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Review article

REMEDYING THE JUDICIARY SYSTEM IN POLAND – RESTORING THE RULE OF LAW

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ABSTRACT

A European Union member state since May 2004, Poland has in recent years been repeatedly challenging fundamental values and principles of European Union law: the rule of law, loyal co-operation, and the primacy of applying EU law. The significance of multiple international agreements binding for Poland has been depreciated, the constitutionally guaranteed tripartite division of power and hierarchy of legal acts seriously distorted.

According to the prevailing consensus, the judiciary is one of the areas to the greatest extent affected by far-reaching violations and problems. Amendments to the Common Courts Law (so-called muzzle law) made it possible to penalise judges for rulings designed to implement standards arising from international agreements Poland is signatory to and the Treaty on European Union, or even implement international courts' case law. Consequently, disciplinary proceedings had been initiated against judges referring to European Union law and/or the European Convention on Human Rights in their rulings. Poland's Constitutional Court – the correctness of its staffing procedures questionable – has issued judgements undermining the validity of European Union law and the European Convention on Human Rights in Poland.

Issues of appointing justices and the consequences of their rulings have triggered greatest doubt in Poland. Circumstances of post-2017 changes to the composition of the National Council of the Judiciary (NCJ) have undermined the body's independence from legislative and executive powers. Most lawyers believe that the Council's composition contradicts Article 187 of the Constitution of the Republic of Poland: justices making up the NCJ are selected by representatives of political parties rather than the judicial community. The situation has impacted the capacity for proposing independent and impartial candidates to judicial positions at Polish courts of law, currently involving as many as around 3,000 judges on all levels of the judiciary. Many believe that they have been appointed in violation of fundamental national regulations governing the procedure for judicial appointments.

In a ruling in Case C-718/21 of December 21st 2023, and in reference to the European Court of Human Rights' ruling of November 8th 2021 in the case of Dolińska-Ficek and Ozimek (Application Nos. 49868/19 and 57511/19), the Court of Justice of the European Union

found that the panel of judges of the Chamber of Extraordinary Control and Public Affairs of the Supreme Court of Poland, the panel having been appointed by the politicised NCJ, is not an independent or impartial court previously established pursuant to legislation, as required by European Union law. It has been recognised that the totality of circumstances behind the appointment of justices forming the panel who had submitted questions in the case may – in the eyes of the public – raise reasonable doubt with regard to the independence and/or impartiality of aforesaid judges. It may further undermine the confidence that the judiciary should inspire in any democratic society or a state of law.

Poland's parliamentary elections of October 15th 2023 brought a change in government, the established majority facing the task of remedying the judiciary and restoring the rule of law. Notable early announcements include measures intended to block the works of the National Council of the Judiciary, by preventing the Minister of Justice from publishing announcements concerning new judicial competitions. The Council has been continuing operations and making decisions crucial to the community, with the likely consequence of slowing down the tempo of expected changes in Poland. Such changes should be achieved through the systemic introduction of remedial laws accounting for the importance of the rule of law and principles resulting from European Union membership.

Keywords: *Judiciary system, National Council of the Judiciary, Rule of law, Poland, Supreme Court*

1. INTRODUCTION

Europe has been experiencing benefits arising from an order based on specific principles for decades. The principle of the rule of law is of fundamental importance, having been placed at the very pinnacle of the European Union's legal order[1] as a *"union of values"*[2], founded on respect for human dignity, freedom, democracy, human rights and *Rechtsstaat*. Aforementioned values are based on shared roots, giving rise to obligations addressing all member states. The weight and importance of respect for the rule of law ought to be the focus of incessant attention and care. Once a governance system loses its attribute of legality, all aforesaid values are undermined, turning into meaningless slogans and postulates.

The purpose of this paper is to shed light on the legal situation in Poland, a country which has in recent years been exposed to a multifaceted rule of law crisis. A presentation of rule of law crisis, especially with regard to issues pertaining to independence of the judiciary, is of considerable significance to how the European Union operates as a whole. Not only have consequences of the crisis impacted the internal situation of Poland – they have also been influencing the order and functioning of other EU member states.

1 Lenaerts, K., *The Rule of Law within the EU*, "Europejski Przegląd Sądowy", No. 7, 2023, p. 4 *et seq*.

2 Lenaerts, K., *The European Union as a Union of Democracies, Justice and Rights*, "International Comparative Jurisprudence", No. 2, 2017, p. 132.

A European Union member state since May 2004, Poland had in recent years been repeatedly challenging fundamental values and principles of European Union law: the rule of law, loyal co-operation, and primacy of applying EU law. A Central European country with a population of nearly 38 million had been affected by a grave and multifaceted crisis of the state's government and political system. Multidimensional and controversial action taken by individual centres of power formed part of so-called constitutionality of *"positive change"*[3], i.a. abusive constitutionality[4] expressed in ostentatious negligence of the rules and principles of law. Blatant exemplars thereof included modified practices of applying the Constitution[5], reformulated interpretations of sovereignty, and manipulative and subversive propositions of the Constitution's primacy over international agreements. The significance of multiple international agreements binding on Poland had been depreciated, constitutionally guaranteed tripartite division of power and hierarchy of legal acts seriously distorted. The issue of the judiciary's independence was recognised as one of the most significant aspects of the multifaceted crisis of the rule of law.[6] Post-2015 years brought a profound constitutional crunch, its significance and outcomes by no means limited to domestic issues, having carried major repercussions in the European Union and international relations alike.

Notably, European courts[7] have referenced the circumstances and multiple legal issues in Poland[8] on a number of occasions over recent years. Occasionally universal in nature, case law-related conclusions may be useful guidelines to the restitution and

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[3] Piotrowski, R., *Konstytucjonalizm „dobrej zmiany"* (*The Constitutionality of "Positive Change"*), "Państwo i Prawo", No. 10, 2022, p. 351.

[4] Wyrozumska, A., *Wyrok Trybunału Konstytucyjnego (K 6/21) dotyczący orzeczenia Europejskiego Trybunału Praw Człowieka w sprawie Xero Flor, które rzekomo „nie istnieje"*, (*Constitutional Court Ruling (K 6/21) regarding the ostensibly 'non-existent' European Court of Human Rights Judgement in the case of Xero Flor v. Poland*), "Europejski Przegląd Sądowy", No. 2, 2023.

[5] Constitution of the Republic of Poland of April 2nd 1997, *Journal of Laws* 1997, No. 78, item 483.

[6] Kocjan, J., *Znaczenie orzecznictwa Europejskiego Trybunału Praw Człowieka dla naprawy wymiaru sprawiedliwości po kryzysie praworządności w Polsce* (*Significance of European Court of Human Rights Case Law to the Effort of Remedying the Judiciary Following the Rule of Law Crisis in Poland),* "Europejski Przegląd Sądowy", No. 12, 2023, p. 18 *et seq.*

[7] There are currently several hundred proceedings pending before European courts (Court of Justice of the European Union and European Court of Human Rights), regarding individual aspects of how the judiciary functions in Poland.

[8] Rakowska, A., *Czy Europejski Trybunał Praw Człowieka jest zgodny z Konstytucją RP? – czyli o reakcjach władzy publicznej na orzeczenia trybunału strasburskiego w sprawach dotyczących praworządności w Polsce* (*Does the European Court of Human Rights Conform to the Constitution of the Republic of Poland? – or on State Authority Reactions to the Strasbourg Tribunal's Judgements Regarding the Rule of Law in Poland*), "Europejski Przegląd Sądowy", No. 12, 2023, p. 43 *et seq.*

strengthening of the rule of law[9]. Noteworthy European Court of Human Rights statements include judgements in the following cases: *Broda and Bojara v Poland*, of June 29th 2021[10]; *Reczkowicz v Poland*, of July 22nd 2021[11]; *Dolińska-Ficek and Ozimek v Poland*, of November 8th 2021[12]; *Advance Pharma sp. z o.o. (Co. Ltd.) v Poland*, of February 7th 2022[13]; *Grzęda v Poland*, of March 15th 2022[14], and *Wałęsa v Poland*, of November 23rd 2023[15]. The statement of the Court of Justice of the European Union of November 19th 2019 is notable as well[16], as is the judgement of the Grand Chamber of the Court of Justice of the European Union of October 6th 2021[17]. Polish reality was referenced and the experience of other countries analysed in a number of cases, the latter especially observable in the judgement of the Grand Chamber of the European Court of Human Rights of December 1st 2020, in the case of *Guðmundur Andri Ástráðsson v Iceland* (Application No. 26374/18)[18], which has served to systematise the interpretation of the right to fair trial before a duly constituted court of law. Statements by domestic courts – the Supreme Court[19] and

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9 Górski, M., *Perspektywa prawa jednostki do sądu należycie ustanowionego: zastosowanie testu Ástráðsson w Polsce* (*The Perspective of an Individual's Right to Fair Trial before a Duly Constituted Court of Law: Applying the* Ástráðsson Test in Poland), "Europejski Przegląd Sądowy", No. 11, 2021, p. 33.

10 Judgment, *Broda and Bojara v Poland,* European Court of Human Rights, (29 June 2022), Applications Nos. 26691/18 and 27367/18.

11 Judgment, *Reczkowicz v Poland,* European Court of Human Rights, (22 July 2021), Application No. 43447/19.

12 Judgment, *Dolińska-Ficek and Ozimek v Poland,* European Court of Human Rights, (8 November 2021), Applications Nos. 49868/19 and 57511/19.

13 Judgment, *Advance Pharma sp. z o.o. (Co. Ltd.) v Poland,* European Court of Human Rights, (7 February 2022), Application No. 1469/20.

14 Judgment, *Grzęda v Poland*, European Court of Human Rights, (15 March 2022), Application No. 43572/18.

15 Judgment, *Wałęsa v Poland*, European Court of Human Rights, (23 November 2023), Application No. 50849/21.

16 Case of AK pursuant to joined actions C-585/18, C-624/18 and C-625/18 [2019] ECLI:EU:C:2019:982.

17 Case C-487/19, W.Ż [2021] ECLI:EU:C:2021:798.

18 Wrzołek-Romańczuk, M., *Glosa do wyroku z 1.12.2020 r. wydanego przez Wielką Izbę Europejskiego Trybunału Praw Człowieka w sprawie Guðmundur Andri* Ástráðsson *przeciwko Islandii (skarga nr 26374/18)*, (*Glossary to the Judgement of the Grand Chamber of the European Court of Human Rights of December 1st 2020 in the Case of Guðmundur Andri Ástráðsson v Iceland (Application No. 26374/18)*), "Iustitia", No. 1, 2021, p. 43; Garlicki, L., *Trybunał Strasburski a kryzys polskiego sądownictwa. Uwagi na tle wyroku Europejskiego Trybunału Praw Człowieka z 1 December 2020 r.* Ástráðsson *przeciwko Islandii* (*The Tribunal in Strasbourg in the Context of the Crisis in the Polish Judiciary. Background Comments to the Judgement of the European Court of Human Rights of December 1st 2020 in the Case of Guðmundur Andri Ástráðsson v Iceland*), "Przegląd Sądowy", No. 4, 2021, p. 5 *et seq.*

19 Supreme Court ruling of December 5th 2019, Ref. No. III PO 7/18, OSNP (*Supreme Court Case Law – Chamber of Labour Law* etc.) 2020/4 item 38, Supreme Court decision of January 15th 2020, Ref. No. III PO 8/18, OSNP 2020/10 item 114, resolution of joined Supreme Court Chambers of January 23rd 2020, Ref. No. BSA 1-4110-1/20, OSNC (*Supreme Court Case Law – Civil Law Chamber*) 2020/4 item 34.

Supreme Administrative Court[20] - have been profuse as well. Not only did Polish authorities challenge their case law – they also resorted to the ostentatious depreciation of European tribunal rulings, refusing to act on them on a number of occasions.[21] Effective ruling implementation was repudiated, European standards and principles blatantly opposed. Any attempts to point out that the dismantling of the rule of law, the principle of the independence of the judiciary in the European Union legal order included, is a matter affecting the entire European community rather than the domestic system of a single state, were shouted down and mocked. Such attitudes swayed Poland's position and authority as a member state of an international community, while exacerbating rule of law issue-related disputes.

Poland's parliamentary elections of October 15th 2023 brought a change in government and a new parliamentary majority[22], all of whom charged with restoring the rule of law and remedying the judiciary. Meeting expectations of the public will require more than the transformation of individual state institutions – rebuilding public trust remains a priority. Wide-ranging, comprehensive legislative and organisational measures will be mandatory, their consistent implementation certainly requiring time and difficult decisions alike, the effort to restore rule of law in Poland a multi-stage, complex and time-consuming task.[23] Potential difficulties impacting the legislative process in Poland are of significance as well.[24]

Polish politicians and lawyers will be expected to work on new regulations, attention paid to their quality – and consistency in their implementation – of particular

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20 See Supreme Administrative Court judgements of October 11th 2021, Ref. No. 9/18, as well as judgements of September 21st 2021 in cases Il GOK 10/18, Il GOK 11/18, Il GOK 12/18, Il GOK 13/18, and Il GOK 14/18.

21 Piaskowska, O., *Polska dołącza do grupy państw ignorujących wyroki ETPCz* (*Poland Joins the Group of States Ignoring ECHR Judgements*), Prawo.pl [https://www.prawo.pl/prawnicy-sady/polska-ignoruje-wyroki-etpc,512819.html], Accessed 26 March 2024.

22 The Polish Parliament consists of the *Sejm* (Lower House – 460 deputies) and Senate (Upper House – 100 senators).

23 In the early days of the new government in office in Poland, National Recovery Plan funds were successfully unblocked after months of having been withheld; moreover, the European Commission decided to confirm Poland's participation in the European Public Prosecutor's Office.

24 Adam Bodnar (Minister of Justice) points out that *"today, Poland has four main legal blocking mechanisms – the president, National Council of the Judiciary (which continues taking assorted action, especially with regard to submitting opinions concerning new judicial appointments), Constitutional Court, and neo-justices. Each of these institutions are the source of some form of objection. All we can do is handle the situation without getting discouraged, which means we may ultimately have to wait*". See: Rojek-Socha, P., *Kolejni sędziowie z pozytywną opinią KRS – m.in. do rejonu i apelacji* (*Successive Justices with Positive NCJ Opinions, i.a. for District and Appellate Court Appointments*), Prawo.pl, [https://www.prawo.pl/prawnicy-sady/krs-opiniuje-kolejnych-kandydatow-na-sedziow,526128.html], Accessed 26 March 2024.

importance at the drafting stage. The above gives rise to a natural question concerning options of reaching for other measures and solutions – not in breach of the law; in other words, consummately lawful. It is noteworthy that the rule of law cannot be built on unlawfulness or restored with the use of methods potentially triggering grave doubts or controversies.

2. ASPECTS OF THE RULE OF LAW CRISIS

Any presentation of the assorted aspects of the rule of law crisis affecting Poland ought to open with a reflection regarding sources of law, and systemic conjectures of the state. The Constitution is an act of law of the highest order; pursuant to Article 2 thereof, the Republic of Poland is a democratic state governed by the rule of law and exercising social justice norms. The aforesaid provision expresses the principle of legalism, and assumes that the state and its bodies should function in respect of values securing the rule of law. The state ought to be governed by law recognised as a guideline for public authorities as well as a point of reference for the public.

Pursuant to Article 87 of the Constitution of the Republic of Poland, sources of universally binding law – the constitution apart – include laws, ratified international agreements[25] and regulations, the latter considered lower-level transposition legal measures.[26] Over recent years, the catalogue of sources of law was impacted by manipulative behaviour on a number of occasions, introducing unconstitutional laws having become unhappy Polish reality. Breaching universally recognised standards and rules of interpreting the Constitution brought modifications to the state's government and political system without any amendments to the Basic Law. The aforesaid tied in with restrictions to – or outright marginalisation of – effective constitutional controls, as a direct outcome of activities[27] which had rendered the Polish Constitutional Court dysfunctional.[28] The constitutionally guaranteed tripartite division of power was seriously distorted, safeguards of the judiciary's independence – judicial impartiality included – considerably weakened. All aforementioned activities and considerations were designed as a staged

[25] With prior consent of the *Sejm* of the Republic of Poland.

[26] Acts of local law are also sources of universally binding law – within territorial jurisdiction of authorities who had introduced them.

[27] Wróbel, W., *Skutki rozstrzygnięcia w sprawie 3/21 w perspektywie Sądu Najwyższego i sądów powszechnych* (*Consequences of Decisions in Case 3/21 in the Context of the Supreme Court and Common Courts*), "Europejski Przegląd Sądowy", No. 12, 2021, p. 19.

[28] Appointing so-called doubles as Constitutional Court justices despite the respective positions having been duly filled beforehand remains Poland's fundamental problem. The filling of the Constitutional Court's presidential position and the way of designating adjudication panel for purposes of individual cases have triggered controversies as well.

and consistent takeover of all and any institutions constituting rule of law foundations, especially those potentially equipped to exercise independent control of centres of power. The undermining of legislative hierarchies and disassembly of institutions intended to guarantee the rule of law were accompanied by a depreciation of international agreements and obligations binding on Poland.

For aforementioned reasons, Polish relations with the European Union[29] became an incendiary area as well. Polish authorities went as far as to challenge the authority of the Court of Justice of the European Union and the European Court of Human Rights as bodies authorised to interpret law binding on Poland. The competencies and authority of European tribunals were occasionally ignored or questioned[30], the Polish Constitutional Court's statement[31] that statutory foundations for the Court of Justice of the European Union and the European Court of Human Rights' adjudication do not conform to the Constitution of the Republic of Poland[32] considered something akin to an apogee.

The instrumental abuse of provisions underlying the state's government and political system and destruction of international relations were accompanied by efforts to antagonise the public, obtuse and omnipresent propaganda, pressure, hate speech and harassment.[33] Aforesaid measures extended beyond individual social groups, targeting lawyers openly questioning and contesting changes introduced in Poland in violation of standards of the rule of law. The authorities' consistency in presenting the community itself – and representatives of so-called evil elites – as odious undermined the judiciary's authority and its public perception. This applied in particular to judges whose image (alongside the image of the entire judiciary) was regularly and purposely destroyed.[34]

3. THE INDEPENDENCE OF THE JUDICIARY

Domestic courts of law and the Court of Justice of the European Union should safeguard thorough and unquestioned application of European Union law, war-

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[29] And with other international entities and institutions.

[30] Rakowska, A., *op. cit.,* note 8, p. 43 *et seq*.

[31] In rulings of March 10th 2022, Ref. No. K 7/21, OTK-A (*Constitutional Court Case Law, group A*) 2022/24, and of October 7th 2021, Ref. No. K 3/21, OTK-A 2022/65.

[32] Wyrozumska, A., *op. cit.,* note 4, p. 14.

[33] See e.g. Judgment, *Żurek v Poland*, the Court of Justice of the European Union judgement of June 16th 2022 in Case No. 39650/18.

[34] Bodnar, A., *Sędzia powołany z neoKRS nie może być uznany za niezawisłego* (*A Justice Appointed by the neo-NCJ Cannot Be Considered Impartial*) Prawo.pl, [https://www.prawo.pl/prawnicy-sady/adam-bodnar-o-sedziach-powolanych-przy-udziale-neokrs,524437.html], Accessed 26 March 2024.

ranting efficient judicial protection of individual rights arising therefrom as well as any standards associated with rule of law-related issues. As it is, the Polish judiciary is an area which had suffered farthest-reaching breaches and problems. Post-2015, the ruling camp generated an intricate administrative-and-disciplinary system designed to introduce political control of the judiciary and prosecution services. Politicising the broadly defined judiciary negated the very notion of a democratic state, turning it into something closely resembling a caricature.

Legislative amendments stood in blatant opposition to the world of science, remaining deaf to any form of constructive criticism. They were pushed through hastily, without actual or broadly-defined consultation, with no heed for – or outright ignoring – critical voices of the legal community. Amendments to the Common Courts Law (so-called muzzle law) made it possible to penalise judges for rulings designed to implement standards arising from international agreements Poland is signatory to and the Treaty on European Union, or even to implement international courts' case law. To that end, a Disciplinary Chamber – an extraordinarily tribunal banned in times of peace – had been established at the Supreme Court.[35] As a result, disciplinary proceedings were taken against justices referencing European Union law and/or the European Convention on Human Rights when adjudicating. In extreme cases, the instrumental use of the disciplinary accountability system equipped executive powers with a capacity to influence the adjudication and professional standing of individual justices. Last but not least, it triggered a so-called chilling effect not only in the legal community but throughout the general public, including citizens contesting action taken by public authorities.

Legislative changes in Poland had been intended to challenge the independence of the judiciary by politicising the course and manner of electing justices. In that particular context, issues of judicial appointments and consequences of individual adjudication have become a trigger for the majority of prevailing doubts. Circumstances of post-2017 changes to the composition of the National Council of the Judiciary (NCJ)[36] have undermined that body's independence from legislative and executive powers. The vast majority of lawyers believe that the Council's composi-

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[35] Resolution of January 23rd 2020 passed by a panel acting jointly on behalf of Civil, Criminal, and Labour & Social Insurance Chambers of the Supreme Court, Ref. No. BSA I-4110–1/20, *LEX* No. 2784794.

[36] Pursuant to Article 186 of the Constitution of the Republic of Poland, the National Council of the Judiciary shall safeguard the independence of the judiciary, and impartiality of justices; The National Council of the Judiciary model was introduced by virtue of the Law of December 8th 2017 on amendments to the National Council of the Judiciary Law and selected other laws (*Journal of Laws* 2018 item 3).

tion contradicts Article 187 of the Constitution of the Republic of Poland: justices making up the NCJ are selected by representatives of political parties rather than the judicial community.[37] It noteworthy that the fact of the legislative or executive power(s) participating in the judicial appointment process is not in itself tantamount to making justices subordinate to public authorities. Yet that subordination does arise from factors depriving judges of protection against external pressures, and/or from instructions regarding their professional performance. Writings on the matter emphasised that contemporaneous state authorities intended to "replace key actors of the judiciary with individuals approved or outright nominated by the Minister of Justice".[38]

The Parliament electing judicial National Council of the Judiciary members compromises aforementioned Article 2 of the Constitution of the Republic of Poland as well as Article 10 ("The governance and political system of the Republic of Poland shall base on the distribution and balance of legislative, executive and judiciary powers") and Article 173 ("Courts and Tribunals shall be a separate power, independent of other authorities") of the Constitution of the Republic of Poland. Introducing a term of office uniformity for the National Council of the Judiciary in 2018 by reducing said term for selected Council members at the time[39] was another issue. In consequence, the effectiveness of appointing the National Council of the Judiciary was questioned, the Council itself thus recognised as a body differing from the one referred to in the Constitution of the Republic of Poland[40]. Polish adjudicature developed a position pursuant to which the premise of judicial composition's incompatibility with provisions of the law – the underlying cause for the nullity of proceedings[41] – shall be found in case of a court's adjudicating panel being joined by an individual with a judicial appointment tied to a motion of the National Council of the Judiciary.[42]

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37 The legislative power (*Sejm* of the Republic of Poland) elected a so-called safe majority of 19 of 25 members, albeit Article 187 clause 1(3) of the Constitution of the Republic of Poland authorises the lower house of the Parliament to elect 4 members only.

38 Śledzińska-Simon, A., *The Rise and Fall of Judicial Self-Government in Poland: On Judicial Reform Reversing Democratic Transition*, German Law Journal, No. 7, 2019, p. 1852.

39 Judgment, *Grzęda v Poland*, European Court of Human Rights judgement of 15 March 2022, Application No. 43572/18.

40 Wawrykiewicz, M.; Gregorczyk-Abram, S., *Konsekwencje niewłaściwie obsadzonego sądu* (*Consequences of Improper Judicial Appointments*), in: Bojarski, Ł.; Grajewski, K.; Kremer, J.; Ott, G.; Żurek, W. (eds.), *Konstytucja. Praworządność. Władza sądownicza* (*Constitution. Rule of Law. The Judiciary*), Warsaw 2019, p. 547.

41 Zembrzuski, T., *Nieważność postępowania w procesie cywilnym* (*Nullity of Civil Proceedings*), Warsaw 2017, p. 215 *et seq*.

42 Resolution of joined Supreme Court Chambers of January 23rd 2020, Ref. No. BSA 1-4110-1/20, OSNC 2020/4, item 34.

The afore-described situation impacted the capacity for proposing independent and impartial candidates for judicial positions in Polish courts of law, giving rise to a grave *"systemic flaw"*.[43] The issue currently applies to as many as around 3,000 judges on all levels of the judiciary; many believe they have been appointed in breach of fundamental domestic regulations governing the judicial appointments procedure.[44] Even without focusing on individual circumstances, it ought to be concluded that Poland has become a stage for a systemic and not easily resolvable issue of a politicised judicial appointments process.

4. INFLUENCE OF THE JURISPRUDENCE OF EUROPEAN COURTS

A determination was required to the effect of the aforementioned phenomenon constituting a major threat to the principle of the rule of law, upon which the functioning of the European Union and individual member states is based. While neither swift nor prompt[45], the reaction of European courts was, in its own way, consistent – it may thus be argued that it had to some extent contributed to transformations ultimately achieved.

Of the many statements, the European Court of Human Rights judgement of November 23rd 2023[46] in the case of Wałęsa v. Poland is particularly notable. In this case, the Court decided to apply a pilot procedure, which consists of indicating in the operative part of the judgement that violations of the Convention are (in the given case) sourced in specific systemic problems, authorities of the given state obliged to remedy them. Attention was drawn to the need to amend the National Council of the Judiciary Law: in the Court's view, the currently applied judicial appointments method constitutes precisely such a systemic issue arising from the manner of establishing the body responsible for the overall form of the Polish judiciary. It was pointed out that the violation of the right to fair trial, guaranteed under Article 6(1) of the Convention for the Protection of Human Rights and

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43 Warecka, K., *Polskie sądownictwo obarczone „wadą systemową". Omówienie wyroku ETPC z dnia 3 lutego 2022 r., 1469/20 (Advance Pharma sp. z o.o.)* (*The "Systemic Flaw" of the Polish Judiciary. Commentary on the European Court of Human Rights Judgement of February 3rd 2022, application 1469/20 (Advance Pharma sp. Z o.o. [Co.Ltd.])*), *LEX* Legal Information System 2022.

44 Markiewicz, K., *Sądy powinna nadzorować KRS, a neosędziowie muszą wrócić tam skąd przyszli* (*The NCJ should supervise courts of law, neo-justices returning to where they came from*) Prawo.pl [https://www.prawo.pl/prawnicy-sady/iii-kongres-prawnikow-polskich-wywiad-prof-krystian-markiewicz,521806.html], Accessed 26 March 2024.

45 Krzyżanowska-Mierzewska, M., *Proceduralna reakcja Europejskiego Trybunału Praw Człowieka na kryzys praworządności w Polsce* (*Procedural Reaction of the European Court of Human Rights to the Crisis of the Rule of Law in Poland*), "Europejski Przegląd Sądowy", No. 2, 2023, p. 16 *et seq*.

46 Application No. 50849/21.

Fundamental Freedoms, ties in i.a. with the flawed judicial appointments procedure. This ruling alone should play an important role in restoring the rule of law in Poland, the process intended to ensure the national legal system's conformity to requirements of an *"independent and impartial court established by law"* and the principle of legal certainty alike.

Also the Court of Justice of the European Union – in its judgement in Case C-718/21 of December 21st 2023 (Grand Chamber), and in reference to the European Court of Human Rights' judgement of November 8th 2021 in the case of Dolińska-Ficek and Ozimek[47] – found that the panel of judges of the Chamber of Extraordinary Control and Public Affairs of the Supreme Court of Poland, the panel having been appointed by the politicised National Council of the Judiciary, is neither an independent nor an impartial court previously established pursuant to legislation, as required by European Union law. The judgement was based on a conclusion that *"appointments of the members of the Chamber of Extraordinary Control and Public Affairs in question were made in manifest breach of fundamental national rules governing the procedure for the appointment of judges"*.[48] A belief was expressed that the circumstances of 2017 changes to National Council of the Judiciary membership had undermined its independence from the legislative and executive powers, impacting the Council's capacity for proposing independent and impartial candidates for judicial positions in Poland.

The judgment of the Court of Justice of the European Union in Case C-718/21 is one of the Court's most significant rulings. While concerning the application of the preliminary ruling mechanism (keystone of the European judicial system), the judgement recognises that the totality of circumstances behind the appointment of justices forming the panel who had submitted questions in the case may – in the eyes of the public – raise reasonable doubt with regard to the independence and/or impartiality of aforesaid judges. It may further undermine the confidence that the judiciary should inspire in any democratic society or a state of law.

Any beliefs or assessments presented notwithstanding, the referenced rulings have made it clear to the entire legal community that systemic changes are an unquestionable necessity for Poland. The prevalent chaos and ever-more profound difficulties have been noted by radical solution supporters and recommenders of

[47] Application Nos. 49868/19 and 57511/19.

[48] It has been further pointed out that judges were appointed by the President of the Republic of Poland pursuant to a National Council of the Judiciary resolution, the exercising of which had been suspended by the Supreme Administrative Court as of the date of said judges' appointment until the time of said resolution's assessment in terms of legitimacy. The Supreme Administrative Court ultimately repealed the resolution.

extensive prudence alike. "The necessity of introducing legislative changes[49] to dispose of procedural defects" has been observed i.a. by judges owing their appointments to the aforesaid body.[50] This lays down a premise for systemic changes to the Polish judiciary.

5. LEGISLATIVE AND ORGANIZATIONAL ACTIVITIES UNDERTAKEN IN POLAND

The Polish *Sejm* has resolved to the effect of concluding that preceding resolutions to elect members of the questionable National Council of the Judiciary had been passed with blatant breach of the Constitution. Early actions ought to include efforts designed to block any works of that body, including i.a. the Minister of Justice stopping the publication of new judicial competition announcements. As a result, we are facing attempts at a gradual shutdown of an improperly established body. Nonetheless, the National Council of the Judiciary continues operating and making decisions vital to the community, which development will in all probability slow down the process of changes necessary to and expected by Poland, ideally achievable through the systemic introduction of remedial acts of law, accounting for the significance of the principle of the rule of law as well as for other rules arising from European Union membership.

The shortage of swift and radical solutions seems to be arising from the risk of potential changes being blocked by the president, who has been afforded the so-called power of veto in the legislative process pursuant to the Constitution of the Republic of Poland. Potential difficulties notwithstanding, the *Sejm* of the Republic of Poland has been proceeding a draft act of law to amend the National Council of the Judiciary Law[51] since February 2024. The said draft assumes i.a. that fifteen judges – National Council of the Judiciary members will be elected directly (in secret ballot) exclusively by justices[52] rather than by the legislative body, as is the case today. Once new National Council of the Judiciary members are elected, former Council members shall lose their mandate.

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49 The aforementioned can be proven i.a. by the suspension of proceedings concerning decisions passed by the National Council of the Judiciary.

50 Rojek-Socha, P., *"Nowy" sędzia zawiesza postępowanie w sprawie decyzji neo-KRS* (*"New" Judge Suspends Proceedings Regarding the neo-NCJ's Decision*), Prawo.pl, [https://www.prawo.pl/prawnicy-sady/sedzia-leszek-bosek-zawieszenie-postepowania-ws-odwolania-od-decyzji-neo-krs,526167.html], Accessed 26 March 2024.

51 [https://www.gov.pl/web/premier/projekt-ustawy-o-zmianie-ustawy-o-krajowej-radzie-sadownictwa], Accessed 26 March 2024.

52 The following are to be elected: one Supreme Court judge, two appellate court justices, three regional court justices, six district court justices, one military court judge, one Supreme Administrative Court judge, and one voivodship administrative court judge.

It goes without saying that unless the National Council of the Judiciary Law is amended, the Polish judiciary will not be sustainably remedied. Other legislative action has to be taken. Target solutions cannot only include attempts at improving the functioning of specific solutions by amending the operating rules and regulations for common courts[53] – formally a regulation: an implementation provision accompanying an act of law. Any compulsory legislative changes[54] should be based on attempts to provide members of the public with a right to have their cases tried by impartial, independent, properly established courts of law. Other essential activities include efforts to rebuild public trust in courts of law and the judiciary in its entirety.

6. VERIFYING JUDGMENTS ISSUED BY INCORRECTLY APPOINTED JUDGES

The matter of rulings passed by justices whose legal status will need to be verified remains a separate issue.[55] Without anticipating whether Poland will face a systemic or individual case-based review of judicial appointments of recent years, a grave risk to procedural law ought to be accentuated, arising from the menace of breaches to the validity and/or stability of legally valid rulings.[56] This raises the question of the capacity to appeal against and contest court rulings passed by judges appointed by the National Judicial Council post-2017. The issue of the status of justices and their adjudication is repeatedly raised by plaintiffs and applicants reaching for ordinary and extraordinary legal remedies.[57] The prospect of filing complaints with requests to reopen proceedings on grounds of nullity[58]

[53] Including the scope of assigning cases to justices depending on their status and National Council of the Judiciary appointment.

[54] Rojek-Socha, P., *Wymiar sprawiedliwości w naprawie - czas rozliczyć tych, którzy go psuli (rozmowa z Ministrem Sprawiedliwości)* (*The Judiciary in Remedy Mode – It's a Time of Reckoning for Those who Harmed It (A Conversation with the Minister of Justice)*), Prawo.pl [https://www.prawo.pl/prawnicy-sady/minister-adam-bodnar-o-planowanych-zmianach-w-sadach-sytuacji-w-prokuraturze,526096.html], Accessed 26 March 2024.

[55] Kappes, A.; Skrzydło, J., *Czy wyroki neo-sędziów są ważne? – rozważania na tle uchwały trzech połączonych izb Sądu Najwyższego z 23.01.2020 r. (BSA I-4110-1/20)* (*Are Judgements Issued by Neo-Judges Valid? – Deliberations in the Context of the Resolution Passed by Three Joined Supreme Court Chambers on January 23rd 2020 (Ref. No. BSA I-4110-1/20)*), "Palestra", No. 5, 2020, p. 136; A. Bodnar, *Poland After Elections in 2023: Transition 2.0 in the Judiciary*, in: Bobek, M.; Bodnar, A.; Bogdandy, A.; Sonnevend, P. (eds.), Transition 2.0. Re-establishing Constitutional Democracy in EU Member States, Baden-Baden 2023, p. 30.

[56] In civil and criminal law cases alike.

[57] Kocjan, J., *op. cit.,* note 6, p. 19.

[58] Zembrzuski, T., *op. cit.*, note 32, p. 422 *et seq*.

would in particular entail destabilisation of the justice system and disruption to legal transactions, the scale of which carrying grave social consequences.

Legal discourse occasionally points to the forgotten term of *"healing law"* which takes on the form of legal convalescence.[59] The structure itself is controversial, *prima facie* ostensibly clashing with *Rechtsstaat* principles, and evoking doubt from the vantage point of the tripartite division of powers, a notion Poland has found difficult to preserve or respect in recent years. Convalescence ought to stand for the legislator interfering with jurisprudence (judgement content and/or validity) under exceptional circumstances. It seems that particular situations might justify the appropriateness of resorting to mechanisms ultimately *"curing"* preceding judgments issued by justices with questionable status. The notion ensconced herein involves a systemic *"subjugation"* of a complaint or application for the reopening of proceedings through the legal convalescence of rulings issued by judges whose appointment has triggered doubt in terms of validity. While giving rise to a certain sense of discomfort for an individual wishing to use any opportunity to challenge a ruling unfavourable to him or her, the aforesaid does not interfere with assumptions of procedural law, which does not include the concept of processually vested rights.

7. TRANSFORMATION OF CIVIL PROCEDURAL LAW

Given the above, it is worthwhile to point out that separate issues have arisen from transformations to procedural law in recent years, civil law in particular[60]. The decline in Poland's lawmaking culture has become apparent in general, the process having become hasty and careless.[61] The 2019 and 2023 amendments to the Code of Civil Procedure were by no means a sound response to contemporary challenges in this particular field of law, well-defined by science before.[62] Not only have these amendments failed to improve or expediate the quality or swiftness of litigation

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[59] [https://www.prawo.pl/prawnicy-sady/konieczna-zmiana-procedury-cywilnej-sedzia-gudowski,525781.html], Accessed 26 March 2024.

[60] Weitz, K., *Współczesne wyzwania prawa postępowania cywilnego* (*Contemporary Challenges of the Civil Procedure Law*), "Forum Prawnicze", No. 2, 2020, p. 28 *et seq.*

[61] Gudowski, J., *Tradycja, postęp i coś jeszcze. Czy konstytucja uratuje Kodeks postępowania cywilnego?* (*Tradition, Progress, and Something Else. Can the Constitution Save the Code of Civil Procedure?*), [in:] Orzeł-Jakubowska, A.; Zembrzuski, T. (eds.), *Konstytucyjne aspekty procesu cywilnego* (*Constitutional Aspects of Civil Law Proceedings*), Warsaw 2023, p. 24 *et seq*.

[62] Ereciński, T., *Ocena skutków nowelizacji Kodeksu postępowania cywilnego z 4.07.2019 r.* (*Evaluation of Consequences of Amendments to the Code of Civil Procedure of July 4th 2019*), [in:] Dziurda, M.; Zembrzuski, T. (eds.), *Praktyka wobec nowelizacji postępowania cywilnego. Konsekwencje zmian* (*Legal Practice in the Context of Amendments to Civil Proceedings. The Consequences of Change*), Warsaw 2021, p. 19 *et seq*.

proceedings – they have actually caused a degradation of the civil procedural law system.[63]

Chaos and wreckage brought about by aforesaid amendments have marked the beginning of a process of decodifying the civil procedural law in Poland[64]. In their Code-specified format, procedural institutions no longer carry organisational qualities, the Code itself not meeting the requirements of functions ascribed to a law of this kind. It has to be concluded that the condition of the institution of judicial civil law proceedings – systemic issues regardless – is highly unsatisfactory, requiring comprehensive repair. Not only have all factors outlined herein undermined the standard of the right to a fair trial – they have also lowered the overall level of protection of civil rights and freedoms in Poland.

8. CONCLUSIONS

The rule of law is a condition for European Union membership as well as a basis for the Union's functioning, and its ultimate foundation.[65] The rule of law is a universal meter for how democracy operates, one which ought to apply to all European Union member states for review and performance assessment purposes.[66] It demands accountability and constancy.

This paper has made it possible to shed light on the legal circumstances in a European Union member state affected by a grave and multifaceted rule of law crisis, the judiciary independence crisis seemingly the most important aspect of all, not least from an international perspective. It demonstrates that while long-term and complex, restoring the rule of law and remedying the justice system is a feasible process. Polish experience may serve as a guideline concerning the restitution and reinforcement of the rule of law. Legal professionals may reference the case study as food for thought regarding reasons behind such state of matters, and when pondering the extent to which such threats have arisen in individual states, or solutions to be put in place in order to prevent similar crises, their outcomes inevitably a challenge for the entire European Union. The matter becomes more important

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[63] Zembrzuski, T., *Koncentracja materiału procesowego – w poszukiwaniu właściwej drogi* (*Concentrating Processual Substance – a Quest for the Correct Path*), in: Dziurda, M.; Zembrzuski, T. (eds.), *Praktyka wobec nowelizacji postępowania cywilnego. Konsekwencje zmian*, Warsaw 2021, p. 47 *et seq*.

[64] Kulski R., *Upadek Polskiego Kodeksu Postępowania Cywilnego* (*Decline of the Polish Code of Civil Procedure*), "Monitor Prawniczy", No. 8, 2023, p. 463 *et seq*.

[65] Grzelak, A., *Praworządność tematem wiodącym Konferencji w sprawie przyszłości Europy?* (*Rule of Law as the Leitmotif for a Conference on the Future of Europe?*), "Europejski Przegląd Sądowy", No. 9, 2021, p. 19.

[66] Lenaerts, K., *op. cit.*, note 1, p. 4.

once we realise that the issue of conforming to the principle of the rule of law is exacerbating across Europe, and as such ought to become a premise for a debate regarding ways of reinforcing the European community's capacity for handling crises, the avoidance and total eradication of which is not and will never be an option. In all actuality, an unavoidable crisis of the rule of law may be predicted with great certainty.[67]

Polish experience with the rule of law, destruction and restoring the judiciary may well serve as a warning for other European Union member states. It has made us realise how fragile values and solutions developed over the years can be, their erosion giving rise to serious complications whenever attempts are made to restitute them. It showcases mechanisms and paths leading to a destabilisation of the *Rechtsstaat*, involving challenges to fundamental principles, such as the tripartite division and balance of powers, especially if taking on the form of harming the separateness and independence of the judiciary. The experience raises awareness of the rank and significance of the aforementioned *"union of values"*[68], and of the need to continually care for and reinforce principles the European Union and its activities stand on.

Poland is facing the need to repeal former and create new statutory regulations, conforming to the spirit of the rule of law and values proclaimed throughout the European Union member states' family. Any changes ought to account for the interest of the state and rule of law, and of the citizens. Notably, more than the individual interest of individual persons is at stake – attention has to be paid to community interest – the interest of the general public – blatantly observable whenever public or private law is introduced or amended. Primary importance and priority ought to be given to systemic issues: activities and measures affecting the form and functioning of constitutional bodies, and organisation of the broadly defined judiciary.

It goes without saying that the process of remedying and restoring the rule of law in Poland will be a lengthy one. It will take more than the parliamentary majority secured or public approval to repair institutions systematically destroyed over multiple years. The average citizen cannot count on rapid or radical changes noticeable in the expedient and swift handling of court cases – a factor usually considered the

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[67] Safjan, M., *Rządy prawa a przyszłość Europy* (*The Rule of Law in the Context of Europe's Future*), [in:] Studia i Analizy Sądu Najwyższego. Przyszłość Europy opartej na rządach prawa (*Studies and Analyses of the Supreme Court. The Future of Europe Based on the Rule of Law*), Warsaw 2019, p. 28 *et seq*.

[68] von Bogdandy, A., *Towards a Tyranny of Values?*, in: von Bogdandy, A.; Bogdanowicz, P.; Canor, I.; Grabenwarter, Ch., Taborowski, M.; Schmidt, M. (eds.), Defending Checks and Balances in EU Member States, Berlin 2021, p. 73.

primary indicator of change. Under such circumstances, a quest for temporary, provisional legal solutions will give rise to a temptation to simplify and shorten the winding and intricate path currently faced by Polish legislators. Nonetheless, conscious efforts ought to be made to follow the legislative path in its entirety, to be duly crowned by statutory solutions evoking no doubt or objection in terms of the principle of the rule of law.

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