality Review

Although the Constitution of Poland is, in principle, directly applicable,<sup>34</sup> until the constitutional crisis courts (other than the Constitutional Court) have normally refrained from dispersed review of the constitutionality of statutes (laws adopted by the Parliament), while arguing that they should instead refer to a preliminary ruling of the Constitutional Court on the alleged unconstitutionality of a statutory provision.<sup>35</sup> However, from the beginning of the democratic backsliding in 2015, and especially following the ECtHR judgment in *Xero Flor*,<sup>36</sup> the Supreme Court and ordinary and administrative courts intensified dispersed (decentralised) review of constitutionality, as a remedy to the political delegitimation and self-dele-

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33 Media Freedom Rapid Response (MFRR), ‘Media freedom at a crossroads’, see n. 29, 10.

34 Article 8 §2 of the 1997 Constitution of the Republic of Poland (“The provisions of the Constitution shall apply directly, unless the Constitution provides otherwise”).

35 Supreme Court of Poland, judgment of 16 April 2004, I CK 291/03.

36 *Xero Flor w Polsce sp. z o.o. v Poland*, App no 4907/18 (ECtHR, 2021), where the Strasbourg Court (inspired by the Grand Chamber’s judgment in *Guðmundur Andri Ástráðsson v Iceland*, App no 26374/18 (ECtHR, 1 December 2020), held that “the applicant company was denied its right to a *tribunal established by law* on account of the participation in the proceedings before the Constitutional Court of Judge Mariusz Muszyński, whose election was vitiated by grave irregularities that impaired the very essence of the right at issue” (§ 290).

gitimisation of the Constitutional Court.<sup>37</sup> In that way they played crucial roles in defending the rule of law.

### 2.2.2 Constitutional Neuroplasticity – International Courts Taking over the Role of “the [Polish] Constitutional Court in Exile”

The two most prominent international courts operating and interplaying in the European constitutional space became crucial for the maintenance of the rule of law in Poland – CJEU and ECtHR. The Strasbourg Court developed – thanks to the interpretative mechanism of ‘living instrument’ assuming a dynamic interpretation of the European Convention in accordance with the ever-changing social, economic, cultural or technological developments<sup>38</sup> – the new standard of interpretation of the right to a fair trial concerning the right to a “tribunal established by law”<sup>39</sup> which was subsequently applied in cases against Poland<sup>40</sup> and then also applied by Polish courts.<sup>41</sup> Later, the Luxembourg Court developed the standard of interpretation of Article 19 (1) TEU (and Article 47 CFR) strengthening the significance of the rule of law in the context of ‘reforms’ concerning

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37 J. Podkowiak, ‘O przyczynach, przejawach i skutkach rozproszonej kontroli konstytucyjności ustaw (w świetle orzecznictwa sądów powszechnych i Sądu Najwyższego)’ [On the causes, manifestations and effects of dispersed control of the constitutionality of laws (in the light of the case law of common courts and the Supreme Court)], (2022) 2 *Studia Prawnicze*, 107, 112. See also G. Maroń, ‘Stanowisko polskich sądów w przedmiocie rozproszonej kontroli konstytucyjności ustaw’ [The position of Polish courts on the dispersed review of the constitutionality of laws] (*CBPE*, 2023) <https://cbpe.pl/stanowisko-polskich-sadow-w-przedmiocie-rozproszonej-kontroli-konstytucyjnosci-ustaw/> accessed 14 December 2024.

38 *Tyrer v the United Kingdom* App no 5656/32, § 31 (ECtHR, 1978) (“the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions. In the case now before it the Court cannot but be influenced by the developments and commonly accepted standards”).

39 *Guðmundur Andri Ástráðsson v Iceland* App no 26374/18, §§ 235–252 (ECtHR, 2020) (the three-element threshold test).

40 For the first time in *Xero Flor w Polsce sp. z o.o. v Poland*, App no 4907/18 (ECtHR, 2021) later on numerous occasions starting from *Broda and Bojara v Poland* App no 26691/18; App no 27367/18 (ECtHR, 2021) and most recently in *Wałęsa v Poland* App no 50849/21 (pilot judgment) (ECtHR, 2023) and *M. L. v Poland* App no 40119/21 (ECtHR, 2023).

41 E.g. the Supreme Administrative Court of Poland, judgment of 13 May 2021, II GOK 4/18, or the Supreme Court, order of 16 September 2021, I KZ 29/21.

national judiciaries.<sup>42</sup> Having done this, both courts took over the role of a constitutional court of Poland ‘in exile’. They substituted the national Constitutional Court of Poland, which had been ‘switched off’ by the political branches of national government. This phenomenon can be described as *constitutional neuroplasticity*: a process of developing functions of defective parts of a *constitutional brain* by other parts of this *organ* – in this case the two international courts. The proposed concept of constitutional neuroplasticity is a term inspired by medical science and refers to the phenomenon consisting of international courts consciously taking over the role of the rule of law protectors, thus substituting dysfunctional domestic (notably constitutional) courts. This process happened in response to the politicisation of the Constitutional Court of Poland and the role of the international rule of law protector (the constitutional court in exile) was jointly (within the limits of their respective jurisdictions) taken over by the ECtHR and the CJEU.

### 2.2.3 Preliminary References

Polish courts have been resorting extensively to preliminary references, ranking fifth in the EU in 2019–2023 (and third after their German and Bulgarian counterparts in 2023).<sup>43</sup> Many references concerned the systemic and generalised deficiencies in the administration of justice resulting from the ‘reforms’ launched by the far-right government.<sup>44</sup> By referring to the Court of Justice for preliminary rulings, Polish Courts aimed at clarification (and development) of the interpretation of Article 19 (1) TEU<sup>45</sup> and Article 47 of the EU Charter of Fundamental Rights,<sup>46</sup> but also at obtaining a shield from the EU constitutional court to protect the rule of law internally.

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42 E.g. Case C-824/18 *A.B. and others v Krajowa Rada Sądownictwa* [2021] CJEU ECLI:EU:C:2021:153.

43 CJEU, ‘Annual Report 2023’ (CJEU, 2023) <[https://curia.europa.eu/jcms/jcms/Jo2\\_7000/en/](https://curia.europa.eu/jcms/jcms/Jo2_7000/en/)> accessed 20 January 2025, 11.

44 E.g. joined cases C-585/18, C-624/18 and C-625/18 *A.K. v Krajowa Rada Sądownictwa*, ECLI:EU:C:2019:982, and the preliminary references in case C-671/20 *M.M.*, C-615/20 *Y.P.*, C-496/20 *M.F. v. J.M.*, C-132/20 *Getin Noble Bank S.A.*, C-55/20.

45 More precisely, the duty of the Member States to provide for remedies sufficient to ensure effective legal protection in the fields covered by Union law.

46 More specifically, as regards the right to a ‘tribunal established by law’.

## 2.2.4 Applications to the ECtHR

During the period 2015–2023, Poland remained one of the top ECHR State Parties against which applications were brought to the Strasbourg Court, scoring the seventh position in total at the end of 2023.<sup>47</sup> An interesting feature of statistics concerning Polish cases before the ECtHR was that the Strasbourg mechanism was employed in order to challenge violations of the right to a *tribunal established by law* (Article 6 (1) ECHR) on account of attempts of the political branches of the government to politically supervise<sup>48</sup> the judiciary while violating the principle of separation of powers.<sup>49</sup>

## 2.2.5 More Extensive Use of Provisional Measures by International Courts

The deterioration of the rule of law in Poland triggered the first-ever use of Rule 39 of the Rules of the Court (ECtHR)<sup>50</sup> in respect of the application targeting Article 6 ECHR – in *Wróbel v. Poland*.<sup>51</sup> The interim measures were also ordered by the EU Court of Justice e.g. in respect of the Commission’s action concerning the politically motivated lowering of the retirement age of the Supreme Court’s judges.<sup>52</sup> And even though the government failed to observe some of these instruments, they were nevertheless seen by the general public as important indicators and authoritative confirmations of the violations of the rule of law by the political rulers, which in turn resulted in the voters’ awareness of international human rights and rule of law scrutiny pertaining to the situation in Poland.<sup>53</sup> In

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47 ECtHR, ‘Analysis of statistics 2023’ (*European Court of Human Rights*, 2024) <<https://www.echr.coe.int/statistical-reports>> accessed 10 January 2025.

48 *Wałęsa v Poland* App no 50849/21 (ECtHR, 2023).

49 *Xero Flor w Polsce sp. z o.o. v Poland*, App no 4907/18 (ECtHR, 2021) (see in particular §§ 281–283).

50 Pursuant to Rule 39 (1) of the Rules of the Court (ECtHR), “The Court may, in exceptional circumstances, whether at the request of a party or of any other person concerned, or of its own motion, indicate to the parties any interim measure which it considers should be adopted”.

51 ECtHR, interim measure decision, *Wróbel v Poland* App no 6904/22 (ECtHR, 2022). See the press release: <<https://hudoc.echr.coe.int/eng>> accessed 12 December 2024.

52 Case C-619/18 R *Commission v Poland* [2019] CJEU ECLI:EU:C:2019:615.

53 ECtHR press release of 16 February 2023, ECHR 053 (2023), concerning the refusal to implement the interim measures ordered in cases *Leszczyńska-Furtak v. Poland* (application no. 39471/22), *Gregajtyś v Poland* (no. 39477/22) and *Piekarska-Drążek v. Poland* (no. 44068/22).

that way they were effective in terms of their political dimension, i.e. possible impact on voters' decisions and ultimately change of political landscape in Poland.<sup>54</sup>

#### 2.2.6 Increasing Use of Interpretative Strategies Against Strategic Lawsuits Against Public Participation

One of the intriguing features of the Polish illiberal democracy episode was the extensive use of *State-sponsored Strategic Lawsuits Against Public Participation*. What is meant here is that these type of litigations are not only those traditionally understood as civil-law litigations aimed at silencing free expression, but more generally and broadly, any litigations targeting the speech or simply harassing political opponents.<sup>55</sup> In Poland, such litigations were often initiated by institutions or bodies controlled by the government and they were targeted against opposition members or simply those who publicly expressed their criticism against the governmental policies.<sup>56</sup> The extensive use of such practises resulted in labelling Poland by prominent

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54 Results of public opinion polls concerning the relevance of particular characteristics of liberal democracy and the assessment of their practical implementation in Poland: Centrum Badania Opinii Społecznej, 'Zasady demokracji' [Public Opinion Research Center, 'Principles of Democracy'] (CBOS, 2021) <[www.cbos.pl/SPISKOM.POL/2021/K\\_066\\_21.PDF](http://www.cbos.pl/SPISKOM.POL/2021/K_066_21.PDF)> accessed 10 January 2025.

55 See P. Canan and G. W. Pring, 'Strategic Lawsuits Against Public Participation' (1998) 35 *Social*, 506; P. Canan and G. W. Pring, 'Strategic Lawsuits Against Public Participation: An Introduction for Bench, Bar and Bystanders' (1992) 12 *Bridgeport Law Review Quinnipiac College*, 937; P. Canan and G. W. Pring, 'Studying Strategic Lawsuits against Public Participation: Mixing Quantitative and Qualitative Approaches' (1988) 22 *Law & Society Review*, 385; G.W. Pring, 'SLAPPs: Strategic Lawsuits Against Public Participation' (1989) 7 *Pace Environmental Law Review*, 3.

56 E.g. the SLAPP unsuccessfully initiated by the ruling Law and Justice party against Professor Wojciech Sadurski for criticising their anti-democratic political agenda (Article 19, 'Poland: Court of Appeal dismisses SLAPP lawsuit against Professor Wojciech Sadurski', 10 November 2020) <[www.article19.org/resources/appeal-court-slapp-sadurski/](http://www.article19.org/resources/appeal-court-slapp-sadurski/)> accessed 10 January 2025), or the SLAPP initiative announced by the state-owned oil and gas company Orlen against Professor Michał Romanowski for criticising their business decisions, 'Naukowcy-prawnicy protestują przeciwko zapowiedzi złożenia przez Orlen powództwa typu SLAPP przeciwko prof. Romanowskiemu' ['Scientists-lawyers protest against Orlen's announcement to file a SLAPP lawsuit against Prof. Romanowski'] <<https://konstytucyjny.pl/naukowcy-prawnicy-protestuja-przeciwko-zapowiedzi-zlozenia-przez-ornen-powodztwa-typu-slapp-przeciwko-prof-romanowskiemu/>> accessed 10 January 2025.

free speech scholars “the European SLAPP champion”<sup>57</sup>. Reacting to this situation, Polish courts developed interpretations against ‘Strategic Lawsuits Against Public Participation’ (SLAPP) in their case law, thus limiting the fear of negative consequences of exercising freedom of expression and the possible chilling effect of state-sponsored lawsuits suppressing anti-government criticism, as well as contributing towards pluralistic debate on matters of general interest, being the indispensable element of democratic society.<sup>58</sup>

### 3. Deficits and Methods Recommended for Application in the Future

In this chapter, certain deficits likely to affect adversely the protection and preservation of the rule of law in the future, as well as certain recommendations for improving this situation will be discussed. Some of these deficits and proposals are interlinked with the issues presented in the first chapter of this paper.

#### 3.1 Insufficient Legal-Constitutional Education of the Society

When compared to the situation in Germany, the constitutional education in Poland is, to say the least, not overly extensive.<sup>59</sup> Issues related to human rights and the Constitution are just a small portion of the curriculum within the compulsory course on *Knowledge about the society* for pupils of the last year of primary school, and the topics related to historical developments of Polish constitutionalism are taught during the course on History.<sup>60</sup> The constitutional education for adults (e.g. in the form of state-sponsored social campaigns about the Constitution and fundamental rights) is absent.

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57 D. Bychawska-Siniarska and A. Gliszczyńska-Grabias, ‘Polska niechlubnym liderem SLAPP-ów’ [Poland the inglorious leader of SLAPPs], 11 April 2024 <[www.rp.pl/opinie-prawne/art40146201-bychawska-siniarska-gliszczynska-grabias-polska-niechlubnym-liderem-slapp-ow](http://www.rp.pl/opinie-prawne/art40146201-bychawska-siniarska-gliszczynska-grabias-polska-niechlubnym-liderem-slapp-ow)> accessed 10 January 2025.

58 E.g. Regional Court in Warsaw, judgment of 12 July 2022, XXII GW 155/22.

59 COE, ‘2016 Report on the State of Citizenship and Human Rights Education in Europe’ <[www.coe.int/en/web/edc/germany](http://www.coe.int/en/web/edc/germany)> accessed 3 January 2025.

60 Regulation of the Minister of Education of 5 July 2024 amending the Regulation on the core curriculum for preschool education and the core curriculum for general education for primary school, including for students with moderate or severe intellectual disabilities, general education for vocational schools of the first degree, general education for special schools preparing for work and general education for post-secondary schools (O.J. 2024/996).

### 3.2 Insufficient International Financing of NGOs and Independent Media

The European Economic and Social Committee has rightly reproached the EU for insufficient financing of the human rights defenders inside the EU and externally.<sup>61</sup> One of the methods undermining the rule of law in Poland was to cut down the distribution of public funds to organisations defending the democratic principles while at the same time re-channelling the funding to organisations set up by the far-right politicians and their allies amongst, e.g. the academia (for example, the Ministry of Justice published an interactive map in 2024 precisely showing the amounts of money distributed in order to increase the popularity of far-right candidates in the 2023 general election).<sup>62</sup> It is of utmost importance to create a strong and efficient EU-financed mechanism transferring the funds, without the intermediary of national governments, directly to civil society institutions dedicated to the protection of fundamental rights and the rule of law, as well as to independent media.

### 3.3 Strict Scrutiny versus ‘Permissive’ Constitutional Adjudication and Insufficient Clarification of Judicial Decisions

As mentioned above, the constitutional rights and freedoms of significant sectors of the society were somewhat insufficiently protected throughout the past three decades.<sup>63</sup> That resulted in turn in the weak identification of these societal sectors with the constitutional adjudicator and their – justified – disbelief and distrust towards the Constitutional Court as the protector of their individual and collective rights. This can be reflected by the public opinion polls showing already in 2015 that, even though 42% of polled citizens declared positive opinions about the Constitutional

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61 EESC, ‘The EU has to ensure that civil society is protected, not attacked’ (*The European Economic and Social Committee*, 21 September 2023) <[www.eesc.europa.eu/en/news-media/press-releases/eu-has-ensure-civil-society-protected-not-attacked](http://www.eesc.europa.eu/en/news-media/press-releases/eu-has-ensure-civil-society-protected-not-attacked)> accessed 20 December 2024.

62 Ministry of Justice, *Środki przyznane w Funduszu Sprawiedliwości poza naborami i konkursami w latach 2019–2023 – interaktywna mapa* [Funds allocated in the Justice Fund outside the concours and competition process in 2019–2023 – interactive map], 28 May 2024 <[www.gov.pl/web/sprawiedliwosc/FS-raport-przyznanych-srodkow](http://www.gov.pl/web/sprawiedliwosc/FS-raport-przyznanych-srodkow)> accessed 17 January 2025.

63 See section 1.3. above.

Court, an even bigger segment of 46% did not have any opinion and 12% expressed their negative attitude.<sup>64</sup> One should not be surprised if one considers a long record of ‘permissive’ adjudication lacking strict scrutiny in relation to the governmental propositions, presented as an example in section 1.3. This can be compared to the practice of the German Federal Constitutional Court which generally shows a tendency to take the public opinion into consideration while deciding cases.<sup>65</sup> Another problem is the low quality of judicial reasoning in Poland,<sup>66</sup> sometimes making the impression of the denial of justice.<sup>67</sup>

### 3.4 Lack of Accession to Protocol 16 to the ECHR (Advisory Opinions)

Protocol No. 16 to the ECHR, providing for a jurisdiction of the Court to deliver advisory opinions on the requests from the highest national courts, was opened to ratification on 2 October 2013, i.e. two years prior to the victory of the far right in the general election in Poland in autumn 2015. Since

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64 K. Sobczak, ‘Tylko co czwarty Polak ufa Trybunałowi Konstytucyjnemu’ [Only one in four Poles trusts the Constitutional Tribunal], 30 November 2020 <[www.prawo.pl/prawnicy-sady/zaufanie-do-trybunalu-konstytucyjne-tylko-26-proc,504866.html](http://www.prawo.pl/prawnicy-sady/zaufanie-do-trybunalu-konstytucyjne-tylko-26-proc,504866.html)> accessed 21 December 2024.

65 S. Sternberg, T. Gschwend, C. Wittig and B. G. Engst, ‘On the influence of public opinion on decisions of the federal constitutional court. An analysis of abstract judicial reviews and federal state disputes 1974–2010’ (2015) 56 *Politische Vierteljahresschrift*, 570; see also: S. Sternberg, S. Brouard and C. Hönnige, ‘The legitimacy-conferring capacity of constitutional courts: Evidence from a comparative survey experiment’ (2022) 61 *European Journal of Political Research*, 973.

66 Ośrodek Szkolenia Ustawicznego i Współpracy Międzynarodowej KSSiP, Dział Badań i Analiz, ‘W poszukiwaniu optymalnego modelu uzasadnienia orzeczenia sądu’ [KSSiP Centre for Continuing Education and International Cooperation, Research and Analysis Department, ‘In Search of an Optimal Model of Justification for a Court Decision’] (*Krajowa Szkoła Sądownictwa i Prokuratury*, 2021) <[www.kSSIP.gov.pl/sites/default/files/raport\\_z\\_realizacji\\_projektu\\_badawczego.pdf](http://www.kSSIP.gov.pl/sites/default/files/raport_z_realizacji_projektu_badawczego.pdf)> accessed 19 December 2024.

67 As the ECtHR held in *Ahorugeze v. Sweden* App no 37075/09 (ECtHR, 2011), 115: “[A] flagrant denial of justice goes beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of Article 6 if occurring within the Contracting State itself. What is required is a breach of the principles of fair trial guaranteed by Article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article.” A summary reasoning which fails to explain the reasons behind a judicial decision may possibly be, in extreme cases, qualified as a denial of justice.

then (as of the end of 2024), 24 states ratified the protocol.<sup>68</sup> Based on the experience of the preliminary rulings of the CJEU on the requests of Polish courts in the context of the right to a fair trial, one should expect the significance of the ECtHR advisory opinions in mitigating the adverse effects of political pressure on the judicial interpretation of law. The far-right lawyers, somewhat rightly, fear that advisory opinions “can potentially constitute an additional tool for imposing systemic solutions on states in matters such as the limits of life protection in the context of both abortion and euthanasia, the system of the national judiciary, the institutionalisation of same-sex unions or the admissibility of the conscience clause”<sup>69</sup>, meaning that, in a non-ideological language, they can sustain the rule of law and fundamental rights.

### 3.5 Insufficient Mechanism of Judicial Execution of Judgments of the ECtHR

Even though the present coalition parties, alongside the human rights NGOs, declared in 2021 that they would execute the ECtHR judgments if they win the general election,<sup>70</sup> the process of restoring the rule of law and assuring observance of international human rights obligations is far from satisfactory.<sup>71</sup> Of course, at least to a certain extent, this slow pace can

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68 Ratification chart <[www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatyNum=214](http://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatyNum=214)> accessed 21 December 2024.

69 Translation (author’s own) of the opinion delivered by Ordo Iuris, the far right lawyers’ think tank, ‘On the legal consequences of the ratification of Protocol No. 16 to the European Convention on Human Rights for the Republic of Poland’ (9 October 2016) <[https://ordoiuris.pl/wolnosci-obywatelskie/opinia-nt-skutkow-prawnych-ratyfikacji-protokolu-nr-16-do-europejskiej#\\_ftn26](https://ordoiuris.pl/wolnosci-obywatelskie/opinia-nt-skutkow-prawnych-ratyfikacji-protokolu-nr-16-do-europejskiej#_ftn26)> accessed 20 December 2024.

70 M. Jałoszewski, ‘Ważne. Cała opozycja i organizacje społeczne będą razem walczyć o wolne sądy i niezależną KRS’ [‘Important. The entire opposition and social organizations will fight together for free courts and an independent National Council of the Judiciary’], 7 December 2021 <<https://oko.press/wazne-cala-opozycja-i-organizacje-spoeczne-beda-razem-walczyc-o-wolne-sady-i-niezalezna-krs>> accessed 20 December 2024.

71 E.g. M. Szwed, ‘Rebuilding the Rule of Law. Three Guiding Principles’ (*verfassungsblog.de*, 29 April 2024) <<https://verfassungsblog.de/rebuilding-the-rule-of-law/>> accessed 18 February 2025; M. Skóra, ‘Restoring the Rule of Law. Politics in the Service of Democracy’ (*verfassungsblog.de*, 18 December 2024) <<https://verfassungsblog.de/restoring-the-rule-of-law/>> accessed 18 February 2025.

be explained by the fear that the far-right president would veto the laws adopted by the parliament. However, this does not explain why the ruling coalition parties have failed to declare their full and unconditional support for the execution of the ECtHR pilot judgment *Wałęsa v. Poland*,<sup>72</sup> or why some members of the government and MPs declared their non-eagerness to execute the ECtHR ruling *Przybyszewska and others v. Poland*<sup>73</sup> specifying the duty to provide an adequate legal framework for legal recognition and protection of same-sex couples.

### 3.6 Insufficient Enforcement of Lawyers' Deontology by Disciplinary Panels

It was not car mechanics or plumbers but genuine lawyers who decided to participate in defective judicial appointment procedures impairing the individuals' right to a fair trial (tribunal established by law).<sup>74</sup> They consciously decided to violate Article 45 of the Polish Constitution, as well as Article 6 ECHR and Article 47 ChFR, all of which provide for the right to a *tribunal established by law* as an essential guarantee of the right to a fair trial. This violation was clear and premeditated. Above all, it was committed by people who can and should be expected and required to obey the fundamental rules of law. They did it for personal advantages, mostly financial and prestigious. And even though such a conduct and motivation should be condemned by the academia and professional disciplinary panels and such people, due to their gross violation of professional dignity and rudimentary public morals, should be expelled from judicial professions and/or academia, to the great surprise of some, they function quite normally.

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72 *Wałęsa v Poland* App no 50849/21 (ECtHR, 2023).

73 *Przybyszewska and others v. Poland* App no 11454/17 and 9 others (ECtHR, 2023).

74 Search engine provided by judicial network Forum Współpracy Sędziów in <<https://wyszukiwarka.forumfws.eu/>> accessed 18 February 2025. According to the Helsinki Foundation of Human Rights, some 2,200 lawyers (approximately 25% of the total number of judges) obtained nominations or promotions in the judiciary in 2018–2023 i.e. after the entry into force of the law of 2017 which resulted in the systemic violation of the right to a tribunal established by law, see Helsinki Foundation of Human Rights, 'Powołania sędziów w latach 2018–2023 na wniosek tzw. „nowej” Krajowej Rady Sądownictwa. Analiza statystyczna' ['Appointments of judges in 2018–2023 at the request of the so-called “new” National Council of the Judiciary. Statistical analysis'], September 2023 <[https://hfhr.pl/upload/2023/10/raport\\_powolania\\_sedziow\\_przez\\_nowa\\_krs.pdf](https://hfhr.pl/upload/2023/10/raport_powolania_sedziow_przez_nowa_krs.pdf)> accessed 18 February 2025.

The lesson that can be learnt by lawyers, especially young legal professionals or law students, is that it doesn't pay to be decent, and it's much better to ignore basic principles of law and rudimentary professional (and general) decency and to accept professional promotions in violation of the constitution because no one will ever question or take it away. Poland has once again (the first time was after 1989 and the democratic breakthrough) taught its lawyers that one should be dishonest and morally filthy because it pays off. If Poland has any genuine ambition of restoring the rule of law, it must understand that justice has to be administered and impunity is destructive to law obedience.

### 3.7 Unclear and Insufficiently Legitimised Processes of Judicial Appointments

The Law and Justice party unduly politicised the mechanism of judicial appointment (and promotions), but the system was far from perfect also before the 'reforms' implemented by the far-right. From the insider's perspective, judicial appointments were often (far too often) decided on the basis of family and social ties (and sometimes even much more intimate ones). These are cases known in the lawyers' community, but there is a dignified silence about them, which is not good.

Desiring an effective and well-functioning judiciary, one should opt for a major reform of judicial careers. If judges are to be, really, the crown jewels among legal professions, they should be experienced and well paid. Only after reaching a certain professional experience in other legal professions should lawyers be eligible for judicial appointments. Otherwise, the dissatisfaction with the functioning of courts will persist.

## 4. *The EU Context*

Before conclusions, one should address the broader context of the constitutional backsliding in Poland, pertaining to its membership in the European Union. First of all, the anti-democratic challenges occurring in Poland gave new impetus to the mechanism of protection of axiological foundations of the Union. They provoked a series of rulings of the CJEU pertaining to the separation of powers and the substantive elements of the right to a fair trial. They also dynamised the discussion on the significance of the rule of law

for the distribution of EU funds, resulting in the adoption of the regulation on the general regime of conditionality.<sup>75</sup> Secondly, the role of the Union in protecting the rule of law in Poland cannot be underestimated. Although one may criticise the interim measures ordered by the CJEU for lack of immediate effectiveness, at the end of the day, they proved effective in the sense that their imposition was one of the factors mobilising the society to vote against the far-right government in the 2023 general election.<sup>76</sup> Rulings of the Court, issued under Articles 258 (coercive action against a Member State) or 267 TFEU (preliminary reference) were important shields protecting the judiciary against politicisation and political abuses from the government. Thirdly, the case law of the Court concerning the rule of law in Poland made many judges realise (although no statistics are available, therefore one may base this opinion on one's own experience resulting from practising a legal profession) that they are European judges in the sense designed by the Court in *Simmenthal II*.<sup>77</sup> It is too early to assess how this CJEU-induced development of self-awareness of judges will impact the future case law of Polish courts, but certainly it cannot be disregarded. Fourthly, the deterioration of the rule of law in Poland resulted in putting the question of democracy on the agenda of the EU. Never before has this issue been so deeply discussed. After the series of crises (financial crises, the Brexit, and the pandemic) the axiological self-identification of the Union was triggered as a consequence of the challenges to democracy in Poland.

## 5. Conclusion

The main reason why – at least so far – the rule of law was defended in Poland despite the episode of backsliding from 2015 to 2023, was probably that it had been sufficiently embedded in the society and its structures already before the deterioration of the rule of law occurred. Although the legal culture had been insufficient and the distrust in state institutions,

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75 Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget [2020] OJ L 433 I/1.

76 See e.g. order of the Vice-President of the Court of 21 April 2023, C-C-204/21 R-RAP *Commission v. Poland*, ECLI:EU:C:2023:334.

77 Case 106/77 *Amministrazione delle Finanze dello Stato v. Simmenthal SA*[1978] CJEU ECLI:EU:C:1978:49, 24.

including courts, had been significant, the majority of the society was nevertheless convinced that the rule of law was worth defending – perhaps due to the historical experience of the authoritarian era of 1944–1989. Therefore, even though large sections of the society (most notably women and minorities) had not been sufficiently protected by democratic institutions and the distrust of democratic institutions had been significant, the existing mechanisms and factors (such as e.g. independent media, relatively strong private capital and NGOs) sufficed to protect the democracy. Normative methods crucial for the protection of the rule of law encompassed internal strategies (e.g. dispersed constitutionality review or anti-SLAPP interpretations) and external methods, i.e. methods of resorting to international courts (“constitutional neuroplasticity”, preliminary references to the CJEU, applications to the ECtHR, extensive use of interim measures by international courts).

Poland’s illiberal democracy episode of 2015 to 2023 may reoccur. Therefore, certain deficits need to be addressed in order to strengthen democratic militancy and prepare for the future challenges to the rule of law: constitutional education should become a central element of curriculums of any high school graduate, EU financing should be provided to human rights NGOs and independent media, the quality of constitutional adjudication should be radically increased, judicial appointments should be transparent and merit-orientated, and enforcing lawyers’ deontology should become more effective. Also, Poland’s accession to Protocol No. 16 to the ECHR is highly recommendable, as well as better execution of the Strasbourg case law.

