

Is Judicial Independence Possible in a State which Is Not a Rule-of-Law State?

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Abstract: Is Judicial Independence Possible in a State which Is Not a Rule-of-Law State?

In Poland, from the start of the democratic transformation in 1989, the rule of law became a fundamental, leading principle of the Polish constitutionalism. The last decades have been a period of constitutional evolution of the judiciary in Poland. Courts, which were to administer justice in line with Montesquieu's formula of court as the mouthpiece of the law, became the basic guarantors of human rights. The Polish constitutional crisis, which began in 2015, is part of the phenomenon of constitutional abusivism, that is, undermining the fundamental values of constitutional democracy. The Polish legal order displays the features of what E. Fraenkel called a dual state. The characteristic feature of the Polish constitutional crisis is that the constitutional disputes about judicial independence are transferred to the supranational level. The dualism of law presents particular challenges for the judiciary. A question arises whether it will be possible to apply constitutional rules after independent institutions in charge of their observance cease to function.

Keywords: Rule of Law, The Polish Constitutional Crisis, The Dual State, Human Rights Protection.

Summary: 1. The rule of law as a fundamental principle of the system of government in the Polish Constitution – 2. The crisis of the rule of law so far – 3. Basic features of the rule of law crisis in Poland – 4. Why have courts failed to defend the rule of law? – 5. *Doppelstaat* instead of *Rechtsstaat*? – 6. Can the rule of law be restored?

1. The rule of law as a fundamental principle of the system of government in the Polish Constitution

The rule of law is the foundation on which democratic states are based. The contemporary understanding of the principle of rule of law draws upon various traditions, which influences how it is implemented in different legal systems. In the case of Poland, the most important views are those referring to the common law rule of law formula and to the German *Rechtsstaat*. The development of the formal and substantive concept of *Rechtsstaat* in the 19th century was particularly important for constitutional monarchies which implemented the principle of democracy to a limited extent. Law, as an instrument of protection against absolute power, was to guarantee the separation of powers and to protect the

individual against the state. The principle of a citizen's trust in the state and the resulting detailed principles determined the relationships between the state and society. After WWII, human rights protection as an element of the rule of law, acquired a new constitutional and international law dimension¹. A similar role was played by the rule of law in post-communist states. In Poland, from the start of the democratic transformation in 1989, the rule of law became a fundamental, leading principle of the Polish constitutionalism².

Both in common law and civil law approach to the rule of law, independent courts are its important element. The prohibition of violating this independence and its guarantees are regulated in constitutions. For a considerable time, we have also been witnessing the process of crystallization of international standards of judicial independence. It has led to an extension of international law guarantees of judicial independence and increased requirements for states to respect such guarantees³.

The last decades have been a period of constitutional evolution of the judiciary in Poland. Courts, which were to administer justice in line with Montesquieu's formula of court as the mouthpiece of the law, became the basic guarantors of human rights. The foundations for such evolution were laid by the 1997 Polish Constitution, which assumed that protection of human rights justified the exercise of judicial authority. The role of guarantors was played by the Constitutional Tribunal, the Supreme Court, administrative courts, and ordinary courts. The right to an impartial and independent tribunal became an important element of the rule of law. The manner of appointing judges, the guarantees of their independence while exercising their office, and their irremovability were elevated to constitutional principles. These principles bind the legislative and executive branches, which should not interfere in the scope of judicial power, but should provide institutional guarantees of judicial independence, which is important for the shape of the principle of separation of powers and that of democratic state. The constitution requires public authorities to act in accordance with the law and determines the legal forms of activities of individual state authorities. Disputes about the permissible methods of operation of the legislature and the executive on the basis of law are resolved by courts. The relationship between the principles of rule of law and democratic state is expressed, first and foremost, in the distinction drawn between political matters, which are the realm of the legislature and the executive, and legal matters, which are the realm of

¹ P. Lesiński, "Rechtsstaat and Its Legal Order According to Robert von Mohl", in *Zeszyty Naukowe Uniwersytetu Rzeszowskiego*, 113 (2020), p. 147.

² D.H. Cole, "Poland's 1997 Constitution in Historical Context", in Digital Repository @ Maurer Law, p. 31. Recovered from <https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1592&context=facpub>, [Consultation date: 10/04/2021].

³ Case of *Guðmundur Andri Ástráðsson v. Iceland*, European Court of Human Rights, application no. 26374/18, judgment of 1.12.2020.

courts. Courts have been granted a number of powers with which they set the legal limits of activities of the legislature and the executive. In a state where courts' powers grow and their independence gains a strong axiological basis there may be problems with determining the relationship between courts and the legislature and the executive. As a result, there may occur problems with setting the boundaries of interference with the independence of courts. Too low a degree of guarantees of independence is a threat to protection of constitutional rights. But too high a degree of such guarantees can lead to problems in the area of separation of powers⁴. Still, if such problems appear, they do not threaten the essence of independence. That they are resolved in literature, case law, and political decisions is a normal phenomenon in democratic states. But in Poland's case a question arises whether the scope and manner in which the principles of the rule of law are undermined does not eliminate judicial independence. Can courts effectively defend their independence and impartiality? Does the dispute about judicial independence have a more general importance for the whole system of government?

Until 1989 the principle of rule of law was not expressed directly in any constitutional act in Poland. The Constitution of 17 March 1921 followed the example of the Constitution of the Third French Republic: it expressed the principle of democracy, separation of powers, and introduced a parliamentary system of government, without expressing the rule of law directly. It did, however, express some of elements of the rule of law, including the right to an impartial and independent court adjudicating on the basis of statutes. The Constitution of 23 April 1935 did not express the principle of sovereignty of the nation. It introduced a presidential system, restricted the separation of powers and human rights guarantees. The principle of acting in accordance with the law was formulated in a peculiar way in Article 10(1), which provided that no activities can contradict the objectives of the State, as expressed in its laws. The communist constitution of 22 July 1952 formally vested the power in the working people of cities and villages. It abolished the separation of powers, free elections, and judicial independence, enabling the communist party to exercise actual and unlimited power. The constitution of the Polish People's Republic formulated the principle of operation of authorities and administration in accordance with the law, the principle of subordination of judges to statutes, and provided for statutory guarantees of judicial independence, yet without creating any actual basis for judicial independence. Courts were subordinated to the communist party⁵.

Despite lack of relevant traditions, the rule of law played an important part in the period of systemic transformation. Amendments of 29 December 1989 to the Constitution of the Polish People's Republic introduced a provision that the Republic was a democratic rule-of-law state implementing the principles of social

⁴ B. Rüthers, *Die heimliche Revolution vom Rechtsstaat zum Richterstaat. Verfassung Und Methoden*, Mohr Siebeck, Tübingen, 2016, p. 176.

⁵ D.H. Cole, *op. cit.*, pp. 23-25.

justice. In the period until the adoption of the 1997 Constitution, the rule of law became a fundamental systemic principle. The Constitutional Tribunal derived from it the separation of powers, fundamental human rights, the principle of proportionality in limiting rights, and a number of principles concerning enacting laws. Some fifteen legal principles not expressed directly in the constitution were considered by the Tribunal to be applicable and binding upon all public authorities. The concept of the rule of law formulated in case law of the Tribunal and in legal literature became the foundation for the adoption of the current Constitution. Its Article 2 repeats the expression that the Republic is a democratic rule-of-law state implementing the principles of social justice. Since 1989 the concept of rule of law followed mainly German literature and case law of the German Federal Constitutional Court⁶. The substance of the principle of rule of law is expressed in two ways. What follows from Article 2 of the Constitution is the principle of the citizen's trust in the state, the principle of protection of justly acquired rights, and around a dozen principles of law-making, including the *lex retro non agit* principle. They are not expressed in the Constitution directly, but were recognized as elements of the rule of law in case law of the Constitutional Tribunal. Other elements of the rule of law are explicitly expressed in many provisions of the Polish Constitution. The rule of law includes, for instance, an extensive catalogue of human rights and the conditions for their limitation only on the basis of statutes and based on the principle of proportionality. A necessary element of the rule of law, according to the Constitution, is the principle of separation of powers, which prevents excessive concentration of power – a threat to human rights. An important element of the rule of law is separation of the judiciary vis-a-vis the legislative and executive powers. The full list of principles making up the rule of law includes its formal and substantive aspects. The formal aspect includes mainly the requirement that public authorities act on the basis and within the limits of the law, the binding character of statutes, and judicial review of the lawfulness of actions taken by authorities. Its substantive dimension is the requirement that public authorities act to protect human rights and recognition of the inalienable dignity of a person as the source of constitutional rights.

The right to (a hearing by) an independent and impartial tribunal is an important element of the rule of law for three reasons. Firstly, the rule of law requires a separate judiciary in accordance with the separation of powers. Secondly, the right to an impartial and independent tribunal is a constitutionally-guaranteed human right. Thirdly, the right to a fair trial is a basic means of protection of constitutional rights. The substance of the constitutional right to a fair trial has been shaped in the case law of the Constitutional Tribunal. According to Article 45(1) of the Constitution, “everyone shall have the right to a fair and

⁶ M. Wyrzykowski, “Selected Problems of System Transformation”, in J. Aregger, J. Poczubot, M. Wyrzykowski (eds.), *Rechtsfragen der Transformation in Polen. Schweizerisch-polnisches Kolloquium. Referate und Diskussionsbeiträge des schweizerisch-polnischen Kolloquiums von 11.-14. Mai 1994 in Warszawa*, Wydawnictwo Baran i Suszczyński, Kraków, 1995, p. 15.

public hearing of his case, without undue delay, before a competent, impartial and independent court”. The constitutional right to a fair trial was modelled on the right to a fair trial in Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms. According to the Constitution, the right to a fair trial consists of three elements: the right of access to a court, the right to a fair hearing of the case before a competent court, and the right to obtain a judgment and to have it enforced. Implementation of the right to a fair trial requires an independent judge and an independent court. Lack of independence, e.g. a case being decided by an assistant judge, who is subordinate to the Minister of Justice, infringes the right to a fair trial⁷. The Constitution contains an extensive catalogue of principles guaranteeing the right to a fair trial, determining the manner in which the President of the Republic appoints judges upon motion of the National Council of the Judiciary, guaranteeing irremovability of judges and their subordination only to the Constitution and statutes. The constitutional standard of independence of courts and judges did not differ from the guarantees provided for in other European states⁸.

Until 2015, the constitutional practice in the field of judicial independence had not caused major controversies. Since the start of the systemic transformation, there had been a general consensus about the important constitutional role of courts. Any doubts there were concerned just a few issues, the main one being the dispute about the permissibility and scope of administrative supervision of the justice minister over courts. It was resolved by the Constitutional Tribunal, which indicated that although administrative supervision was permitted, it could not, even indirectly, influence the administration of justice in specific cases⁹. What caused controversies was the powers of the justice minister to appoint court presidents and to exercise direct administrative supervision over court directors. The Constitutional Tribunal set the limits of such supervision, indicated the need for judges’ participation in appointing court presidents, and identified the need for introducing statutory criteria for their appointment¹⁰. The Tribunal also reviewed

⁷ Judgment of the Polish Constitutional Tribunal of 24.10.2007, case no. SK 7/06. Recovered from <https://ipo.trybunal.gov.pl/ipo/Sprawa?cid=1&dokument=1816&sprawa=4377>, [Consultation date: 10/04/2021].

⁸ M. Mistygacz, “The Position of Judge in Poland Within the Judicial System”, in *Studia Politologiczne*, 58 (2020), p. 45.

⁹ Judgment of the Constitutional Tribunal of 15.1.2009, case no. K. 47/05. Recovered from <https://ipo.trybunal.gov.pl/ipo/Sprawa?cid=2&dokument=333&sprawa=4373>, [Consultation date: 10/04/2021].

¹⁰ Judgment of the Constitutional Tribunal of 7.11.2013, case no. K 31/12. Recovered from <https://ipo.trybunal.gov.pl/ipo/Sprawa?cid=2&dokument=10102&sprawa=9840>, [Consultation date: 10/04/2021].

the regulations guaranteeing independence, including the requirements for lifting a judge's immunity, and the principles of judges' disciplinary liability¹¹.

After the Constitution entered into force in 1997, there was no doubt about courts being the basic guarantor of constitutional human rights and about efficient protection of these rights being dependent on courts' actual independence¹². The importance of judicial independence for the protection of human rights was also confirmed in public assessments. But the assessment of the actual efficiency of courts was not so unequivocal. It was reduced, among other things, by protracted court proceedings¹³. The problem of protracted proceedings has not been resolved yet. Objections against courts included their formalism, manifested, for instance, by insufficiently taking into account the Constitution and the European Human Rights Convention when applying the law. Public controversies were aroused by certain categories of cases, such as property reprivatization cases, or cases concerning lustration of state officials who were accused of secretly collaborating with the communist security service. Another problem was lack of lustration of judges after 1989¹⁴.

2. The crisis of the rule of law so far

The Polish constitutional crisis, which began in 2015, is part of the phenomenon of constitutional abusivism, that is, undermining the fundamental values of constitutional democracy¹⁵. The Polish particularity is that foundations of the state system of government are undermined without any constitutional amendments. The crisis began with a dispute concerning appointment of Constitutional Tribunal justices. Fifteen justices are elected by the Sejm [lower chamber of the Parliament], by an absolute majority of votes, for individual 9-year terms. According to an unwritten rule and established practice, an election can take place when the term of a CT justice ends during the term of the Parliament. In 2015 a new Act on the Constitutional Tribunal was passed and it broke that rule. Near the end of legislative work, Article 137a was inserted into the bill. It provided that the

¹¹ Judgment of the Constitutional Tribunal of 2.4.2015, case no. P 31/12. Recovered from <https://ipo.trybunal.gov.pl/ipo/Sprawa?cid=2&dokument=12142&sprawa=9839>, [Consultation 10/04/2021].

¹² S. Biernat, M. Kawczyńska, "The Role of Polish Constitution (Pre-2016): Development of Liberal Democracy in the European and International Context", in A. Albi, S. Bardutzky (eds.), *National Constitution in European and Global Governance: Democracy. Rights, the Rule of Law. National Reports*, Springer, Berlin 2019, p. 759.

¹³ Case of *Kudła v. Poland*, European Court of Human Rights, application no. 30210/96, judgment of 26.10.2000.

¹⁴ J. Zajadło, "Pięć minut antyfilozofii prawa. Glosa do uchwały SN z dnia 20 grudnia 2007 r., I KZP 37/07", in *Gdańskie Studia Prawnicze – Przegląd Orzecznictwa*, 1 (2008), p. 161.

¹⁵ D. Landau, "Abusive Constitutionalism", in *University of California Davis Review*, 47 (2013), pp. 195 ff.

Sejm elected justices to fill posts vacated in a given calendar year. This provision entered into force even though its inconsistency with the Constitution was pointed out. On its basis, during the last session, on 8 October 2015, the Sejm elected five CT justices, even though the terms of two ‘old’ justices were due to end after the end of the parliamentary term. The Tribunal received a motion of a group of MPs who argued that the statutory grounds for election of the justices was inconsistent with the Constitution. When proceedings were still pending before the Tribunal, on 25 November 2015 the newly elected Sejm adopted resolutions that invalidated the election of the five CF justices that took place on 8 October, asserting that their election was based on an unconstitutional provision of law. On 2 December 2015, the Sejm passed a resolution on the election of five new justices. At night, they were sworn in by the President of the Republic. On 3 December, the Constitutional Tribunal issued a judgment in which it held Article 137a of the Act unconstitutional to the extent to which it enabled the election of two justices to fill the posts of justices whose terms ended after the end of the parliamentary term. On the basis of this judgment, the President of the Constitutional Tribunal, Andrzej Rzepliński, allowed two of the newly elected justices to adjudicate, but refused to allow the other three to adjudicate. Quoting the CT judgment of 3 December 2015, he stated that they had been elected by the Sejm to fill places that had already been filled. Simultaneously, the President of the Republic refused to swear in the three justices elected on 8 October 2015¹⁶. Problems with the election of justices immediately affected the functioning of the Constitutional Tribunal, in particular the validity of its judgments. Refusal to allow three justices to adjudicate was used by the Prime Minister as an excuse for refusal to promulgate judgments of the CT in the official gazette. The government declared such judgments to have been issued by an incorrectly composed panel, hence without legal effect. When the term of CT President Andrzej Rzepliński ended in December 2016, the acting President justice Julia Przyłębska allowed the three justices to adjudicate. The objection of deficiency has been raised against judgments issued by panels on which they sit. In case law one can find the view that these are deficient judgments, as they were issued with the participation of persons who are not justices and who were elected to posts already filled¹⁷.

The personal crisis at the Constitutional Tribunal coincided with an institutional one. Between November 2015 and December 2016 six bills allegedly “repairing” the Constitutional Tribunal, prepared by the Law and Justice party,

¹⁶ P. Radziejewicz, P. Tuleja (eds.), *Konstytucyjny spór o granice zmian organizacji i zasad działania Trybunału Konstytucyjnego, czerwiec 2015 – marzec 2016*, Wolters Kluwer, Warszawa, 2017, pp. 137 ff; “Opinion no. 833/2015 in Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland”, adopted by the Venice Commission at its 106th Plenary Session, Venice, 11-12.3.2016.

¹⁷ Cfr. decision of the District Court for Wrocław-Krzyki of 25.11.2019, case no. VII W 256/19, recognizing judgment of the Constitutional Tribunal of 26.6.2019, case no. K 16/17 as inexistent. A different view, based on CT judgment, was assumed by the Supreme Administrative Court in its judgment of 11.9.2018, case no. I FSK 158/18.

became laws. They disorganized, to a considerable degree, the discharge of constitutional tasks by the Tribunal. These laws were an instrument to limit the Tribunal in reviewing of constitutionality of statutes¹⁸. When the term of CT President Andrzej Rzepliński ended, yet another Act on the Constitutional Tribunal entered into force, restoring the majority of solutions applicable before 2015. Its interim provisions introduced a special procedure of election of the new President of the Tribunal, based on principles that the Constitutional Tribunal had previously held to be incompatible with the Constitution¹⁹. The lawfulness of the manner in which Constitutional Tribunal justices elected candidates for the post of president was dubious. Consequently, also the validity of appointment of the President of the Tribunal by the President of the Republic is questioned. Thereafter, the terms of eight other justices ended and they were replaced by newly elected justices. The dispute concerning the Constitutional Tribunal and its current functioning begs some questions: Does it still discharge its constitutional tasks? Has it not actually become a third chamber of the parliament, which only confirms the legislative decisions of the Sejm²⁰?

Having made the personnel changes and having passed the new Constitutional Tribunal Act, the government and the parliamentary majority moved on to make changes in ordinary courts and in the Supreme Court. The greatest number of doubts, from the point of view of judicial independence, were caused by changes in four areas: amendments to the Law on the System of Ordinary Courts and replacement of court presidents by the justice minister²¹, shortening of the term of the National Council of the Judiciary and changing the principles of election of its members, lowering the retirement age of Supreme Court and Supreme Administrative Court judges, as well as changing the principles of disciplinary proceedings in judges' cases and the establishment of a Disciplinary Chamber at the Supreme Court.

The most far-reaching consequences were produced by statutory shortening the term of office of National Council of the Judiciary members. The Council consists of the First President of the Supreme Court, the Minister of Justice, the

¹⁸ Remarks of the Supreme Court of 27.6.2016, no. BSA III-021-199/16, to the MPs Constitutional Tribunal Bill. Recovered from <http://orka.sejm.gov.pl/Druki8ka.nsf/0/00A0615373883E8BC1257FE3003A6362/%24File/558-003.pdf>, [Consultation date: 10/04/2021].

¹⁹ Judgment of the Constitutional Tribunal of 7.11.2016, case no. K 44/16. Recovered from <https://ipo.trybunal.gov.pl/ipo/Sprawa?cid=1&dokument=16940&sprawa=17892>, [Consultation date: 10/04/2021].

²⁰ M. Pyziak-Szafnicka, "Trybunał Konstytucyjny á rebours", in *Państwo i Prawo*, 5 (2020), pp. 25 ff.

²¹ The Constitution requires that the justice minister should appoint court presidents with the participation of judges, cfr. judgment of the Constitutional Tribunal of 7.11.2013, case no. K 31/12. Recovered from <https://ipo.trybunal.gov.pl/ipo/Sprawa?cid=2&dokument=10102&sprawa=9840>, [Consultation date: 10/04/2021]. After amendment, the Act on the System of Ordinary Courts vested the power exclusively with the justice minister, who replaced the majority of court presidents.

President of the Supreme Administrative Court, a nominee of the President of the Republic, four MPs elected by the Sejm, two Senators elected by the Senate, and fifteen judges elected from among the judges of the Supreme Court, ordinary courts, administrative courts, and military courts. In Article 187(4) of the Constitution, the term of elected Council members is set at four years. Contrary to the Constitution, the statute shortened the term of NCJ members, changing also the principles of their election. Previously, judges of all kinds of courts chose fifteen members from among their number. Currently, it is the Sejm that elects judges to sit on the Council. Consequently, out of twenty-three NCJ members twenty-one are elected by political authorities. Change in the way Council members are elected, their election that lacked transparency, and the way the Council works have caused serious doubts relating to its participation in the procedure of appointing judges²². According to Article 179 of the Constitution, judges are appointed by the President of the Republic upon the Council's motion. The flaws in the appointment and functioning of the NCJ provoked a dispute about the status of judges appointed by the President of the Republic with the involvement of the NCJ. The question arose whether a court on which the newly appointed judges sat could guarantee the right to a hearing before an impartial and independent court. Doubts were aroused by resolutions of the National Council of the Judiciary containing motions for new judges to be appointed or for judges to be promoted to higher-instance courts²³.

The principle of irremovability of judges of the Supreme Court and the Supreme Administrative Court was infringed by statutory lowering of the age when judges should retire. In the light of earlier provisions, judges retired at the age of 65, but with consent of the National Council of the Judiciary their retirement could be postponed until 70 years of age. The introduced amendment concerned judges who had turned 65 and, having obtained NCJ consent, continued to adjudicate. The amendment was to result in immediate retirement of a large number of judges and their replacement with new judges, recommended by the newly elected NCJ. It was also to remove the First President of the Supreme Court from her office²⁴.

²² Office for Democratic Institutions and Human Rights, "Final Opinion on Draft Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland", opinion no. JUD-POL/305/2017, pp. 11 ff. Recovered from https://www.legislationline.org/download/id/7051/file/305_JUD_POL_5May2017_Final_en.pdf, [Consultation date: 10/04/2021].

²³ European Commission Recommendation of 26.07.2017 C (2017) 5320 regarding the rule of law in Poland. Complementary to Commission Recommendations (EU) 2016/1374 and (EU) 2017/146, pp. 11 ff. Recovered from <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32017H1520>, [Consultation date: 10/04/2021].

²⁴ M. Ziółkowski, "Two Faces of the Polish Supreme Court After 'Reforms' of the Judiciary System in Poland: The Question of Judicial Independence and Appointments", in *European Papers*, 5 (2020), n. 1, p. 361.

The most far-reaching interference with judicial independence was connected with changes in the rules of disciplinary proceedings. The amended Act on the System of Ordinary Courts introduced separate disciplinary courts, extended the powers of disciplinary attorneys and made them subordinate to the justice minister. This minister is also the Prosecutor General. In the new disciplinary procedure, the right to defence of the accused judges was limited, while the list of acts considered disciplinary torts was extended. Simultaneously, the Supreme Court Act was amended and its Disciplinary Chamber was established. It took over examination of disciplinary cases of judges, advocates, attorneys at law, and prosecutors, which was previously the responsibility of the Court's Criminal Chamber. Only persons who had not been Supreme Court judges could become Disciplinary Chamber judges. The autonomy of the Disciplinary Chamber, the special rules of procedure before it, and the scope of cases it examines indicate that the Chamber is an extraordinary court which, according to Article 175(2) of the Constitution, could only be established during a time of war²⁵. Major constitutional doubts result from the practice of disciplinary proceedings. The possibility of holding a judge disciplinarily liable for the contents of the issued judgment has been extended considerably. One of the disciplinary torts is decisions to submit to the CJEU referrals for preliminary rulings concerning the independence of Polish courts. Until 2017 it was only possible to initiate disciplinary proceedings for the contents of a judgment when the judgment glaringly infringed the law. Currently, glaring infringement of law is defined extensively. The most serious violation of judicial independence involves prosecutor's offices initiating criminal proceedings against judges for the contents of their judgments. Disciplinary proceedings against judges are used to interfere in the adjudicating activity of judges, to prevent them from adjudicating, and to create a chilling effect due to the threat of their removal from office²⁶.

The aforementioned violations of independence of judges and courts prompt the question whether in Poland there still are independent courts. An attempt to answer the question was presented by the CJEU in *Celmer* judgment, where indicated that legislative amendments in Poland concerning courts gave rise to systemic doubts. Before issuing a European arrest warrant, a court should assess whether a person surrendered to Poland will be guaranteed the right to a fair trial. The court should take into account all legal circumstances and facts that influence such assessment. The so-called *Celmer* test was formulated in the judgment²⁷. The same view was expressed by the CJEU in the *PPU* judgment issued on 17

²⁵ W. Wróbel, "Izba Dyscyplinarna jako sąd wyjątkowy w rozumieniu art. 175 ust. 2 Konstytucji RP", in *Palestra*, 1-2 (2019), pp. 17 ff.

²⁶ The Ombudsman's Statement of the CHR re the National Public Prosecutor Office's motion for consent to detention of judge Igor Tuleya for the purpose of compulsory appearance 18.5.2021. Recovered from <https://www.rpo.gov.pl/en/content/statement-chr-prosecutor-judge-tuleya>, [Consultation date: 10/04/2021].

²⁷ Judgment of the Court (Grand Chamber), 25.7.2018, no. C-216/18, ECLI:EU:C:2018:586.

December 2020²⁸. The greatest doubts concerning the independence of Polish courts were confirmed by the CJEU in the judgment in *A.K. v Poland* case, issued on 19 November 2019²⁹. These doubts concerned the National Council of the Judiciary, the Supreme Court Disciplinary Chamber, and disciplinary proceedings against judges. Enforcing the CJEU judgment of 19 November 2019, three chambers of the Supreme Court in joint session in the resolution of 23 January 2020 held that the Supreme Court Disciplinary Chamber was not a court within the meaning of Article 19(1) of the Treaty on the European Union and Article 45(1) of the Polish Constitution. It does not guarantee the right to an independent and impartial tribunal. The SC resolution also indicated that the right to an impartial and independent tribunal cannot be guaranteed when on the adjudicating panel there are judges in whose appointment the new NCJ was involved³⁰. The response to the CJEU judgment and the resulting resolution of three chambers of the Supreme Court sitting jointly was the adoption of the so-called “muzzle law” (Ustawa z dnia 20 grudnia 2020 r. o zmianie ustawy – Prawo o ustroju sądów powszechnych, ustawy o Sądzie Najwyższym oraz niektórych innych ustaw, Dziennik Ustaw 2020, no. 190), which prohibited enforcing the CJEU judgment of 19 November 2019³¹. The practice of applying this law vis-a-vis Polish judges led the European Commission to submit to the CJEU application C-204/21 on 31 March 2021. Currently, the problem of flawed procedure of judicial appointments and failure to guarantee the right to a fair trial is also on the case list of the European Court of Human Rights³².

Undermining the separation and independence of the Constitutional Tribunal, the courts, and the National Council of the Judiciary weakens the protection of constitutional rights. In particular this concerns the freedom of assembly, the freedom of speech, and personal freedoms. Limited independence of courts has an adverse effect on the independence of other public authorities. An example is the statutory restriction of powers of the National Council of Radio Broadcasting and Television, tasked with guaranteeing freedom of the media. The Constitutional Tribunal held the statutory restriction of the Council’s powers and

²⁸ Judgment of the Court (Grand Chamber), 17.12.2020, no. C-354/20, C-412/20, ECLI:EU:C:2020:1033.

²⁹ Judgment of the Court (Grand Chamber), 17.12.2020, no. C-585/18, C-624/18, C-625/18, ECLI:EU:C:2019:982.

³⁰ Joint resolution of the Civil, Criminal, and Social Security Chambers of the Supreme Court of 23.1.2020, case no. BSA I-4110-1/2020.

³¹ Venice Commission CDL-PI (2020)002-e, Poland – Urgent Joint Opinion on the amendments to the Law on organisation of the Common Courts, the Law on Supreme Court and other Laws, [https://www.venice.coe.int/webforms/documents/default.aspx?pdf=CDL-PI\(2020\)002-e&lang=fr](https://www.venice.coe.int/webforms/documents/default.aspx?pdf=CDL-PI(2020)002-e&lang=fr), [Consultation date: 10/04/2021].

³² The European Court of Human Rights decided on 9 July 2019 to communicate to the Government of Poland the application *Grzęda v. Poland* (no. 43572/18), and requested it to submit their observations. The case concerns judicial reform in Poland, which resulted in the mandate of a Supreme Administrative Court Judge elected to the National Council of the Judiciary being terminated before the end of the four-year term.

entrusting other state authorities with its tasks to be unconstitutional³³. Yet that judgment has not been enforced so far.

The constitutional crisis deepened during the COVID-19 pandemic. The need to fight the threats connected with the pandemic requires public authorities to take special measures resulting in extraordinary restrictions of citizens' constitutional rights. In such a situation, the Polish Constitution requires the introduction of a state of emergency. Three extraordinary measures are possible: martial law, state of emergency or state of natural disaster. The COVID-19 pandemic justifies introducing the state of natural disaster. Yet no such state was introduced, because this would mean having to postpone the presidential election, which was to be held on 10 May 2020. An attempt to hold the election in the early period of the pandemic resulted in violations of many fundamental principles of electoral law, including the principle of free and universal election. There was also an unprecedented limitation of the powers of the State Electoral Commission, an independent authority safeguarding free and universal elections. The election scheduled to be held on 10 May 2020 did not take place. It was supposed to be postal voting only. In the conditions of social isolation it was impossible to hold the election. When the presidential election was held later, it gave rise to doubts as to the possible violations of electoral law³⁴. Even though the validity of the presidential election was confirmed by the Supreme Court, its decision also causes doubts relating to the independence of judges appointed with the participation of defectively filled National Council of the Judiciary and the assessment of influence of violations of electoral law on the election result³⁵.

The dispute about the date of the presidential election was the main reason why a state of emergency was not introduced. Due to the threats resulting from the pandemic, the government was, however, forced to use emergency measures. Without the relevant statutory authorization, it introduced a number of emergency solutions resulting in significant restrictions of human rights³⁶. During the

³³ Judgment of 13.12.2016, case no. 13/16 issued before the personnel changes in the Tribunal. Recovered from <https://ipo.trybunal.gov.pl/ipo/Sprawa?cid=2&dokument=14922&sprawa=17154>, [Consultation date: 10/04/2021].

³⁴ Doubts concerned, among other things, amendments to electoral law that were not justified even by the pandemic concerns, independence of the media, and the mechanism for declaring the validity of election. Office for Democratic Institutions and Human Rights, "Republic of Poland Presidential Election 28 June and 12 July 2020, ODIHR Special Election Assessment Mission, Final Report", Warsaw, 23/09/2020, pp. 11 ff. Recovered from <https://www.rpo.gov.pl/sites/default/files/Poland%20Presidential%20Election%202020%20%20final%20report.pdf>, [Consultation date: 10/04/2021].

³⁵ Judgment of the Provincial Administrative Court of 15.9.2020, case no. VII Sa/Wa 992/20. Recovered from https://www.rpo.gov.pl/sites/default/files/Wyrok_WSA_z_uzasadnieniem_15.09.2020.pdf, [Consultation date: 10/04/2021].

³⁶ G. Makowski, M. Waszak, "Polish Legislation during the Pandemic vs. Corruption. Anti-crisis Shields: Completing the Law and Justice State Project?", in *Fundacja Batorego*, p. 10. Recovered

pandemic, legislation was not reviewed by the Constitutional Tribunal, because the parliamentary opposition believes that the CT has lost independence and no longer guarantees impartial examination of the objections concerning unconstitutionality of government regulations. Meanwhile, courts hold that administrative decisions, including decisions imposing penalties for failure to observe restrictions during the pandemic, have been issued without a legal basis and should be annulled³⁷.

The legislation of the pandemic period is characterized by numerous violations of the procedure of adopting statutes, the most glaring example being the PM refusing to promulgate in the Polish official gazette a statute adopted by the parliament and signed by the president into law. The reason for the refusal was that MPs had voted against the government and, as a result, pay rises were granted to too broad a group of physicians. In practice, the constitutional hierarchy of enactments have been reversed. The government took over many matters reserved for statutes and regulates them with executive regulations. This concerns, among other things, the introduction of drastic restrictions upon economic freedom, freedom of movement or freedom of assembly.

3. Basic features of the rule of law crisis in Poland

After a few years of the rule of law crisis in Poland, it is possible to indicate its basic determinants, characteristic features, and observable regularities. It is also possible to determine the role played in the crisis by the principle of rule of law. For this role, it is important to remember the way the principle was introduced into the Polish Constitution, which can be called “revolutionary”. Until 1989, there was no broader reflection in legal literature on the rule of law, while the practice of the system of government was based on dictatorship of the communist party. After 1989 it very soon became a central principle of the system of government. Its development in literature and case law influenced the final form of the 1997 Constitution. The understanding of the rule of law was vital for formulating the principles of correct legislation, setting the boundaries of legislative activity, and providing guarantees of judicial independence. Yet the consensus around such a quickly emerging systemic principle failed to take root, either at the legal plane or at the political one. After the 2015 election, fundamental elements of the rule of law were challenged in official statements and

from https://www.batory.org.pl/wp-content/uploads/2021/01/Tarcze_ENG.pdf, [Consultation date: 10/04/2021].

³⁷ Judgment of the Supreme Court of 16.3.2021, case no. II KK 97/21. Recovered from <http://www.sn.pl/sites/orzecznictwo/orzeczenia3/ii%20kk%2097-21.pdf>, [Consultation date: 10/04/2021].

actions of the legislative and the executive³⁸. Whenever the foundations of rule of law were undermined, this followed a certain pattern of activity. The key mechanism consisted in using a statute to dismantle the judiciary and eliminating the legal means of protection of the Constitution. The first step was to pass statutes which enabled replacing the justices of the Constitutional Tribunal, the Supreme Court, and ordinary court judges. Next, changes of the organization and functioning of courts were introduced. These changes aimed to increase the influence of the legislature and the executive on courts. They made it difficult for the Constitutional Tribunal, the Supreme Court, and other courts to discharge their constitutional functions. The most deplorable effects were produced by changes affecting the National Council of the Judiciary and the creation of the Disciplinary Chamber at the Supreme Court. The loss of independence by the Council – the body which presents candidates for judges to the President of the Republic, undermined not only the independence of individual judges, but the independence of the whole judiciary. In courts there are more and more judges whose independence and impartiality are objected to. This change calls into question the possibility of guaranteeing the right to a hearing before an independent and impartial court in Poland. The new rules of disciplinary proceedings and the activity of the Supreme Court Disciplinary Chamber have led to crossing the proverbial Rubicon in terms of holding judges accountable for infringements of law. Although Article 107(1)(1) of the Law on the System of Ordinary Courts provides that a judge can be held liable for an obvious and glaring violation of law, yet in practice judges can be held liable for any infringement of law and sometimes even for actions that are consistent with law. The phenomenon that, until recently, was not seen in Poland is lifting immunity and holding judges criminally liable for the judgments they issue, which are not glaring violations of law³⁹. The degree of interference in judicial independence can be seen in Article 107(1)(3) of the Law on the System of Ordinary Courts, which prohibits judges from issuing judgments indirectly challenging the effectiveness of judicial appointments. This provision is explicitly oriented towards annulling the effects of the judgment in which the CJEU points at the defects in the procedure of appointing judges and at lack of guarantees of the right to an impartial and independent tribunal. The limitation of courts' independence is of total dimensions. It concerns the manner of appointing judges, the way they administer justice, and the method of removing them from office. This limitation occurs at the substantive, procedural, and systemic levels. It makes the judiciary subordinate to the political branches of government. These branches not only disregard the constitutional guarantees of judicial independence, but – with their

³⁸ M. Ziółkowski, “Constitutional Moment and Polish Constitutional Crisis 2015-2018 (A Few Critical Remarks)”, in *Przegląd Konstytucyjny*, 4 (2018), pp. 87 ff.

³⁹ J. Kościarczyński (eds.), *Justice Under Pressure – Repressions as a Means of Attempting to Take Control Over the Judiciary and the Prosecution in Poland. Years 2015-2019*, Iustitia, Warszawa 2019, p. 63.

actions – show that there are no boundaries whatsoever. The particular nature of the Polish abusivism lies in the fact that without a formal constitutional amendment the fundamental principles of the system of government provided for in it have been invalidated. This aim was achieved using statutes, presidential decrees, and activities of the Minister of Justice, who is at the same time the Prosecutor General. This was done under the banner of reforming the administration of justice and subordinating the judiciary to the sovereign.

From the perspective of the last few years, it is clear that abolishing an independent judiciary is not the end in itself, but the means to a considerable extension of the freedom of activity of the legislature and the executive. The Constitution no longer restrains them. The constitutional norms, including ones that enshrine human rights and define the powers of central authorities of the state, become just policies (so-called programmatic norms). An example is the aforementioned change of the systemic position of the National Council of Radio Broadcasting and Television, which deprived the Council of influence on the activities of public radio and television stations. Lack of judicial independence made enabled significant infringements of the rule of law in the fight against the COVID-19 pandemic. One can ask if the unconstitutional legislative activity of the government and the Sejm, the permanent transgression of permissible limits of interference with human rights, will not bring on lasting systemic changes that will be irreversible under the existing Constitution?

The characteristic feature of the Polish constitutional crisis is that the constitutional disputes about judicial independence are transferred to the supranational level. This is demonstrated by the aforementioned opinion of the Venice Commission on the independence of the Constitutional Tribunal, numerous documents of the European Parliament and the European Commission, as well as the latter's applications to the CJEU⁴⁰. Against the background of the Polish cases, we can almost speak of the establishment of a line of case law of the CJEU where the European standard of judicial independence is being defined. However, the final shape of such a standard is not free from doubts⁴¹. Objections concerning the rule of law in Poland were one of the reasons behind the adoption of the Regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalized deficiencies as regards the rule of law in the Member State⁴². Currently, cases concerning violations of the right to a fair trial, which are pending before the ECtHR, are entering a decisive phase. We can simultaneously speak of a consistent trend of Polish authorities refusing to enforce CJEU judgments. None of the aforementioned judgments led to any improvement

⁴⁰ The last application alleging a systemic violation of independence of courts was submitted to the CJEU by the European Commission on 31.3.2021, C-204/21.

⁴¹ P.M. Rodriguez, "Poland Before the Court of Justice: Limitless or Limited Case Law on Art. 19 TEU?", in *European Papers*, 5 (2020), n. 1, p. 343.

⁴² Applications concerning the conditionality mechanism provided for in the Regulation were submitted to the CJEU by Poland (C-157/21) and Hungary (C-156/21).

in the political and legal situation surrounding courts. Rather, the opposite phenomenon is observed. Polish courts' attempts to enforce CJEU judgments are met with resistance from the legislature and the executive⁴³.

4. Why have courts failed to defend the rule of law?

The titular question about judicial independence in a state which is losing the traits of a rule-of-law state can be reversed. We can ask what degree of limitation of judicial independence causes a state to cease to be a rule-of-law state. The case of Poland shows that these issues are closely interrelated. Violations of the principle of supremacy of the Constitution, separation of powers, and constitutional rules of enacting laws had the aim of limiting judicial independence. Depriving courts of their independence makes it easier to further violate these principles, while making it more difficult or impossible to restore rule of law. In Poland, we observe an escalation of the dispute that existed before 2015, albeit on a lesser scale. The Constitution increased the influence of the judiciary on the legislature and the executive. The Constitutional Tribunal and courts justifying their power with the need to protect human rights started to encroach upon the areas of public authority, previously considered the realm of political branches of government. Granting human rights binding character at the level of constitution and international law resulted in a change of the paradigm of interpreting and applying the law. Extension of the subsumption model of applying the law to include the possibility of weighing the principles led to extension of not only the scope of judicial assessment of acts of the executive, but also of the legislature. The accusation of transforming a rule-of-law state into a rule-of-judge state became the fertile ground for legal populism and led to negation of judicial independence. Consequently, in Poland the dispute is not about the scope of judicial power, but about whether the adjudicating bodies are still courts within the meaning of Article 45(1) of the Constitution, Article 6 of the Convention, and Article 19 TEU.

The case of Poland shows that courts have limited possibilities of taking action to protect their own independence. These limitations affect also the Constitutional Tribunal. Changes introduced by statutes in the system of courts, court procedures, and substantive grounds for adjudication render administering justice considerably more difficult. In few cases can courts adjudicate solely on the basis of the Constitution, international agreements or EU law. Even the Constitutional Tribunal adjudicates on the basis of a procedure set out in a statute. Loss of courts' trust in the independence of the Constitutional Tribunal resulted in dispersed judicial review of constitutionality of statutes. However, protection of

⁴³ This is indicated by the European Commission in its application of 31.3.2021, C-204/21, requesting an interim measure in the form of the CJEU issuing a complete prohibition of activity of the Supreme Court Disciplinary Chamber (C-204/21 R).

courts' own independence and human rights through dispersed review of constitutionality of statutes is limited in scope. The reason is that courts cannot replace the legislature in creating the bases of their own decisions. The inability to guarantee in Poland the right to a tribunal established by law, as referred to in Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, has two dimensions. On the one hand, statutes introduce unconstitutional norms, which limit or exclude exercise of the right to an independent and impartial court. On the other hand, when courts refuse to apply such statutes, this means that in the certain cases there is no statutory base for administering justice.

The constitutional crisis in Poland exposed the weakness of classic constitutional mechanisms guaranteeing separation of powers. The parliamentary system which implements the assumption of rationalization of parliamentarism was intended by the Constitution-makers to ensure stable parliamentary majority and a stable government based on this majority. This aim is served, among other things, by electoral thresholds, D'Hondt's seat allocation method or constructive vote of no-confidence. The homogeneity of the parliament and the government should be counterbalanced by the President of the Republic elected in universal election. In 2015 the parliamentary majority in the Sejm and Senate was gained by the same political parties. They subsequently formed the government. These parties also supported the candidate who won the presidential election. The parliament, the government, and the president are from the same political camp. Political homogeneity is additionally reinforced by the party system based on two dominant and opposing political parties. The articulate legal institutionalization of parties makes it difficult to form new political parties and change the political scene. This facilitates not only the legal and political interference with judicial independence, but also a serious limitation of the separation of powers.

Of little effect were the mechanisms of EU law that were supposed to protect the independence of Polish courts. The principle of rule of law, which guarantees judicial independence, is among the constitutional foundations of European Union law. As long as the rule of law was universally accepted as a principle of EU law, law was an efficient instrument of integration. The fact that some Member States' governments and parliaments challenged the fundamental elements of the rule of law creates a new situation. The law of the European Union is to be not so much an instrument to facilitate integration as an instrument imposing the duty to adhere to the basic principles of integration⁴⁴. In case of violations of the treaty bases, the 'nuclear' weapon was to be Article 7 TEU and the procedure it provides for, whereby the European Council determines the existence of a serious and persistent breach by a Member State of the values referred to in Article 2 TEU. The practice so far has shown this instrument as

⁴⁴ A. von Bogdandy, "Tyrannei der Werte? Probleme und Wege Europäischen Schutzes nationaler Rechtsstaatlichkeit", in *MPIL Research Paper*, 4 (2019), p. 4.

being inefficient both in regard to Hungary and to Poland⁴⁵. Until now, judicial protection of rule of law by the CJEU has also proven inefficient. Firstly, the question arises to what extent the CJEU can unify the standards of rule of law for all Member States? Do the different traditions, different models of rule of law, and diverse legal solutions for courts permit creating specific standards for the protection of their independence? An example is the different manners of appointing judges and the attempts to define the required degree of independence of authorities participating in the appointment process. Building the standards of rule of law at European level is fraught with particular difficulties that do not arise at national level. One of the difficulties in unifying the standards of independence is the manner of appointing judges⁴⁶. A major limitation is connected with the difficulties in enforcing CJEU judgments when a given Member State challenges the foundations of rule of law. An example to illustrate the scale of the difficulties is the aforementioned CJEU judgment of 19 November 2019. In response to the request for a preliminary ruling submitted by the Polish Supreme Court, the CJEU found the National Council of the Judiciary and the Supreme Court Disciplinary Chamber lacking in independence. Therefore, it ordered Polish courts to examine whether judges appointed with the participation of the NCJ in whose functioning there are faults, in particular the judges of the Supreme Court Disciplinary Chamber, guarantee the right to an independent and impartial tribunal. When enforcing this judgment, the Supreme Court in its judgment of 5 December 2019, case no. III PO 7/19⁴⁷, and in the joint resolution of three Chambers of 23 January 2020, case no. BSA I-4110-1/20⁴⁸, found that such judges do not guarantee the right to an impartial and independent tribunal. In addition, the Supreme Court set out the criteria on whose basis, in any given case, the independence of a court should be examined and its results determined. The response to these judgments was the adoption of a statute law which introduced a new disciplinary tort for judges. A judge commits a tort when, applying the criteria of court independence set out in CJEU judgment, he/she examines whether that court guarantees the right to impartial hearing of the case. In other words, acting in accordance with CJEU guidelines exposes a judge to the threat of disciplinary liability. The person who decides whether or not to initiate proceedings is the disciplinary attorney, who is subordinate to the justice minister, while decisions relating to disciplinary

⁴⁵ R. Grzeszczak, "Skuteczność unijnych procedur ochrony praworządności w stosunku do państw członkowskich", in *Państwo i Prawo*, 6 (2019), p. 41.

⁴⁶ Case of *VQ v Land Hessen*, Judgment of the Court (Third Chamber) of 9.7.2020, C-272/19, ECLI:EU:C:2020:535.

⁴⁷ Judgment of the Supreme Court of 5.12.2019, case no. III PO 7/18. Recovered from <http://www.sn.pl/sites/orzecznictwo/orzeczenia3/iii%20po%207-18-2.pdf>, [Consultation date: 10/04/2021].

⁴⁸ Resolution of the formation of the combined Civil Chamber, Criminal Chamber, and Labour Law and Social Security Chamber, 23.1.2020, case no. BSA I-4110-1/20. Recovered from http://www.sn.pl/aktualnosci/SiteAssets/Lists/Wydarzenia/AllItems/BSA%20I-4110-1_20_English.pdf, [Consultation date: 10/04/2021].

liability are to be made by the Disciplinary Chamber, as to whose independence the CJEU has expressed major doubts. Subsequent proceedings before the CJEU only limited the activity of the Disciplinary Chamber. But this limitation caused a situation where the prosecutors' offices, supervised by the justice minister, initiate criminal, rather than disciplinary, proceedings against judges⁴⁹.

In Poland, in the last few years, there have been systemic infringements of the fundamental principles of enacting and applying the law. Undermining judicial independence is an essential element of the so-called systemic "reforms" implemented by the governing political party, Law and Justice, and the President of the Republic, who is also this party's nominee. This programme is implemented with considerable public support, as demonstrated by the fact that Law and Justice won the elections in 2015 and 2019, while president Andrzej Duda was elected in 2015 and re-elected in 2020. Representatives of the party and of both the legislature and the executive declare that the "reform" of courts is within the standard of the rule of law. Referring to the Constitution, they indicate that limiting the powers of courts and submitting judges to greater control of the legislature and executive is justified in a democratic state. It is, after all, the sovereign, not the courts or the Constitutional Tribunal, who decides about the form of judicial independence. Refusal to enforce CJEU judgments or to respect the standards resulting from ECtHR case law is justified by both the legislature and the executive with the principle of state sovereignty. One of the elements of this principle is the state's exclusive competence to shape the system of courts and the status of judges. Consequently, the CJEU has no competence to lay down standards of independence of Polish courts, as such acts are *ultra vires*⁵⁰. This is the *ratio* underlying the so-called muzzle law, which bans judges from applying the test of independence formulated in CJEU judgment of 19 November 2019. It demonstrates that without a general legal and political consensus about judicial independence, courts are unable to protect it.

5. *Doppelstaat* instead of *Rechtsstaat*?

The Polish legal order displays the features of what E. Fraenkel called a dual state (*Doppelstaat*)⁵¹. The political authorities consider that the principle of sovereignty must not be limited by the principle of rule of law, which results in actual

⁴⁹ European Court on Human Rights, application no. 21181/19 *Igor Zygmunt TULEYA against Poland*, lodged on 10.4.2019. Recovered from [https://hudoc.echr.coe.int/eng#{"appno":\["21181/19"\],"itemid":\["001-204784"\]}](https://hudoc.echr.coe.int/eng#{), [Consultation date: 10/04/2021].

⁵⁰ S. Biernat, "How Far Is It from Warsaw to Luxembourg and Karlsruhe: The Impact of the PSPP Judgment on Poland", in *German Law Journal*, 21 (2020), n. 5, p. 1115.

⁵¹ E. Fraenkel, *The Dual State. A Contribution to the Theory of Dictatorship*, Oxford University Press, Oxford-New York, 2017, p. 71.

abolition of constitutional limitations. There has been a considerable restriction upon the courts' actual ability to control the activity and decisions of the legislature and the executive. The decision-making centres shift from the constitutional authorities of the state to the parliamentary majority party. The structure and *modus operandi* of the party's decision-making centre is not transparent⁵². Activities of the state authorities focus on attaining current political goals. There is more to the dualism in the state's functioning than just political authorities and courts refusing to recognize one another's decisions. In areas important for the political power, laws are enacted and applied without the constitutional guarantees, while in those unimportant from the political point of view, e.g. civil or administrative law, the legal system operates with those guarantees.

Challenging the foundations of rule of law and judicial independence is not based on any coherent and thoughtful vision aimed at reforming the state's system of government. Initially, one could discern in such measures an attempt to return to 19th-century concepts of a state ruled by laws or legislative state (*Gesetzstaat*). Rejection of the principle of supremacy of the Constitution meant that in fact statutes became the supreme law. During the COVID-19 pandemic also the principle of exclusivity of statute started to erode. Constitutional principles setting the boundaries of enacting laws ceased to have any practical importance. Constitutional provisions expressing human rights lost their binding character. The same was true of the right to an impartial and independent tribunal. The substance, scope and guarantees of this independence are decided by the legislature and the executive. This situation cannot be reconciled with the Polish version of the principle of constitutionalism, which is based on supremacy of the Constitution, the principle of democracy, separation of powers, and human rights, which are directly applicable and binding upon all public authorities. Article 8 of the Constitution enshrines the principle supremacy of the Constitution and the imperative of its direct application. The second chapter of the Constitution contains a catalogue of human rights, presented as binding legal principles which can be limited only subject to the principle of proportionality. The right to a fair trial is the basic means of protection of these rights. In the case law of the Constitutional Tribunal the principle of judicial independence and separation of courts from the other branches of government was, until recently, an instrument safeguarding exercise of the right to an impartial tribunal and a fair hearing of the case. Thus we are dealing with a systemic discrepancy between the constitutional plane and the plane of statutes and implementing instruments⁵³. Courts lost the ability to eliminate this discrepancy in a systemic way. But the Constitution still remains the basis for the judgments they issue.

⁵² W. Sadurski, "How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populism Backsliding", in *Sydney Law School Research Paper*, 1 (2018), pp. 65 ff.

⁵³ T. Drinóczi. A. Bień-Kacała, "Illiberal Constitutionalism: The Case of Hungary and Poland", in *German Law Journal*, 20 (2019), n. 8, p. 1156.

The legal system of a state whose system of government is to a lesser and lesser degree regulated by the Constitution, and increasingly by statutes, and – with time – by governmental regulations, becomes a dualist system. Within this system, there operate statutes and other legal instruments that clearly infringe the Constitution. This justifies courts' refusal to apply them under Article 178(1) of the Constitution, which provides that a court is subject to the Constitution and statutes. Another basis for refusal is Article 91(3) of the Constitution, which provides that each public authority should refuse to apply national laws, including statutes, if they are inconsistent with European Union law. In practice there arises a state of uncertainty as to whether Polish statutes and other normative instruments apply or not and to what extent they should be applied. This uncertainty is aggravated by the doubts about the status of courts as such and of judges appointed with the participation of the unconstitutionally functioning National Council of the Judiciary. Judgments issued by those courts give rise to doubts as to their validity and enforceability. This legal dualism grew during the pandemic. This is demonstrated by the aforementioned examples of the government limiting constitutional rights and courts' reactions to these limitations. In many cases, courts refuse to apply governmental regulations, so they set aside administrative decisions or discontinue proceedings concerning breaches of prohibitions issued during the pandemic⁵⁴.

The dualism of law presents particular challenges for the judiciary. These challenges are not taken up by the Constitutional Tribunal. It is courts that grapple with the problem of unconstitutionality of enactments and acts of applying the law, though there are noticeable differences of opinions between courts, too. We can find judgments based on unconstitutional governmental regulations and judgments in which the Constitutional Tribunal challenges the courts' right to interpret statutes in accordance with the Constitution and with EU law⁵⁵. All courts adjudicate in conditions of lack of independence. It is likely that legal dualism will be limited at the expense of further limitation of judicial independence. This will speed up the process of deconstitutionalization of public authority, as the rules of its exercise will no longer be set by law.

Legal dualism in Poland can hardly be expected to be eliminated by actions of the European Union. Subsequent judgments in which the CJEU confirms Poland's infringements of the rule of law result rather in deepening the dualism. The CJEU expects Poland to restore a state consistent with EU law, while political authorities declare they will take no such measures, as they believe the CJEU to be acting *ultra vires*. These declarations are followed by legislative and actual

⁵⁴ Judgment of the Supreme Court of 16.3.2021, case no. II KK 97/21. Recovered from <http://www.sn.pl/sites/orzecznictwo/orzeczenia3/ii%20kk%2097-21.pdf>, [Consultation date: 10/04/2021].

⁵⁵ Judgment of the Constitutional Tribunal of 20.4.2020, case no. U 2/20. Recovered from <https://ipo.trybunal.gov.pl/ipo/Sprawa?cid=1&dokument=20180&sprawa=22632>, [Consultation date: 10/04/2021].

measures which make it difficult or impossible for courts and other state authorities to restore a state of consistency of Polish law with EU law. Dualism is also visible in the manner of making referrals for preliminary rulings. The CJEU formulates the conditions of adherence to EU law, but the courts which submit questions of law are unable to meet these conditions. With the best of intentions, this is not possible when the legislature and the executive unequivocally oppose it.

6. Can the rule of law be restored?

Does lack of judicial independence and its influence on the whole system of government mean that is impossible to restore the rule of law on the basis of the existing Constitution? An analysis of the mechanism of suppressing the rule of law shows that this is a probable scenario. What proved to be the key element of this mechanism was negation – by the parliamentary majority, the government and the president – of the principles of supremacy of the Constitution, binding character of constitutional rights of an individual, and separation of the judiciary. Rejecting the fundamental assumptions of rule of law means that many political and legal disputes cannot be resolved using the legal means provided for in the Constitution. Similarly, we can hardly expect political consensus restoring adherence to the above principles to be reached again. The causes of the constitutional crisis in Poland would require a separate paper. Here, some of its sources can be indicated, such as the adaptive character of the of rule of law conception and problems resulting from the systemic transformation after 1989, with law being perceived as an insufficiently effective means of solving them. The upshot was facilitating the growth of legal populism after 2015. Moreover, the development of rule-of-law state was not accompanied by adequate development of the principle of welfare state, which could have prevented social exclusion. The Constitution itself does not establish sufficient mechanisms to prevent excessive concentration of political power. The constitution-makers attached great weight to rationalizing parliamentarism. As Poland's example shows, neither separation of the judiciary, nor the strong – prior to 2015 – position of the Constitutional Tribunal were sufficient guarantees of rule of law. The possibility of concentrating the political power of the legislature and the executive, lack of a strong position of regions and local governments, as well as the two-party system enabled Law and Justice party to reject the constitutional principle of rule of law and to create lasting barriers preventing it from being restored.

Currently, despite the existing limitations, courts still play an important role in protecting human rights. They are, however, unable to defend by themselves their constitutional position, which is necessary for an independent and impartial administration of justice. Courts face two fundamental limitations. Firstly, adjudicating in compliance with the Constitution and with EU law can result in disciplinary or criminal sanctions, leading to removal of the judge from office.

Secondly, administration of justice in a statutory law system is based mainly on statutes. In certain cases, courts can refuse to apply some statutory provisions, but cannot themselves create the law on which to base the judgments. Therefore, in the long run, judicial protection of constitutional rights will weaken.

So far, neither the European Commission nor the CJEU has been able to prevent violations of rule of law or EU law. There are doubts whether the European Commission does have the political will to prevent such violations. The European Parliament points out to lack of effects of the Commission's measures⁵⁶. In the case of the CJEU, what has become apparent is the limited possibilities to use preliminary rulings to defend the rule of law. For referrals for preliminary rulings to be efficient, once an answer is given, the judgment of the CJEU should be enforced by an independent court cooperating with the legislature and the executive. Simultaneously, it is becoming a permanent phenomenon for Poland to confirm human rights infringements. The process will probably be strengthened after the judgment in *Grzęda v Poland*. The statements formulated by the ECtHR in *Astráðsson v Iceland* case indicate that the procedure of appointing judges in Poland would be deemed contrary to Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms. But bringing Polish law and practice of authorities to the Strasbourg standards seems unlikely. The effectiveness of EU law and the European Convention on Human Rights in protecting rule of law remains an open issue.

What is becoming a growing problem in Poland is not just the intensity of violations of rule of law, but also their lasting character. Even though, formally, the Constitution has not been changed, the number and gravity of infringements may be difficult to remove. A question arises whether it will be possible to apply constitutional rules after independent institutions in charge of their observance cease to function? In other words, are the changes made in the legal order reversible?

⁵⁶ European Parliament resolution of 25.3.2021 on the application of Regulation (EU, Euratom) 2020/2092, the rule-of-law conditionality mechanism (2021/2582(RSP)).