



Poland's Experience in the Face of the Rule of Law Dispute: From 2015 to 2024

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Abstract. The article examines an account of the events from 2015 to 2024 related to the conflict between the government of the Republic of Poland and the European Union's institutions, as a result of the reforms introduced in the functioning of the judiciary. The study focused on the main aspect of the dispute related to the changed procedure of Poland's judicial appointments. Furthermore, it analysed the European Commission's Reports on the rule of law in Poland from 2020 to 2024 and selected relevant rulings of the European Court of Human Rights and the Court of Justice of the European Union against Poland. The Polish dispute over the rule of law is a broad issue, and not all of its aspects can be presented in such a short study. However, an attempt has been made to capture its primary aspects and show how the rule of law is evolving in the EU forum. The conclusions highlight a broader context of the dispute against the backdrop of the accelerating process of European integration and possible proposals for changes to the Treaties.

Keywords: rule of law, European Union, Poland, interpretation of law, courts

1. Introduction

Alexander Solzhenitsyn stated: 'I spent my whole life in a society where there was no rule of law. It is a terrible life. But a society in which the rule of law is the only standard of ethical behavior is just as bad.'¹

The principle of the rule of law was the subject of intense public debate in Poland between 2015 and 2024 as a result of the boundary events selected for this study. It began with the genesis in Poland of the so-called crisis around the Constitutional Tribunal (CT) and the election at the last session of the Parliament

1 Tischler, 2002, pp. 112–114.

(7th term) on 8 October 2015, of five, rather than three, judges of the Constitutional Court (CC), whose vacancies overlapped with the then term of office. The chosen time of analysis closed with the termination of the procedure for monitoring the state of the rule of law against Poland under Article 7(1) of the Treaty on European Union (TEU).

Although the debate on the state of the rule of law and the assessment of the changes made to the law in force between 2015 and 2023 is ongoing in Poland and will likely continue for a long time, for this study, the abovementioned timeframe was chosen. It is impossible for a scientific article to trace the entire process of adjusting the Polish legal system and practice to the standard of the rule of law during the transition from the communist system after 1989. In turn, the closure by the European Commission (EC) of the procedure under Article 7 of the TEU is an important event in the discussion on the European Union's (EU) interpretation of the rule of law that has been going on in Poland for several years. The EC's communication states: 'The Commission considers that there is no longer a clear risk of a serious breach of the rule of law in Poland within the meaning of Article 7(1) of the Treaty on European Union'.²

According to the opponents of the EU policy towards Poland (and Hungary), Article 7, initiated against Poland by the EC in 2017, was primarily politically motivated. The crowning evidence of this assessment is that, in Poland, the new government of Donald Tusk failed to enact changes to the existing law due to the opposition of President Andrzej Duda, who was associated with the previous political camp. At the time of writing (September 2024), nothing had changed in the normative dimension in Poland that would justify the EC taking a favourable view of the functioning of the Polish legal system. The declarations of the new government and the arrangements made during the working meetings behind closed doors proved to be crucial.

When following the public debate in Poland about the rule of law, legal theorists realize how chaotically it is conducted. This observation applies to the dialogue of the EU institutions, which were involved in the 2015–2023 dispute with the Polish government. Normative and factual arguments are mixed up, legal discourse intermingles with journalistic-political discourse, and the rule of law is not distinguished from its Anglo-Saxon counterpart (the latter is not helped by the English language, which lacks a separate wording for the continental versus Anglo-Saxon understanding of the rule of law). However, the most critical complication is the different understanding of the rule of law by the two parties of the ongoing dispute – the supporters and opponents of the judicial reforms in Poland carried out between 2015 and 2023. This paper cannot refer to all the elements of the changes; however, the most serious and emotional one is the

2 The Commission intends to close Article 7(1) of the TEU procedure for Poland – see also: Ministry of Justice, 2024.

partial change in the rules for the election of the members of the National Council of the Judiciary (NCJ), a special constitutional body that guards the independence of the courts and the judges (Article 186(1) of the PL Constitution), in 2017.

This change consisted in a shift from the previous mechanism of the judges' role in this body, which is decisive for candidate selection by the judges themselves, to a parliamentary system in which 'judges from among the judges' are elected by the Parliament, instead of the judges themselves. This created several repercussions, primarily jurisprudential, which are impossible to list in such a short study.

Another element is the already signalled selection of CC judges, which consisted of the actions of the outgoing coalition in 2015 and the new government, the United Right coalition. Furthermore, the Supreme Court (SC) witnessed changes in the staffing of judges and organizational changes in its structure, including the creation of two new Chambers – Disciplinary and Extraordinary Control and Public Affairs – and the abolition of the Military Chamber. However, the latter is correlated with the amendment of the law on the NCJ; hence, it is secondary to the first point of contention.

As mentioned, the most serious problem in the discussion on the rule of law, at the national level, between local discourse actors, and at the EU level, is the different understanding of the rule of law. This is because 'those who do not understand the same words and terms in the same way are adherents of a different reality'.³ Without seeking further consideration, it is appropriate to mention that several science or legal practice representatives, without undermining the entirety of the changes introduced in Poland in the administration of justice from 2015 to 2023, oriented themselves towards a traditional, formal view of the rule of law. This emphasized the notion of the competence of public authorities to act in a certain way. This does not mean that there is a complete and, nowadays, already unacceptable reduction of this principle to legalism, which excludes any content elements. It is rather a matter of preserving legalistic paradigms of interpreting the law, such as interpretative restraint (primacy of linguistic interpretation directives) and attachment to a strict understanding of competence norms.

The contesters of the changes and the supporters of the EU interpretation of the rule of law understand it broadly. Here, the formal aspect decisively gives way to the formulation of content claims, extending (or reformulating) the rule of law to include several new objects of protection with which it has not hitherto been associated. This is the basis for the position of EU bodies to recognize the rule of law of those countries that guarantee the right to abortion, legalize same-sex couples, etc. However, in the national discourse, the principle of the rule of law has been dominated by the recognition as a court established by law in which the selection of judges-members of the NCJ will take place in a corporate system,

3 Pieńkos, 1999, p. 59.

which is the decisive role of the judiciary itself, with the minimization of the role that bodies with democratic legitimacy can take away.

Another characteristic feature of this attitude is an aversion to the multivariate interpretation of selected constitutional institutions and the argument from a position of constitutional superiority, which is supposed to legitimize an extraordinary and often contradictory interpretation of legal provisions (e.g. grounds for exclusion of a judge, selected absolute grounds of appeal, etc.). All of this leads to a bit of systemic chaos. However, the biggest difficulty is caused by the lack of discourse between the opponents of the dispute, who seem to delegitimize their opponents. In the absence of an ideal speech situation, according to R. Alexe, it is difficult to work out any compromise and establish a dialogue. Therefore, the dispute has transformed from a normative to a political one, as its resolution lies in the realm of the force of fact rather than legal-normative arguments.

The objective of this paper is to summarize the Polish ‘rule-of-law dispute’, within the timeframe mentioned above. From a neutral perspective, the national position of the national judiciary on the EU interpretation of the rule of law will be presented. Regarding the EU perspective, several rulings of the Court of Justice of the EU (CJEU), in the context of Poland’s violation of Article 258 of the Treaty on the Functioning of the EU (TFEU), have played a special role, which was met with a response from the Polish CC. First, however, a selection of the Rule of Law Reports, published annually by the EC since 2020, is synthetically discussed in the section on Poland.

Over the last 10 years, there have been several studies on the disputes between EU Member States and the EC and part of the Brussels elite regarding the understanding of the rule of law and the limits of the competences of EU institutions and Member States. For obvious reasons, it is impossible to present most of them, including the part concerning Poland, in an article. This would require a monographic study.⁴ Therefore, concerning sources, this study focuses on an analysis of the EC’s reports on the situation in Poland, primarily from 2020 to 2024. In conclusion, this paper will discuss the Polish perspective regarding the ‘rule-of-law dispute’ (as it is called in the national discourse), considering both sides of the conflict. At the time of writing, this dispute had not been resolved; hence, its solution is not presented in this work. This is not possible without a legislative action under conditions of broad political consensus, which, at the end of 2024, was by no means in sight in Poland. In the meantime, the dispute is escalating, which has not been resolved by the closure of the monitoring procedure under Article 7 of the TEU by the EC.

4 See: Stepkowski, 2023, pp. 225–270; Taborowski, 2019; Pech, 2023.

2. Materials and Methods

The article follows the IMRAD scheme adapted to the social science field: introduction, materials and methods, research and analysis, and discussion and conclusions.

Regarding the research methodology, the article falls within the purview of analytical philosophy. It consists of a conceptual analysis of legal acts and literature. However, the aim is to find the key concepts concerning a given issue. Thus, the study belongs to the stream of analytical jurisprudence, which is not changed by the reference to the selected rulings of national or EU judicial authorities, EC documents, etc. The study does not analyse the legal basis of the study; hence, an analysis of jurisprudence, typical of empirical jurisprudence, was not carried out (in compliance with the requirements of sampling, estimation of results, etc.).

The structure, concerning research and analysis, consists of three parts: the genesis of the rule of law dispute in Poland – which describes the key events that resulted in its initiation and escalation at the EU forum –, selected comments from the EC Reports on the assessment of the rule of law in Poland from 2020 to 2024, and a compilation of selected statements of legal science and practice concerning the two sides of the domestic rule-of-law dispute indicated in the introduction. The discussion and conclusions are presented in the final section.

3. Origin of the Dispute Over the Rule of Law in Poland

The year 2015 marked the beginning of a systemic crisis in the Polish judiciary. It started with the activities related to the election of the CT, whose term of office was due to expire at the end of the term of the sitting Parliament (2015–2019), for three judges and the new Parliament, which would elect two more judges, which was commonly referred to as the ‘spare’ election. However, in view of the major systemic changes announced by the United Right government, under Jarosław Kaczyński, the ceding coalition led to the election of all five judges of the CT. At the last sitting of the seventh Parliament, on 8 October 2015, the handing-over coalition elected the judges whose terms of office were expiring concurrently with the ending term of the Parliament and the two judges whose seats were to become vacant in December 2015, during the next term of the Parliament.

The election of the two judges ‘in reserve’ took place based on a hastily modified provision of the then Act on the CT, which instrumentally allowed the seventh Parliament to elect additional judges of the CT. This regulation broke with the constitutional *usus* and the accepted understanding in doctrine and judicature of Article 194(1) of the Constitution: ‘The Constitutional Tribunal

consists of 15 judges, individually elected by the Parliament for 9 years.’ This was understood to mean that the right to elect the judges of the CT was vested in the Parliament, both beginning their terms of office together. This solution was eventually declared unconstitutional by the Court in its judgment of 3 December 2015, ref. K 34/15 (in the composition of judges before the 2015 election).

The crisis could have been resolved at the grassroots level. However, the eighth Parliament, at the beginning of its term, with the votes of the United Right government, adopted resolutions declaring the election of five judges of the CT on 8 October to be of no legal force. It further re-elected all five judges of the Tribunal, the status of three of whom is disputed to date. The Parliament made this selection on the eve of the aforementioned CT ruling, which gave these actions the formal attribute of legality (at the time of the selection, the Tribunal ruling, which was final, was not in force, and the Parliament made the selection on the same legal basis as the one of the previous terms). However, the argumentation of both sides was a stretch and became purely political. In December 2015, the new coalition adopted an amendment to the law on the CT, which President Andrzej Duda signed on 28 December. The CC declared it entirely unconstitutional (dissenting opinions were submitted by the members of the panel elected by the ‘new’ Parliament). The judgment was published more than two years later, on 5 June 2018.

In 2016, there was a dispute over the CC that had not yet attracted EU retaliation. The then President of the CC, Prof. Andrzej Rzepliński, did not allow the three ‘disputed’ judges to rule, but assigned them offices and ordered them to pay their emoluments. The new judges boycotted the work of the CC. At the end of 2016, another dispute flared up in the CC, related to the vacant post of the CC President. According to the law, the General Assembly of the CC presents a candidate to the President of the Republic of Poland. The new CC judges did not attend this assembly. However, in the absence of a quorum, a resolution of the judges gathered at the Assembly was passed, yet the President decided that there were no grounds to appoint any of the candidates presented. In response, the ruling coalition adopted a series of so-called ‘remedial laws’ against the CC, assessed by a doctrine as instrumental interference of political power in the CC to select candidates favourable to that power to become its President.

On 20 December 2016, based on the new legislation, the President of the Republic of Poland entrusted Judge Julia Przyłębska with the duties of the CC’s President. On the same day, the General Assembly was convened, which was attended by 14 judges. According to some of the positions, in the absence of a quorum, the resolution to present the CC judge, Julia Przyłębska, to the President of the Republic of Poland as a candidate for the office of the President of the CC was defectively adopted. Another argument concerned the lack of participation in the vote of at least half of the CC composition (six people took part in the vote, while eight refused to participate). Furthermore, there were doubts concerning

the holding of, 'instead of two separate votes, one, on the selection of candidates and the other, on the presentation of candidates to the President of the Republic of Poland, whereas only the first one was held'.⁵

In 2017, the United Right government reformed the ordinary judiciary and the SC. This was the most significant reform of the judiciary since the Constitution of the Republic of Poland came into force in 1997. However, the government did not have a constitutional majority. The changes covered several constitutional laws concerning the judiciary: The NCJ, the SC, the general and military courts, and the public prosecutor's office. The most significant change covered the mechanism for the election of the judicial part of the NCJ and the organization and, partially, the staffing of the SC. The basis for these measures was sought by the United Right government in two provisions of the Constitution. The composition of the NCJ is defined by Article 187 of the Polish Constitution as follows:

- (1) The National Judicial Council shall consist of:
 - 1) The First President of the Supreme Court, the Minister of Justice, the President of the Supreme Administrative Court and a person appointed by the President of the Republic,
 - 2) fifteen members elected from among judges of the Supreme Court, common courts, administrative courts and military courts,
 - 3) four members elected by the Parliament from among MPs and two members elected by the Senate from among senators.
- (2) The National Council of the Judiciary shall elect a President and two Vice-Presidents from among its members.
- (3) The term of office of the elected members of the National Judicial Council shall be four years.
- (4) The organisation, scope of activities and working procedures of the National Council of the Judiciary and the manner of election of its members shall be determined by law.

This provision does not specify the body which elects the 15 members of the NCJ from among judges of the SC, common-administrative and military courts. By virtue of the statutory delegation of Article 187(4) of the Constitution, the mechanism of selection of this part of the NCJ was changed, abandoning the 'co-optation mechanism'. The government, and part of the legal science community, referred to the fact that this provision did not specify the principles and mode of selection, which left its determination to the legislator. Another issue was the rationality of accepting that, by means of a law, the mode of selection of a key part of this body could be changed, in principle, every time, after the end of the term

5 The statement of the Legal Expert Team at the Batory Foundation on recent legal and factual developments concerning the CC.

of office. The First President of the SC (already selected by the ‘new’ NCJ; Prof. Małgorzata Manowska), in her response to the 2021 EC Rule of Law Report, said:

Article 187 (1) point 2 of the Constitution does not provide for a mandatory rule under which the fifteen members of the National Council of the Judiciary selected from among judges of the Supreme Court, common courts, administrative courts, and military courts are to be selected solely by judges. In Art. 187 (1) point 3 of the Constitution – regarding deputies and senators – the electing body was indicated (respectively: the Parliament and the Senate), but this does not mean that the persons referred to in Art. 187 (1) point 1 of the Constitution are to be elected by the judiciary. Such an interpretation would be contrary to the basic principle of linguistic interpretation. It prohibits the addition of expressions that do not appear in the normative text. No indication of the entity selecting the members elected from among judges of the Supreme Court, common courts, administrative courts, and military courts in the wording of Art. 187 (1) point 2 of the Constitution means that, according to the Art. 187 (4) of the Constitution, the organisational 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. In accordance with the Constitution, this means that the legislator has a specified margin of discretion in determining the model of the composition of the National Council of the Judiciary. Therefore, the legislator may modify the model of selecting judges to the National Council of the Judiciary maintaining the standards of independence of these judges.⁶

This change was protested against by the judiciary community centred around the SC and the *Lustitia* (the Polish Association of Judges), a significant part of the legal academia, the then opposition and the Ombudsman, Adam Bodnar (at the time of this study, he was the Minister of Justice in D. Tusk’s government). In general, the two sides were divided along political lines into either supporters or opponents of the then United Right government. According to the opponents:

The proposal contained in the Act on the NCJ to deprive the judiciary of the power to elect judges serving as members of the NCJ and to hand it over to the legislature leads to an unacceptable interference of the executive power in the administration of justice and, consequently, to a violation of Article 10 of the Constitution of the Republic of Poland in connection with Article 173 of the Constitution of the Republic of Poland and Article 187(1)(2) of the Constitution of the Republic of Poland. (...) Subjecting the

6 Manowska, 2021, p. 11.

NCJ to the influence of the legislature, which is to have a direct influence on 21 of its 25 members, will mean that the NCJ, as the body guarding the relatively weakest segment of power, will be subject to pressure from political power. (...) there is no constitutional basis for judges to the NCJ to be elected by politicians. In view of the above, the election of members to the NCJ who are judges (...) leads to a violation of the principle of the tripartition and balance of powers by depriving the judiciary of influence over the composition of the NCJ.⁷

Regarding the SC, the draft provided for profound organizational changes. The original draft (the law proposed by President Andrzej Duda was eventually adopted, as a result of his vetoing of his political environment's draft) provided for the creation of new chambers in the SC: private law, public law, and disciplinary law (with broad autonomy, which immediately raised allegations that it was a special court). Additionally, as part of the change of the SC system, it was envisaged that all SC judges would be retired. This procedure was legitimized by Article 180(5) of the Constitution, which provides that in the event of a change in the system of courts or a change in the boundaries of court districts, a judge may be transferred to another court or retired with full emoluments. The issue concerned the then First President of the SC, Prof. Małgorzata Gersdorf. The term of office of the First President of the SC is constitutionally protected; however, the statutory regulation interrupted this term of office, which was a drastically unconstitutional procedure. The draft provided for additional competences of the Minister of Justice, the Prosecutor General, in the interim period and the limitation of the competences of the SC in the recruitment procedure for judicial positions in this court.⁸

The above changes sparked intense protests across the country, despite the holiday period. Particularly, numerous protests took place in Warsaw. President Duda refused to sign two of the three bills presented to him (the amendment to the Law on Common Courts was adopted). On 31 July, the President delivered an address on the issue, which was criticized by his political base.⁹ In September 2017, the President presented his own bills on the NCJ and the SC, with the latter being of a more lenient nature. It abandoned the retirement of SC judges (including the President of the Polish Supreme Court; PPSC). The draft provided for the dissolution of the Military Chamber (whose judges were transferred to the Criminal Chamber) and the simultaneous establishment of two new Chambers: the Disciplinary Chamber and the Extraordinary Control and Public Affairs Chamber. Recruitment to these new chambers was carried out with the participation of

7 Bodnar, 2017, pp. 2–3.

8 Jałoszewski, 2017.

9 Szydło, 2017.

the newly appointed NCJ. Jurors were introduced to the SC for the first time to adjudicate in the newly established chambers. In addition to the extraordinary means of appeal previously in force, the Act introduced the ‘extraordinary complaint’, a new means of extraordinary control of final court decisions, into the Polish legal system. Both elements were criticized by some legal science and practice experts, as incompatible with the principle of a democratic state of law and inherent to the state of emergency due to their extraordinariness.¹⁰ As a result of increased pressure on the United Right government and CJEU rulings, the Disciplinary Chamber was abolished in 2022 (replaced by the Chamber of Professional Responsibility, without clearly outlined autonomy in the structure of the SC, such as a separate chancellery, budget, etc.).

Actions aimed at legal changes to the functioning of the NCJ and the SC, along with the mid-2017 protests, were the direct cause for the EC to initiate infringement proceedings under Article 7 of the TEU. The EC communiqué underlined, *inter alia*, that:

Over a period of two years, the Polish authorities have adopted more than 13 laws affecting the entire structure of the justice system in Poland, impacting the Constitutional Tribunal, Supreme Court, ordinary courts, National Council for the Judiciary, prosecution service and National School of Judiciary. The common pattern is that the executive and legislative branches have been systematically enabled to politically interfere in the composition, powers, administration and functioning of the judicial branch.¹¹ It highlighted that it had made recommendations to the Polish government on three occasions before initiating the procedure: Today’s Recommendation focuses on the fresh concerns raised by the new law on the Supreme Court adopted by the Polish Parliament on 15 December 2017 and the law on the National Council for the Judiciary adopted on 15 December 2017. The Polish authorities have still not addressed the concerns identified in the first three Commission Recommendations, which remain valid. (...) The Polish authorities are invited to:

- Amend the Supreme Court law, not apply a lowered retirement age to current judges, remove the discretionary power of the President to prolong the mandate of Supreme Court judges, and remove the extraordinary appeal procedure, which includes a power to reopen final judgments taken years earlier;
- Amend the law on the National Council for the Judiciary, to not terminate the mandate of judges-members, and ensure that the new appointment

10 Wróbel, 2019.

11 EU Press Release, 2017.

regime continues to guarantee the election of judges-members by their peers;

- Amend or withdraw the law on Ordinary Courts Organisation, in particular to remove the new retirement regime for judges, including the discretionary powers of the Minister of Justice to prolong the mandate of judges and to appoint and dismiss presidents of courts;

- Restore the independence and legitimacy of the Constitutional Tribunal, by ensuring that its judges, President and Vice-President are lawfully elected and by ensuring that all its judgements are published and fully implemented;

- Refrain from actions and public statements which could further undermine the legitimacy of the judiciary.¹²

The position of the then Prime Minister of Poland, Mateusz Morawiecki of the United Right government, amounted to an assessment of the EC's actions as purely political. On 9 January 2018, there was a meeting between the President of the EC Jean-Claude Juncker and Morawiecki, which took place at the invitation of the EC President. They issued the following joint statement after a working dinner held in Brussels:

Tonight, the Polish Prime Minister and the President of the European Commission had a constructive discussion during which they touched on a number of topics. This was a continuation of the conversation started at the first meeting between the President and the Prime Minister, which took place on the margins of the European Council in December 2017.

President Juncker and Prime Minister Morawiecki discussed a number of issues of common interest, such as the future of the European Union, Poland's position in the European Union, as well as EU policies on the internal market, the single market for digital content, energy and migration. They also addressed in detail the issue of the rule of law. They agreed to meet again to continue the discussion with a view to making progress by the end of February.

The dinner was held in a friendly atmosphere.¹³

¹² EU, 2017.

¹³ EuropeDirect, 2018.

4. Selected Comments from the EC's Rule of Law Assessment Reports in Poland from 2020 to 2024

The EC has been publishing the Rule of Law Reports since 2020. This action was preceded by the plan presented in 2019 for strengthening the rule of law in the Union.¹⁴ This document emphasizes that the rule of law is one of the fundamental values on which the Union is founded; that is, Article 2 of the TEU:

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society based on pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men.

The document 'Strengthening the rule of law within the Union...' (hereafter as Action Plan) refers to the traditional definition of the rule of law, albeit without extensive references to its positivist origins in 19th-century German positivism (the name *Rechtsstaat* is not mentioned therein). It is pointed out that:

Under the rule of law, all public powers always act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts. The rule of law has a direct impact on the life of every citizen: it is a precondition for ensuring equal treatment before the law and the defence of individual rights, for preventing abuse of power by public authorities and for decision-makers to be held accountable. Respect for the rule of law is also essential for citizens to trust public institutions. Without such trust, democratic societies cannot function. The rule of law covers how accountably laws are set, how fairly they are applied, and how effectively they work.¹⁵

The Action Plan, and several statements by high-ranking EC officials, emphasize: 'The European project relies on permanent respect of the rule of law in all Member States'.¹⁶ This gives rise to claims by the EU courts to extend the supremacy of EU law to the entire national legal system of the Member States, which ignores numerous provisions of the TEU and TFEU, such as the principle of conferral (Article 5(1) and (2) of the TEU), the autonomy and national identity of the Member States (Article 4 *in extenso* TEU), and the distinction between

¹⁴ EC, 2019.

¹⁵ EC, 2019, p. 2.

¹⁶ *Ibid.*

exclusive (delegated), shared, and complementary Union competences (articles 4–6 of the TFEU), which is crucial for this issue.

The principle of the primacy of Union law, understood in a way that it extends to the entire legal system of a Member State, runs through the Reports and the statements of high-ranking officials, which are formulated by them, as active politicians, in relation to the independent Member States and their courts. There were loud speeches by the EU Justice Commissioner Didier Reynders, criticizing the Polish CC after a series of rulings on the extent of the legal autonomy of the Polish legal system and the supremacy of the Polish Constitution and the Romanian CC:

In the May and December 2021 rulings, the CJEU said that judges in Romania should recognise the supremacy of EU law over the national legislative system, including rulings of the national Constitutional Court, when they violate the EU Treaty. Romania's Constitutional Court rejected both rulings, arguing that judges should put Romanian law first. Reynders stated that he may take legal action against Romania given the real, permanent and persistent position of opposing EU law or the binding nature of the rulings of the CJEU.¹⁷

The EC conducted an intensified public campaign for the rule of law in 2019–2020, preceded by a series of studies and research, including written expert opinions, conferences, and debates at the European level and in the capitals and surveys for public acceptance of the rule of law within the framework of the Eurobarometer.¹⁸ It is essential to point out that the concept of the rule of law has evolved in the discourse of the Union's institutions over the last decade and, particularly, has been extended to include several content issues hitherto not qualified under this principle in continental jurisprudence. This does not mean that these were irrelevant considerations (such as civil rights, effective judicial protection, a court established by law, selected moral rights of sexual minorities, women's reproductive rights, etc.).

To avoid diluting the principle of legalism, the above issues were qualified as separate principles of law, linked to the protection of certain values. This is important, as the principle of the rule of law is intended to serve their realization, and thus it plays an executive role. However, the separation of the content and formal spheres of the rule of law realized the democratic philosophy of power in states governed by the rule of law, where the normative content of legal regulations is given by the law-making bodies, while the organs of applied power (primarily the courts) address them for the resolution of individual cases.

¹⁷ EU, 2022.

¹⁸ EC, 2019, pp. 2–3.

The rule of law is, first and foremost, legalism, acting on the basis and within the limits of the law by public authorities. Limiting oneself only to the formal aspect of the rule of law was characteristic of pre-war legal positivism and is an anachronistic position. However, the extension of this principle with additional elements, which was widely accepted in the Euro-Atlantic cultural area, was associated with ensuring the control of the legalistic action of public authorities (appointment of CCs, ombudsmen, expansion of judicial guarantees, etc.). As mentioned, the EC documents presented a picture of an intensive expansion of the understanding of the rule of law to include additional issues that have never been associated with this principle. On the one hand, it threatened to dilute the semantic core and, on the other hand, it dangerously entangled the related discourse in the sphere of lawmaking, which carries intrinsically political inclinations.

Analysing the EC Reports on the rule of law concerning the situation in Poland, apart from the traditional definition of the rule of law, which is synonymous with legalism, the following characteristics emerge that shape the understanding of this legal principle adopted by the EU institutions:

1. Public and business perceptions of the level of judicial independence and the independence of judges.¹⁹
2. Stability of judicial appointments, prohibiting arbitrary changes to the system of retirement of judges.²⁰
3. The apolitical nature of the bodies deciding on judicial appointments; in the case of Poland, the NCJ.²¹
4. Respecting judicial guarantees and a disciplinary judiciary that does not raise doubts about its independence.²²
5. Prohibition of retroactivity of judicial service requirements. The 2020 Report was critical of the fact that:

All judges in Poland were obliged to disclose personal information, such as their membership in associations, functions in non-profit organisations or their membership and position in political parties prior to 29 December 1989. Such provisions raise concerns as regards the right to respect for private life and the right to protection of personal data as guaranteed by the Charter of Fundamental Rights of the EU and the General Data Protection Regulation.²³

19 EC, 2020, p. 2; EC, 2021, p. 2; EC 2022, p. 3; EC 2023, p. 3; EC 2024, p. 3.

20 EC, 2020, p. 4; EC, 2021, p. 4; EC 2022, p. 3; EC 2023, pp. 3–4.

21 EC, 2020, p. 5; EC, 2021, pp. 4–5; EC, 2021, p. 7; EC 2023, p. 5.

22 EC, 2020, p. 5, 7; EC, 2021, p. 6–7, 9–10; EC, 2023, p. 10.

23 EC, 2020, p. 8.

6. The existence of legal remedies in the legal system to adjudicate on the legality of judicial appointments and the powers of judges to perform judicial functions.²⁴
7. Separation of the functions of Attorney General and Minister of Justice.²⁵
8. An adequate level of financial investment in the judiciary.²⁶
9. An effective, institutional system for combating and preventing corruption in the state, particularly focusing on the judiciary.²⁷
10. The existence of ethics and integrity regulations in the public sector – restrictions on the conduct of business by public office holders.²⁸
11. The absence of legal remedies enabling final judicial decisions to be overturned from a perspective contrary to the principle of legal certainty, apart from the institution of resumption of proceedings, particularly initiated based on the *propter nova* ground.²⁹
12. Adequate funding of the Ombudsman's office.³⁰
13. The correct and transparent filling of positions in the CC.³¹
14. Implement, without undue delay, the judgments of the CJEU.³²
15. Without undue delay, the 'implementation of final judgments and interim measures of the European Court of Human Rights regarding judicial independence'.³³

In addition to the abovementioned elements, the Reports contain comments of a 'soft' nature, as good practices and suggestions. These include:

1. Unifying and centralizing the system of asset declaration and monitoring.³⁴
2. Recommendation for greater transparency of lobbying activities, and 'that detailed rules be introduced for interactions with lobbyists, and that sufficient information about the purpose of these contacts be disclosed'.³⁵
3. Media pluralism and an apolitical media regulator.³⁶
4. A wide and transparent access to public information.³⁷

24 EC, 2020, p. 8–9; EC, 2021, p. 11.

25 EC, 2020, p. 8; EC, 2021, p. 11; EC, 2022, pp. 10–11; EC, 2023, pp. 11–12.

26 EC, 2020, pp. 8–9; EC, 2023, p. 12.

27 EC, 2020, pp. 10–11.

28 EC, 2020, p. 12.

29 EC, 2020, p. 16.

30 EC, 2020, pp. 17–18.

31 EC, 2021, p. 5–6; EC 2022, pp. 8–9; EC, 2023, p. 9.

32 EC, 2022, p. 6; EC 2023, pp. 3–4.

33 EC, 2023, pp. 4–5.

34 EC, 2020, p. 12.

35 EC, 2020, pp. 12–13.

36 EC, 2020, p. 13.

37 EC, 2020, p. 15.

5. The restrained use of fast-track legislation.³⁸
6. Strengthening the NGO sector with apolitical resource allocation.³⁹
7. Regular filling of judicial vacancies.⁴⁰

Since all these elements were pointed out in the EC's reports on the rule of law, it can be assumed that they are regarded as a constituent part of this legal principle in the larger sense. As the situation around the 'rule of law dispute' in Poland's relationship with the EU developed, the EC made the following comments in the successive Reports:

1. 'The European Court of Human Rights, seized in a number of cases related to the functioning of the Polish justice system, held that a 2015 appointment to the Constitutional Tribunal led to a breach of the requirement of a tribunal established by law' – lack of independence and legitimacy of the CT.⁴¹
2. The National Council for the Judiciary is to be composed mainly of politically appointed members.⁴²
3. The EC has invariably formulated a position that differs from that of the Polish First President of the SC (Manowska), whereby the EU law does not cover issues concerning the system and functioning of the courts of the Member States.⁴³
4. Compliance with the judicial guarantees of the constitutional entitlement of the SC Disciplinary Chamber.⁴⁴
5. The statutorily introduced obligation for judges to disclose their affiliation to associations or functions in non-commercial organizations was considered by the EC to be an 'intrusive' requirement that undermines the independence of the judge.⁴⁵
6. The conferment by law of exclusive competence for the adjudication of cases concerning the independence of the judiciary and of judges by the Chamber of Extraordinary Control and Public Affairs, which was staffed by judges, with the participation of the new NCJ.⁴⁶
7. Lack of separation between the functions of the Minister of Justice and the Attorney General.⁴⁷

38 EC, 2020, pp. 15–16.

39 EC, 2020, p. 17.

40 EC, 2021, p. 13.

41 EC, 2021, pp. 5–6; EC 2022, pp. 8–9; EC, 2023, p. 9.

42 EC, 2021, p. 7; EC, 2022, p. 3; EC, 2023, p. 5.

43 EC, 2021, p. 9.

44 EC, 2021, pp. 9–10.

45 EC, 2021, pp. 10–11.

46 EC, 2021, p. 11.

47 EC, 2021, p. 11; EC 2022, pp. 10–11; EC, 2023, pp. 11–12.

8. The Commission cast doubt on the standard of a democratic state of law and the Treaties in Poland's attempt to introduce the institution of magistrates and reorganize the general judiciary by introducing two levels: a possible mass transfer of judges into retirement and a modification of the system of judicial promotions (this was to consist of the introduction of a single post of a judge of a general court, with a designated jurisdiction in either a trial or an appeal court).⁴⁸
9. The Commission reported doubts as to whether several SC judges, including its First President, complied with the requirement of a tribunal established by law.⁴⁹

It is worth noting that the EC Reports assessed that, regarding the efficiency of common courts measured by the length of proceedings, the Polish judiciary was at the EU average.⁵⁰ Furthermore, progress in the digitalization of the judiciary was positively assessed.⁵¹

Some reference should be made to the 2024 EC Report on Poland. As indicated, the Commission decided to close the procedure under Article 7(1) of the TEU despite the lack of adoption of new laws concerning the constitutional matter (listed above). This act can be assessed in two ways. On the one hand, as a gesture of goodwill on the part of the Commission, and, on the other hand, in the opinion of the current opposition (and the previous government), as evidence of the EU institutions being guided only by instrumental political actions, since the declarative political behaviour of the Tusk government in the form of 'the Action Plan on the Rule of Law', which had no normative translation, was sufficient to close the procedure:

The Action Plan includes a clear affirmation by Poland to the primacy of EU law, to respect the case law of the Court of Justice of the EU (Court of Justice) and underlines the importance of the requirements of judicial independence. The Action Plan lays out, institution by institution, the Government's intentions about how judicial independence would be restored and safeguarded. (...) The Minister of Justice formally called on Polish judges to fully respect and apply EU law and legal principles stemming from the European Convention on Human Rights.⁵²

48 EC, 2022, p. 5.

49 EC, 2023, p. 7.

50 EC, 2021, pp. 14–15; EC, 2022, p. 12; EC, 2023, p. 13.

51 EC, 2022, p. 11; EC, 2023, p. 12.

52 EC, 2020, pp. 3–4.

To understand the EU definition of the rule of law, it is useful to recall that, as a reason for closing Article 7(1) of the TEU procedure against Poland, the Commission mentioned in its 2024 Report the ‘commitments Poland made to the primacy of EU law and to the implementation of judgments of the Court of Justice and of the ECHR’.⁵³ Thus, as an element of the definition, the monocentric structure of the emerging legal order of the Union and the subordination of the entire system of the Member States were adopted.

Even if this is currently a declarative action, whose success depends on the decisions taken by judicial bodies independent in their adjudication, the path has been set. However, the Polish government may act towards the programmatic achievement of this goal by taking measures within its broad competence, which consist in favouring the supremacy of Union law to the greatest extent possible, irrespective of the current Treaty regulations. This can be done by selecting candidates for judicial office, especially in the CC, and in the highest courts, who can guarantee the formulation of such a legal view. Currently, this is not particularly difficult, especially since persons with academic titles are appointed to the constitutional and cassation courts whose legal views are verifiable because of their academic activities and community opinion. The fact that such activity is modelling the rule of law towards deeper integration is of little relevance in this case.

5. Selected Contributions of Legal Science and Practice

Quoting all the statements from legal academia and practice made in Poland between 2015 and 2024 regarding the Polish government’s dispute with the EU institutions over the rule of law is impossible. It was noted in closed-door conversations that we are dealing with an abuse of the principle and value of the rule of law, which the national discourse of the legal establishment has obsessed over. However, considerations in this regard must be left to the psychologists of science. We cite the more relevant positions, formulated mainly in national jurisprudence, concerning the limits of the rule of law and the competence of the EU institutions to control elements that are not always treated as inherent to it.

It should be pointed out that such a broad understanding of the rule of law has been criticized by the Polish CT, the First President of the SC, and part of the legal doctrine (although the latter in Poland mostly presents a position favourable to the interpretation of the rule of law adopted by the CJEU and the EC). Of course, the judiciary would not be able to be transparent regarding all issues, such as pluralism of the media, adequate financial resources for the judiciary, or transparency of lobbying activities. No reasonable person would dispute these issues concerning the functioning of a democratic state of law.

53 EC, 2024, p. 4.

Hence, the dispute was essentially about the meaningful scope of the shared competence laid down in Article 4(2)(j) of the TFEU, that is, freedom, security, and justice. The issue is whether, and to what extent, the organization and functioning of the national judiciary is within the competence of the EU institutions and can be subject to in-depth scrutiny by its bodies. No one questioned the complete exclusion of the organization of national justice from the competence of the Union institutions. It boiled down to an assessment of the relationship of this organization and the functioning of the judiciary regarding the shared competence of freedom, security, and justice and how the rule of law standard related to this issue should be understood.

In general, the dividing line as to the opinions formulated runs according to the date of appointment of the judges. The new judges, either appointed or promoted with the participation of the new NCJ, shaped by the law adopted by the United Right government, present a sovereignty narrative (particularly in the highest courts) in which the rule of law is reduced to the maximum extent possible to the principle of legalism. In contrast, the judges appointed before 2017 mostly presented a pro-EU interpretation of the rule of law. This is a simplification, enforced by the format of the academic article. Nonetheless, the character of the personal composition of the judiciary raises the probability of the direction of the resolution of interpretationally disputed cases related to the systemic aspect of Poland's membership in the EU, towards the context of the rule of law.

Therefore, it can be summarized that the dispute over the limits of the understanding of the rule of law is essentially about the preservation of the legal sovereignty of the Member States. This is one of the fundamental pillars of the self-rule of the state and its people. As mentioned, based on the current wording of the Treaties on EU and on the Functioning of the EU, it is not possible to accept the existence of a monocentric system of sources of law within this international organization, with the power of the constitutions of the Member States subordinate to European law. This has been expressed by the CCs of the Member States.

Regarding the improper staffing of the NCJ and the unconstitutionality of the adopted solution of granting the Parliament the right to elect the NCJ's members specified in Article 187(1)(2) of the Constitution, an entire narrative of 'breaking the rule of law' was built after 2017 in Poland and internationally, which can be considered an uncharacteristic action of certain domestic political and legal elites. After the parliamentary elections in October 2023, the idea of the necessity of the restoration of the 'rule of law' was conceptualized, even in the formula of bending the law or seeking a legal basis for questionable moves in terms of their legality. At the same time, this took place in the absence of any broader discussion about the constitutionality and rationality of the model of judicial selection in Poland introduced by the United Right government and the previous

solution, which was widely criticized as leading to a lack of transparency in the process or cronyism among the judicial elite.

Questions about compliance with the Treaty standard of the rule of law were first posed to the CJEU by a panel of judges from the SC, where judges had been appointed under the previous law on the NCJ. A strong dispute arose between these communities, which spilled over into personal relationships within the SC building. Even at the time of writing in late 2024, ‘old’ and ‘new’ judges from the SC did not speak to each other and adjudicate, ate meals in the court canteen in separate groups, and did not greet each other. This aroused a sense of embarrassment among ordinary court employees; however, later, everyone treated this abnormal situation as ordinary, which made the whole situation more complex.

On 2 August 2018, Case No. III UZP 4/18, the SC, in an enlarged composition, following a legal question presented by an order of the SC – Chamber of Labour and Social Insurance, referred legal questions to the CJEU regarding the application of selected provisions of the Act on the SC in the wording used before the amendment of 21 November 2018. It was controversial that the legal questions were asked concerning how to ‘determine the merits of the case’, instead of the subject matter of the proceedings. The type of cases in which these questions were asked was described by some commentators as being used instrumentally.

Years later, the answer to whether these questions were asked correctly, in view of the original CJEU case-law, is irrelevant. The fact is that the CJEU accepted the questions and answered them. The court asked whether the reduction of the age up to which a judge of a court of final instance of a Member State may occupy a judicial post from 70 years to 65 years, making the possibility of continuing to occupy the post subject to the discretionary approval of the executive, was contrary to Article 19(1), second sentence, Article 4(3) and Article 2 of the TEU, the third paragraph of Article 267 of the TFEU, and Article 47 of the CFR, and it violated the prohibition of discrimination on grounds of age. However, it was novel to suspend, based on point III of the operative part of the above-mentioned judgment, the application of selected provisions of the Act on the SC, which no court in Poland was entitled to do. Judicature and part of the doctrine developed a peculiar state of constitutional superiority, necessitated by this circumstance.⁵⁴

The weighing of values regarding sacrificing the existing interpretation of the law to protect the rule of law has been referred to by courts in Poland, particularly the SC, in numerous judgments. For example, the justification of the SC’s order of 12 October 2022, ref. III KO 15/22, mentioned:

Under conditions of constitutional crisis, the rule of law must activate specific protective instruments aimed at preventing and abrogating the

⁵⁴ Malecki and Pach, 2018.

effects of violations of constitutional principles. One such instrument is the pro-constitutional interpretation of legal regulations, which were given a different meaning in the times of the proper functioning of the rule of law. (...) In a situation where guarantees of resolving a case by an impartial and independent court are sufficiently contained in constitutional solutions concerning the proper procedure of appointing a judge or determining the composition of the court in a particular case, it may be justified to apply a narrow interpretation of procedural instruments, such as a motion for exclusion of a judge or a motion for reopening proceedings, aimed at observing the standard of independence and impartiality of the court in a particular case, invoking the principle of efficiency or stability of judgements. However, when these systemic guarantees become obsolete, there is insufficient justification for a restrictive interpretation of the procedural safeguards provided by national law.

As has been pointed out, the basis for the criticism of the then opposition and a significant part of the doctrine and judiciary was the way in which competitions for judicial positions were conducted, as changed by the United Right government. Additionally, the legislator's sudden intervention in the appeal process against the NCJ's resolutions became the subject of dispute. It was argued:

(...) that, as part of the so-called 'justice reform', the authorities had first guaranteed themselves the composition of the body that selects candidates for judges and then presents them to the President of the Republic of Poland. When it became apparent that several judges (...) had filed appeals against negative resolutions of the NCJ, the political authorities became concerned that the process of 'taking over' the Supreme Court would be significantly delayed. This was all the more so because the Supreme Administrative Court, to which the judges' appeals were submitted, first withheld the implementation of the NCJ's resolutions (which was ignored by the NCJ and the President), and then applied to the Court of Justice of the European Union with preliminary questions concerning the right of candidates for judges to a fair nomination process. What did the political power do then? It hastily amended the law, removing the right of judicial candidates to appeal and ordering the Supreme Administrative Court to discontinue the appeal proceedings already underway. The legislator's aim was undoubtedly to also discontinue proceedings already initiated before the CJEU. Indeed, the CJEU cannot hear cases that have been discontinued before a national court. However, the Supreme Administrative Court did not bow to the pressure, disregarded the provisions of the amendment and

posed further questions to the CJEU, boiling down to whether it should continue to rule on the appeals filed.⁵⁵

On 25 March 2019, the CT issued a judgment in case K 12/18, which subjected the selection of the NCJ members by the Parliament to scrutiny. The CT extensively analysed the various models for the selection of the ‘judicial’ part of the NCJ. It pointed out, among other things, that:

The NCJ is not part of the Polish constitutional tradition, as it was only established by the Act of 7 April 1989 amending the Constitution of the People’s Republic of Poland (...). The introduction of this body into the Polish legal system was justified by the need to ensure the protection of judicial independence. However, the mere existence of the judicial council in the constitutional system of state organs is neither a necessary nor a typical feature of the modern state (...) which is also confirmed by the systemic practice of other states. (...) The NCJ, however, is not an organ of judicial power, as this power in the Republic of Poland – in accordance with Article 10(2) of the Constitution – is exercised exclusively by courts and tribunals, whose independence the NCJ should supervise, in accordance with the disposition of Article 186(1) of the Constitution. The systemic positioning of the NCJ in the Constitution makes the constitutional standards for courts and tribunals inapplicable to it. In addition to judges, the composition of the NCJ also includes representatives of the legislative and executive branches of government, and therefore goes beyond the grasp of the principle of separation of powers referred to in Article 10 of the Constitution. The Constitutional Tribunal takes the view that the NCJ is a body structurally located between the authorities, which conditions the role of the NCJ as an organ constituting an instrument for the implementation of the constitutional principle of balance between the three authorities, as well as a forum for cooperation and balancing between the authorities. (...) Nothing prevents judges to the NCJ from being elected by judges. However, one cannot agree with the assertion that the holders of active electoral rights here must be exclusively judges. While Article 187(1) (3) of the Constitution clearly indicates that deputies are elected to the NCJ by the Parliament and senators by the Senate, there is no constitutional guidance in this respect regarding the judges of the NCJ members. That is, the Constitution does not prejudice who can elect judges to the NCJ.

The above ruling was not met with any counter-argument by the opponents of the changes. Significantly, the counter-rulings of the SC formations, in which

⁵⁵ Dębska, Gajdus, and Bucki, 2020.

the 'old' judges sat, contested the very empowerment of the CT, mentioned in the above composition, to issue it. For example, in the SC's decision of 16 September 2021, I KZ 29/21, a three-member composition of 'old' judges from the Criminal Chamber assessed that:

The Legislator did not assume, after all, that there would be future developments:

- electing persons to positions of judges already occupied,
- rescinding resolutions of the Parliament of the previous term 'without procedure' (without legal basis),
- non-publication of Constitutional Court decisions by virtue of politicians' decisions under the guise of acting under Article 7 of the Polish Constitution,
- the refusal of the President of the Republic of Poland (guardian of the Constitution of the Republic of Poland) to take the oath of office from duly elected judges.

Thus, it was not a question of anybody being described as a 'Constitutional Court' and the persons who sit on such a body being called Constitutional Court judges, but of it being a body described in the Constitution as a Constitutional Court, and therefore meeting the requirements of the Polish Constitution also in terms of the appointment of judges to it.

A legal view contrary to the CT's position (rejected due to the defects in the formal empowerment of this body, in the opinion of the adjudicating panels) was expressed regarding the new mechanism of the functioning of the NCJ by the SC in its decision of 30 August 2018, III PO 7/18. In the justification of that order, the SC pointed out that:

the (...) amendment to the Act on the NCJ, enacted in a package with the new SCM, introduced a solution as a result of which the legislative and executive authorities – despite the long-standing statutory tradition of electing part of the composition of the Council by the judges themselves, reflecting the provisions of the Constitution of the Republic of Poland regarding the status and tasks of the Council and the separation of the judiciary from the other authorities – gained an almost monopolistic position in selecting the composition of the NCJ. Currently, the legislature elects 15 judges-members of the NCJ, and an additional 6 members of the NCJ are parliamentarians (4 elected by the Parliament, 2 elected by the Senate). The new election of 15 judges to the NCJ has led to a situation in which the decision on the staffing of as many as twenty-one of the twenty-five members of the Council (i.e. 84% of the body's composition) belongs to both chambers of parliament. In addition, the NCJ is composed ex officio of the Minister of Justice and a

representative of the President of the Republic of Poland. Thus, 23 of the 25 members are ultimately designated by authorities other than the judiciary. In this way, the division and balance between the legislative power, the executive power and the judiciary power, resulting from Article 10 of the Constitution of the Republic of Poland, which underpins the model of a democratic state of law (Article 2 of the Constitution of the Republic of Poland), was deformed.

Subsequently, the Supreme Court assessed the statutory delegation in Article 184(4) of the Constitution differently:

The Supreme Court notes that due to the prohibition of *per non est* interpretation, the delegation contained in Article 187(4) of the Constitution of the Republic of Poland to determine, by way of a law, the manner in which members of the NCJ are to be elected, concerns only the manner in which members of the Council are to be elected. The mechanism envisaged in this provision does not include the possibility of converting in an ordinary law the entity electing the members of the NCJ, but only the manner of distributing the pool of judge-member seats to be filled by – in a manner specified in the law – the general assemblies of individual courts. A different interpretation of Article 187(4) of the Constitution of the Republic of Poland leads to an increase in the number of elected members of the Council by one authority (currently the legislature), even though the provisions of the Constitution of the Republic of Poland strictly regulate its power in this respect.

Thus, we are dealing with two opposite interpretations of the same provision of the Constitution. The CT perceived a broader competence of the legislator to modify the mechanism of the selection of the NCJ judges, while ‘senior’ judges and a significant part of the legal doctrine in Poland argued that a holistic interpretation of the provisions of the Constitutional Act allows for a proper reading of the constitutional standard of the lawful model of appointment of judges in Poland. In doing so, one must respect convention and treaty (EU) obligations. These dictate that the accent in the competence to select the judicial part of the NCJ should be shifted in such a way as to balance different types of authorities and not introduce domination of political power in this mechanism. Therefore, the fact that representatives of the judiciary are selected from among the NCJ judges was assessed differently. While, for CT and the supporters of the reform, the fact that this act is performed by a qualified (or absolute, depending on the stage of the procedure) parliamentary majority was irrelevant from the perspective of the principle of the division and balance of powers enshrined

in the Constitution (Article 10(1)), the opponents saw this as the fundamental problem of the change.

However, it should be emphasized that the question of assessing compliance with the constitutional (and, therefore, EU and Convention) standard of the rule of law is not to compare the introduced amendment to the previous solution; instead, it is whether the amendment resulted in a solution that did not contradict this standard. Several rulings have been issued by the CJEU and the European Court of Human Rights as a result of the preliminary questions raised by the national courts regarding the Polish 'rule-of-law dispute'.

On 24 June 2019, the CJEU handed down a judgment in Case C-619/18, holding that:

by applying the legislation introducing a reduction in the retirement age for judges of the Supreme Court (Poland) to incumbent judges appointed to that court before 3 April 2018 and, on the other hand, by conferring on the President of the Republic of Poland a discretionary right to extend the active service of judges of that court beyond the newly set retirement age, the Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU.

The Polish government, supported by Hungary, took the view that:

national legislation such as that challenged by the Commission in the present case could not be subject to review in the light of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter of Fundamental Rights.

The matter was discussed at the time and was important for preserving the legal sovereignty of the Member States and upholding the principle of *pacta sunt servanda*. The latter was not properly emphasized, which can be considered a mistake on the part of the Polish government. In effecting its accession (to the European community and not the Union, which is subject to much weaker centralization), Poland and the public decided to transfer some competences following the treaty regulations. This is a persistent problem with the phenomenon of competence creep and the related activities of, among others, the CJEU.⁵⁶

The politicization of the CJEU judges is widely discussed in the literature.⁵⁷ The reasons for the competence creep phenomenon are seen in the provisions of the Treaties, which contain significant room for an ambiguous interpretation of the competences of the Union's institutions and the Member States, and the consent of large EU countries (mainly Germany and France) to expand the

⁵⁶ Bailey, 2006.

⁵⁷ Carruba et al., 2008; Garret, 1995; Grosse, 2020.

Union's tasks, without it being supported by the Treaties.⁵⁸ This is because it is in the interest of the large Member States, whose politicians overwhelmingly staff the EU institutions.

However, a separate phenomenon is the discretionary power of the CJEU and the political consent for integration through jurisprudence, which goes beyond the competence delegated in the Treaties.⁵⁹ Thus, accession to the EU entails a kind of gateway to permanent integration, which is accepted by the CJEU as a guiding principle for the Union's functioning; instead of clearly delineated rules for the delegation of tasks known to international law.⁶⁰ It suffices to recall that it was the CJEU jurisprudence that established such fundamental principles of EU law, which directly affect or are the supreme binding force of union law. In turn, the principle of subsidiarity in the EU edition is sometimes assessed as an element of centralization rather than decentralization of power.⁶¹ Therefore, irrespective of the criticism of the CJEU's actions in the Polish legal discourse and a series of 'counter-rulings' of the Polish CC, the CJEU's judgments found their way into legal circulation, and their justifications were massively invoked as a source of interpretation of national law, albeit in accordance with EU values. For example:

- In the justification of the judgment of 26 July 2022, ref. III KK 404/21, the SC assessed, *inter alia*, that:

It should be stressed that the Court of Justice of the European Union emphasizes that, in order to assess the procedure for the appointment of judges from the point of view of the standard of the right to a fair and impartial tribunal, it is important to take into account, as a whole, the potential factors which may affect that standard. Indeed, while a particular factor considered in isolation does not necessarily lead to a negative conclusion as to the respect of that standard, their combination, in conjunction with the circumstances in which the appointment of the judge in question took place, may already lead to doubts as to the independence of the authority involved in the judicial appointment procedure (see judgment in Case C-585/18 and Others, paragraph 142). (...) This is possible, and sometimes necessary *ex officio*, especially when there is information in the public space that may lead to the assessment that, notwithstanding the fact that the process of appointment to the position of judge by the currently functioning NCJ (...) had the effect of undermining the general presumption as to a judge's independence and impartiality, it was also subject to other

58 Muszyński, 2023.

59 Pollack, 1994.

60 Rasmussen, 1986.

61 Cahill, 2018.

defects which, in addition to the main, structural defect (inference by a Body which is not the Body indicated in Art. 179 of the Constitution of the Republic of Poland) may have further tainted the process of nominating a candidate for a judicial post to such an extent that it may lead to the conclusion that a judge nominated in such a procedure does not guarantee that the court with his/her participation will have the attribute of objective impartiality and independence, and thus the standard set by the norms of Article 45(1) of the Constitution of the Republic of Poland and Article 6(1) of the ECHR will be met.

- In turn, in the justification of the order of 14 September 2022, ref. I KZP 7/22, the SC indicated that:

(...) there is no doubt that the Disciplinary Chamber of the Supreme Court has never been a court in the sense arising from Article 45(1) of the Constitution of the Republic of Poland, Article 6(1) of the ECHR or Article 47 of the Charter of Fundamental Rights. Therefore, regardless of when this body issued its decisions called judgments, they were never court decisions in the constitutional sense (Article 45(1)). (...) This was the view expressed by the court of first instance and, citing a resolution of three Chambers of the Supreme Court as well as rulings of the CJEU and the ECHR, it discontinued the criminal proceedings due to the existence of a procedural obstacle under Article 17(1)(10) of the Code of Criminal Procedure.

- In the judgment of 8 February 2024, III KK 471/23, the SC, referring to the CJEU jurisprudence, denied the attribute of constitutional authority to the NCJ:

The Supreme Court in this composition upholds the view, repeatedly expressed in its other rulings (...), as well as in the rulings of international tribunals – the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (...), that the National Council of the Judiciary, as shaped by the 2017 Act on the NCJ, is not a body independent of the executive and legislative authorities, and thus is not a body identical to a constitutional body whose composition and method of appointment is regulated by Article 187(1) of the Constitution of the Republic of Poland. The consequence of allowing, in the sphere encompassing the process of nominating a judge, a body appointed in a manner contrary to the Constitution of the Republic of Poland to function is that the hitherto generally accepted presumption of independence and impartiality of a judge nominated on the motion of this body falls away.

The CJEU has never directly addressed the legality of the mechanism of judicial appointments, as amended in Poland, because it has no legitimacy to do so. Neither has it questioned the effectiveness of these appointments in any ruling. However, it analysed and critically assessed the way these changes were introduced concerning the rule of law standards. In its rulings, the CJEU formulated abstract criteria that should be fulfilled according to the democratic standard of the rule of law by the judicial nomination process. A more concrete perspective has been adopted by the European Court of Human Rights (ECHR) in its jurisprudence. This is due to the cognition of this Court. The first ruling was issued by the ECHR on the maintenance of the rule of law standard regarding the constitutional complaint recognized by the Polish CC. In its judgment of 7 May 2021, from complaint no. 26374/18, the ECHR held that:

a fundamental principle applicable to the mode of selection of judges of the Constitutional Tribunal, by the Parliament and the President of the Republic, had been violated. The Eighth Parliament elected three judges of the Constitutional Tribunal, including M.M., on 2 December 2015, even though the relevant positions had already been filled by judges elected by an earlier Parliament. The President of the Republic refused to swear in the three judges elected by the earlier Parliament and took the oath of office from the three judges elected on 2 December 2015.⁶²

In contrast, the first ruling concerning the SC was issued by the ECHR in the case of *Reczkowicz v Poland*, based on application no. 43447/19 of 22 July 2021.⁶³ The case concerned the status of the SC's Disciplinary Chamber:

(178) it is well known that the reform of the judiciary in Poland initiated by the Government in 2017 and introduced by subsequent laws (...) has since been the subject not only of heated public debate in Poland and at the European level but also of numerous proceedings before the Polish courts and the CJEU, other actions before the institutions of the European Union, including a procedure under Art. 7(1) TEU before the European Commission, (...) (280) ...there was a clear violation of national law, which had a negative impact on the basic principles of the procedure for the appointment of judges to the Disciplinary Chamber of the Supreme Court, as the appointment was made on the basis of the recommendation of the NCJ, established by the 2017 Amendment Act, i.e. a body that no longer provided sufficient guarantees of independence from the legislature or the executive. The irregularities in the appointment process nullify

62 ECHR, 2021a.

63 ECHR, 2021b.

the legitimacy of the Disciplinary Chamber to the extent that, following an inherently flawed appointment procedure, it did not and still does not possess the attributes of a 'court' that is 'lawful' for the purposes of interpretation under Article 6(1).

In the above ruling, the ECHR referred to the so-called threshold test developed in its jurisprudence. The criteria for establishing an impartial court under the law refer to:

- The absence of a manifest infringement of national law and an objective nature. It is, therefore, a dialectical premise based on the dominant assessment of national legal discourse.
- The aforementioned infringement should be assessed:

in the light of the object and purpose of the requirement of a 'court established by law', namely to ensure the ability of the judiciary to perform its duties free from undue interference and thus to protect the rule of law and the separation of powers.

- The ECHR's decision must be preceded by a review of the correctness of the court's establishment by law by the national courts, based on the relevant provisions of the national law.

On 8 November 2021, the ECHR handed down its judgment on Application No. 49868/19, in the case of *Dolińska-Ficek and Ozimek v Poland*. The Court found that:

the violations of the procedure for the appointment of judges to the Supreme Court's Extraordinary and Public Scrutiny Chamber were so serious that they violated the very essence of the applicants' right to a 'court established by law' (...) by virtue of the 2017 Amendment Act (...), which deprived the judicial bodies of the right to elect the judges who sit on the NCJ – a right granted to them by previous legislation and backed by international standards; the legislature and the executive gained decisive influence over the composition of the NCJ (...). As a result, this enabled the executive and legislative authorities to intervene directly or indirectly in the procedure for the appointment of judges, an opportunity which these authorities took advantage of – as evidenced, for example, by the circumstances surrounding the approval of candidates for judges to the NCJ.⁶⁴

Hence, the ECHR directly established the defectiveness of the amended procedure for the appointment of judges in Poland. At the same time, the Court

⁶⁴ ECHR, 2021a.

placed itself in the role of a Polish CC, as it did not carry out the rule-of-law criteria concerning this procedure from the perspective of the Polish Constitution. This was due to the apparent lack of competence of the ECHR to analyse in this regard. On 3 February 2022, the ECHR, due to complaint No. 1469/20, examined the Convention's requirement to establish an independent and impartial court by law. Analyses of the jurisprudence of international and EU courts demonstrated the high self-referentiality of their interpretation of the law.⁶⁵ Referring to the position presented in its original judgments, the Court held, *inter alia*, that:

the violation of the applicant's rights originated in the amendments to Polish legislation which deprived the Polish judiciary of the right to elect members of the NCJ and enabled the executive and legislative authorities to interfere directly or indirectly in the procedure for the appointment of judges, thereby systematically undermining the legality of the court composed of judges so appointed.⁶⁶

To conclude this part of the consideration, the judgment of the ECHR of 23 November 2023, complaint no. 50849/21 (*Wałęsa v. Poland* case), cannot be overlooked. In the judgment, the Court, regarding Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, found that the violation identified by the domestic courts was due to:

- The flawed procedure for the appointment of judges with the involvement of the National Judicial Council shaped by the 2017 Amendment Act;
- The resulting lack of independence of the Supreme Court's Extraordinary and Public Accounts Chamber;
- The exclusive competence of the Supreme Court's Extraordinary and Public Review Chamber to hear cases involving allegations of a judge's lack of independence or lack of judicial independence;
- Defects in the extraordinary complaint procedure (...) – with regard to the principle of legal certainty;
- The exclusive competence of the Extraordinary and Public Accounts Chamber of the Supreme Court to hear extraordinary complaints.⁶⁷

Furthermore, the ECHR found that the above failings were of a persistent nature and threatened a continuing negative assessment of the national legislation in similar cases regarding Article 6(1) of the Convention. In response to the above

65 Kotowski, 2022.

66 ECHR, 2022.

67 ECHR, 2023.

ruling, the Ministry of Justice of the Republic of Poland issued a communiqué stating, *inter alia*, that:

The judgment of the European Court of Human Rights in the case ‘*Wałęsa v. Poland*’ is unlawful and has no binding force. It was made in violation of the European Convention on Human Rights. The Strasbourg Court unjustifiably denies the legality of the National Council of the Judiciary and the Supreme Court in Poland, and itself violates the rules of international law.

Furthermore, among the most important rulings of the CJEU concerning the Polish ‘rule-of-law dispute are:

- Judgment of the Court of Justice of 15 July 2021, C-791/19, in which the Court, *inter alia*, denied the attributes of independence and impartiality to the Disciplinary Chamber, as a result of its staffing the newly formed NCJ and the power of the President in charge of *the work of the Disciplinary Chamber of the Supreme Court to appoint the competent disciplinary court of first instance in cases of judges of ordinary courts*.⁶⁸

- Judgment of the Court of Justice of 6 October 2021, C-487/19, in which the Court allowed a national court to disregard a judgment of a national court in which the latter, sitting alone, rejected an appeal by a judge of a national court empowered to interpret and apply EU law in which he challenged a decision to transfer him without his consent. In this case, the Court indirectly referred to the procedure for appointing judges, involving the NCJ and the President of the Republic of Poland. It indicated that it could not raise objective doubts about the independence and impartiality of the judge so appointed. In the grounds of its ruling (paragraphs 148 and 109–110), the Court indicated that:

It is necessary to ensure that the substantive conditions and procedural rules for decisions concerning the appointment of judges are formulated in such a way as not to give rise, in the minds of individuals, to legitimate doubts as to the invulnerability of the judges concerned to external factors and their neutrality in relation to the interests that clash before them once they have been appointed, and that, to that end, it is particularly important that those conditions and rules are formulated in such a way [...] in particular as regards the composition of the body, the appointment of its members, the duration of their term of office and the grounds for their exclusion or removal, such as to exclude, in the opinion of individuals, any reasonable doubt as to the body’s invulnerability to external factors and its neutrality with regard to the interests that come before it. (...) In this regard, it is important that judges are protected from outside interference or pressure

68 CJEU, 2021a.

that could jeopardise their independence. The standards applicable to the status of judges and the performance of their duties should make it possible, in particular, to exclude not only any direct influence in the form of recommendations, but also more indirect forms of influence that may weigh on the decisions of the judges concerned, and thus to prevent the absence of visible signs of the independence or impartiality of those judges, which could undermine the confidence that the judiciary should inspire in individuals in a democratic society and in the rule of law.⁶⁹

Therefore, it is apparent that the issue of the regularity of judicial appointments, specifically the adopted model for staffing the NCJ, has become the axis of the Polish dispute over the rule of law. Among the issues, two key domestic legal doctrine issues run through the domestic, CJEU and ECHR jurisprudence, along with the statements of the opponents of the reforms. The first is the repeatedly identified issue of the entity selecting ‘the fifteen members chosen from among judges of the Supreme Court, common courts, administrative courts and military courts’ (as literalized by Article 187(1)(2) of the Polish Constitution). The second is the role of the NCJ and the President in the judicial nomination process.

The first issue has been discussed several times in this study. However, it should be added that the process of selecting candidates from among the judges elected by the Parliament, following the amended Act on the NCJ, was a non-transparent procedure. It took place in Poland almost under a national hysteria and scandal. However, proponents of the reforms pointed to immense environmental pressure from the judicial establishment as the source of the problems with transparency. A problem of a strictly interpretative nature is to assess whether, based on the systemic standards of the Polish Constitution, it is possible to accept that the Parliament selects the NCJ’s judicial part. There is no consensus on this issue on the grounds of domestic interpretative discourse.

According to the two sides of the conflict, the judicial or parliamentary-political model results in a violation of the principle of the division and balance of powers, as defined in Article 10(1) of the Polish Constitution. That is, the proponents of the changes argued that granting this power to the judges would disturb this balance and give an advantage to the judiciary in the nomination procedure, which was particularly evident in the pre-reform experience concerning the staffing of the SC (for which individuals were running for office after having worked in the Office of Studies and Analyses of the Supreme Court, even with negligible or no experience in the area of legal practice). These issues were extensively described, inter alia, in the legal question addressed to the CJEU by Judge of the Regional Court – Civil Division (*Sędzia Sądu Cywilnego*; SSC) T. Szanciło in the justification of the order of the SC of 19 August 2024.

69 CJEU, 2021b.

According to the Polish Constitution, 'judges are appointed by the President of the Republic of Poland, on the proposal of the National Council of the Judiciary, for an indefinite period of time' (Article 179). Two opposing positions have emerged on this issue as well. The opponents of the introduced changes point to the NCJ's key role in this procedure and only a formal role of the President of the Republic (according to extreme statements, his role would be limited to a kind of notary public of the appointment act submitted by the NCJ, dominated by judicial bodies). Any defect in the procedure results in the improper staffing of the court and an unauthorized person sitting on the bench. In the national discourse, this position has evolved by considering the issuance of a decision by a person so appointed as undue manning of the court, for the currently dominant position that they are unauthorized persons, that is, they cannot be considered judges in the constitutional sense.⁷⁰

However, the opponents of this reasoning have diverse positions. Those who did not unequivocally support the reform carried out by the United Right government argue that a possible defect in the procedure of the NCJ should result in a relative ground of appeal, instead of an absolute ground, and in analysing the defect in the staffing of the court *ad casum*. Nonetheless, it is indisputable that these persons cannot be denied the status of a judge. This spectrum of views accentuates the presidential prerogative, which cannot be reduced to a formal signature on the NCJ's application. In general, the procedure for the appointment of a judge should be the result of a consensus of all types of authorities, which is made evident by the multi-stakeholder composition of the NCJ (which, in addition to judges, includes the First President of the SC, the Minister of Justice, the President of the Supreme Administrative Court, a representative of the President of the Republic of Poland, four deputies, and two senators).

The President, as the highest representative of the Republic of Poland (Article 126(1) of the Constitution), appoints judges selected by a body combining various authorities. At the same time, the President is elected by universal suffrage. Therefore, he has a strong democratic mandate. Exemplarily, this constitutes the culmination of the procedure for the appointment of a judge, to whom the nomination act is handed by an entity on behalf of the Nation, as the guarantor of the continuity of state power. Hence, the assessment that the President merely plays the role of 'notary' is unwarranted, anti-democratic, and disrespectful of the role that the Nation, even if only symbolically, plays in this procedure.

70 Bodnar, 2024. See also S.C., 2020, BSA I-4110–1/20.

6. Conclusions – Poland’s Experience in the Face of the Rule-of-Law Dispute from 2015 to 2024

The above demonstrates that the dispute over the rule of law between the former (at the time of preparing this text) government of Poland and the institutions of the EU is dominated by the procedure of judicial appointments. Moreover, it has taken on a highly personalized character, as it concerns the staffing of the highest judicial instances – the SC and the CT – and the ordinary courts. As announced by the current government in Poland, the settlements of judges who took part in the unconstitutional procedure should concern three groups of judges, of which there is a red group, which is the most vulnerable to disciplinary proceedings.⁷¹ This includes judges of the SC, defectively appointed judges of the CT, judges of common courts who signed letters of support to the NCJ a few years ago, and former disciplinary ombudsmen or judges delegated to the Ministry of Justice who actively cooperated with its leadership on changes to the judiciary. All these announcements sound mysterious, as no draft law has been disclosed so far (it is being drafted, among other things, by a committee appointed by the current Minister of Justice and headed by a judge who is the chairman of one of Poland’s well-known judges’ associations).

Opponents of such measures raise a fundamental axiological problem. In Poland, judges from the People’s Republic of Poland, including those who passed harsh sentences on oppositionists or demonstration participants back in the 1980s, were not subject to accountability and stigmatization. The legitimacy of these actions is not strengthened by the fact that the environment of the current ReconVista refers to centre-left traditions of politics. In turn, some of these people are directly linked to the old nomenklatura from the communist era.

All this, to an external observer, may indicate that the dispute has been reduced almost to personalities, to the circulation of elites per V. Pareto’s theory, with the difference that in Poland, it has been reduced to a conflict. This was due to the elites’ inability or downright unwillingness to compromise. This was compounded by the inability of the then government to carry out the reform, despite having all the instruments of power necessary to do so (a single parliamentary majority, a president from its political camp, and favourable social conditions). Hence, the basic problem was the speed of the changes introduced and the lack of a broader expert base to carry them out. Furthermore, the lack of media coverage did not help those in power. In contrast, the media revealed how it constitutes an essential element in the contemporary power structure.

Furthermore, an external observer may be surprised by the chaos that has developed and that threatens the Polish justice system. The remedial measures amount to mere *restitutio in integrum*, without considering that the extraordinary

71 Michalski, 2024.

remedial instruments, contrary to the Constitution, may one day be used by an unspecified political force. However, just as the Polish problem impacted the entire judiciary in the EU, the current *restitutio in integrum* proposals could set a dangerous precedent for political forces in other countries should the proposals of the current Polish government be accepted by the EC, CJEU, and ECHR when challenged by, for example, ex officio judges.

However, the experience of the Polish dispute over the rule of law is far-reaching. It is striking how this dispute is devoid of deeper reflection. This paper cites selected relevant statements from EU institutions and from national and EU case-law. Evidently, the matter has been reduced to the staffing of the highest courts. In the long term, this will weaken the public's sense of and belief in the rule of law and lead to a greater alienation of the legal elite. The most dangerous consequence is the permanent dependence of the systemic entrenchment of the judiciary on political decisions. It has revealed the valid extreme positivist thesis that in a situation of an interpretative conflict, especially one with an axiological basis, without the disputing parties being able to find a common position, the law is governed by political power. It alone is able to enforce the dispositions of norms.

The discourse related to the Polish dispute on the rule of law proved to be continually shallow. This is evidenced by the absence of any consideration of the additional features of the rule of law mentioned in the Commission Reports – although the principle is not limited to legalism. However, one must not lose sight of the fact that, in systems of statute law with a clear division between lawmakers and law appliers, a strict understanding of the norms of competence is crucial for the value of the rule of law and the preservation of the democratic order.

Furthermore, the rule of law should be combined with certain content demands towards the law. Perhaps the most relevant of these is the idea of democracy, which is important in view of the crisis of the social legitimacy of power. This includes the competence creep of EU institutions, the direction of European integration, which ignores the idea of sovereign nations, the global problem of disinformation, the information bomb (information entropy) and lobbying by corporations or supranational interest groups. In Poland, instead of discussing the rule of law, the dispute has been limited to the correctness of judicial appointments. This is, undoubtedly, an important issue; however, it is not the only issue around the rule of law.

Meanwhile, progressive European integration is forcing the transformation of multicentric European law into a monocentric system. This is an obvious consequence of the chosen path towards European federation. A clear signal from the EU elite is the draft reform of the European treaties developed by the European Parliament's Committee on Constitutional Affairs.⁷² The extent to which such a

72 AFCE, 2023.

discussion around the rule of law will strengthen or weaken the legal self-rule of the Member States remains an open question.

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