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Restoring the Polish Constitutional Tribunal's Judicial Independence without breaching the Legal Obligations emanating from the Rule of Law

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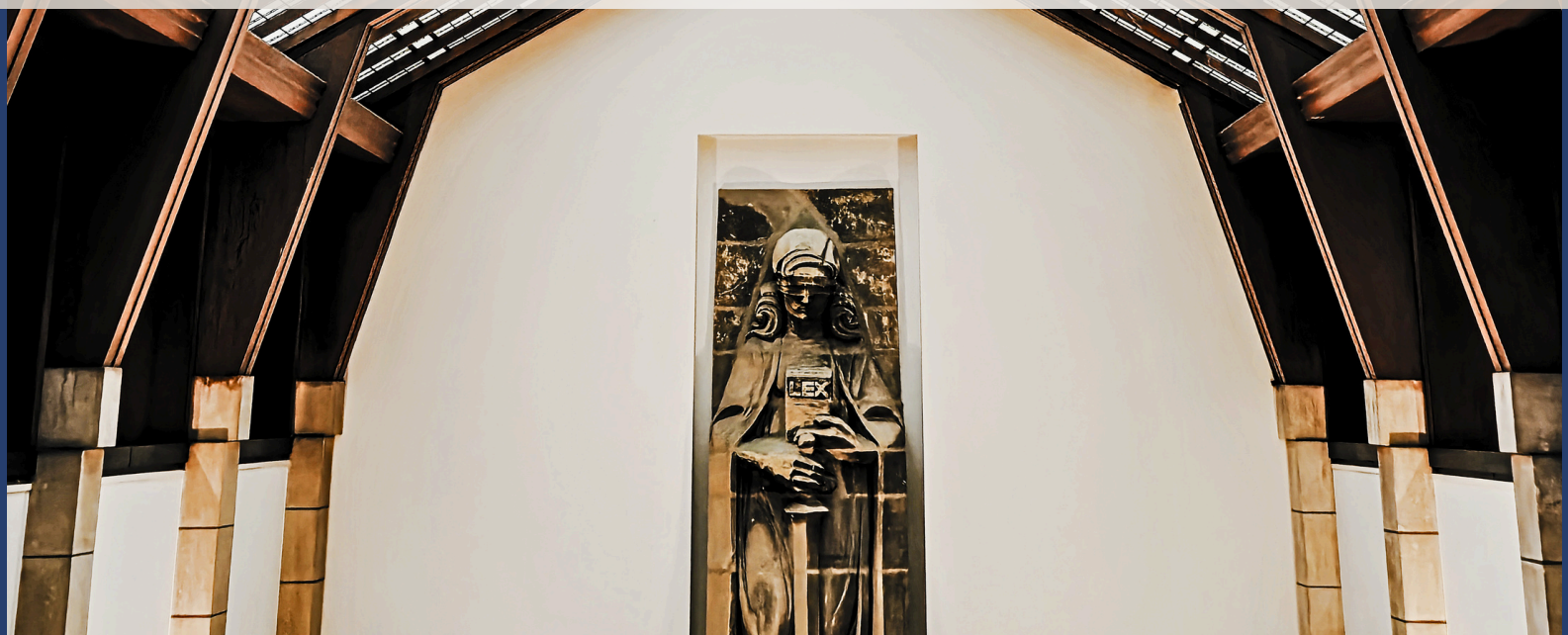

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Abstract

This Master's Thesis examines how the EU value of the Rule of Law, specifically the principle of judicial independence, can be restored within the Polish Constitutional Tribunal ("PCT") without breaching the very legal principles that substantiate that value. Numerous academic contributions outlined in detail how the Rule of Law has been eroded in Poland from 2015 onwards and how the EU institutions reacted to these developments. The present research does not follow in these footsteps; instead, it seeks to propose a potential 'way forward' and outline how judicial independence could be restored within the PCT. This Constitutional Tribunal, which is intended to serve as the guardian of the national Constitution, has been widely perceived as 'captured' following a hostile takeover by the PiS government.

Consequently, the underlying challenge in restoring the PCT's judicial independence revolves around the procedure by which judges appointed through unconstitutional procedures can be lawfully removed from office. An important caveat must be added here: in contrast to existing academic proposals, the current research acknowledges that any attempt to restore the Rule of Law, which involves the removal of serving judges from office, encounters objections from the value itself. In more detail, these objections originate from the principle of judicial irremovability, which sets out that judges should remain in office until reaching the obligatory retirement age or the expiry of their mandate. Consequently, this research emphasises the normative and doctrinal constraints inherent in any judicial dismissal, and seeks a resolution within the boundaries of EU law.

To this end, the Thesis develops the concept of "EU militant Rule of Law", which offers a normative framework allowing for the careful reinterpretation of certain Rule of Law principles, such as judicial irremovability, where their rigid application would perpetuate institutional illegitimacy. Subsequently, drawing on jurisprudence from the Court of Justice of the European Union and the European Court of Human Rights, it argues that the dismissal of 'quasi-judges' appointed under serious procedural flaws may be permissible when based on a compelling legitimate ground and implemented through individualized, proportionate procedures subject to independent oversight. Such a legally constrained approach to restoring the PCT's independence is not only compatible

with EU Rule of Law obligations, but normatively desirable. The Thesis concludes by arguing that a Rule of Law-compliant restoration creates the conditions for sustainable constitutionalism both institutionally and societally.

List of Abbreviations

AG	Advocate General
CFR	Charter of Fundamental Rights of the European Union
CoE	Council of Europe
CJEU	Court of Justice of the European Union
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECJ	European Court of Justice
EU	European Union
Para/Paras	Paragraph/Paragraphs
PCT	Polish Constitutional Tribunal
PiS	Law and Justice (*Prawo i Sprawiedliwość*) Party
TEU	Treaty of the European Union
TFEU	Treaty on the Functioning of the European Union

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1. Introduction

1.1 Setting the Scene: Restoring the Rule of Law, a Daunting Task?

Over the span of eight years, Poland experienced two parliamentary elections that fundamentally changed the direction of Polish politics. In 2015, the right-wing Law and Justice Party ("PiS") won the elections and an absolute majority of seats in Parliament,[1] allowing the party to subsequently initiate multiple reforms of the Polish judiciary and bend the Polish constitution at will.[2] These developments were not left unchallenged from, *inter alia*, judgements of the Court of Justice of the European Union ("CJEU") and European Court of Human Rights ("ECtHR"),[3] the first employment of the Rule of Law Framework,[4] and an increased use of conditionality mechanisms in EU secondary law resulting in the freezing of billions in EU funds.[5] In October 2023, the Civic Platform, headed by re-elected party leader and former European Council President Donald Tusk, formed a wide centrist coalition and obtained the parliamentary majority.[6] Subsequently, the incoming Parliament elected Donald Tusk as the new Prime Minister on 11 December 2023. His appointment was widely praised, but it alone cannot repair what eight years of nationalist and populist rule previously damaged. Thus, the new government, particularly the Minister of Justice Adam

[1] Matteo Bonelli, 'A Union of Values' (PhD Dissertation, Maastricht University 2019), 277.

[2] Laurent Pech and Kim L Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) 19(1) Cambridge Yearbook of European Legal Studies 3, 5.

[3] See, for example, Case C-619/18 *Commission v Poland (Indépendance de la Cour suprême)* [2019] EU:C:2019:531; *Dolińska-Ficek and Ozimek v Poland* App nos 49868/19 and 57511/19 (ECtHR, 11 November 2021). See also, *Section 2.2* of this Master's Thesis providing a more detailed overview of the CJEU and ECtHR lines of jurisprudence in this area.

[4] See, European Commission, 'Commission Recommendation (EU) 2018/103 of 20 December 2017 regarding the rule of law in Poland complementary to Recommendations (EU) 2016/1374, (EU) 2017/146 and (EU) 2017/1520' [2017] L 17/50.

[5] Kim L Scheppele and John Morijn, 'What Price Rule of Law', in Anna Södersten and Edwin Hercock (eds), *The Rule of Law in the EU: Crisis and Solutions* (SIEPS 2023) 39, 42-45. These frozen funds can be accessed when the country reaches certain milestones (including the restoration of judicial independence). See, European Commission, Press Release, 'Poland's efforts to restore rule of law pave the way for accessing up to €137 billion in EU funds' [2024]. In more detail, this number is composed of €59.8 billion in grants and loans under the Recovery and Resilience Facility and €76.5 billion under the Common Provisions Regulation conditioned on the fulfilment of horizontal enabling conditions.

[6] For the official results of the 2023 parliamentary elections see, 'Polish Parliamentary Elections 2023' (*National Electoral Commission*, 17 October 2023) <https://wybory.gov.pl/sejmsenat2023/en> accessed on 9 January 2024.

Bodnar, faces many demanding challenges, one of which is the restoration of the Rule of Law within the country.[7]

Numerous academic contributions outlined in detail how the Rule of Law has been eroded in Poland from 2015 onwards and how the European Union ("EU") and Council of Europe ("CoE") reacted to these developments.[8] This Master's Thesis does not follow in these footsteps; instead, it seeks to propose a potential 'way forward' and outline how the Rule of Law could be restored in the Polish Constitutional Tribunal ("PCT"). From 2015 onwards, the PCT was subject to a 'hostile takeover' by PiS. Subsequently, this 'captured' institution has undermined the separation of powers between the different State branches, functioning not as a 'watchdog' of the Polish Constitution but rather as an 'instrument' of the government.[9] Thus, in the broader process of the Rule of Law restoration in Poland, it seems evident that the transformation of the PCT into a 'Rule of Law actor' should be one of the priorities of the Polish authorities. This institution, furthermore, poses significant challenges to the Rule of Law restoration itself, as it not only enabled the Rule of Law erosion but will also likely tamper the process of the value's restoration,[10] by, for example, declaring

[7] For a recent summary of Adam Bodnar's 'action plan' to restore the Rule of Law see, Adam Bodnar, 'Incremental Rule of Law Restoration?' (Inaugural lecture for the CEU Democracy Institute Rule of Law clinic, Budapest, 27 May 2024) <https://revdem.ceu.edu/2024/06/07/adam-bodnar-in-budapest/> accessed 28 May 2024.

[8] For an overview see, Laurent Pech and Kim L Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) 19(1) Cambridge Yearbook of European Legal Studies 3; Tímea Drinóczi and Agnieszka Bień-Kacała (eds), *Rule of Law, Common Values, and Illiberal Constitutionalism: Poland and Hungary Within the European Union* (Routledge 2021); Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press 2019); Matteo Bonelli, 'A Union of Values' (PhD Dissertation, Maastricht University 2019), 276-302.

[9] Michal Kovalčík, 'The instrumental abuse of constitutional courts: how populists can use constitutional courts against the opposition' (2022) 26(7) The International Journal of Human Rights 1160, 1163-1172; Mirosław Wyrzykowski and Michał Ziółkowski, 'Illiberal constitutionalism and the Judiciary' in András Sajó, Renáta Uitz, and Stephen Holmes, *Routledge Handbook of Illiberalism* (Routledge 2021) 517, 520. It is also interesting to note that this role of the Constitutional Tribunal is generally justified with arguments such as that this unelected (and elitist) institution should not restrict the exercise of the "will of the majority" by Parliament.

[10] András Sajó, 'The Limits of Judicial Irremovability from the Perspective of Restoring the Rule of Law: A View from Strasbourg' in Filipe Marques and Paulo Pinto de Albuquerque, *Rule of Law in Europe* (Springer 2024) 55, 56.

certain reforms 'unconstitutional'.[11] Acknowledging that this institution has been partly captured, the underlying issue in restoring the Tribunal's judicial independence thus revolves around the procedure by which non-independent judges can be removed from office.

The Polish transformation from an illiberal to a liberal regime is not the first instance in history where this issue has emerged. One notable example occurred when an English external advisor to the Czech government, established after the fall of the Communist regime, was confronted with the task of reforming the national judiciary. He suggested, although with some form of black humour, to "hang all judges".[12] Even if the brutality is left aside, and the proposal is interpreted as a call for a complete overhaul of the judiciary, it remains, considering the context of a country in the process of a peaceful societal transition at the end of the 20th century, little more than a joke.[13] This historical example may further suggest that the procedure for removing judges from office is not only important for the sake of respecting the Rule of Law, but also has a broader societal impact.

In contemporary times, the prevailing State structure in most European countries has become that of 'liberal democracy', which means that every transition of power should be peaceful and in line with the Rule of Law.[14] Consequently, also the potential removal of judges from office should respect

[11] While PiS Politicians are no longer part of the Polish government and parliamentary majority, the party still appointed judges to the Constitutional Tribunal, who previously supported the interest of the party. What hinders these judges from continuing their loyalty to PiS and hampering the restoration of the Rule of Law? In the words of András Jakab, there is a danger that these individuals act like "a deep state of the *ancien régime* countering the new government". See, András Jakab, 'How to Return from a Hybrid Regime into a Constitutional Democracy? Hypothetical Constitutional Scenarios for Hungary and a Few Potential Lessons for Poland' in Michal Bobek and others (eds), *Transition 2.0, Re-establishing Constitutional Democracy in EU Member States* (Nomos 2023) 145, 146.

[12] Ivo Pospíšil and Kokeš Marian, *In dubio pro libertate. Úvahy nad ústavními hodnotami a právem. Pocta Elišce Wagnerové u příležitosti životního jubilea* (Masaryk University 2009), 247 cited in Case C-132/20 *BN and Others v Getin Noble Bank S.A.* [2021] EU:C:2021:557, Opinion of AG Bobek, paras 1-5.

[13] ibid.

[14] Dieter Grimm, 'The Democratic Costs of Constitutionalisation: The European Case' (2015) 21(4) European Law Journal 460, 464; Giovanni Capoccia, 'Militant Democracy: The Institutional Bases of Democratic Self-Preservation' (2013) 9(1) Annual Review of Law and Social Science 207, 219.

the Rule of Law. However, in so far as the restoration of judicial independence involves the dismissal of judges from office, it encounters objections from the value of the Rule of Law itself. These originate from the principle of judicial irremovability, which sets out that judges should remain in office until reaching the obligatory retirement age or the expiry of their mandate.[15] It thus seems that the various principles that substantiate the Rule of Law are in 'tension'[16] with each other and that the value might sometimes require its own disregard.[17] In other words, the balancing of apparent conflicting Rule of Law principles is required and the value is not breached if the 'right balance' is found.[18]

In the current debate around the restoration of the Rule of Law in the PCT, two fundamentally opposing views can be identified. On the one hand, there are renowned Polish Constitutional law professors and practitioners arguing that previous laws enacted by PiS require measures that, while essentially in violation of the Rule of Law, are justified in light of the overall aim of restoring the Rule of Law in Poland. Two examples of these "legally revolutionary" arguments can be considered.[19] First, Lech Garlicki, the former Polish judge at the ECtHR, called for bold measures to remove the pathologies created by the PiS government. These measures enjoy a 'presumption of constitutionality' and are justified by the aim of restoring the constitutional

[15] Case C-619/18 *Commission v Poland (Indépendance de la Cour suprême)* [2019] EU:C:2019:531, para 76.

[16] The idea of the different principles of the Rule of Law being in tension with each other will be further explored in *Chapter 1*. For now, it can already be stated that the dismissal of non-independent judges would arguably benefit the principle of effective judicial protection, which requires national courts to satisfy guarantees of judicial independence, but conflict with principles such as judicial irremovability and legal certainty.

[17] András Sajó, 'The Limits of Judicial Irremovability from the Perspective of Restoring the Rule of Law: A View from Strasbourg' in Filipe Marques and Paulo Pinto de Albuquerque, *Rule of Law in Europe* (Springer 2024) 55, 60.

[18] European Commission for Democracy through Law (Venice Commission), 'Poland Urgent Joint Opinion on the Draft Law Amending the Law on the National Council of the Judiciary' [2024] CDL-AD(2024)018, 19.

[19] András Jakab discusses these "legally revolutionary" arguments in his work. These entail, for example, breaking the legal continuity of public officials appointed by the illiberal regime. See, András Jakab 'How to Return from a Hybrid Regime into a Constitutional Democracy? Hypothetical Constitutional Scenarios for Hungary and a Few Potential Lessons for Poland' in Michal Bobek and Others (eds), *Transition 2.0, Re-establishing Constitutional Democracy in EU Member States* (Nomos 2023) 145, 170-204.

order.[20] Second, Wojciech Sadurski, a Constitutional law Professor, advocated for the "extinction" of the PCT.[21] On the other hand, this Thesis argues that the restoration of the Rule of Law should be in line with legal obligations stemming from the value itself. In this respect, it must be remembered that any interference with the current judges' terms of office interferes with the principle of judicial irremovability, which forms an essential guarantee of the principle of judicial independence.[22] This principle is, in turn, one of the principles forming part of the Rule of Law.[23] In summary, the Rule of Law delineates the legal boundaries within which a State must operate, even when reinstating the value itself. As a result, it prohibits certain actions, such as the stark illustrations of "hanging" judges or "extinguishing" the Tribunal.

Consequently, this Master's Thesis aims to address the following research question: "How could the Rule of Law, in particular judicial independence, be restored in the Polish Constitutional Tribunal without breaching the Rule of Law's legal obligations stemming from EU law?". Apart from establishing *how* this could be achieved, it is also explored *why* it is in the first place desirable to respect the Rule of Law in restoring the value.

1.2 Structure of the Master's Thesis

Having established the context and research question, this Section sets out how the research question will be addressed. The first Chapter of this Thesis establishes the conceptual framework. Consequently, before examining how the Rule of Law, and specifically judicial independence, can be restored, it is first

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[20] Ewa Bagińska and Others, Debate of 4 December 2023 'Przyszłość Trybunału Konstytucyjnego' (2024) 2 Państwo i Prawo (PiP) 118, 122-123.

[21] Wojciech Sadurski, 'Sadurski odpowiada Matczakowi: wyzerowanie Trybunału to nie odpowiedzialność zbiorowa' (*Wyborcza* 9 December 2023) <https://wyborcza.pl/7,75968,30489669,sadurski-odpowiada-matczakowi-wyzerowanie-to-nie-odpowiedzialnosc.html> accessed on 10 April 2024. In his opinion, Wojciech Sadurski argues for a complete overhaul of the Constitutional Tribunal or, in other words, its "zeroing out". See also, Wojciech Sadurski, 'Extinguishing the Court' (*Verfassungsblog* 14 August 2022) <https://verfassungsblog.de/extinguishing-the-court/> accessed on 2 May 2024.

[22] Case C-619/18 *Commission v Poland (Indépendance de la Cour suprême)* [2019] EU:C:2019:531, para 76; *Guðmundur Andri Ástráðsson v Iceland* App no 26374/18 (ECtHR, 1 December 2020), paras 239-240.

[23] Case C-64/16 *Associação Sindical dos Juízes Portugueses* [2018] EU:C:2018:117, paras 35-38; Case C-506/04, *Graham J. Wilson v Ordre des avocats du barreau de Luxembourg* [2006] EU:C:2006:587, paras 49-51.

necessary to determine what meaning the EU attaches to the value (*Section 1.1*). As will be seen, it is advanced that the value has a "well-defined" meaning and is composed of concrete legal principles, such as the principle of judicial irremovability. Special attention is cast as to whether there are justified limitations to the latter principle recognized in the jurisprudence of the CJEU, while also drawing inspiration from recent cases before the ECtHR. Additionally, the CJEU's case law on the requirements for a 'court' or 'tribunal' under the preliminary reference procedure will be explored to better understand how the CJEU analyses the independence of national courts. *Section 1.2* develops the normative concept of 'EU militant Rule of Law' and is divided into two parts. The first part aims to explore why militant measures are needed in the process of Rule of Law restoration. It will be established that these 'militant measures' entail, for example, the reinterpretation of established Rule of Law principles. In this context, it is pertinent to explore how the concept of 'EU militant Rule of Law' differs from the correlated and already well-established concept of 'militant democracy', coined by Karl Loewenstein.[24] The second part emphasises the EU dimension of the concept, acknowledging that EU Member States operate within a multi-layered system and remain bound by EU law, also in their efforts to restore the Rule of Law. The second Chapter examines in a concise manner to what extent the PiS government undermined the PCT's judicial independence from 2015 onwards (*Section 2.1)*, and how both EU and CoE institutions reacted towards the Rule of Law backsliding in Poland (*Section 2.2*). Finally, the third Chapter provides an answer to the research question. *Section 3.1* examines why it is in the first place necessary to respect the Rule of Law in the restoration of the value. Prior to proposing arguments that argue in favour of respecting the Rule of Law, the opposite scenario of not respecting the Rule of Law during the restoration of the value will be further developed to explore the implications of measures, such as the 'extinction' of the PCT. Subsequently, it will be argued that respecting the Rule of Law in restoring the value, first, is a normative obligation flowing from the concept of 'EU militant Rule of Law' and, second, establishes the conditions for the value to be not only restored in the short-

[24] Karl Loewenstein, 'Militant Democracy and Fundamental Rights, I' (1937) 31(3) The American Political Science Review 417; Karl Loewenstein, 'Militant Democracy and Fundamental Rights, II' (1937) 31(4) The American Political Science Review 638.

term, but also maintained in the long-term.[25] The latter is as important as the former, since a restoration of the Rule of Law should not merely be temporary, but permanent. *Section 3.2* investigates how the Rule of Law, and specifically judicial independence, can be restored in the Polish Constitutional Tribunal while respecting the Rule of Law's legal obligations stemming from EU law (*Section 3.2.1*). Finally, it will address the fate of judgements issued by the PCT in its unlawful composition (*Section 3.2.2*).

1.3 Methodology of the Master's Thesis

Especially in illiberal regimes, a wide gap can be identified between black letter constitutional law, on the one hand, and institutional practices (or, 'constitutional reality'), on the other.26 As it was aptly summarized by András Jakab, the problems in these regimes generally do not lie in the constitutional norms as such, but emanate from their application and de facto (institutional) practices.27 Thus, a normative approach is employed with the aim of analysing how future reforms of the Polish Constitutional Tribunal should be designed to be in line with the Rule of Law requirements stemming from EU law. The Rule of Law is firmly enshrined in the legal text of the EU Treaties,28 and amounts to a general principle of EU law.29 Subsequently, since the Rule of Law is firmly

[25] This refers, for example, to the necessary conditions for a "Rule of Law culture" to flourish. On the "Rule of Law culture" see, Monica Claes, 'Safeguarding a Rule of Law Culture in the Member States: Engaging National Actors' (2023) 29(2) Columbia Journal of European Law 214.

[26] András Sajó, *Ruling by Cheating. Governance in Illiberal Democracy* (Cambridge University Press 2021), 255; András Jakab 'How to Return from a Hybrid Regime into a Constitutional Democracy? Hypothetical Constitutional Scenarios for Hungary and a Few Potential Lessons for Poland' in Michal Bobek and Others (eds), *Transition 2.0, Re-establishing Constitutional Democracy in EU Member States* (Nomos 2023) 145, 148-150. See also, Bruno De Witte, 'Legal Methods for the Study of EU Institutional Practice' (2022) 18(1) European Constitutional Law Review 637, 638-640. Although Professor Bruno De Witte's Article concerned the methodology that should be employed to examine the role of EU institutions, his findings relating to a broad understanding of relevant sources, including "legally relevant institutional practice", can be applied by analogy to the present research.

[27] András Jakab 'How to Return from a Hybrid Regime into a Constitutional Democracy? Hypothetical Constitutional Scenarios for Hungary and a Few Potential Lessons for Poland' in Michal Bobek and Others (eds), *Transition 2.0, Re-establishing Constitutional Democracy in EU Member States* (Nomos 2023) 145, 148-150.

[28] Matteo Bonelli, 'A Union of Values' (PhD Dissertation, Maastricht University 2019), 29.

[29] Case 294/83 *Les Verts* [1986] EU:C:1986:166, para 28. See also, Laurent Pech, 'The Rule of Law as a Constitutional Principle of the European Union' (2009) Jean Monnet Working Paper 04/09, 58-61.

embedded in EU law, the normative framework adopts an internal perspective,30 which is composed of the legal obligations stemming from the Rule of Law, compromising, inter alia, the principle of judicial independence.

A meaningful interpretation of key principles of constitutional law, such as democracy and Rule of Law, is inherently political.31 Consequently, for the research to be meaningful, the legal sources are approached in their political, but also sociological, context.32 These political and sociological perspectives are examined with the underlying aim of better understanding the legal sources, and to provide an answer as to why the legal obligations flowing from the Rule of Law should be respected in the restoration of the value. Thus, while the normative framework is internal and self-referential, it does not operate in complete isolation and interacts, inter alia, with political and social subsystems.33 In other words, the normative system remains internal but is essentially 'porous' and communicates with different subsystems.34 Each subsystem nevertheless operates on its own distinct logic and procedures, and potential solutions to a problem, such as the restoration of the Rule of Law, will

[30] Sanne Taekema, 'Theoretical and Normative Frameworks for Legal Research: Putting Theory into Practice' (2018) 8(1) Law and Method 1, 7-8.

[31] András Jakab, *European Constitutional Language* (Cambridge University Press 2016), 2-6.

[32] For similar methodological approaches see, András Jakab, 'How to Return from a Hybrid Regime into a Constitutional Democracy? Hypothetical Constitutional Scenarios for Hungary and a Few Potential Lessons for Poland' in Michal Bobek and Others (eds), *Transition 2.0, Re-establishing Constitutional Democracy in EU Member States* (Nomos 2023) 145, 154-158 and 219-222. András Jakab discusses both the deterioration and restoration of the Rule of Law in their political, social and cultural context. See also, Laurent Pech, 'The Rule of Law as a Constitutional Principle of the European Union' (2009) Jean Monnet Working Paper 04/09, 17-21. Lauren Pech discusses the political and cultural challenges in the implementation and development of the Rule Of Law at the EU level.

[33] Gunther Teubner, 'Autopoiesis in Law and Society: A Rejoinder to Blankenburg' (1984) 18(2) Law & Society Review 291, 293-299. The article reflects the idea that even self-referential, also called 'autopoietic', subsystems are able to communicate between each other.

[34] For an implicit example of the "porous metaphor" see, Daniel On, 'Strict liability and the aims of Tort Law: a doctrinal, comparative, and normative study of strict liability regimes' (PhD Dissertation, Maastricht University 2020), 21-26. The underlying ideas about the application of his methodological theory were collectively developed with Daniel On in a conversation in March 2024.

necessarily vary depending on which subsystem is being analysed.35 The choice for this approach is based on the assumption that in order to fully understand the reasons for the Rule of Law 'backsliding' in Poland,36 and how the restoration of the value might be designed, it is necessary to examine the socio-political circumstances in which the Rule of Law operates.

The system of research is EU law. In order to address the research question, it is mandatory to consult multiple primary legal sources, inter alia, the Treaties of the EU,37 secondary EU law (such as the definition of 'Rule of Law' provided by the Conditionality Regulation),38 and reports by the European Commission for Democracy through Law ("Venice Commission").39 Furthermore, it is necessary to examine the relevant jurisprudence of the CJEU and ECtHR. The jurisprudence of the ECtHR is taken into account since it dealt more exhaustively with the removal of judges. In this regard, it must be

[35] Gunther Teubner, 'Autopoiesis in Law and Society: A Rejoinder to Blankenburg' (1984) 18(2) Law & Society Review 291, 293-299.

[36] András Jakab, 'How to Return from a Hybrid Regime into a Constitutional Democracy? Hypothetical Constitutional Scenarios for Hungary and a Few Potential Lessons for Poland' in Michal Bobek and Others (eds), *Transition 2.0, Re-establishing Constitutional Democracy in EU Member States* (Nomos 2023) 145, 156. For example, András Jakab points out that there is a "pessimistic, cynical and anomic social culture" in Poland and Hungary.

[37] Consolidated Version of the Treaty on European Union [2008] OJ C 115/13; Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C 326/47.

[38] Regulation 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget [2020] OJ L 433I, Article 2 (a).

[39] The Venice Commission aims to establish common European and international constitutional standards, including those underpinning the value of the Rule of Law. These standards are frequently cited by the CJEU and ECtHR and help interpret how the Courts apply the law. Furthermore, the European Commission recognizes the expert advisory role of the Venice Commission in the EU's new framework for "strengthening the Rule of Law". Subsequently, in recent recommendations for Poland, there are extensive references to the conclusions of the Venice Commission. The European Commission even required Poland to implement the conclusions of the Venice Commission, challenging the original legal nature of Venice Commission recommendations and opinions as not legally binding. See, European Commission, Communication, 'A new EU Framework to strengthen the Rule of Law' [2014] COM/2014/0158 final, 2-4; Simona Granata-Menghini, 'La Commission de Venise du Conseil de l'Europe: méthodes et perspectives de l'assistance constitutionnelle en Europe' (2014) 55-56 Les Nouveaux Cahiers du Conseil constitutionnel 69, 76-77.

acknowledged that the EU is not (yet) part of the ECHR.40 However, the ECHR forms part of the general principles of EU law,41 sets out a minimum standard of protection for corresponding fundamental rights,42 and the "Rule of Law jurisprudence" is an area in which the CJEU and ECtHR have been reinforcing each other, for example by consistently referencing the jurisprudence of the other Court.43 Furthermore, ECtHR jurisprudence is one of the primary sources from which European standards on the Rule of Law are derived, making it a natural point of reference in the discussion on the value's restoration.44

Secondary sources, such as articles and commentaries are consulted to acquire a full understanding of the primary sources. Apart from arguing why it is necessary to respect the Rule of Law in restoring judicial independence in Poland's judiciary, it will also be illustrated how the Rule of Law could be respected. In this regard, it can already be noted that the principle of judicial irremovability has not been extensively developed in the jurisprudence of the CJEU. Thus, an answer to the main research question of this Thesis will be provided by drawing inspiration from multiple hard law and soft law sources, using analogous reasoning to construct a comprehensive answer.

There are limitations to the research of this Master's Thesis. Firstly, the Thesis adopts the perspective of EU law on the restoration of the Rule of Law. Consequently, the point of view of Polish law is not thoroughly considered and it will not be analysed in detail how necessary reforms can be implemented. Secondly, the focus of the research remains on the restoration of judicial independence in the Constitutional Tribunal. Nevertheless, the Sections of this Thesis relating to constitutional theory may also be applied to other courts by

[40] On the fact that the EU is not (yet) part of the ECHR see, Opinion 2/13 [2014] EU:C:2014:2454, paras 179-185; Case C-426/16 *Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen, VZW and Others v Vlaams Gewest* [2018] EU:C:2018:335, para 40.

[41] Article 6 (3) TEU.

[42] Article 52 (3) CFR.

[43] See, for example, Case C-791/19 *Commission v Poland* (*Régime disciplinaire des juges*) [2021] EU:C:2021:596, paras 198-173. See also, Romain Tinière, 'The Use of ECtHR Case Law by the CJEU: Instrumentalisation or Quest for Autonomy and Legitimacy?' (2023) 8(1) European Papers 323, 329.

[44] Marcin Szwed, 'Fixing the Problem of Unlawfully Appointed Judges in Poland in the Light of the ECHR' (2023) 15(1) Hague Journal on the Rule of Law 353, 355.

analogy, in so far as they outline a general procedure through which certain judges can be dismissed. Moreover, there are two central propositions underlying the research of this Thesis, both of which will be supported by arguments throughout the next Chapters. Firstly, it is asserted that the Rule of Law should be closely observed in the process of restoring the value. Secondly, it is advanced that judges appointed under national law should, in principle, also be perceived as 'judges' from the perspective of EU law. In the context of illiberal regimes, it must be noted that these regimes undermine the Rule of Law more systemically, resulting in judicial appointments in line with tailor-made domestic law that violates the Rule of Law itself.45 Thus, the CJEU exceptionally should go beyond the legal illusion created by the Member State and independently check whether judicial appointments are in line with European standards.46 To be clear, and as it will be illustrated in more detail in Section 3.2, the more radical position that unlawfully appointed judges have never actually become 'judges' by virtue of being appointed by an illiberal regime, and can therefore be directly dismissed, is not supported.47 Instead, it will be argued that the status of these judges must be carefully examined in an individualized procedure.

As a last point and to maintain full transparency, it is acknowledged that Artificial Intelligence tools were used for translation purposes, as well as for checking spelling and grammatical mistakes. They were not employed in conducting legal research.

2. The Concepts of 'Rule of Law' and 'EU Militant Rule of Law' in a Multi-Layered System

The first Chapter's aim is to set out the conceptual framework of the Master's Thesis. It is divided into two Sections, with the first one exploring the legal meaning behind the notion of 'Rule of Law' in the EU. This mainly revolves around the question of whether the Rule of Law is an "essentially contested

[45] András Sajó, 'The Limits of Judicial Irremovability from the Perspective of Restoring the Rule of Law: A View from Strasbourg' in Filipe Marques and Paulo Pinto de Albuquerque, *Rule of Law in Europe* (Springer 2024) 55, p. 61.

[46] ibid.

[47] Marcin Szwed, 'Fixing the Problem of Unlawfully Appointed Judges in Poland in the Light of the ECHR' (2023) 15(1) Hague Journal on the Rule of Law 353, 359.

concept"48 or a "well-defined principle"49. As will be seen, the Rule of Law can be defined at the EU level and is composed of many concrete legal principles. One of these is the principle of judicial irremovability as part of the principle of judicial independence. Subsequently, it is explored whether there are justified limitations to this principle recognized in the jurisprudence of the CJEU, while also drawing inspiration from recent cases before the ECtHR (Subsection 1.1.1). Furthermore, the CJEU's assessment of judicial independence under Article 19 TEU and Article 267 TFEU is analysed to better understand how the Court examines the independence of national courts (Subsection 1.1.2). Throughout the second Section, the concept of 'EU militant Rule of Law' is developed with the aim of providing a normative framework that answers two central questions. First, why militant measures are needed in the restoration of the Rule of Law and what these measures might entail (Subsection 1.2.1). Second, why the EU should become active in defending EU liberal values inside the Member States and what this concretely means in the process of restoring the Rule of Law (Subsection 1.2.2).

2.1 The Rule of Law within the EU

This Thesis does not aim to provide an autonomous definition of the Rule of Law. Instead, it builds upon established academic contributions, legal sources from EU institutions, and CJEU jurisprudence to define the value. Throughout the Section, it will be essentially argued that the EU has both a 'concrete' and 'broad' comprehension of the Rule of Law. The term 'broad' is used to describe that the EU understands the value as encompassing elements from different values, such as democracy and fundamental rights. This broad understanding of the value is shared by multiple legal scholars. James Waldron, for example, has a similar conception of the Rule of Law and argues that the Rule of Law should entail traits of democratic governance.[50] Jürgen Habermas, with his theory of

[48] Walter B Gallie, 'Essentially Contested Concepts' (1955-1956) 56(1) Proceedings of the Aristotelian Society 167 cited in Richard H Fallon, '"The Rule of Law" as a Concept in Constitutional Discourse' (1997) 97(1) Columbia Law Review 1, 7. Gallie introduced the notion of "essentially contested concepts", which are concepts that provoke genuine endless disputes about their right use.

[49] Laurent Pech, 'The Rule of Law as a Well-Established and Well-Defined Principle of EU Law' (2022) 14(1) Hague Journal on the Rule of Law 107, 110-120.

[50] James Waldron, 'The rule of law in public law' in Mark Elliott and David Feldman (eds) *The Cambridge Companion to Public Law* (Cambridge University Press 2015) 56, 66.

'*Kooriginalität'*, advances that both the value of democracy and Rule of Law are mutually reinforcing (e.g. a State abiding by the principles of the Rule of Law creates the necessary conditions for democracy to flourish).[51]

Article 2 TEU explicitly lists the values the EU is founded upon.[52] Among these different values, the Article features the "Rule of Law". The CJEU consistently highlights the importance of this value throughout its jurisprudence, for example, by emphasising that "the European Union is a Union based on the Rule of Law".[53] Before becoming an EU Member State, a State must already respect the values of Article 2 TEU and be committed to promoting them.[54] In this regard, the Copenhagen criteria further clarify that potential Member States should have institutions in place capable of guaranteeing the protection of the Rule of Law.[55] Naturally, compliance with this value must continue when the State becomes part of the EU, even when acting outside the scope of EU law.[56] It, moreover, forms an underlying basis for the promotion of further values enshrined in Article 2 TEU, such as the protection of fundamental rights.[57] Even though the Rule of Law occupies such a significant role in the EU, it is left largely undefined by the Treaties. This was potentially one of the factors leading the former Polish Foreign Minister to promise a "horse and a box of

[51] Jürgen Habermas, *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (Suhrkamp 1992), 110-155.

[52] Article 21 TEU even maintains that these values "inspired [the Union's] own creation".

[53] Case 294/83 *Les Verts* [1986] EU:C:1986:166, para 23; Case C-583/11 P *Inuit Tapiriit Kanatami and Others v European Parliament and Council of the European Union* [2013] EU:C:2013:625, para 91.

[54] Article 49 TEU. See also, Eleanor Spaventa, 'Fundamental rights in the European Union' in Steve Peers and Catherine Barnard (eds), *European Union Law* (4th edn, Oxford University Press 2023), 247-248.

[55] European Council, 'Conclusions of the Presidency - Copenhagen' [1993] SN 180/1/93 REV 1, 12-13.

[56] Koen Lenaerts and Piet van Nuffel, *EU Constitutional Law* (Tim Corthaut ed, Oxford University Press 2022), 78.

[57] European Commission, Communication, 'Further strengthening the Rule of Law within the Union. State of play and possible next steps' [2019] COM(2019) 163 final, 1.

Belgian chocolates" for anyone who finds a definition of the Rule of Law in the Treaties.[58]

While it is indeed a truism that the value is left undefined by the Treaties, it nevertheless has a clear meaning within the EU legal system,[59] and might be further defined by the EU legislator.[60] The Commission provided such a general definition of the value's core meaning, according to which the Rule of Law requires "public authority to act within the constraints set out by law and under the control of independent and impartial courts".[61] As a side note, it is also common for Member States to not include a detailed definition of the Rule of Law in their respective Constitutions.[62] Instead, it can be perceived that most of these States provide a general definition of the concept,[63] encompassing two

[58] 'Były szef MSZ komentuje list Jourovej. "Konia z rzędem, kto znajdzie w traktatach UE definicję praworządności"' (*Niezalezna* 27 December 2019) <https://niezalezna.pl/polska/byly-szef-msz-komentuje-list-jourovej-konia-z-rzedem-kto-znajdzie-w-traktatach-ue-definicje-praworzadnosci/303625> accessed on 12 April 2024.

[59] While the meaning of the Rule of the Law is clear at the EU level, it does not have an autonomous meaning. Fundamental EU values are defined according to what is "common to the Member States" and thus take the national constitutional traditions as a starting point to substantiate the meaning of the Rule of Law at the EU level. See, Amaryllis Verhoeven, *The European Union in Search of a Democratic and Constitutional Theory* (Kluwer Law International 2002), 322-323; Laurent Pech, 'The Rule of Law as a Constitutional Principle of the European Union' (2009) Jean Monnet Working Paper 04/09, 5.

[60] Case C-156/21 *Hungary v European Parliament and Council of the European Union* [2022] EU:C:2022:97, paras 226-243. *In casu*, the CJEU was confronted with the argument of Hungary that the Rule of Law cannot be defined by the EU legislators. The Court followed the Advocate General on this point and, consequently, upheld the legality of Article 2 (a) of the Conditionality Regulation, which defined the value. See also, Case C-156/21 *Hungary v European Parliament and Council of the European Union* [2021] EU:C:2021:974, Opinion of AG Campos Sánchez-Bordona, paras 272-273.

[61] European Commission, Communication, 'Further strengthening the Rule of Law within the Union. State of play and possible next steps' [2019] COM(2019) 163 final, 1. See also, Ronald Janse, 'Is the European Commission a credible guardian of the values? A revisionist account of the Copenhagen political criteria during the Big Bang enlargement' (2019) 19(1) International Journal of Constitutional Law 43, 46. For an earlier definition of its core elements in Europe see, European Commission for Democracy through Law (Venice Commission), 'Report on the Rule of Law' [2011] Study 512/2009, 12.

[62] Laurent Pech, 'The Rule of Law as a Well-Established and Well-Defined Principle of EU Law' (2022) 14(1) Hague Journal on the Rule of Law 107, 121.

[63] For a comparative overview see, Matteo Bonelli, 'A Federal Turn? The European Union's Response to Constitutional Crises in the Member States' (2018) 10(1) Perspectives on Federalism 41.

core elements.[64] Firstly, the constraining of the exercise of public power,[65] which is generally captured by the principle of legality (i.e. the actions of the state require a legal basis). Secondly, the protection of citizens through the law, not just from the arbitrary use of the law by public authorities, but also from their fellow citizens.[66] This focus on defining the 'core elements' of the Rule of Law can thus generally be found both at the EU and national level.[67]

The lack of a precise definition in the EU Treaties does not imply that the Rule of Law cannot be enforced. Although this might not have been immediately apparent when the Lisbon Treaty entered into force, the 'enforceability' of the value gradually increased with an evolving body of case law from the CJEU.[68] As a starting point, the value is composed of multiple legal principles, which in turn set out concrete legal obligations.[69] Article 2 (a) of the Conditionality Regulation highlights the broad understanding of the value at the EU level, emphasizing elements such as a "democratic and pluralistic law-making process" and

[64] Adriaan Bedner, 'An Elementary Approach to the Rule of Law' (2010) 2(1) Hague Journal On The Rule Of Law 48, 50-60.

[65] Interestingly, the function of the Rule of Law to limit the exercise of public power can be traced back to the ancient Greeks and authors such as Aristotle. See, Brian Tamanaha, *On the rule of law: history, politics, theory* (Cambridge University Press 2004), 7-8.

[66] Adriaan Bedner, 'An Elementary Approach to the Rule of Law' (2010) 2(1) Hague Journal On The Rule Of Law 48, 50-60.

[67] On this point, it has to be stated that the second 'core element' is more prominently featured in national conceptions of the 'Rule of Law', for example in the Dutch conception of the '*Rechtsstaat*'. However, this element can also be observed to some extent at the EU level. For example, in the exceptional horizontal application of EU law. See, for example, Dorota Leczykiewicz, 'Horizontal application of the Charter of Fundamental Rights' (2013) 38(4) European Law Review 479. Nevertheless, it is argued that the Rule of Law at the EU level primarily refers to the first core element (i.e. the constraining of the exercise of public power).

[68] Sacha Prechal, 'Article 19 TEU and National Courts: A New Role for the Principle of Effective Judicial Protection?' in Matteo Bonelli, Mariolina Eliantonio, and Giulia Gentile (eds), *Article 47 of the EU Charter and Effective Judicial Protection, Volume 1* (Hart Publishing 2024) 11, 16-18.

[69] For example, the principle of effective judicial protection, the principle of openness, the principle of transparency, the principle of accountability, the principle of legality, or the principle of separation of powers. For an overview see Franco Peirone, 'European Values in the Multi-Level Legal System' in Aalt Willen Heringa, Hoai-Thu Nguyen, and Franco Peirone, *Textbook on European and National Constitutional Law* (forthcoming), 5-10.

"respect for fundamental rights".[70] This provision confirms the EU's conception of the Rule of Law as both '*broad'*, deeply intertwined with the values of democracy and fundamental rights, but still '*concrete'*, composed of specific and enforceable principles.

Among these different principles that substantiate the Rule of Law, this Thesis focuses mainly on one: judicial independence. In the groundbreaking judgement of *Portuguese Judges*,[71] the CJEU clarified that Article 19 (1) TEU, which guarantees the principle of effective judicial protection, gives concrete expression to Article 2 TEU and the Rule of Law, and can be directly relied upon by individuals before national courts.[72] More precisely, the second Subsection of Article 19 (1) TEU obliges Member States to "provide remedies sufficient to ensure effective legal protection in the fields covered by Union law". Since Article 19 TEU was given direct effect by the CJEU, the enforcement of this Article is not only the role of the CJEU but also the task of national courts,[73] which nevertheless remain under the guidance of the CJEU through the preliminary ruling procedure.[74] As the second Section will illustrate, this multi-layered judicial system increasingly encounters problems, such as conflicting opinions about the primacy of EU law.[75]

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[70] Regulation 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget [2020] OJ L 433I, Article 2 (a).

[71] Matteo Bonelli and Monica Claes, 'Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary: ECJ 27 February 2018, Case C-64/16, Associação Sindical dos Juízes Portugueses' (2018) 14(3) European Constitutional Law Review 622, 628.

[72] Case C-64/16 *Associação Sindical dos Juízes Portugueses* [2018] EU:C:2018:117, paras 30-32. See also, Lucia Rossi, 'La valeur juridique des valeurs: L'article 2 TUE: relations avec d'autres dispositions de droit primaire de l'UE et remèdes juridictionnels' (2020) 56(3) Revue Trimestrielle De Droit Européen 639, 644.

[73] Case C-64/16 *Associação Sindical dos Juízes Portugueses* [2018] EU:C:2018:117, paras 32-33.

[74] See, for example, Case 283/81 *CILFIT* [1982] EU:C:1982:335, paras 11-14.

[75] Frans van Dijk and Kees Sterk, 'The Court of Justice of the European Union and national courts as enforcers of EU law' in Miroslava Scholten (ed), *Research Handbook on the Enforcement of EU Law* (Edward Elgar Publishing Limited 2023) 123, 123. For the conflicting opinions about EU primacy see, for example, German Federal Constitutional Court, *Judgement of the Second Senate of 5 May 2020* (PSPP) [2020] (2 BvR 859/15); Polish Constitutional Tribunal, Judgement *K 3/21,* 7 October 2021.

Having clarified that Article 19 (1) TEU gives concrete expression to the Rule of Law, the question in *Portuguese Judges* became of what this requirement of "effective judicial protection" is composed of. The Court clarified, by reference to Article 267 TFEU and Article 47 of the Charter of Fundamental Rights of the European Union ("CFR")[76], that this obligation on the Member States requires national judges to fulfil the criteria of judicial independence.[77] Thus, the CJEU thereby explicitly established a link between the Rule of Law and the principle of judicial independence, which has both an internal and external dimension. On the one hand, external judicial independence requires certain guarantees to be in place to protect judges from external pressure or intervention.[78] An example of such a guarantee is the principle of judicial irremovability.[79] On the other hand, internal judicial independence, which is closely linked to the principle of impartiality, demands that national judges remain objective and have no stake in the outcome of the proceedings.[80] In summary, the groundbreaking nature of the case is situated in the fact that the Court 'materialized' the Rule of Law and judicial independence in a primary law obligation (Article 19 (1) TEU), which subsequently allowed the Commission to open numerous infringement proceedings, *inter alia*, against Poland (as will be seen in *Section 2.2*).[81]

In conclusion, the EU has a rather broad understanding of the Rule of Law, encompassing elements from different values, such as democracy and fundamental rights. Similarly to the national level, in defining the value it

[76] Charter of Fundamental Rights of the European Union [2012] OJ C 326/391.

[77] Case C-64/16 *Associação Sindical dos Juízes Portugueses* [2018] EU:C:2018:117, paras 35-38; Case C-506/04 *Graham J. Wilson v Ordre des avocats du barreau de Luxembourg* [2006] EU:C:2006:587, paras 49-51.

[78] Case C-506/04, *Graham J. Wilson v Ordre des avocats du barreau de Luxembourg* [2006] EU:C:2006:587, para 51.

[79] Joined Cases C-9/97 and C-118/97 *Raija-Liisa Jokela and Laura Pitkäranta* [1998] EU:C:1998:497, para 20.

[80] Case C-506/04, *Graham J. Wilson v Ordre des avocats du barreau de Luxembourg* [2006] EU:C:2006:587, para 52.

[81] Matteo Bonelli and Monica Claes, 'Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary: ECJ 27 February 2018, Case C-64/16, Associação Sindical dos Juízes Portugueses' (2018) 14(3) European Constitutional Law Review 622, 628; Sacha Prechal, 'Article 19 TEU and National Courts: A New Role for the Principle of Effective Judicial Protection?' in Matteo Bonelli, Mariolina Eliantonio, and Giulia Gentile (eds), *Article 47 of the EU Charter and Effective Judicial Protection, Volume 1* (Hart Publishing 2024) 11, 16-18.

focuses on defining the core elements and generally sets out that it requires "public authority to act within the constraints set out by law and under the control of independent and impartial courts".[82] This broad nature does not imply that the Rule of Law cannot be enforced at the EU level, as was clarified on multiple instances by the CJEU. Instead, the value is composed of multiple principles, which in turn set out concrete legal obligations. The following Section will closely explore a key aspect of external judicial independence that inherently conflicts with the early dismissal of judges: the principle of judicial irremovability.

2.1.1 The Principle of Judicial Irremovability

The principle of judicial irremovability is one of the safeguards forming part of the external dimension of judicial independence. It ensures that judges remain in office until reaching the obligatory retirement age or the expiry of their mandate.[83] In *Commission v. Poland (Indépendance de la Cour suprême)*, the CJEU clarified that the principle is not of absolute nature and might be limited by a 'legitimate and compelling ground', subject to the principle of proportionality.[84] The Court, furthermore, recognized the "widely accepted scenarios" that the dismissal of judges follows a 'legitimate and compelling ground' when they are deemed unfit for the purposes of carrying out their duties on account of incapacity or a serious breach of obligations, provided that the appropriate procedures are followed.[85] The rules governing the dismissal must adopt the form of specific legislative provisions offering the necessary safeguards that go beyond the general rules of employment law.[86] While recognizing these widely accepted scenarios as possible limitations to the principle, there has not (yet) been an individual case in which the Court allowed

[82] European Commission, Communication, 'Further strengthening the Rule of Law within the Union. State of play and possible next steps' [2019] COM(2019) 163 final, 1; Article 3.4 of the European Charter on the Statute for Judges [2008].

[83] Case C-619/18 *Commission v Poland (Indépendance de la Cour suprême)* [2019] EU:C:2019:531, para 76.

[84] ibid.

[85] Case C-658/18 *Governo della Repubblica italiana* [2020] EU:C:2020:572, para 48.

[86] Case C-274/14 *Banco de Santander SA* [2020] EU:C:2020:17, para 60; Case C-216/18 PPU *Minister for Justice and Equality (Deficiencies in the system of justice)* [2018] EU:C:2018:586, para 67. In essence, this procedure must guarantee the rights enshrined by Articles 47 and 48 CFR.

a derogation.[87] Therefore, it currently remains an open question as to what might amount to a 'legitimate and compelling ground' allowing a limitation of the principle of judicial irremovability in individual cases.

In principle, it thus seems that the removal of judges, even if it occurs in the broader context of a country in the transformation from an illiberal to a liberal regime, is hardly compatible with the principle of judicial irremovability and the Rule of Law. In the words of the Venice Commission, "it would be unacceptable if each new government could replace sitting judges with newly elected ones of their choice".[88] This link between the security of tenure (or 'judicial irremovability') and the stability of the judicial system, on the one hand, and judicial independence, on the other, is continuously emphasised by the Venice Commission.[89] In June 2024, the Venice Commission published an Opinion addressing the restoration of the Rule of Law in Poland, but focusing on the Polish National Council of the Judiciary rather than the Constitutional Tribunal.[90] Nevertheless, this Opinion is of high importance to the present research, since the Venice Commission provided further clarification on the limits of the principle of irremovability. In detail, it held that the principle of judicial irremovability can only apply to judges that have been appointed in line with the national Constitution and European standards.[91] In other words, countries are not able to 'cherry-pick' on which of the fundamental principles of

[87] For cases where a limitation of the principle was not accepted, see, for example, Case C-619/18 *Commission v Poland (Indépendance de la Cour suprême)* [2019] EU:C:2019:531; Case C-192/18 *Commission v Poland (Indépendance des juridictions de droit commun)* [2019] EU:C:2019:924; Case C-274/14 *Banco de Santander SA* [2020] EU:C:2020:17; Case C-487/19 *W.Ż.* [2021] EU:C:2021:798.

[88] European Commission for Democracy through Law (Venice Commission), 'Armenia Opinion on three Legal Questions in the Context of Draft Constitutional Amendments Concerning the Mandate of the Judges of the Constitutional Court' [2020] CDL-AD(2020)016, 10.

[89] European Commission for Democracy through Law (Venice Commission), 'Ukraine Opinion on Amendments to the legal Framework Governing the Supreme Court and Judicial Governance Bodies' [2019] CDL-AD(2019)027, 9; European Commission for Democracy through Law (Venice Commission), 'Armenia Opinion on three Legal Questions in the Context of Draft Constitutional Amendments Concerning the Mandate of the Judges of the Constitutional Court' [2020] CDL-AD(2020)016, 10.

[90] European Commission for Democracy through Law (Venice Commission), 'Poland Urgent Joint Opinion on the Draft Law Amending the Law on the National Council of the Judiciary' [2024] CDL-AD(2024)018.

[91] ibid, 15.

the Rule of Law they want to rely on (i.e. national authorities cannot appoint a judge in violation of the national Constitution and European standards and then rely on the principle of irremovability to keep the judge in office). Thus, it seems that in establishing whether judges can be lawfully removed from office, one must go back in time and analyse whether their original appointment aligned with the national Constitution and European standards.

Turning to EU law, Advocate General ("AG") Bobek provided in his opinion to *Getin Noble Bank* important guidance on the connection between judicial appointments and the principle of judicial irremovability. The case essentially related to the question of whether the appointment of Polish judges during the Communist regime violates the principle of judicial independence in line with Article 19 (1) TEU and Article 47 CFR.[92] To begin with, the AG held that the simple fact that judges are appointed during the Communist regime cannot call into question their independence today.[93] The referring court further asked if it should examine on its own motion whether irregularities in the appointment procedures of judges of another national court might be in violation of Article 19 (1) TEU. In particular, it questioned whether the principle of judicial irremovability could prevent it from doing so. In this regard, the CJEU already held in *Simpson* that Article 47 CFR requires, if there are genuine doubts, every court to check whether another court constitutes an independent and impartial tribunal previously established by law.[94] In other words, Article 47 CFR establishes, provided that there are genuine doubts, an obligation to "check the independence of one another".

Concerning the relationship between, on the one hand, the principle of judicial irremovability and, on the other hand, principles such as judicial independence and the right to effective judicial protection, the AG identifies "delicate problems of linkage". The referring court suggested that because of the national constitutional guarantee of judicial irremovability, an appointed judge has to remain in office despite the fact that this might violate EU standards

[92] Case C-132/20 *BN and Others v Getin Noble Bank S.A.* [2021] EU:C:2021:557, Opinion of AG Bobek, paras 1-22.

[93] ibid, para 126.

[94] Joined Cases C-542/18 RX-II and C-543/18 RX-II *Simpson* [2020] EU:C:2020:232, paras 57 and 75-81.

of independence.[95] AG Bobek fundamentally disagreed with this argument and suggested that a balance between the aims of both principles, which may differ in certain circumstances, must be struck on a case-by-case approach.[96] Interestingly, the AG also proposed a principle of 'removability' when it has been established that the particular judge is not independent. Leaving such a judge in office contrasts with the "heart of a legal system based on the rule of law and of a democracy predicated on the separation of powers".[97] More precisely, the AG argued that only a serious infringement of the rules governing the judicial appointment, taking into account the effectiveness of remedies available to combat the breach, could lead to this conclusion.[98] Unfortunately, the AG did not develop this argument further. Nevertheless, it should be remembered that AG Bobek *de facto* made the case for an additional 'legitimate and compelling ground' to limit the principle of judicial irremovability: when it has been established through serious flaws in the appointment procedure that the respective judge is not independent.[99]

Recognizing that there has not (yet) been a justified limitation of the principle of judicial irremovability before the CJEU (apart from the "widely accepted" ones), the remainder of the Section turns to the jurisprudence of the ECtHR. The landmark case *Ástráðsson* emphasises the close relationship between the right to a 'tribunal established by law' and the guarantees of

[95] Case C-132/20 *BN and Others v Getin Noble Bank S.A.* [2021] EU:C:2021:557, Opinion of AG Bobek, para 151.

[96] ibid, paras 156-158.

[97] ibid, para 160.

[98] ibid, para 162.

[99] Please note that the CJEU did not touch upon these points in *Getin Noble Bank* since it perceived "no need" to answer Question 6 and 7. The Court actually only briefly mentioned the principle of irremovability in one paragraph in the merits of the case. See, Case C-132/20 *BN and Others v Getin Noble Bank S.A* [2022] EU:C:2022:235, para 82. In my personal analyses of the judgement, this does not mean that the CJEU disagrees with the AG but only that it was not strictly necessary to touch upon these points to answer the preliminary question. The AG explicitly acknowledged this in para 144, but still went on in his Opinion. In any case, please further note that AG's opinions are not legally binding on the CJEU, as established in Article 19 (2) TEU and Article 252 TFEU. However, they have nevertheless been highly influential on the Court in the past. See, Takis Tridimas, 'The role of the Advocate General in the development of Community law: Some reflections' (1997) 34(6) Common Market Law Review 1349, 1364-1366.

independence and impartiality.[100] Indeed, while assessing the different components of the right to a 'tribunal established by law', which is enshrined in Article 6 (1) ECHR,[101] the guarantees of independence and impartiality of the judicial body are examined.[102] These institutional requirements under Article 6 (1) ECHR collectively uphold the Rule of Law and separation of powers inside the State.[103] Apart from the general clarifications of the ECtHR in *Ástráðsson*, the case provides further guidance concerning irregularities in the judicial appointment procedure. It is interesting to note that the higher a body is placed in the judicial hierarchy, the more demanding the selection procedure should be designed.[104] More specifically, the ECtHR established a cumulative three-sept test, that if violated, signifies a breach of the right to a 'tribunal established by law'. The Court adopts this approach as it starts from the assumption that not any irregularity in the judicial appointment procedure compromises the right to a 'tribunal established by law'.[105] The three steps are outlined in more detail in the following.

First, there must be a "manifest" (i.e. objectively and genuinely identifiable) breach of domestic rules governing the judicial appointments.[106] In principle, national authorities determine whether there exists a manifest breach, unless the breach is flagrant (i.e. when the national authorities' findings are manifestly unreasonable).[107] However, the absence of a manifest breach does not preclude a violation of the right to a 'tribunal established by law'. This refers to situations where a judicial appointment in line with domestic rules is still incompatible with the object and purpose of the ECHR. [108] In these exceptional

[100] *Guðmundur Andri Ástráðsson v Iceland* App no 26374/18 (ECtHR, 1 December 2020), paras 231-232.

[101] European Court of Human Rights, 'Guide on Article 6 of the European Convention on Human Rights; Right to a fair trial (civil limb)' [2013], 27-29.

[102] *Guðmundur Andri Ástráðsson v Iceland* App no 26374/18 (ECtHR, 1 December 2020), paras 231-232.

[103] ibid, paras 231-234.

[104] ibid*,* para 222.

[105] ibid*,* para 236.

[106] ibid, paras 209-216 and 243-252.

[107] *Lavents v. Latvia* App no 58442/00 (ECtHR, 28 November 2002), para 114.

[108] See, for example, *DMD Group, A.S. v. Slovakia* App no 19334/03 (ECtHR, 5 October 2010), paras 70-72.

circumstances, the Court continues with its assessment of the second and third steps. In summary, the first step is fulfilled when (*a)* there is a manifest violation of domestic law, or (*b*) there is no manifest violation, but the law itself is incompatible with the object and purpose of the ECHR. The latter situation seems especially relevant for illiberal regimes, where judges can be appointed in line with abusive legislative provisions (in other words, the rule by law is used as a tool to "legalize arbitrariness").[109] Second, the breach must concern fundamental rules of the procedure for appointing judges. These relate to breaches that affect the essence of the right to a 'tribunal established by law' (e.g. breaches that vest substantial discretion in the executive).[110] Third, the irregularities in the judicial appointment and their impact on the right to a 'tribunal established by law' must not have been effectively remedied by domestic courts.[111] This third requirement stems from the subsidiary role of the ECtHR and from the fact that Contracting Parties have the primary responsibility to secure rights under the ECHR.[112] The ECtHR thus examines whether the national court acknowledged the irregularities in the judicial appointment procedure, whether it correctly balanced the competing interests at stake, and if it drew the necessary conclusions. Concerning the balancing of the competing interests, the authorities have a certain margin of discretion, which is however limited by the ECHR itself. For example, in the application of the third criterion in *Ástráðsson*, the ECtHR noted that the Icelandic Supreme Court failed to draw the necessary conclusions since it should have annulled the judgement handed by the irregularly appointed judge.[113] The Court further noted that the Icelandic government could not reasonably rely on the principles of legal certainty and security of judicial tenure to argue against a violation of the right to a 'tribunal established by law'.[114]

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[109] András Sajó, 'The Limits of Judicial Irremovability from the Perspective of Restoring the Rule of Law: A View from Strasbourg' in Filipe Marques and Paulo Pinto de Albuquerque, *Rule of Law in Europe* (Springer 2024) 55, 61.

[110] *Guðmundur Andri Ástráðsson v Iceland* App no 26374/18 (ECtHR, 1 December 2020), paras 246-247.

[111] ibid, para 248.

[112] ibid, para 250.

[113] ibid, para 278.

[114] ibid, para 284.

Concerning the principle of judicial irremovability, the ECtHR equally recognized that it is a corollary of judicial independence of a non-absolute nature.[115] As a side note, the ECtHR explicitly cites *Commission v. Poland (Indépendance de la Cour suprême)* when reference is made to the principle,[116] illustrating that it generally recognizes the same exceptions to the principle as the CJEU. In *Ástráðsson*, the ECtHR recognized that finding a judicial body is not a 'tribunal established by law' may have considerable consequences for the principle of judicial irremovability and that upholding the principle at all costs might further harm the Rule of Law and public confidence in the judiciary.[117] Therefore, the ECtHR introduced a balancing test to determine whether there is a "pressing need, of a substantial and compelling character" that justifies a departure from the principle of legal certainty, which can only be determined on a case-by-case approach.[118]

It thus seems that the various principles that substantiate the Rule of Law are in tension with each other and that the Rule of Law sometimes requires partial disregard of these principles.[119] To put it differently, the balancing of apparent conflicting Rule of Law principles is required and the value is not breached if the 'right balance' is found.[120] The ECtHR gave an example of this in *Ástráðsson*, when it established that, with the passage of time, the weight of legal certainty increases in relation to the applicant's right to a 'tribunal established by law'.[121] However, more crucial for the purposes of this research is the question of what qualifies as a 'legitimate ground' that could justify limiting the principles of judicial irremovability and legal certainty in favour of the principle of effective judicial protection.

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[115] ibid, para 239.

[116] ibid.

[117] ibid, para 240.

[118] ibid.

[119] András Sajó, 'The Limits of Judicial Irremovability from the Perspective of Restoring the Rule of Law: A View from Strasbourg' in Filipe Marques and Paulo Pinto de Albuquerque, *Rule of Law in Europe* (Springer 2024) 55, 60.

[120] European Commission for Democracy through Law (Venice Commission), 'Poland Urgent Joint Opinion on the Draft Law Amending the Law on the National Council of the Judiciary' [2024] CDL-AD(2024)018, 19.

[121] *Guðmundur Andri Ástráðsson v Iceland* App no 26374/18 (ECtHR, 1 December 2020), para 252.

Guidance can perhaps be found when the consequences of an ECtHR ruling, determining that a national court violated the right to a 'tribunal established by law', are examined. In this regard, the supervisory mechanism of ECtHR judgements by the Committee of Ministers should be taken into account. It is acknowledged that a State, in principle, remains free in deciding how to implement a judgement of the ECtHR, provided that this is compatible with this judgement itself,[122] and that the supervisory mechanism does not have the same legal authority as a judgement of the ECtHR. Nevertheless, the mechanism still confers to the Committee of Ministers the power to declare that a Contracting Party successfully executed an ECtHR ruling.[123] In *Ástráðsson*, the Committee closed the supervisory mechanism after three of the relevant judges were reappointed under conditions deemed compatible with the ECHR, and the last judge, while still remaining in office, no longer participated in adjudication.[124] Thus, none of the judges were removed from office. Furthermore, the case *Xero Flor* should be considered, which is also closely examined in *Section 2.2*. In brief, the case concerned a decision by the PCT, sitting in a panel that included an unlawfully elected judge, to dismiss a constitutional complaint.[125] The ECtHR held that this infringed the applicant's right to a 'tribunal established by law', as guaranteed by Article 6 (1) ECHR.[126] The subsequent supervisory mechanism has not been closed (yet), but the Committee explicitly requested the national authorities to exclude the judges unlawfully elected.[127] It thus seems that there is a fundamental differences between the execution of *Ástráðsson* and *Xero Flor*. On the one hand, *Ástráðsson* concerned a personal deal, or an 'exchange of favours', between the

[122] *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* App no 32772/02 (ECtHR, 20 June 2009), para 88.

[123] Article 46 (1) European Convention on Human Rights.

[124] Committee of Ministers, '1428th meeting - Execution of the judgment of the European Court of Human Rights Guðmundur Andri Ástráðsson against Iceland (Application No. 26374/18)' [2022] CM/ResDH(2022)48.

[125] *Xero Flor w Polsce sp. z o.o. v. Poland* App no 4907/18 (ECtHR, 7 May 2021), paras 95-98.

[126] ibid, paras 289-291.

[127] Committee of Ministers, '1436th meeting - H46-18 Xero Flor w Polsce sp. z o.o. v. Poland (Application No. 4907/18)' [2022] CM/Del/Dec(2022)1436/H46-18; Committee of Ministers, '1451st meeting - H46-24 Xero Flor w Polsce sp. z o.o. v. Poland (Application No. 4907/18)' [2022] CM/Del/Dec(2022)1451/H46-24.

Ministry of Justice and certain judges. It seems, however, that this concerned a single case in Iceland and that the country is not in the process of Rule of Law 'backsliding'. The flaws in the appointment procedure could thus be remedied by 'simply' reappointing certain judges. On the other hand, *Xero Flor* is situated within the context of a country posing a systemic threat to the rule of law, which is further documented in *Section 2.1*.[128] Thus, in the context of systemic violations of the Rule of Law by an illiberal regime, it seems that only the removal of unlawfully appointed judges is able to execute a judgement finding a violation of the right to a 'tribunal established by law'.

In conclusion, neither the CJEU nor the ECtHR have explicitly accepted that irregularities in the judicial appointment procedure can justify an exception to the principle of judicial irremovability. However, there appears to be a certain 'sentiment' that finding serious flaws in the appointment procedure impacts the principle of judicial irremovability. As illustrated in this Section, this sentiment originates from three actors. First, the Venice Commission held that the principle of judicial irremovability can only apply to judges that have been appointed in line with the national Constitution and European standards.[129] Second, AG Bobek proposed a principle of 'removability' when it has been established that the particular judge is not independent, for example, through serious infringements of the rules governing the judicial appointment, and that leaving such a judge in office contrasts with the "heart of a legal system based on the rule of law and of a democracy predicated on the separation of powers".[130] Third, the ECtHR held in *Ástráðsson* that finding a judicial body to be not a 'tribunal established by law' may have considerable consequences for the principle of judicial irremovability and that upholding the principle at all costs might further harm the Rule of Law.[131] Furthermore, concerning the execution of an ECtHR ruling, determining that a national court violates the right to a 'tribunal

[128] See also, European Parliament, 'Resolution of 13 April 2016 on the situation in Poland' [2016] 2015/3031(RSP).

[129] European Commission for Democracy through Law (Venice Commission), 'Poland Urgent Joint Opinion on the Draft Law Amending the Law on the National Council of the Judiciary' [2024] CDL-AD(2024)018, 15.

[130] Case C-132/20 *BN and Others v Getin Noble Bank S.A.* [2021] EU:C:2021:557, Opinion of AG Bobek, para 160.

[131] *Guðmundur Andri Ástráðsson v Iceland* App no 26374/18 (ECtHR, 1 December 2020), para 240.

established by law', it seems that national authorities are either required to dismiss the concerned judges,[132] reappoint them under a procedure compatible with the Convention,[133] or to prevent them from adjudicating in a panel[134]. Thus, this creates an unclear situation: On the one hand, the implementation of a judgement finding judges to be irregularly appointed requires them to be removed, reappointed, or sidelined. On the other hand, it has not (yet) been explicitly recognized by either the CJEU or the ECtHR that irregularities in the judicial appointment procedure amount to a 'legitimate and compelling' ground to limit the principle of judicial irremovability.

2.1.2 Judicial Independence of National Courts under Article 19(1) TEU and Article 267 TFEU

The principle of judicial independence in EU law is enshrined in three provisions of primary EU law (Article 19 (1) TEU, Article 267 TFEU, and Article 47 CFR), its meaning being the same under each provision.[135] However, since the three provisions pursue a different scope and objective, the factors considered by the Court and the level of scrutiny depend on the provision at stake.[136] As seen in the previous Section, the CJEU adopts a broad scope and focuses on formal and institutional elements in the overall constitutional structure of the Member State under Article 19 (1) TEU. The threshold of an infringement seems thus rather high and only systemic issues have the necessary gravity to reach that threshold.[137]

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[132] Committee of Ministers, '1436th meeting - H46-18 Xero Flor w Polsce sp. z o.o. v. Poland (Application No. 4907/18)' [2022] CM/Del/Dec(2022)1436/H46-18; Committee of Ministers, '1451st meeting - H46-24 Xero Flor w Polsce sp. z o.o. v. Poland (Application No. 4907/18)' [2022] CM/Del/Dec(2022)1451/H46-24.

[133] Committee of Ministers, '1428th meeting - Execution of the judgment of the European Court of Human Rights Guðmundur Andri Ástráðsson against Iceland (Application No. 26374/18)' [2022] CM/ResDH(2022)48.

[134] ibid.

[135] Case C-896/19 *Repubblika* [2020] EU:C:2020:1055, Opinion of AG Hogan, para 45.

[136] Joined Cases C-558/18 and C-563/18 *Miasto Łowicz* [2019] EU:C:2019:775, Opinion of AG Tanchev, para 125; Joined Cases C-748/19 to C-754/19 *WB and Others* [2021] EU:C:2021:403, Opinion of AG Bobek, paras 163-169. See also, Lucia Rossi, 'La valeur juridique des valeurs: L'article 2 TUE: relations avec d'autres dispositions de droit primaire de l'UE et remèdes juridictionnels' (2020) 56(3) Revue Trimestrielle De Droit *Européen* 639, 648.

[137] Joined Cases C-748/19 to C-754/19 *WB and Others* [2021] EU:C:2021:403, Opinion of AG Bobek, paras 163-169.

Under Article 267 TFEU, the CJEU clarified that a national 'court' or 'tribunal' must be, *inter alia*, independent to refer a preliminary question to the CJEU.[138] The Court here adopts a broad material scope focusing on all situations in which a national Court might apply EU law. In this regard, the CJEU ruled that a Court might only make a reference under Article 267 TFEU if it is a body responsible for applying EU law.[139] The focus is thus more on a structural assessment, focusing on the role of the body in the national institutional framework. In this assessment, the CJEU seems to adopt a more lenient interpretation of the independence requirement under Article 267 TFEU compared to Article 19 TEU.[140] This can be explained by the Court's aim to broaden access to the preliminary reference procedure, thereby allowing for judicial dialogue and increasing the uniform application of EU Law.[141] In this regard, the CJEU even adopts a (formalistic) presumption that national courts fulfil the requirements of a 'court' or 'tribunal' under EU law.[142] The presumption does not render the independence requirement under Article 267 TFEU meaningless, as it can still be rebutted. This is in particular the case when there is already a national or international judgement indicating that the respective national court is not an independent and impartial tribunal previously established by law under Article 19 (1) TEU.[143]

In summary, a distinction between two approaches in the jurisprudence of the CJEU concerning the independence of national courts must be

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[138] Case C-53/03 *Syfait and Others v GlaxoSmithKline plc and GlaxoSmithKline AEVE* [2005] EU:C:2005:333, para 29.

[139] Case C-274/14 *Banco de Santander* [2020] EU:C:2020:17, para 56.

[140] See, for example, Case C-246/80 *Broekmeulen v Huisarts Registratie Commissie* [1981] EU:C:1981:218. In *Broekmeulen*, the Dutch Appeals Committee was considered a 'court' or 'tribunal' under EU law, even though it operated on the basis of consent of public authorities and with their cooperation; Case C-103/97 *Josef Köllensperger GmbH & Co. KG and Atzwanger AG v Gemeindeverband* [1999] EU:C:1999:52. In *Köllensperger* and *Atzwanger*, the Austrian Procurement Office was held to be 'court' or 'tribunal' under EU law, even though its members were appointed and dismissed directly by the executive under vague provisions.

[141] Takis Tridimas, 'Knocking on heaven's door: fragmentation, efficiency and defiance in the preliminary reference procedure' (2003) 40(1) Common Market Law Review 9, 30.

[142] Case C-718/21 *Krajowa Rada Sądownictwa (Maintien en fonctions d'un juge)* [2023] EU:C:2023:1015, para 41.

[143] Case C-132/20 *BN and Others v Getin Noble Bank S.A* [2022] EU:C:2022:235, para 72.

remembered. On the one hand, the Court adopts a firm approach to the independence criteria of national courts in the case law under Article 19 (1) TEU, to guarantee individuals effective judicial protection and access to an independent body. On the other hand, the Court seems to adopt a 'looser' approach towards these independence requirements under Article 267 TFEU, with the primary goal of broadening access to the preliminary reference procedure. The Court also constructed a connection between the two Articles, which concerns the situation where the presumption that national courts fulfil the requirements of a 'court' or 'tribunal' under Article 267 TFEU can be rebutted by a national or international judgement indicating that the respective national court is not independent under Article 19 (1) TEU.[144] Therefore, when the independence of a national court is 'compromised', it not only affects its status under Article 19 (1) TEU, but also its capability to refer a preliminary question to the CJEU under Article 267 TFEU. This interconnectedness between the two provisions guarantees that the principle of judicial independence is upheld in the EU legal order. Thus, it seems that a judgement by a national or international court finding a national court to be 'not independent', which may result from serious flaws in the appointment procedure, has concrete consequences in EU law. Taking into account the previous Section, it is advanced that such a finding might also amount to a 'legitimate and compelling ground' to limit the principle of judicial irremovability. This final point will be picked up again in *Section 3.2*.

2.2 EU Militant Rule of Law

In the discussion around the restoration of the Rule of Law, it is often taken for granted that the legal obligations emanating from the Rule of Law should be respected. To put it in the words of the Venice Commission, "any measure taken with a view of restoring the Rule of Law has to meet the overall requirements of the Rule of Law".[145] However, as was seen in *Section 1.1.1*, the restoration procedure creates tensions between various principles that substantiate the Rule of Law and might even require a slight reinterpretation of the principle of judicial irremovability. But why is it in the first place desirable to approach the

[144] Case C-132/20 *BN and Others v Getin Noble Bank S.A* [2022] EU:C:2022:235, para 72.

[145] European Commission for Democracy through Law (Venice Commission), 'Poland Urgent Joint Opinion on the Draft Law Amending the Law on the National Council of the Judiciary' [2024] CDL-AD(2024)018, 19.

restoration of the Rule of Law more 'carefully' and respect the legal obligations flowing from the value in this procedure? Additionally, what kind of measures should be implemented to restore the Rule of Law?

With the aim of providing an underlying theoretical framework to answer these questions, *Section 1.2* develops the concept of 'EU militant Rule of Law'. This concept is composed of two components: 'militant Rule of Law' and its 'EU dimension'. The use of the term 'Rule of Law' presumes a broad (EU) understanding of the value, as outlined in *Section 1.1*. The concept of 'militant Rule of Law' can be broadly defined as a normative theory advocating for the stringent use of recognized exceptions to, or reinterpretations of, Rule of Law principles.[146] The use of these militant measures is characterised by mandatory adherence to safeguards, such as the principle of proportionality and independent judicial oversight.

In order to substantiate the concept of 'EU militant Rule of Law', this Section is structured into two main parts: The first part aims to explore why militant measures are needed and what they might entail. In this context, it is pertinent to explore the work of the author who coined the correlated concept of 'militant democracy', Karl Loewenstein. As will be illustrated, the two concepts of 'militant *democracy*' and 'EU militant *Rule of Law*' differ substantially from each other. Two pivotal differences are highlighted throughout *Section 1.2.1*. First, this Thesis will particularly emphasize the role of an independent judiciary as a mandatory prerequisite for militant measures, an element not addressed by Loewenstein. Second, the concept of 'EU militant Rule of Law' is arguably more nuanced than that of 'militant democracy' because it presumes that every action must abide by the Rule of Law's legal requirements. In summary, the underlying aim of *Section 1.2.1* is to construct the concept of 'EU militant Rule of Law' and establish clearly how this concept differs from that of 'militant democracy'. Subsequently, *Section 1.2.2* emphasises the EU dimension of the concept, acknowledging that EU Member States operate within a multi-layered system, also in their efforts to restore the Rule of Law. This Section therefore explores whether, and to what extent, the EU should actively defend the Rule

[146] András Sajó, 'Militant Rule of Law and Not-so-Bad Law' (2024) Hague Journal on the Rule of Law <https://link.springer.com/article/10.1007/s40803-024-00221-8> accessed 10 May 2024, pp. 17-25.

of Law inside its Member States. Furthermore, it explores the potential role the EU might play in the process of restoring the Rule of Law.

2.2.1 The Concept of 'EU Militant Rule of Law'

The concept of 'EU militant Rule of Law' can be defined as a normative theory advocating for the stringent use of recognized exceptions to, or reinterpretations of, Rule of Law principles.[147] It adopts a broad (EU) understanding of the 'Rule of Law', encompassing elements of democracy and fundamental rights. Furthermore, the name incorporates a firm commitment to abide by the legal obligations arising from the Rule of Law. The 'militancy' of the concept applies both to preventative and restorative situations,[148] with this research primarily concentrating on the latter. Restorative militant actions aim at breaking the hold of illiberal regimes on outdated legal structures, for example, through the reinterpretation of established Rule of Law principles.[149] It should be remembered in this regard how illiberal regimes have previously used the law to legalize arbitrariness and systemically undermined the institutions of the State.[150]

The reinterpretation of established Rule of Law principles simultaneously creates the possibility for the abuse of the concept. Thus, a reinterpretation of such principles should only take place if is subject to certain legal safeguards, such as the principle of proportionality and judicial oversight.[151] Furthermore, it is advanced that any 'judicially-controlled reinterpretation' of Rule of Law principles can only occur if it benefits a different principle.[152] This essentially refers back to the flexible nature of the Rule of Law, where the various principles

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[147] ibid.

[148] András Sajó, 'Militant Rule of Law and Not-so-Bad Law' (2024) Hague Journal on the Rule of Law <https://link.springer.com/article/10.1007/s40803-024-00221-8> accessed 10 May 2024, pp. 2-4.

[149] ibid.

[150] András Sajó, 'The Limits of Judicial Irremovability from the Perspective of Restoring the Rule of Law: A View from Strasbourg' in Filipe Marques and Paulo Pinto de Albuquerque, *Rule of Law in Europe* (Springer 2024) 55, 61.

[151] András Sajó, 'Militant Rule of Law and Not-so-Bad Law' (2024) Hague Journal on the Rule of Law <https://link.springer.com/article/10.1007/s40803-024-00221-8> accessed 10 May 2024, pp. 2-4.

[152] ibid. Applying this to the present research, the reinterpretation of the principle of judicial irremovability, with the aim of allowing the removal of judges appointed under serious flaws, would arguably benefit the principle of effective judicial protection.

substantiating the value sometimes come into conflict with one another and require a 'balancing'.[153] In this regard, it is advanced that as long as the necessary safeguards are observed, the balancing and reinterpretation of seemingly conflicting Rule of Law principles do not compromise the legal obligations inherent to the Rule of Law itself.

As was noted in the introduction of the Second Chapter, the concept of 'EU militant Rule of Law' is similar to that of 'militant democracy', originally coined by Karl Loewenstein in 1937. In this Section, it is proposed that the concept of 'EU militant Rule of Law' can be better understood by means of distinguishing it from that of 'militant democracy'. As will be illustrated, two elements clearly differentiate both concepts. First, Loewenstein did not consider the fundamental importance of an independent judiciary, which should function as a supervisory mechanism to prevent the abuse of militant measures. Second, militant democratic measures can be quite severe and their compatibility with Rule of Law principles (such as that of legality) is questionable. In this regard, the concept of 'EU militant Rule of Law' is arguably more nuanced than that of 'militant democracy,' as it requires that every action strictly adhere to the legal requirements of the Rule of Law.

Having fled Germany in the early 1930s, Loewenstein published two consecutive articles about "militant democracy" in 1937.[154] His work is situated in the context of rising fascism in many European countries and starts from the basic premise that if the system of democracy is convinced that it has not yet fulfilled its destination, it must become militant and fight for its preservation.[155] The need for militant democratic measures is situated in potential weaknesses of the system, such as democratic tolerance for anti-democratic ideas or the impossibility to appeal to emotion,[156] which can be used for its own destruction. While the concept of militant democracy is often associated with measures such

[153] See, *Section 1.1.1*, pp. 20-21.

[154] Karl Loewenstein, 'Militant Democracy and Fundamental Rights, I' (1937) 31(3) The American Political Science Review 417; Karl Loewenstein, 'Militant Democracy and Fundamental Rights, II' (1937) 31(4) The American Political Science Review 638.

[155] Karl Loewenstein, 'Militant Democracy and Fundamental Rights, I' (1937) 31(3) The American Political Science Review 417, 423.

[156] ibid, pp. 424-428. In support of the latter weakness Loewenstein claimed that "Democracy *à la recherche d'une nouvelle mystique* seems hopeless, if not ridiculous".

as the prohibition of a political party,[157] it generally refers in its original form to legislative or statutory measures taken with the aim of preserving democracy against anti-democratic movements.[158] From the very general nature of Loewenstein's theory, it follows that a classification of a national system as a 'militant democracy' is difficult and near to impossible. Instead, the focus should be on the existence of militant democratic traits inside a system. Subsequently, a determination can be made that one system possesses more 'militant traits' than another system.

For Loewenstein, militant democratic measures can involve the restriction of fundamental rights, such as the freedom of expression.[159] These restrictions subsequently vest a lot of powers in the hands of the sovereign and simultaneously create the possibility of abusing these powers. While construing the theory of 'militant democracy', Loewenstein did not consider the fundamental importance of independent (constitutional) courts as a necessary safeguard. This leads to the first distinction between the two concepts: In the concept of 'EU militant Rule of Law', the role of independent courts is considered fundamental since they determine whether a militant measure is suitable and proportionate in a particular case. This supervisory element seems often forgotten in the academic discussions around militant democracy, but is of fundamental importance, for example, in preventing that measures adopted in the light of militant democracy are abused for partisan purposes.[160] Thus, in the concept of 'EU militant Rule of Law', it is emphasized that an independent

[157] This is especially the case in the German debate around the concept. See, for example, Mathias Hong, 'Grundrechtsverwirkung und Parteiverbote gegen radikale AfD-Landesverbände (Teil I)' (*Verfassungsblog*, 6 February 2024) <https://verfassungsblog.de/grundrechtsverwirkung-und-parteiverbote-gegen-radikale-afd-landesverbande-i/> accessed on 1 June 2024.

[158] Karl Loewenstein, 'Militant Democracy and Fundamental Rights, II' (1937) 31(4) The American Political Science Review 638, pp. 644-658.

[159] Giovanni Capoccia, 'Militant Democracy: The Institutional Bases of Democratic Self-Preservation' (2013) 9(1) Annual Review of Law and Social Science 207, 211. Loewenstein's most discussed ideas refer to the restriction of fundamental rights of, for example, political extremists. But he refers also to measures that do not directly restrict those rights. See, Karl Loewenstein, 'Militant Democracy and Fundamental Rights, II' (1937) 31(4) The American Political Science Review 638, pp. 650. On these pages, he discusses legislation to precaution against illicit manufacture, transport, wearing, possession, and use of firearms.

[160] Giovanni Capoccia, 'Militant Democracy: The Institutional Bases of Democratic Self-Preservation' (2013) 9(1) Annual Review of Law and Social Science 207, 213.

judiciary is a mandatory prerequisite for implementing militant measures, necessitating regulatory steps to guarantee (or restore) judicial independence. Consequently, an independent judiciary also requires a regulated procedure for the dismissal of non-independent judges. Without such regulation, one could imagine a scenario in which a new government dismisses all of the current judges and appoints its own set of judges. This would quickly overcome the supervisory element of militant measures and allows the government to abuse such measures to, for example, suppress the political opposition and minorities in the country. In summary, militant measures should be subjected to the control of an independent judiciary. This, furthermore, presupposes a regulatory framework ensuring that only independent judges occupy judicial offices, while simultaneously foreseeing a procedure to dismiss judges not fulfilling these independence requirements. This ultimately guarantees that militant measures cannot be abused by an illiberal regime.

Turning to the second distinctive feature between the two concepts, which relates to the more nuanced nature of 'EU militant Rule of Law', the concept of 'militant democracy' is first embedded in the supranational structure of the EU. While Loewenstein originally criticized the lack of combined effort among democratically-minded States,[161] this criticism is less pertinent nowadays after the creation of the EU, which aims to promote liberal democratic values.[162] It is, furthermore, a precondition for joining the EU is to respect these values.[163] Considering that the EU shall respect the fundamental constitutional structures of the Member States,[164] there is no singular model of liberal democracy that the Member States must adopt. States 'merely' remain bound by liberal democratic values and therefore adopt "some form of liberal democracy".[165] The concept of 'liberal democracy' has been defined in academia as a system in

[161] Karl Loewenstein, 'Militant Democracy and Fundamental Rights, I' (1937) 31(3) The American Political Science Review 417, 430.

[162] See, for example, Article 2 TEU.

[163] Tore Vincents Olsen, 'Liberal Democratic Sanctions in the EU' in Anthoula Malkopoulou and Alexander Kirshner (eds), *Militant Democracy and Its Critics* (Edinburgh University Press 2019) 150, pp. 151-152.

[164] Article 4 (2) TEU.

[165] Tore Vincents Olsen, 'Liberal Democratic Sanctions in the EU' in Anthoula Malkopoulou and Alexander Kirshner (eds), *Militant Democracy and Its Critics* (Edinburgh University Press 2019) 150, pp. 151-152.

which actors compete for power on an equal footing in regular elections, and in which a constitution and the Rule of Law constrain decision-making.[166] From the perspective of constitutional law, the concept of *militant* democracy does not oppose that of *liberal* democracy, as long as militant democratic measures adhere to the Rule of Law, particularly to the principle of legality.[167] At the EU level, the foundational liberal democratic values are enshrined in Article 2 TEU, which are expressed in concrete legal principles with binding legal obligations.[168] Consequently, in EU Member States, militant democratic measures must operate within the framework established, *inter alia*, by the value of the Rule of Law, and particularly by the principle of legality, which requires any state action to have a legal basis enshrined in law.[169] This is, however, at odds with the original theory of Lowenstein, as he, for example, advocates for proactive actions that might be perceived as undemocratic, such as banning certain political parties or limiting the freedom of speech, but which are justified by their overarching aim of preserving democracy. These measures are likely to conflict with the principle of legality. Thus, it seems that the concept of 'militant democracy' can only 'survive' in EU Member States when it is adapted into a 'softer' or 'more nuanced' version, limited by the principle of legality. This leads to the second difference between the two concepts, which has also been aptly summarised by Andras Sajó: "militant Rule of Law - unlike militant democracy in certain scenarios - does not contradict the fundamental principles of what it seeks to protect".[170] This refers to criticism often advanced against militant democratic measures, which argues that limiting the freedom of speech is in itself an undemocratic measure. The concept of 'EU militant Rule of Law', on the

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[166] For the definition of "liberal democracy" see, Giovanni Capoccia, 'Militant Democracy: The Institutional Bases of Democratic Self-Preservation' (2013) 9(1) Annual Review of Law and Social Science 207, 219.

[167] Giovanni Capoccia, 'Militant Democracy: The Institutional Bases of Democratic Self-Preservation' (2013) 9(1) Annual Review of Law and Social Science 207, 219; Tore Vincents Olsen, 'Liberal Democratic Sanctions in the EU' in Anthoula Malkopoulou and Alexander Kirshner (eds), *Militant Democracy and Its Critics* (Edinburgh University Press 2019) 150, 165.

[168] Case C-156/21 *Hungary v European Parliament and Council of the European Union* [2022] EU:C:2022:97, para 232.

[169] Adriaan Bedner, 'An Elementary Approach to the Rule of Law' (2010) 2(1) Hague Journal On The Rule Of Law 48, pp. 50-60.

[170] András Sajó, 'Militant Rule of Law' (*Verfassungsblog*, 20 December 2023) <https://verfassungsblog.de/militant-rule-of-law/> accessed on 5 March 2024.

other hand, does not compromise the value it seeks to protect as any militant measure is characterised by mandatory adherence to certain safeguards, such as the principle of legality and independent judicial oversight.

In conclusion, the central premise of Lowenstein's work hinges on the necessity of militant actions in the face of internal threats that exploit the inherent weaknesses of the system, such as tolerance for anti-democratic ideologies.[171] Nowadays, this premise is as pertinent as it was in the 1930's and might equally explain the need for militant Rule of Law measures. In this regard, recent Rule of Law 'backsliding' in EU Member States has indeed been partly attributed to institutional and constitutional weaknesses that were abused by illiberal regimes.[172] With the aim of providing an underlying theory to guide the process of restoring the Rule of Law and dismantling the hold of illiberal regimes on outdated legal structures, this Section developed the concept of 'EU militant Rule of Law'. The concept advocates for the employment of militant measures, such as the reinterpretation of established Rule of Law principles, with the aim of restoring the value. Furthermore, a distinction was drawn between this concept and the well-established notion of 'militant democracy'. Most strikingly, the concept of 'EU militant Rule of Law' acknowledges the potential for abuse of militant measures and, therefore, emphasises that any such measure must be subjected to safeguards, such as independent judicial oversight. This, in turn, also necessitates a regulated framework ensuring judicial independence and procedures for the removal of non-independent judges. The following Subsection will further contextualize this concept and place it within the EU framework.

2.2.2 Militant Rule of Law in a Multi-Layered System

The creation of the EU as a *sui generis* international organization allowed the Member States to 'open up' to common EU institutions with executive, legislative, and judicial powers.[173] This, consequently, resulted in the present

[171] Karl Loewenstein, 'Militant Democracy and Fundamental Rights, I' (1937) 31(3) The American Political Science Review 417, 423.

[172] See, Laurent Pech and Kim L Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) 19(1) Cambridge Yearbook of European Legal Studies 3, 9-12; Matteo Bonelli, 'A Union of Values' (PhD Dissertation, Maastricht University 2019), 20.

[173] Ingolf Pernice, 'Multilevel Constitutionalism and the Crisis of Democracy in Europe' (2015) 11(3) European Constitutional Law Review 541, pp. 542-545.

pluralist or 'multi-level' constitutional order, characterised by converging yet distinct legal orders between the national and supranational (EU) level.[174] The different legal orders advance competing claims for legal authority. It can, for example, be argued that EU constitutional law is essentially based on national constitutions, which can be witnessed by the existence of 'enabling clauses' in most constitutions, through which legitimacy is provided for EU claims of authority.[175] According to Pernice, the two legal orders form a "unity" (i.e. one system of law producing a single legal solution to an issue) in certain areas, for example, in the protection of the common values.[176] Acknowledging that EU Member States operate within a multi-level constitutional system, also in restoring the Rule of Law, the question becomes if and how the EU should become active in the Rule of Law restoration inside the Member States.

There are many normative arguments that justify the EU becoming active in protecting the Rule of Law. This Section touches upon three of those. Firstly, an illiberal regime, which weakens its protection of democracy and Rule of Law, remains a participating Member State in the EU institutions and affects, for example, the democratic legitimacy of decision-making in the Council.[177] It follows from the 'all-affected principle' that every citizen has an interest in not been subject to an illiberal Member State in the EU since this Member State will insert influence in the (European) Council and, thereby, affect the lives of all citizens.[178] Secondly, such a regime undermines the functioning of the internal

[174] ibid; Patricia Popelier, 'Europe Clauses' and Constitutional Strategies in the Face of Multi-Level Governance' (2014) 21(2) Maastricht Journal of European and Comparative Law 300, 303.

[175] Patricia Popelier, 'Europe Clauses' and Constitutional Strategies in the Face of Multi-Level Governance' (2014) 21(2) Maastricht Journal of European and Comparative Law 300, 303.

[176] Ingolf Pernice, 'Multilevel Constitutionalism and the Crisis of Democracy in Europe' (2015) 11(3) European Constitutional Law Review 541, 545.

[177] Tom Theuns, 'The Need for an EU Expulsion Mechanism: Democratic Backsliding and the Failure of Article 7' (2022) 28(1) Res Publica 693, 700-704. Tom Theuns claims that the democratic legitimacy of the Council is dependent on the democratic legitimacy of the national governments themselves. Consequently, the democratic legitimacy of the Council suffers when illiberal regimes participate in the decision-making.

[178] Jan-Werner Müller, 'Should the EU Protect Democracy and the Rule of Law inside Member States?' (2015) 21(2) European Law Journal 141, 145.

market, which is composed of mechanisms such as 'mutual recognition'.[179] Lastly, it seems evident that respecting the liberal EU values should not merely be a condition for joining the EU, but that these values must equally be respected throughout the membership. There are thus strong arguments for the EU to protect the Rule of Law in backsliding Member States. This aligns with the general view of EU citizens, as 74% of the respondents to a recent Eurobarometer survey indicated that the EU should play an important role in upholding the Rule of Law in the Member States.[180] In summary, as long as a country remains an EU Member State, it is the normative business of the EU to protect the Rule of Law inside backsliding States.

This means, in turn, that the EU should take active measures to protect the Rule of Law. In this context, the Member States voluntarily established sanctioning mechanisms for cases where they fail to adhere to the 'rules'.[181] These mechanisms can be classified as 'militant traits' the EU currently possesses to actively defend the Rule of Law.[182] This is further expressed by the Commission's commitment to undertake constant actions to safeguard the values of democracy and Rule of Law through its annual Rule of Law reports, which (according to the Commission) contribute to a strong and healthy European democracy.[183] As previously hinted at, the EU possesses concrete mechanisms through which it can protect the Rule of Law within the Member States. In this regard, one can, for example, consider infringement actions that can be initiated by the Commission under Article 258 TFEU, proceedings under Article 7 TEU, and an increased use of conditionality mechanisms in EU secondary law. These mechanisms have been put into use by the EU against Polish violations of liberal democratic values with the aim of safeguarding the

[179] Carlos Closa, Dimitry V Kochenov, and Joseph H H Weiler, 'Reinforcing Rule of Law Oversight in the European Union' (2014) 25 EUI Working Papers RSCAS, pp. 4-7.

[180] European Commission, 'Special Eurobarometer 553 - Rule of Law' [2024], 25.

[181] Jan-Werner Müller, 'Should the EU Protect Democracy and the Rule of Law inside Member States?' (2015) 21(2) European Law Journal 141, 144.

[182] Tom Theuns, 'Is the European Union a militant democracy? Democratic backsliding and EU disintegration' (2024) 13(1) Global Constitutionalism 104, pp. 110-115.

[183] European Commission, Communication, '2023 Rule of Law Report' [2023] COM(2023) 800 final, 1.

Rule of Law.[184] A clarification is needed regarding these 'militant traits' of the EU. While the Treaty provisions have been in place for some time, their application has significantly evolved in recent years, particularly after *Portuguese Judges*.[185] It thus seems that the EU institutions actively developed these 'militant traits' in the last years in response to Rule of Law 'backsliding' Member States.[186] The Polish case study shows that when national institutions are 'captured' by an authoritarian regime, there is still the EU level that is able to undertake measures against these developments. In other words, the EU level serves as an additional 'defender' of the EU liberal values in the multi-layered system.

The EU's role regarding Rule of Law backsliding Member States has primarily focused on sanctioning these States by using the existing Rule of Law 'toolbox'. The restoration of the value is a problem of a different nature and arguably requires another approach from the EU. The 'conventional' mechanisms under Article 7 TEU and Article 258 TFEU do not seem appropriate to be used against a Member State in the process of restoring the Rule of Law. On the contrary, the EU level should not hit Member States aiming to restore the value 'further on the head' with its sanctioning arm, but facilitate the Rule of Law restoration as much as possible. Thus, restoring the Rule of Law seems to require 'unconventional' measures by the EU. The evident question then becomes: How can the EU facilitate the process of Rule of Law restoration inside the Member States?

Until now, the EU's approach has largely focused on dialogue between the European Commission and the backsliding Member State. In February 2024,

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[184] Kim L Scheppele and John Morijn, 'What Price Rule of Law', in Anna Södersten and Edwin Hercock (eds), *The Rule of Law in the EU: Crisis and Solutions* (SIEPS 2023) 39, pp. 42-45.

[185] For a detailed discussion of *Portuguese Judges* see, *Section 1.1*. In brief, it was argued that the Court 'materialized' the Rule of Law and judicial independence in a primary law obligation (Article 19 (1) TEU), which subsequently allowed the Commission to open numerous infringement proceedings on the basis of that Article.

[186] Kim L Scheppele and others, 'EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union' (2021) 39(1) Yearbook of European Law 3, pp. 44-46. The authors describe the response of the Court and the Commission to the Rule of Law crisis in Poland as the result of a "deep learning curve" after having failed to respond to effectively combat attacks on judicial independence in Hungary.

this resulted in the 'unfreezing' of millions in EU funds, after two "super milestones" were reached.[187] In May 2024, the Commission furthermore closed the procedure under Article 7 (1) TEU since "there is no longer a clear risk of a serious breach of the rule of law in Poland".[188] However, deeper reforms are needed to fully restore the Rule of Law in Poland and to implement the 'promises' that led to the closure of the procedure under Article 7 (1) TEU. The focus of the current research is the restoration of judicial independence in the Polish Constitutional Tribunal. As will be further illustrated in the next Chapter, this requires the removal of certain judges from office, which, in turn, conflicts with the EU Rule of Law principle of judicial irremovability. This creates a certain paradox, where necessary national reforms aiming at restoring judicial independence conflict with established EU Rule of Law principles. The normative concept of 'EU militant Rule of Law' provides a possible solution to this paradox. As was established in the previous Subsection, this concept advocates for militant measures in the form of the rigorous use of recognized exceptions to, or reinterpretations of, established Rule of Law principles. Applying this to a scenario where a court has been 'captured' by the previous illiberal regime, it seems evident that, for that the national level is in a situation, where it can restore judicial independence and simultaneously act in line with EU law, there should be a recognized procedure at the EU level to dismiss judges appointed under serious flaws. To be clear, it is argued that Member States should play the primary role in the Rule of Law restoration process. The CJEU should 'only' avoid further obstructing this process and, consequently, recognize an additional justified limitation to the principle of judicial irremovability, provided that the necessary safeguards are respected. In summary, the concept of 'EU militant Rule of Law' advocates that the CJEU should recognize an additional exception in its future case law to allow the dismissal of judges appointed under

[187] These two "super milestones" relate to the reform of the disciplinary regime for judges and the use "Arachne", an IT tool that supports Member States' audit and control systems and which therefore ensures the necessary safeguards against fraud. See, European Commission, Press Release, 'Poland's efforts to restore rule of law pave the way for accessing up to €137 billion in EU funds' [2024].

[188] This assessment is essentially forward-looking and based on the 'action plan' that Adam Bodnar presented to the Commission. See, European Commission, Press Release, 'Commission intends to close Article 7(1) TEU procedure for Poland' [2024].

serious flaws. How such an exception might look like and which procedural safeguards must be met will be further explored in *Section 3.2.2*.

3. Deterioration of the Polish Constitutional Tribunal's Judicial Independence

The primary objective of this Thesis is to establish a possible way of restoring the PCT's judicial independence without breaching the legal obligations flowing from the Rule of Law. It follows that it first has to be explored to what extent the PCT's judicial independence deteriorated from 2015 onwards. In 2024, the history of the Rule of Law backsliding in Poland has been subject to numerous academic publications.[189] This second Chapter, therefore, does not aim to provide an exhaustive overview of these developments in Poland. Instead, it specifically focuses on the undermining of judicial independence in the PCT through the unlawful election of the 'quasi-judges' and the installation of a new President (*Section 2.1*), as well as the CJEU's and ECtHR's responses to the Rule of Law 'backsliding' in Poland (*Section 2.2*).

3.1 Developments around the Polish Constitutional Tribunal post-2015

The undermining of the Polish judiciary by PiS will be illustrated in this Section by focusing on the case study of the deterioration of the PCT's independence. As a starting point, the PCT was a well-established and strong protector of fundamental rights and the national constitution pre-2015.[190] To fully understand how the PCT became subject to a 'hostile takeover',[191] the actions of the seventh-term lower house of the Polish Parliament ("*Sejm*"), which was not ruled by a PiS majority, must be considered. Accordingly, shortly before its parliamentary term was over, it adopted an act vesting in it the power to elect judges to all seats at the PCT that were becoming vacant in 2015.[192] This concerned in total five seats. Three of those became vacant in November 2015

[189] For a detailed overview see, Laurent Pech and Kim L Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) 19(1) Cambridge Yearbook of European Legal Studies 3; Tímea Drinóczi and Agnieszka Bień-Kacała (eds), *Rule of Law, Common Values, and Illiberal Constitutionalism: Poland and Hungary Within the European Union* (Routledge 2021); Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press 2019); Matteo Bonelli, 'A Union of Values' (PhD Dissertation, Maastricht University 2019), pp. 276-302.

[190] Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press 2019), 59.

[191] Miroslaw Wyrzykowsk, 'Experiencing the Unimaginable: the Collapse of the Rule of Law in Poland' (2019) 11(1) Hague Journal on the Rule of Law 417, 419.

[192] Adam Ploszka, 'It Never Rains but it Pours. The Polish Constitutional Tribunal Declares the European Convention on Human Rights Unconstitutional' (2022) 15(1) Hague Journal on the Rule of Law 51, 53.

and two in December 2015. All judges were elected in October but did not take up their duties as the President refused to confer his oath upon them.[193] This is required by statute but does not amount to discretion on the side of the Head of State in practice (i.e. the requirement is, in principle, not more than a formality).[194] On this point, the outgoing *Sejm*'s election of the two seats becoming vacant in December was indeed legally questionable and has been described as an "unsuccessful attempt of court-packing".[195]

After PiS came into power, it adopted several legislative reforms modifying the Act on the Constitutional Tribunal and amending the procedure by which judges are elected to the Constitutional Tribunal.[196] Furthermore, on 25 November 2015, the newly elected (eight-term) *Sejm* declared the elections of all five October judges to the PCT as "lacking legal effect" and, subsequently, nominated five of their own candidates in December 2015.[197] Contrasting to this, the PCT itself held in case *K 34/15* that only the election of the two seats that became vacant in December 2015 was unconstitutional.[198] Consequently, on the basis of this ruling, the new *Sejm* should have only re-elected these two seats. However, this ruling was disregarded, and all five seats were replaced with new judges. The three duly elected October judges were therefore never able to perform their duties and were replaced by 'quasi-judges',[199] as they were

[193] *Xero Flor w Polsce sp. z o.o. v. Poland* App no 4907/18 (ECtHR, 7 May 2021), paras 8-10.

[194] Polish Constitutional Tribunal, Judgement *K 34/15*, 3 December 2015.

[195] Adam Ploszka, 'It Never Rains but it Pours. The Polish Constitutional Tribunal Declares the European Convention on Human Rights Unconstitutional' (2022) 15(1) Hague Journal on the Rule of Law 51, 53.

[196] For an overview of these amendments see, United Nations (Human Rights Committee), 'Concluding observations on the seventh periodic report of Poland' [2016] CCPR/C/POL/7, pp. 2-3.

[197] *Xero Flor w Polsce sp. z o.o. v. Poland* App no 4907/18 (ECtHR, 7 May 2021), paras 18-20.

[198] Polish Constitutional Tribunal, Judgement *K 34/15*, 3 December 2015. Concerning the other three judges appointed by the 7th-term Sejm, the PCT held that their appointment was constitutional and that the President was under an obligation to confer his oath upon them.

[199] The three 'quasi-judges' were initially Mariusz Muszyński, Henryk Cioch, and Lech Morawski. However, both Henryk Cioch and Lech Morawski passed away while serving in office, in December 2017 and July 2017, respectively. They were replaced by Justyn Piskorski and Jarosław Wyrembak. However, the fact that these two judges were newly appointed does not alter their classification as "quasi-judges," since they were appointed

labelled by academia.[200] The unconstitutional nature of the 'quasi-judges' election was explicitly confirmed by the PCT in case *K 35/15*.[201] Additionally, the government's decision to not publish these rulings further exacerbated the ambiguity surrounding the PCT.[202]

The crisis reached a second stage when Julia Przyłębska was elected as the new President of the PCT. While her status as a judge is indisputable,[203] her election as the President of the PCT was plagued by irregularities.[204] In brief, the election procedure violated the statutory and constitutional provisions and lacked the necessary quorum.[205] Her subsequent presidency cast an even worse light on the Tribunal. To name but a few instances: She *de facto* silenced one of her most vocal critics, Judge Biernat, by forcing him to use his holiday entitlements,[206] she was accused of illegally manipulating the composition of the panels and maintained very close contact with the PiS leader.[207] Arguably the most important impact in practice was that she enabled the 'quasi-judges' to

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to positions that were already occupied at the time. See, Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press 2019), 75.

[200] See, for example, Adam Ploszka, 'It Never Rains but it Pours. The Polish Constitutional Tribunal Declares the European Convention on Human Rights Unconstitutional' (2022) 15(1) Hague Journal on the Rule of Law 51, 52; Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press 2019), 62.

[201] Polish Constitutional Tribunal, Judgement *K 35/15*, 9 December 2015.

[202] United Nations (Human Rights Council), 'Report of the Special Rapporteur on the independence of judges and lawyers on his mission to Poland' [2018] A/HRC/38/38/Add.1, pp. 8-9; United Nations (Human Rights Committee), 'Concluding observations on the seventh periodic report of Poland' [2016] CCPR/C/POL/7, pp. 2-3. Through a bottom-up civil society initiative, the judgements were initially published on Facebook. See, Tomasz T Koncewicz, 'Of institutions, democracy, constitutional self-defence and the rule of law: The judgments of the Polish Constitutional Tribunal in Cases K 34/15, K 35/15 and beyond' (2016) 53(6) Common Market Law Review 1753, 1773.

[203] Julia Przyłębska was one of the five judges appointed on 2 December 2015, but she is not one of the three 'quasi-judges'. The appointment of her and Piotr Pszczółkowski was in line with the Polish Constitution.

[204] Marcin Matczak, 'Poland's Constitutional Tribunal under PiS control descends into legal chaos' (*Verfassungsblog*, 11 January 2017) <https://verfassungsblog.de/polands-constitutional-tribunal-under-pis-control-descends-into-legal-chaos/> accessed on 3 April 2024.

[205] Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press 2019), pp. 65-66.

[206] ibid, 68. This decision was justified under "budgetary reasons".

[207] Adam Ploszka, 'It Never Rains but it Pours. The Polish Constitutional Tribunal Declares the European Convention on Human Rights Unconstitutional' (2022) 15(1) Hague Journal on the Rule of Law 51, pp. 54-55.

take part in the panels,[208] a step the previous President had declined to make.[209] Ultimately, the reforms transformed the PCT from a well-established guardian of the national constitution to a captured institution that shields the parliamentary majority.

3.2 The CJEU's and ECtHR's Attempts to Protect the Rule of Law in Poland and the Polish Constitutional Tribunal's Resistance

The previous Section illustrated that the PiS reforms resulted in 'systemic' Rule of Law deficiencies within Poland's judiciary.[210] It should, therefore, not come as a surprise that these reforms were not met with appraisal by the CJEU and ECtHR. The subsequent developments can be classified into two stages. Firstly, the CJEU and ECtHR issued judgements finding the Polish judiciary in violation of European Rule of Law standards. Secondly, the PCT handed two judgements in cases *K 3/21* and *K 6/21* that can be characterised as 'principled resistance' against EU and ECHR law respectively. These judgements, furthermore, illustrate the practical implications of a 'captured' court. This Section begins by illustrating the 'EU perspective' of the story of the Rule of Law backsliding in Poland, before shifting to the 'ECHR perspective'.

From the standpoint of EU law, it is not unusual for a national Constitutional Court to embark on a confrontational path against EU law. Over history, there are certainly more 'positive'[211], but also 'negative'[212] examples of

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[208] Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press 2019), 64.

[209] Matteo Bonelli, 'A Union of Values' (PhD Dissertation, Maastricht University 2019), 279.

[210] On the notion of 'systemic deficiencies' in the Rule of Law context see, Armin Von Bogdandy, 'Principle of a systemic Deficiencies Doctrine: How to Protect Checks and Balances in the Member States' Common Market Law Review (2020) 57(3) 705, 718. Armin Von Bogdandy defines 'systemic deficiencies' as "phenomena of illegality that either occur on a regular basis, are widespread or deep-rooted, or can be traced back to high authorities that use them to express a political stance".

[211] See, for example, the *Taricco saga* as summarized by: Matteo Bonelli, 'The Taricco saga and the consolidation of judicial dialogue in the European Union' (2018) 25(3) Maastricht Journal for European and Comparative Law 357. Matteo Bonelli characterises the saga as a "positive episode" of constitutional conversations between national and EU courts.

[212] See, for example, the *PSPP saga* as summarized by: Ulrich Haltern, 'Revolutions, real contradictions, and the method of resolving them: The relationship between the Court of Justice of the European Union and the German Federal Constitutional Court' (2021) 19(1) International Journal of Constitutional Law 208.

such judicial dialogue between the national and EU level.[213] Concerning the latter category of negative examples, case *K 3/21* stands out prominently. The previous Section only touched upon the legislative reforms that concerned the PCT. However, the whole Polish judiciary, ranging from lower ordinary courts to the Supreme Court, was targeted by these reforms.[214] Subsequently, the CJEU was called upon in many cases to establish whether these reforms were compatible with Article 2 TEU and Article 19 (1) TEU. In these cases, the Court repeatedly declared the Polish reforms to be in violation of EU guarantees of judicial independence (i.e. in violation of the independence requirements outlined in *Section 1.1*).[215] In principle, these cases resulted in the obligation for national courts to set aside conflicting provisions of national law,[216] which *in casu* concerned the legislative amendments of the judiciary by PiS. Against this background, the Prime Minister submitted a request to the PCT for an abstract constitutional review concerning the relation between Polish and EU law.[217] In the subsequent case *K 3/21*, the PCT outrightly rejected the primacy of EU law in the national constitutional system and, thereby, did not allow the CJEU to protect the independence of the national judiciary through Article 19 (1) TEU.[218]

[213] Matteo Bonelli classified the dialogue between the EU and national level as "positive" in the *Taricco saga*. In my personal understanding, I classify judicial dialogue between the national and EU level as "positive" when both the CJEU and the national Constitutional Court compromise on their initial starting position and reach somewhat of a compromise. This can furthermore be witnessed by the ICC being willing to 'play the game' and refer questions to the CJEU while using 'EU law language'.

[214] Niels Petersen and Mariusz Maciejewski, 'The Primacy of EU Law and the Polish Constitutional Law Judgment' [2022] Study for the LICE Committee of the European Parliament, pp. 14-16.

[215] See, for example, Case C-619/18 *Commission v Poland (Indépendance de la Cour suprême)* [2019] EU:C:2019:531, paras 108-124; Case C-192/18 Commission v Poland (*Indépendance des juridictions de droit commun*) [2019] EU:C:2019:924, paras 120-135; Joined Cases C-585/18, C-624/18 and C-625/18 *A. K.* (*Indépendance de la chambre disciplinaire de la Cour suprême*) [2019] EU:C:2019:982, paras 131-153.

[216] Case 106/77 *Simmenthal* [1978] EU:C:1978:49, para 21.

[217] Niels Petersen and Mariusz Maciejewski, 'The Primacy of EU Law and the Polish Constitutional Law Judgment' [2022] Study for the LICE Committee of the European Parliament, 20.

[218] Polish Constitutional Tribunal, Judgement *K 3/21*, 7 October 2021. See also, Matteo Bonelli and others, 'Usual and Unusual Suspects: New Actors, Roles and Mechanisms to Protect EU Values' (2022) 7(2) European Papers 641, 642.

Turning to the ECHR, it is also not revolutionary that a national Constitutional Court exercises (principled) resistance against it.[219] In the case of the PCT, the principled resistance to the ECHR became particularly evident with case *K 6/21*. To fully understand this case of the PCT, regard should be given to a prior ECtHR judgement. In May 2021, the ECtHR ruled in the case *Xero Flor* on a decision by the PCT to dismiss a constitutional complaint by a majority of one vote.[220] As such this does not seem problematic. However, one of the judges on the panel was a 'quasi-judges'. The ECtHR began its reasoning by recalling that the right to a fair trial under Article 6 (1) ECHR entails the right to a 'tribunal established by law' and continued with an application of the threshold test previously established in *Ástráðsson*. Given, *inter alia*, the fact the PCT already established in case *K 34/15* that the election of the three judges by the seventh-term *Sejm* was constitutional, and the PiS government subsequently should not have replaced these judges with its own candidates, the irregularities in the judicial appointment procedure were evident. These irregularities amounted to a violation of the applicant's right to a 'tribunal established by law' as guaranteed by Article 6 (1) ECHR.[221] The importance of this judgement should not be underestimated, as it marked the first instance an international court declared the Polish Constitutional Tribunal in violation of the Rule of Law (i.e. the rulings of the CJEU cited above had addressed most Polish courts, but not the PCT).[222]

In response to the ruling in *Xero Flor*, the PCT ruled in case *K 6/21* that Article 6 ECHR is incompatible with the Polish Constitution in so far as it allows the classification of the PCT as a "court" under the Article and permits the review of judicial appointments.[223] This, in turn, provoked dissatisfied opinions by the

[219] Marten Breuer, 'Principled resistance to the European Court of Human Rights and its case law: a comparative assessment' in Helmut Philipp Aust and Esra Demir-Gürsel (eds), *The European Court of Human Rights: current challenges in historical perspective* (Edward Elgar Publishing 2021) 43, pp. 50-55.

[220] *Xero Flor w Polsce sp. z o.o. v. Poland* App no 4907/18 (ECtHR, 7 May 2021), paras 95-98.

[221] ibid, paras 289-291.

[222] See, Marcin Szwed, 'What Should and What Will Happen After Xero Flor' (*Verfassungsblog*, 9 May 2021) <https://verfassungsblog.de/what-should-and-what-will-happen-after-xero-flor/> accessed on 17 January 2024.

[223] Polish Constitutional Tribunal, Judgement *K 6/21*, 24 November 2021.

Committee of Ministers under the supervisory mechanism.[224] Interestingly, while the Court did not specify which general measures should be taken to remedy the breach of Article 6 ECHR, the Committee clarified that the Polish authorities should admit the three lawfully elected judges to the PCT and should, consequently, exclude the irregularly elected judges.[225]

In conclusion of the second Chapter, due to the legislative reforms after 2015, PiS transformed the whole Polish judiciary substantially. Regarding the PCT, *Section 2.1* illustrated how the appointment of three 'quasi-judges' and a controversial President contributed to the Tribunal's transformation from a strong protector of the national constitution into a "*de facto* captured institution"[226] that acts as a protector of the parliamentary majority. Both the CJEU and ECtHR have criticized the reforms of the Polish judiciary. On the one hand, the CJEU repeatedly declared Polish reforms of the national judiciary in violation of EU guarantees of judicial independence.[227] These cases, however, did not directly concern the independence of the PCT. On the other hand, the ECtHR explicitly held in *Xero Flor* that the irregularities in the appointment of the 'quasi-judges' entailed a violation of the applicant's right to a 'tribunal established by law' under Article 6 (1) ECHR.[228] In response to these judgements, the PCT declared in *K 3/21* and *K 6/21* that both EU and ECHR law are incompatible with the Polish Constitution to the extent these legal orders examine the independence of the Polish judicial system. As a last point, this Section also illustrated the practical implications of a 'politically captured'

[224] See, for example, Committee of Ministers, '1436th meeting - H46-18 Xero Flor w Polsce sp. z o.o. v. Poland (Application No. 4907/18)' [2022] CM/Del/Dec(2022)1436/H46-18; Committee of Ministers, '1451st meeting - H46-24 Xero Flor w Polsce sp. z o.o. v. Poland (Application No. 4907/18)' [2022] CM/Del/Dec(2022)1451/H46-24.

[225] Committee of Ministers, '1451st meeting - H46-24 Xero Flor w Polsce sp. z o.o. v. Poland (Application No. 4907/18)' [2022] CM/Del/Dec(2022)1451/H46-24, para 4.

[226] Matteo Bonelli, 'A Union of Values' (PhD Dissertation, Maastricht University 2019), pp. 277-278.

[227] See, for example, Case C-619/18 *Commission v Poland (Indépendance de la Cour suprême)* [2019] EU:C:2019:531, paras 108-124; Case C-192/18 Commission v Poland (*Indépendance des juridictions de droit commun*) [2019] EU:C:2019:924, paras 120-135; Joined Cases C-585/18, C-624/18 and C-625/18 *A. K.* (*Indépendance de la chambre disciplinaire de la Cour suprême*) [2019] EU:C:2019:982, paras 131-153.

[228] *Xero Flor w Polsce sp. z o.o. v. Poland* App no 4907/18 (ECtHR, 7 May 2021), paras 289-291.

Constitutional Tribunal, which refuses to abide by CJEU and ECtHR judgements and fundamentally changes the relationship between the different legal orders.

4. Restoring the Polish Constitutional Tribunal's Judicial Independence without Breaching the Rule of Law

Building upon the last Sections, the third Chapter essentially aims to substantiate two central propositions to this research. First, *Section 3.1* advances two arguments in support of the proposition that the restoration of judicial independence should be strictly in line with legal obligations stemming from the Rule of Law. Second, *Section 3.2* examines how judges can be removed from office in line with the legal obligations arising from the Rule of Law. The second Section begins by testing the proposition that a judge appointed under national law should, in principle, also be considered a 'judge' from the perspective of EU law. Subsequently, it establishes a procedure under which judges could be removed from the PCT in line with the principle of judicial irremovability (*Section 3.2.1*). Finally, it will address the fate of judgements issued by the PCT in its unlawful composition (*Section 3.2.2*).

4.1 The Importance of Respecting the Rule of Law while Restoring the Rule of Law

The underlying claim of the research question asserted that Polish authorities should respect the legal obligations emanating from the Rule of Law in restoring the value. As it was already remarked in *Section 1.2*, it is frequently simply assumed that any measure taken with a view of restoring the Rule of Law has to meet the overall requirements of the Rule of Law.[229] But why is it in the first place desirable to respect legal obligations flowing from the Rule of Law in the process of restoring the value? And why are not 'legally revolutionary measures' appropriate to remedy judicial appointments by an illiberal regime? To put it simply, why is it not appropriate to 'fight fire with fire'? This Section outlines two arguments in support of the claim that the Rule of Law should be respected while restoring the value: First, it lays the foundation for a Rule of Law culture and, thereby, ensures that the value is not 'only' restored in the short term but also sustained over the long term. Secondly, this approach aligns with the concept of 'EU militant Rule of Law', as developed in *Section 1.2*.

[229] European Commission for Democracy through Law (Venice Commission), 'Poland Urgent Joint Opinion on the Draft Law Amending the Law on the National Council of the Judiciary' [2024] CDL-AD(2024)018, 19.

Before developing these two arguments, the opposite situation is examined to explore the implications of 'legally revolutionary arguments', such as 'extinguishing' the PCT. *Section 1.1* established that the "common core" of Rule of Law definitions includes, *inter alia*, the public exercise of power to be constrained by the law.[230] This is generally captured by the principle of legality, which requires State actions to have a legal basis enshrined in law.[231] Or, in the words of Hans Kelsen, the exercise of the State's functions must be "as lawful as possible".[232] Thus, according to the principle of legality, the Polish government is strictly bound by Polish (constitutional) law and EU law in its efforts to restore judicial independence.

At this point, it is interesting to revisit some academic proposals for restoring the Rule of Law touched upon in the Introduction. For example, Wojciech Sadurski advanced the argument that the PCT should be "extinguished".[233] Naturally, there is currently no procedure foreseen in the Polish Constitution to extinguish the PCT (or to dismiss judges for different reasons than those enshrined in Article 180 (2) of the Constitution).[234] Consequently, if the proposal were to be implemented in line with the principle of legality, it would require a constitutional amendment. The author did not discuss this possibility and argues for the implementation of these measures even though they are unconstitutional. On a more general note, the extreme nature of these 'legally revolutionary' proposals is justified, according to the authors, because they deem all judges of the PCT as "illegitimate",[235] or because

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[230] Adriaan Bedner, 'An Elementary Approach to the Rule of Law' (2010) 2(1) Hague Journal On The Rule Of Law 48, 58.

[231] ibid, 50-60.

[232] Hans Kelsen, 'Who ought to be guardian of the Constitution? Kelsen's reply to Schmitt' in Hans Kelsen and Carl Schmitt, *The guardian of the Constitution: Hans Kelsen and Carl Schmitt on the limits of constitutional law* (Lars Vinx ed, Cambridge University Press 2015), 175. Kelsen claims that the "political function of the constitution is to impose legal limits on the exercise of powers". In addition, there must be an institution in place that controls that no institution acts outside its assigned powers.

[233] Wojciech Sadurski, 'Extinguishing the Court' (*Verfassungsblog* 14 August 2022) <https://verfassungsblog.de/extinguishing-the-court/> accessed on 2 May 2024.

[234] Marcin Szwed, 'Rebuilding the Rule of Law' (*Verfassungsblog*, 29 April 2024) <https://verfassungsblog.de/rebuilding-the-rule-of-law/> accessed on 30 April 2024.

[235] Wojciech Sadurski, 'Extinguishing the Court' (*Verfassungsblog* 14 August 2022) <https://verfassungsblog.de/extinguishing-the-court/> accessed on 2 May 2024.

the reform pursues the overall aim of "restoring constitutionality"[236]. However, notwithstanding the fact that the proposals might pursue a 'noble' aim, it seems rather evident that they are in violation of the principle of legality. Furthermore, the proposed measures lead to many further problems. To touch upon a few, one could think about which institution should be empowered to make a determination on the 'legitimacy' of a Constitutional Court, or about the precedent this would establish in Polish constitutional law. For instance, what would prevent PiS from declaring the PCT "illegitimate" again if they secure a parliamentary majority in the future? Moreover, the judicial dismissals would hardly be in line with the European standards concerning the principle of judicial irremovability, and would produce, in the not unlikely scenario these judges would challenge their dismal before the ECtHR and CJEU, very interesting case law. Most importantly, these 'legally revolutionary' approaches would further add to the legal ambiguity surrounding the PCT and reinforce a "Schmittian us vs. them logic".[237] Therefore, the approach of the new government should avoid mirroring that of the previous illiberal regime and abide closely by the Rule of Law. Moreover, it is advanced that operating in violation of the principle of legality would further undermine public confidence in the PCT and the Polish government.

This last point simultaneously introduces the first argument in favour of respecting the Rule Law: namely, that the manner in which the PCT's independence is restored significantly impacts the public confidence that Polish citizens vest in the institution. To fully understand this argument, existing academic literature on the concept of a "Rule of Law culture" must be taken into account. A "Rule of Law culture" can be defined as a commitment to the values of liberal democracy going through all actors of society,[238] or as a feeling of

[236] Ewa Bagińska and others, Debate of 4 December 2023 'Przyszłość Trybunału Konstytucyjnego' (2024) 2 Państwo i Prawo (PiP) 118, pp. 122-123.

[237] András Jakab 'How to Return from a Hybrid Regime into a Constitutional Democracy? Hypothetical Constitutional Scenarios for Hungary and a Few Potential Lessons for Poland' in Michal Bobek and Others (eds), *Transition 2.0, Re-establishing Constitutional Democracy in EU Member States* (Nomos 2023) 145, 161.

[238] Monica Claes, 'Safeguarding a Rule of Law Culture in the Member States: Engaging National Actors' (2023) 29(2) Columbia Journal of European Law 214, 216.

"collective responsibility"[239] for the implementation of these values. Accordingly, for the Rule of Law to prosper in a country, it requires a robust civil, political, and legal culture.[240] In this regard, it is advanced that by respecting the legal obligations flowing from the Rule of Law in restoring the PCT's independence, the Polish government demonstrates a 'break in time' and its willingness to act by the Rule of Law standards. This, combined with a civil society that already defended (at least in parts) the value in an already ever-decreasing civic space,[241] could strengthen the trust of many Polish citizens in the PCT and create an "enabling environment",[242] where the Rule of Law is built from below.[243] Furthermore, this would be in sharp contrast to the way the previous government operated and might also persuade PiS voters of the fundamental importance of a government that respects the Rule of Law. In summary, if the Rule of Law is respected in the restoration of the PCT's independence, it could set the first stone in the construction of a robust civil society in Poland, one capable of protecting the value through a bottom-up approach in the future. This, in turn, guarantees that the Rule of Law is not only restored until the next elections, but maintained for an indefinite term.

In one of their many articles about Rule of Law developments in Europe, Pech and Scheppele constructed a 'script of Rule of Law backsliding', according to which, in the first acts of the script, citizens lose their faith in public institutions and subsequently vote for parties that promise radical change.[244]

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[239] European Commission for Democracy through Law (Venice Commission), 'Rule of Law Checklist' [2016] Study No. 711/2013, 10.

[240] Monica Claes, 'Safeguarding a Rule of Law Culture in the Member States: Engaging National Actors' (2023) 29(2) Columbia Journal of European Law 214, 219.

[241] Barbara Grabowska-Moroz and Olga Sniadach, 'The Role of Civil Society in Protecting Judicial Independence in Times of Rule of Law Backsliding in Poland' (2021) 17(2) Utrecht Law Review 56, 68; Armin Von Bogdandy, 'Principle of a systemic Deficiencies Doctrine: How to Protect Checks and Balances in the Member States' Common Market Law Review (2020) 57(3) 705, 713.

[242] European Union Agency for Fundamental Rights, 'Europe's Civil Society: Still under Pressure' [2022], 7.

[243] Monica Claes, 'Safeguarding a Rule of Law Culture in the Member States: Engaging National Actors' (2023) 29(2) Columbia Journal of European Law 214, pp. 224-226. Professor Monica Claes identifies in her article three dimensions to promote a 'Rule of Law culture'. Arguably, the measures discussed in this Thesis fall both under the 'fostering a civil society' and 'investing in education' dimensions.

[244] Laurent Pech and Kim L Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) 19(1) Cambridge Yearbook of European Legal Studies 3, 9.

The first argument aimed to highlight the importance of acting according to the legal obligations flowing from the Rule of Law and that this, in turn, impacts the public trust Polish citizens vest in the Constitutional Tribunal in the forthcoming years. For the purpose of summarizing and structuring the findings, the script above is transformed into a 'script of Rule of Law restoration'. In this regard, this Section outlined how the first steps of this script could be designed. Accordingly, public authorities should closely abide by the legal obligations flowing from the Rule of Law in restoring the PCT's independence. In a second step, once the PCT has retaken its role as a strong protector of the national constitution, it is likely that citizens (re)gain faith in the Tribunal. This, in turn, creates, over a longer time period, a robust civil society, which is able to protect the Rule of Law through a bottom-up approach. Public trust could emerge from various factors, including the PCT finally resuming its role as a 'watchdog' of the Polish Constitution rather than merely acting as an 'instrument' of the government.

The second argument is of normative nature and relates to the concept of 'EU militant Rule of Law'. As a reminder, this concept advocates for the rigorous use of militant measures, in the form of recognized exceptions to, or reinterpretations of, established Rule of Law principles, with the aim of preserving or restoring the Rule of Law. It was argued in *Section 1.2.2* that, in the context of restoring the PCT's judicial independence, the reinterpretation of the principle of judicial irremovability is necessary to allow the dismissal of judges appointed under serious flaws. However, such a reinterpretation of established Rule of Law principles simultaneously creates the possibility to abuse the concept. Therefore, the application of the normative concept must be contingent upon strict adherence to certain safeguards, such as the principle of proportionality and independent judicial oversight.[245] Furthermore, in the process of 'balancing' the different Rule of Law principles, it must be justified to what extent limiting one principle (*in casu*, the principle of judicial irremovability) might benefit another principle (*in casu*, the principle of effective judicial protection). The principle of legality, moreover, mandates that there must be a legal basis enshrined in Polish law for removing judges appointed

[245] András Sajó, 'Militant Rule of Law and Not-so-Bad Law' (2024) Hague Journal on the Rule of Law accessed 10 May 2024, pp. 2-4.

under serious flaws. This could be accomplished through a legislative amendment of the relevant Articles of the Polish Constitution and the Act on the Constitutional Tribunal. This would, in turn, allow for judicial oversight over the reform.[246] Ultimately, if these safeguards are observed, the balancing and reinterpretation of seemingly conflicting Rule of Law principles would not undermine the fundamental legal obligations inherent to the Rule of Law itself. This 'cautious' approach would furthermore mark a 'new chapter' in Polish politics, where the Rule of Law and judicial independence are rigorously upheld, in stark contrast to the approach of the previous illiberal regime. The next Section applies this theory to the concrete case study of the PCT and explores in detail how the restoration of the PCT's judicial independence should be designed to ensure compliance with EU Rule of Law principles.

4.2 Restoring the Rule of Law in line with EU Law

The previous Section argued that the restoration of the PCT's independence *should* be in line with the legal obligations flowing from the Rule of Law. Subsequently, the last questions that must be answered are: How could judges be removed from office in line with the legal obligations flowing from EU law? Additionally, what should be the fate of judgements previously rendered by unlawfully appointed judges?

4.2.1 Removing Judges from Office in line with the Principle of Judicial Irremovability

One of the underlying premises of this Thesis asserts the presumption that national judges should also be perceived as 'judges' from the perspective of EU law. In principle, this presumption should equally arise in instances where irregularities occurred in the appointment procedure (or, in other words: *in dubio pro iudice independente*).[247] However, illiberal regimes undermine the

[246] Alternatively, in the scenario where the national Constitutional Court has become a *de facto* captured institution, the government might also consider to refer the bill(s) to the Venice Commission. This guarantees that the national reform complies with European Rule of Law standards and allows for the Parliament to make necessary legislative amendments before the bill becomes law. This seems to be the chosen approach of Adam Bodnar as he already referred his reform of the National Council of the Judiciary to the Venice Commission. See, European Commission for Democracy through Law (Venice Commission), 'Poland Urgent Joint Opinion on the Draft Law Amending the Law on the National Council of the Judiciary' [2024] CDL-AD(2024)018.

[247] This expression is inspired by the famous Latin principle '*in dubio pro reo*'.

Rule of Law more systemically, resulting in that judicial appointments are in line with tailor-made domestic law.[248] Thus, the CJEU exceptionally has to go beyond the legal illusion created by the Member State and independently assess whether judicial appointments are in line with European standards.[249] To be clear, the more radical position that unlawfully appointed judges have never actually become 'judges' by virtue of being appointed by an illiberal regime, and can therefore be directly dismissed, is not supported.[250] This approach would have serious legal consequences on the status of national judges and the judgements rendered by them.[251] For instance, one might question whether all these judgements are void of legal effect after such a declaration has been made. Instead, this Section advocates for a more nuanced, case-by-case assessment of judicial appointments, and argues that there is a 'legitimate and compelling reason' to limit the principle of judicial irremovability if serious flaws in the appointment procedure are identified.

As a preliminary point, it should be remembered that while the CJEU can review the compliance of any judicial reform with the principle of effective judicial protection (Article 19 (1) TEU and Article 47 CFR) and which includes judicial independence,[252] Member States retain procedural autonomy in the organisation of their judiciary. This procedural autonomy of the Member State is in tension with, and limited by,[253] the principle of effective judicial

[248] András Sajó, 'The Limits of Judicial Irremovability from the Perspective of Restoring the Rule of Law: A View from Strasbourg' in Filipe Marques and Paulo Pinto de Albuquerque, *Rule of Law in Europe* (Springer 2024) 55, 61.

[249] ibid.

[250] Marcin Szwed, 'Fixing the Problem of Unlawfully Appointed Judges in Poland in the Light of the ECHR' (2023) 15(1) Hague Journal on the Rule of Law 353, 359.

[251] ibid, pp. 366-367.

[252] Case C-216/18 PPU *Minister for Justice and Equality (Deficiencies in the system of justice)* [2018] EU:C:2018:586, para 63; Case C-619/18 *Commission v Poland (Indépendance de la Cour suprême)* [2019] EU:C:2019:531, para 58.

[253] For an overview of the different ways in which the national procedural autonomy is limited by the EU principle of effective protection see, Matteo Bonelli, 'Article 47 of the Charter, Effective Judicial Protection and the (Procedural) Autonomy of the Member States' in Matteo Bonelli, Mariolina Eliantonio, and Giulia Gentile (eds), *Article 47 of the EU Charter and Effective Judicial Protection, Volume 1* (Hart Publishing 2024) 81.

protection,[254] which has become particularly evident in the recent case law of the CJEU.[255] Nevertheless, it is advanced that fundamental choices in the organisation of the judiciary, including the appointment of judges,[256] principally fall in the purview of the Member State. In a subsequent step, assuming that the national judge is also a 'judge' from the perspective of EU Law, it is the role of the CJEU to check if the judicial appointment is in line with the requirements of effective judicial protection and,[257] if not, whether this affects the principle of judicial irremovability. Thus, the Court is able to examine whether the competence to organise the national judicial system was exercised in line with the principle of effective judicial protection, a principle applicable to any court or tribunal capable of ruling on matters of EU law.[258]

Therefore, the starting point in the procedure of dismissing national judges is the assumption that, despite irregularities in the appointment procedure, these judges should still be considered as "judges" from the perspective of EU law. They are, consequently, protected by the principle of judicial irremovability. As was seen in *Section 1.1*, the Court clarified that this principle is not of an absolute nature and can be limited when two conditions are fulfilled. First, there must be a 'legitimate and compelling ground'.[259]

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[254] Joined Cases C-585/18, C-624/18 and C-625/18 *A.K.* (*Indépendance de la chambre disciplinaire de la Cour suprême*) [2019] EU:C:2019:982, para 73; Ruairi O'Neill, 'Effet utile and the (re)organisation of national judiciaries: A not so unique institutional response to a uniquely important challenge?' (2022) 27(1-3) European Law Journal 240, 243.

[255] See, for example, Case C-583/11 P *Inuit Tapiriit Kanatami* [2013] EU:C:2013:625, para 104; Case C-896/19 *Repubblika* [2021] ECLI:EU:C:2021:311, paras 58-63.

[256] On this point, it should be taken into account that the detailed mechanisms for judicial appointments vary in every Member State. See, Michał Krajewski, 'The EU Right to an Independent Judge: How Much Consensus Across the EU?' in Matteo Bonelli, Mariolina Eliantonio, and Giulia Gentile (eds), *Article 47 of the EU Charter and Effective Judicial Protection, Volume 1* (Hart Publishing 2024) 61, 74.

[257] Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 *Asociaţia 'Forumul Judecătorilor din România' and Others* [2021] EU:C:2021:393, para 111.

[258] Case C-896/19 *Repubblika* [2020] EU:C:2020:1055, Opinion of AG Hogan, para 36; Joined Cases C-558/18 and C-563/18 *Miasto Łowicz and Prokurator Generalny* [2020] EU:C:2020:234, para 34. See also, Sacha Prechal, 'Article 19 TEU and National Courts: A New Role for the Principle of Effective Judicial Protection?' in Matteo Bonelli, Mariolina Eliantonio, and Giulia Gentile (eds), *Article 47 of the EU Charter and Effective Judicial Protection, Volume 1* (Hart Publishing 2024) 11, pp. 16-18.

[259] Case C-619/18 *Commission v Poland (Indépendance de la Cour suprême)* [2019] EU:C:2019:531, para 76.

Secondly, the limitation must be in line with the principle of proportionality.[260] The remainder of this Section first addresses the condition of a 'legitimate and compelling ground', before turning to the principle of proportionality, and analyses how both conditions could be applied to the case study of restoring judicial independence in the PCT.

The CJEU has not yet acknowledged a 'legitimate and compelling ground' for a derogation from the principle of judicial irremovability,[261] apart from the "widely recognized scenarios".[262] As a result, there are currently uncertainties regarding what might amount to a 'legitimate and compelling ground' to limit the principle of judicial irremovability. In this Thesis, it is argued that such a ground exists when it has been established that there were 'serious flaws in the appointment procedure' of the respective judge. This argument rests on several findings that are outlined in the following. Firstly, the Venice Commission recently found that the principle of judicial irremovability can only apply to judges that have been nominated in line with the national Constitution and European standards.[263] Secondly, AG Bobek proposed a principle of 'removability' when it has been established that the particular judge is not independent, for example, through serious infringements of the rules governing the judicial appointment.[264] Thirdly, the ECtHR held in *Ástráðsson* that finding a judicial body to be not a 'tribunal established by law' may have considerable consequences for the principle of judicial irremovability and that upholding the

[260] ibid.

[261] For cases where a limitation of the principle was not accepted, see, for example, Case C-619/18 *Commission v Poland (Indépendance de la Cour suprême)* [2019] EU:C:2019:531; Case C-192/18 *Commission v Poland (Indépendance des juridictions de droit commun)* [2019] EU:C:2019:924; Case C-274/14 *Banco de Santander SA* [2020] EU:C:2020:17; Case C-487/19 *W.Ż.* [2021] EU:C:2021:798.

[262] As a reminder, these "widely recognized scenarios" concern cases when judges are deemed unfit for the purposes of carrying out their duties on account of incapacity or a serious breach of obligations. See, Case C-658/18 *Governo della Repubblica italiana* [2020] EU:C:2020:572, para 48.

[263] European Commission for Democracy through Law (Venice Commission), 'Poland Urgent Joint Opinion on the Draft Law Amending the Law on the National Council of the Judiciary' [2024] CDL-AD (2024)018, 15.

[264] Case C-132/20 *BN and Others v Getin Noble Bank S.A.* [2021] EU:C:2021:557, Opinion of AG Bobek, para 160.

principle at all costs might further harm the Rule of Law.[265] Regarding *Ástráðsson*, it should further be noted that the violation of the right to a 'tribunal established by law' emanated from a manifest breach of the rules that governed the judicial appointment.[266] Fourthly, concerning the execution of an ECtHR judgement establishing a violation of the right to a 'tribunal established by law', it seems that national authorities are either required to dismiss the concerned judges,[267] reappoint them under a procedure that is compatible with the Convention,[268] or to prevent them from adjudicating in a panel[269]. On this point, it was argued that, in the context of systemic Rule of Law violations, it seems that only the removal of unlawfully appointed judges is able to execute such a judgement.

In summary, considering these four points and reasoning by analogy, a pattern in both hard law and soft law sources suggests that 'serious flaws in the appointment procedure' should be considered as a 'legitimate and compelling ground' to limit the principle of judicial irremovability. The next question naturally becomes: how is it possible to identify such serious flaws in the appointment procedure? This assessment must be placed in the context of illiberal regimes, which often undermine the Rule of Law in a systemic manner. Subsequently, two scenarios are distinguished based on a country's stage in the process of Rule of Law backsliding. Firstly, 'serious flaws in the appointment procedure' can be established through a ruling of a national Constitutional Court. Secondly, it is necessary to consider the scenario where the erosion of judicial independence has advanced to the extent that the national Constitutional Court has been 'captured'. In this scenario, the Constitutional Court might grant the government leeway and overlook irregularities in the judicial appointment

[265] *Guðmundur Andri Ástráðsson v Iceland* App no 26374/18 (ECtHR, 1 December 2020), para 240.

[266] ibid, paras 209-252.

[267] Committee of Ministers, '1436th meeting - H46-18 Xero Flor w Polsce sp. z o.o. v. Poland (Application No. 4907/18)' [2022] CM/Del/Dec(2022)1436/H46-18; Committee of Ministers, '1451st meeting - H46-24 Xero Flor w Polsce sp. z o.o. v. Poland (Application No. 4907/18)' [2022] CM/Del/Dec(2022)1451/H46-24.

[268] Committee of Ministers, '1428th meeting - Execution of the judgment of the European Court of Human Rights Guðmundur Andri Ástráðsson against Iceland (Application No. 26374/18)' [2022] CM/ResDH(2022)48.

[269] ibid.

procedure. Consequently, it falls to the CJEU and the ECtHR to go beyond the legal illusion created by the Member State and independently assess whether judicial appointments are in line with European standards.

Having established what could amount to a 'legitimate and compelling ground', the legal theory can subsequently be applied to the restoration of judicial independence in the PCT. As a reminder, the most significant issues concerning the PCT's independence are the unconstitutional appointments of three 'quasi-judges' and the subsequent election of Judge Przyłębska as the PCT's President. First, concerning the three 'quasi-judges', there exists both a judgement of the PCT and a judgement of the ECtHR that found serious flaws in the appointment procedure. First, the PCT ruled in case *K 34/15* that only the election of the two seats that became vacant in December 2015 was unconstitutional.[270] This implicitly meant that the PiS government was only allowed to reappoint these two seats, and not all five. By, however, doing the latter the government acted in disobedience of the judgement and the Polish Constitution. It is interesting to note that this ruling stems from 2015, which was at the beginning of Rule of Law backsliding in Poland. This can further be witnessed by the fact that case *K 34/15* was later overruled by a different bench of the PCT. Ironically, judges who were unlawfully appointed participated in this second judgement.[271] Furthermore, the ECtHR ruled in *Xero Flor* that the irregularities in the appointment of the 'quasi-judges' entailed a violation of the applicant's right to a 'tribunal established by law' under Article 6 (1) ECHR.[272] In conclusion, it can be determined with certainty that the appointment of the three judges was both in violation of the Polish Constitution and European standards of judicial independence. Thus, a 'legitimate and compelling ground' exists to limit the principle of judicial irremovability and to dismiss the 'quasi-judges'.

[270] Polish Constitutional Tribunal, Judgement *K 34/15*, 3 December 2015. In support of this see also, Polish Constitutional Tribunal, Judgement *K 35/15*, 9 December 2015

[271] András Sajó, 'The Limits of Judicial Irremovability from the Perspective of Restoring the Rule of Law: A View from Strasbourg' in Filipe Marques and Paulo Pinto de Albuquerque, *Rule of Law in Europe* (Springer 2024) 55, 61.

[272] *Xero Flor w Polsce sp. z o.o. v. Poland* App no 4907/18 (ECtHR, 7 May 2021), paras 289-291.

Turning to the President of the PCT, Judge Przyłębska, *Section 2.1* illustrated that she is one of the main reasons the PCT is described as a 'captured institution'. In contrast to the three 'quasi-judges', her original appointment as a judge was constitutional. However, her subsequent election as the President of the PCT was plagued by irregularities. In this regard, it is again the Venice Commission that provided important guidance. To begin with, the Commission pointed out that shortening the term of a Constitutional Court's President does not have the same impact as shortening the term of a judge and that international standards seem to provide more leeway in this regard, as long as the shortening of the presidential mandate has no impact on the expiry of the original judicial mandate.[273] The Venice Commission further distinguishes between judicial and administrative functions of judges and characterises the tasks of a President as predominantly administrative.[274] Nevertheless, both the Venice Commission and the ECtHR emphasise that terminating the presidential mandate of judges, while they retain their judicial status, must still be justified by a 'legitimate and compelling reason' and respect the principle of proportionality.[275] In *Baka*, for example, the ECtHR rejected the claim that the early termination of Judge Baka's presidency of the Hungarian Constitutional Court pursued a 'legitimate and compelling reason', as it could not be reasonably supported by the government's argument that the reform aimed to maintain judicial impartiality.[276] Instead, it seemed to the Court that it followed after Judge Baka publicly expressed criticism against the ongoing legislative reforms.[277] The case of Judge Przyłębska is, however, entirely different from the one of Judge Baka, since she was not dismissed but appointed (under serious

[273] European Commission for Democracy through Law (Venice Commission), 'Armenia Opinion on three Legal Questions in the Context of Draft Constitutional Amendments Concerning the Mandate of the Judges of the Constitutional Court' [2020] CDL-AD(2020)016, 15.

[274] European Commission for Democracy through Law (Venice Commission), 'Armenia Opinion on the Draft Law on introducing Amendments and Addenda to the Judicial Code of Armenia (Term of Office of Court Presidents)' [2014] CDL-AD(2014)021, pp. 6-8.

[275] *Baka v. Hungary* App no 20261/12 (ECtHR, 23 June 2016), paras 155-157; European Commission for Democracy through Law (Venice Commission), 'Armenia Opinion on three Legal Questions in the Context of Draft Constitutional Amendments Concerning the Mandate of the Judges of the Constitutional Court' [2020] CDL-AD(2020)016, 15.

[276] *Baka v. Hungary* App no 20261/12 (ECtHR, 23 June 2016), paras 155-157

[277] ibid, para 99.

flaws) by an illiberal regime. The unconstitutional nature of her appointment was, furthermore, confirmed by the PCT in case *K 44/16*.[278] Therefore, it is argued that shortening the presidential term of Judge Przyłębska is not contrary to the principle of judicial irremovability as long as she retains her status as a judge at the PCT, there is a 'legitimate and compelling ground', and the principle of proportionality is respected. Regarding the 'legitimate and compelling ground', it is advanced that, similar to the situation of the three 'quasi-judges', serious flaws in the appointment procedure should be considered as a 'legitimate and compelling ground' to justify a limitation to the principle of judicial irremovability.

The presence of a legitimate and compelling ground alone is insufficient to limit the principle of judicial irremovability and it is also mandatory that the principle of proportionality is observed. Unfortunately, neither the ECtHR nor the CJEU have given much guidance as to what exactly is required under this condition. This guidance might be found in reports by the Venice Commission and the Consultative Council of European Judges ("CCJE"). As a preliminary point, the only factor clearly addressed by the CJEU is that the procedure must be governed by explicit legal provisions that go beyond the general rules of employment law.[279] The Venice Commission fleshes this condition out and establishes that the decision to dismiss a judge must be taken on a case-by-case assessment, by an independent authority, and the rights of defence must be guaranteed throughout the procedure.[280] These rights refer to the rights guaranteed by virtue of Articles 47 and 48 CFR. The CCEJ suggests that this procedure is carried out by a separate and independent body inside the State that might also hear disciplinary cases.[281] It is therefore proposed that the dismissal of a judge should be conducted before an independent authority,

[278] Polish Constitutional Tribunal, Judgement *K 44/16*, 7 November 2016.

[279] Case C-274/14 *Banco de Santander SA* [2020] EU:C:2020:17, para 60; Case C-216/18 PPU *Minister for Justice and Equality (Deficiencies in the system of justice*) [2018] EU:C:2018:586, para 67.

[280] European Commission for Democracy through Law (Venice Commission), 'Report on the Independence of the Judicial System' [2010] CDL-AD(2010)004, paras 40-45.

[281] Consultative Council of European Judges, 'Opinion for The Attention of The Committee of Ministers of the Council of Europe on Standards Concerning the Independence of the Judiciary and the Irremovability of Judges' [2001], 14.

which individually reviews judicial appointments and ensures the protection of the defence rights.[282]

In summary, it is pertinent to remember that a 'legitimate and compelling' ground on its own does not make a dismissal lawful. Instead, it should also undergo an individualized procedure before an independent authority that guarantees the protection of defence rights. If these procedural safeguards are provided by the Polish authorities, the dismissal of the three 'quasi-judges' and the early termination of the PCT President's mandate would align with the principle of judicial irremovability.

4.2.2 The Fate of Judgements Rendered by Unlawfully Appointed Judges

The last Section is devoted to the legal status of judgements issued by the PCT in its irregular formation. These involve judgements where one of the 'quasi-judges' participated in the adjudication and have severe consequences concerning the relationship between Poland, on the one hand, and the EU (case *K 3/21*) and the ECHR (case *K 6/21*), on the other hand. Two extreme positions can be imagined from the outset. First, all the judgements could be considered void because they have been handed by a court in an irregular formation.[283] Second, it could be argued, in the light of legal certainty, that defects in the appointment procedure should not affect the validity of judgements already ruled upon. This Thesis aims to argue for a solution situated in the 'middle ground' between these two positions. The issue with the involvement of irregular judges in rulings of the Constitutional Tribunal can be illustrated by means of the '*pastis metaphor'*, describing how a little drop of pastis can turn a whole

[282] Considering the Polish Constitution, Article 180 (2) requires that the suspension or transfer from office can only occur via a court judgement. The procedural condition established by the Polish Constitution is thus in principle compatible with the procedure suggested in this Section.

[283] The 'extreme' nature of this proposal can be best understood if it is adopted to the ordinary Polish courts. These ordinary courts equally face problems concerning judicial appointments because of the involvement of the National Council of the Judiciary ("NCJ"), which lost its independence after controversial reforms in 2017 and, consequently, tainted the appointment procedure of thousands of judges to the ordinary courts. If this 'extreme' proposal would also be adopted to judgements handed by judges appointed by the NCJ to the ordinary courts, it would lead to the voidness of tens of thousands of judgements. This would, in turn, seriously impair the principle of legal certainty and the functioning of the Polish judicial system.

glass of water milky.[284] This is not much different with the legitimacy of a ruling handed by a Constitutional Tribunal in an irregular formation. In this regard, Fallon's concept of 'sociological legitimacy' should be taken into account, describing a public institution's practise as legitimate when there is general civil acceptance of such practise.[285] Concerning the PCT, it seems that its legitimacy is necessarily negatively impacted by the simple fact of an irregularly appointed judge participating in the adjudication of a ruling.

To provide a possible solution for these 'illegitimate' judgements, it is argued that a possibility to appeal judgements ruled upon in an irregular formation should be introduced. This would be an extraordinary ground of review, which is appropriate given the fact that the case was ruled upon by irregularly appointed judges. Since the relevant court is the Constitutional Tribunal, the appeal proceedings cannot be conducted before an ordinary national court and must instead take place before the Constitutional Tribunal in its regular formation.[286] In this regard, it must be noted that the Constitutional Tribunal generally operates by means of three- or five-judge benches.[287] Thus, such an appeal could be ruled upon by a different bench of the PCT, which excludes any unlawfully appointed judge, provided that they have not already been removed from office.

In conclusion of the third Chapter, it remains to be seen (in all likelihood in the near future) if the CJEU and ECtHR explicitly acknowledge that 'serious flaws in the appointment procedure' can amount to a legitimate and compelling ground to limit the principle of judicial irremovability. In any case, a limitation must always be in line with the principle of proportionality, necessitating at least

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[284] Case C-13/07 *Commission of the European Communities v. Council of the European Union* [2009] EU:C:2009:190, Opinion of AG Kokott, para 121. AG Kokott used it to describe the practise of Member States to add a single Article in an International Agreement that fell into their exclusive competence to force 'mandatory mixity'.

[285] Gillian E Metzger, 'Considering Legitimacy' (2020) 18(2) Georgetown Journal of Law & Public Policy 353, pp. 354-358.

[286] Contrasting with this view, Luke D. Spieker argued for a "decentralized constitutional review" that should be conducted by ordinary Polish courts given the fact the PCT lacks judicial independence. See, Luke D. Spieker, 'The Lighthouse of EU Law Shines on the Polish Constitutional Tribunal' (*Verfassungsblog*, 26 June 2024) <https://verfassungsblog.de/the-lighthouse-of-eu-law/> accessed on 2 July 2024.

[287] Article 26 of the Act on the Constitutional Tribunal [2016]. Only exceptionally, the PCT sits in a full bench of 15 judges.

an individualized procedure that reviews the judicial appointment and guarantees the 'defence rights'. Lastly, it was argued that there should be a possibility to appeal judgements rendered by the PCT in its unlawful composition. This 'extraordinary' appeal could be heard by a bench of the PCT that excludes any unlawfully appointed judges.

5. Conclusion

"L'Europe se fera dans les crises et elle sera la somme des solutions apportées à ces crises" (Jean Monnet, 1976).[288]

In 2024, the EU is facing multiple crises,[289] the Rule of Law crisis being 'only' one of them. In the context of this crisis, most of the academic discussion has centred on the extent to which the Rule of Law has been eroded in Member States and how the EU should act to sanction backsliding Member States.[290] However, within Member States that have successfully transformed from an illiberal regime, which eroded the Rule of Law, into a liberal regime, the pressing issue becomes how the Rule of Law should be restored. Restoring the Rule of Law involves numerous complex aspects, and examining all of them in detail would exceed the scope of a Master's Thesis. Instead, this Thesis adopted a more focused approach by exploring the research question: "How could the Rule of Law, in particular judicial independence, be restored in the Polish Constitutional Tribunal without breaching the Rule of Law's legal obligations stemming from EU law?".

Chapter 2 provided a detailed overview of how the PCT has been captured by PiS, which ultimately resulted in the transformation of the institution from a 'watchdog' of the Polish Constitution into an 'instrument' of the government. The roots of the problems concerning the PCT's independence are the unconstitutional appointments of three 'quasi-judges' and the subsequent election of Judge Przyłębska as the PCT's President. Consequently, to restore the PCT's judicial independence, it seems necessary to dismiss certain judges. However, in so far as the restoration of the Rule of Law involves the dismissal of judges, it encounters objections from the value itself. These originate from the principle of judicial irremovability, which sets out that judges should remain in office until reaching the obligatory retirement age or the expiry of their

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[288] Jean Monnet, *Mémoirs* (Fayard 1976).

[289] Paul Craig, 'Development of the EU' in Steve Peers and Catherine Barnard (eds), *European Union Law* (4th edn, Oxford University Press 2023) 10, pp. 31-39.

[290] For an overview see, Laurent Pech and Kim L Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) 19(1) Cambridge Yearbook of European Legal Studies 3; Tímea Drinóczi and Agnieszka Bień-Kacała (eds), *Rule of Law, Common Values, and Illiberal Constitutionalism: Poland and Hungary Within the European Union* (Routledge 2021); Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press 2019).

mandate.[291] This principle is, however, not of absolute nature and can be limited by a 'legitimate and compelling ground' that fulfils the principle of proportionality.

The fundamental premise of this analysis was that judicial independence should be restored in line with the legal obligations of the Rule of Law. In this regard, the normative concept of 'EU militant Rule of Law' was developed, which advocates for the reinterpretation of established Rule of Law principles with the aim of restoring the value. A reinterpretation of the principle of judicial irremovability was indeed considered necessary to enable the lawful removal of judges appointed under 'serious flaws'. It was acknowledged that such a reinterpretation of a Rule of Law principle could potentially lead to abuses. Thus, the application of the normative concept of 'EU militant Rule of Law' must be contingent upon adherence to certain safeguards, such as the principle of proportionality and independent judicial oversight. In the case of the PCT, 'serious flaws in the appointment procedure' were identified in both the appointments of the three 'quasi-judges'[292] and the election of the PCT's President[293]. Thus, it was argued that there exists a 'legitimate and compelling ground' to remove the three 'quasi-judges' from office and to end the presidential mandate of Judge Przyłębska. However, the existence of a legitimate and compelling ground alone is insufficient to lawfully limit the principle of judicial irremovability and it is mandatory that the principle of proportionality is equally observed. This second condition requires the presence of certain procedural safeguards, such as an individualized procedure before an independent authority. Concerning the cases ruled upon by the PCT in its irregular formation, it was proposed that a possibility to appeal these judgements under an extraordinary ground of review should be established before the PCT.

This Thesis primarily focused on a theoretical and normative discussion of how judicial independence can be restored in the Polish Constitutional

[291] Case C-619/18 *Commission v Poland (Indépendance de la Cour suprême)* [2019] EU:C:2019:531, para 76.

[292] See, Polish Constitutional Tribunal, *Judgement K 34/15*, 3 December 2015; Polish Constitutional Tribunal, *Judgement K 35/15*, 9 December 2015; *Xero Flor w Polsce sp. z o.o. v. Poland* App no 4907/18 (ECtHR, 7 May 2021).

[293] See, Polish Constitutional Tribunal, *Judgement K 44/16*, 7 November 2016.

Tribunal. Having set out a possible solution to this question, the subsequent issues revolve around the implementation and adaptation of these findings to the Polish political reality. In this regard, two considerations are presented to the reader. Firstly, the legislative act that would govern the dismissal of the judges at the Polish Constitutional Tribunal faces the same obstacle as most of the other measures aiming at restoring the Rule of Law in Poland:[294] the veto of President Andrzej Duda, who is a member of PiS.[295] This veto can, in principle, be overridden by the Sejm with a three-fifth majority.[296] However, looking at the current composition of the Sejm, it is unlikely that this majority is reached. Therefore, the fate of any legislative measure that aims at restoring the Rule of Law essentially lies in the hands of the Polish President, who is unlikely to provide his signature. This 'deadlock' might be resolved in the near future as there are presidential elections in mid-2025.[297] In the meantime, Adam Bodnar's strategy is to prepare the necessary measures, in cooperation with the Venice Commission,[298] ensuring that they can be implemented as soon as a new President takes office.[299] Secondly, judges are appointed to the Constitutional Tribunal for a single term of nine years.[300] Taking into account the previous consideration, the legal problems surrounding the judicial mandate of the 'quasi-judges' will therefore most likely be resolved by the passage of time. However, leaving aside the political considerations, it is still argued that dismissing the

[294] This refers to measures which require a legislative act to be implemented. Examples include: the reform of the Supreme Court, National Council of the Judiciary, ordinary courts, and the division between the office of the Minster of Justice and Prosecutor General.

[295] Article 122 (4) of the Constitution of the Republic of Poland [1997].

[296] Article 122 (5) of the Constitution of the Republic of Poland [1997].

[297] A specific date for these presidential elections still has to be established in line with Article 128 of the Polish Constitution.

[298] See, for example, European Commission for Democracy through Law (Venice Commission), 'Poland Urgent Joint Opinion on the Draft Law Amending the Law on the National Council of the Judiciary' [2024] CDL-AD(2024)018. Sources at the Venice Commission furthermore confirmed that there are requests concerning the Constitutional Tribunal and the office of the Prosecutor General expected in the near future.

[299] Adam Bodnar, 'Incremental Rule of Law Restoration?' (Inaugural lecture for the CEU Democracy Institute Rule of Law clinic, Budapest, 27 May 2024) <https://revdem.ceu.edu/2024/06/07/adam-bodnar-in-budapest/> accessed 28 May 2024.

[300] Article 194 (1) of the Constitution of the Republic of Poland [1997].

judges would be legally desirable, even if the situation would 'solve itself' over time. Throughout the last Sections, several advantages were presented to support the proposition that judges appointed under serious flaws should be removed from office. Most importantly, this would set a strong precedent illustrating a 'new chapter' in Polish politics where the Rule of Law and judicial independence are rigorously upheld. It would also underscore the illegitimate nature of the PCT and signal a commitment to European standards.

Finally, three suggestions for future legal research are presented. First, this Master's Thesis focused on the restoration of judicial independence in the PCT. Subsequently, the theoretical framework established by this Thesis was only applied to the PCT. Future research could focus on the restoration of judicial independence in the Polish Supreme Court or the ordinary courts. In this regard, it is argued that the main theoretical claim - that it is in line with the principle of judicial irremovability to dismiss judges appointed under serious flaws, provided that there is an individualized procedure that guarantees the necessary procedural safeguards - can also be applied by analogy to these courts. Second, Section 3.1 laid the groundwork for a 'Rule of Law restoration' script, which was constructed on the assumption that this restoration should be in line with the Rule of Law and that this, in turn, creates the conditions for the Rule of Law to flourish in the civil society. Future research could focus on expanding this script. Third, the role of the EU in creating a 'Rule of Law culture' could be further explored. In this regard, it could for example be questioned whether the EU should have a role in creating such a culture, for example, through 'positive funding',[301] or if such a culture can only be successfully built at the national level.

[301] By 'positive' funding I refer to EU funding of civil society (e.g. of NGOs). This term is opposed to 'negative' funding, or 'funding conditionality', where the EU freezes money because the Member State is not complying with EU values. An example of 'funding conditionality' in relation to Poland can be found at the beginning of the Introduction.

List of References

1. Legal Sources

1.1 Legislative and Other Legal Acts

1.1.1 European

Charter of Fundamental Rights of the European Union [2012] OJ C 326/391

Consolidated Version of the Treaty on European Union [2008] OJ C 115/13

Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C 326/47

Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) [1950]

European Charter on the Statute for Judges [2008]

Regulation 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget [2020] OJ L 433I

1.1.2 National

Act on the Constitutional Tribunal [2016]

The Constitution of the Republic of Poland [1997]

1.2 Case Law

1.2.1 European

Case 106/77 *Simmenthal* [1978] EU:C:1978:49

Case C-246/80 *Broekmeulen v Huisarts Registratie Commissie* [1981] EU:C:1981:218

Case 283/81 *CILFIT* [1982] EU:C:1982:335

Case 294/83 *Les Verts* [1986] EU:C:1986:166

Joined Cases C-9/97 and C-118/97 *Raija-Liisa Jokela and Laura Pitkäranta* [1998] EU:C:1998:497

Case C-103/97 *Josef Köllensperger GmbH & Co. KG and Atzwanger AG v Gemeindeverband* [1999] EU:C:1999:52

Case C-53/03 *Syfait and Others v GlaxoSmithKline plc and GlaxoSmithKline AEVE* [2005] EU:C:2005:333

Case C-506/04 *Graham J. Wilson v Ordre des avocats du barreau de Luxembourg* [2006] EU:C:2006:587

Case C-583/11 P *Inuit Tapiriit Kanatami and Others v European Parliament and Council of the European Union* [2013] EU:C:2013:625

Opinion 2/13 [2014] EU:C:2014:2454

Case C-274/14 *Banco de Santander* [2020] EU:C:2020:17

Case C-64/16 *Associação Sindical dos Juízes Portugueses* [2018] EU:C:2018:117

Case C-426/16 *Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen, VZW and Others v Vlaams Gewest* [2018] EU:C:2018:335

Case C-192/18 *Commission v Poland (Indépendance des juridictions de droit commun)* [2019] EU:C:2019:924

Case C-216/18 PPU *Minister for Justice and Equality (Deficiencies in the system of justice)* [2018] EU:C:2018:586

Joined Cases C-542/18 RX-II and C-543/18 RX-II *Simpson* [2020] EU:C:2020:232

Joined Cases C-558/18 and C-563/18 *Miasto Łowicz and Prokurator Generalny* [2020] EU:C:2020:234

Joined Cases C-585/18, C-624/18 and C-625/18 *A. K.* (*Indépendance de la chambre disciplinaire de la Cour suprême*) [2019] EU:C:2019:982

Case C-619/18 *Commission v Poland (Indépendance de la Cour suprême)* [2019] EU:C:2019:531

Case C-658/18 *Governo della Repubblica italiana* [2020] EU:C:2020:572

Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 *Asociaţia 'Forumul Judecătorilor din România' and Others* [2021] EU:C:2021:393

Case C-487/19 *W.Ż.* [2021] EU:C:2021:798

Case C-791/19 *Commission v Poland* (*Régime disciplinaire des juges*) [2021] EU:C:2021:596

Case C-896/19 *Repubblika* [2021] ECLI:EU:C:2021:311

Case C-132/20 *BN and Others v Getin Noble Bank S.A* [2022] EU:C:2022:235

Case C-156/21 *Hungary v European Parliament and Council of the European Union* [2022] EU:C:2022:97

Case C-204/21 *Commission v Poland (Indépendance et vie privée des juges)* [2023] EU:C:2023:334

Case C-718/21 *Krajowa Rada Sądownictwa (Maintien en fonctions d'un juge)* [2023] EU:C:2023:1015

Lavents v. Latvia App no 58442/00 (ECtHR, 28 November 2002)

Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2) App no 32772/02 (ECtHR, 20 June 2009)

DMD Group, A.S. v. Slovakia App no 19334/03 (ECtHR, 5 October 2010)

Baka v. Hungary App no 20261/12 (ECtHR, 23 June 2016)

Guðmundur Andri Ástráðsson v Iceland App no 26374/18 (ECtHR, 1 December 2020)

Xero Flor w Polsce sp. z o.o. v. Poland App no 4907/18 (ECtHR, 7 May 2021)

Dolińska-Ficek and Ozimek v Poland App nos 49868/19 and 57511/19 (ECtHR, 11 November 2021)

Alvina Gyulumyan and Others v Armenia App no 25240/20 (ECtHR, 21 November 2023)

1.2.2 National

German Federal Constitutional Court, *Judgement of the Second Senate of 5 May 2020* (PSPP) [2020] (2 BvR 859/15)

Polish Constitutional Tribunal, Judgement *K 34/15*, 3 December 2015

Polish Constitutional Tribunal, Judgement *K 35/15*, 9 December 2015

Polish Constitutional Tribunal, Judgement *K 44/16*, 7 November 2016

Polish Constitutional Tribunal, Judgement *K 3/21*, 7 October 2021

Polish Constitutional Tribunal, Judgement *K 6/21*, 24 November 2021

1.3 Other Legal or Policy Documents

Case C-13/07 *Commission of the European Communities v. Council of the European Union* [2009] EU:C:2009:190, Opinion of AG Kokott

Case C-896/19 *Repubblika* [2020] EU:C:2020:1055, Opinion of AG Hogan

Case C-132/20 *BN and Others v Getin Noble Bank S.A* [2022] EU:C:2022:235, Opinion of AG Bobek

Case C-156/21 *Hungary v European Parliament and Council of the European Union* [2021] EU:C:2021:974, Opinion of AG Campos Sánchez-Bordona

Committee of Ministers, ‘1428th meeting - Execution of the judgment of the European Court of Human Rights Guðmundur Andri Ástráðsson against Iceland (Application No. 26374/18)’ [2022] CM/ResDH(2022)48

Committee of Ministers, ‘1436th meeting - H46-18 Xero Flor w Polsce sp. z o.o. v. Poland (Application No. 4907/18)’ [2022] CM/Del/Dec(2022)1436/H46-18

Committee of Ministers, ‘1451st meeting - H46-24 Xero Flor w Polsce sp. z o.o. v. Poland (Application No. 4907/18)’ [2022] CM/Del/Dec(2022)1451/H46-24

Consultative Council of European Judges, ‘Opinion for The Attention of The Committee of Ministers of the Council of Europe on Standards Concerning the Independence of the Judiciary and the Irremovability of Judges’ [2001]

European Commission, Communication, ‘A new EU Framework to strengthen the Rule of Law’ [2014] COM/2014/0158 final

European Commission, Communication, ‘Further strengthening the Rule of Law within the Union. State of play and possible next steps’ [2019] COM(2019) 163 final

European Commission, Communication, ‘2023 Rule of Law Report’ [2023] COM(2023) 800 final

European Commission, Press Release, ‘Rule of Law: Commission launches infringement procedure against Poland for violating EU law with the new law establishing a special committee’ [2023]

European Commission, Press Release, ‘Poland's efforts to restore rule of law pave the way for accessing up to €137 billion in EU funds’ [2024]

European Commission, Press Release, ‘Commission intends to close Article 7(1) TEU procedure for Poland’ [2024]

European Commission, ‘Special Eurobarometer 553 - Rule of Law’ [2024]

European Commission, Recommendation**,** ‘Commission Recommendation (EU) 2018/103 of 20 December 2017 regarding the rule of law in Poland complementary to Recommendations (EU) 2016/1374, (EU) 2017/146 and (EU) 2017/1520’ (2017) L 17/50’ [2017] L 17/50

European Commission for Democracy through Law (Venice Commission), 'Report on the Independence of the Judicial System' [2010] CDL-AD(2010)004

European Commission for Democracy through Law (Venice Commission), 'Report on the Rule of Law' [2011] Study 512/2009

European Commission for Democracy through Law (Venice Commission), 'Armenia Opinion on the Draft Law on introducing Amendments and Addenda to the Judicial Code of Armenia (Term of Office of Court Presidents)' [2014] CDL-AD(2014)021

European Commission for Democracy through Law (Venice Commission), 'Rule of Law Checklist' [2016] Study No. 711/2013

European Commission for Democracy through Law (Venice Commission), 'Ukraine Opinion on Amendments to the legal Framework Governing the Supreme Court and Judicial Governance Bodies' [2019] CDL-AD(2019)027

European Commission for Democracy through Law (Venice Commission), 'Armenia Opinion on three Legal Questions in the Context of Draft Constitutional Amendments Concerning the Mandate of the Judges of the Constitutional Court' [2020] CDL-AD(2020)016

European Commission for Democracy through Law (Venice Commission), 'Poland Urgent Joint Opinion on the Draft Law Amending the Law on the National Council of the Judiciary' [2024] CDL-AD(2024)018

European Council, 'Conclusions of the Presidency - Copenhagen' [1993] SN 180/1/93 REV 1

European Court of Human Rights, 'Guide on Article 6 of the European Convention on Human Rights; Right to a fair trial (civil limb)' [2013]

European Parliament, 'Resolution of 13 April 2016 on the situation in Poland' [2016] 2015/3031(RSP)

European Union Agency for Fundamental Rights, 'Europe's Civil Society: Still under Pressure' [2022]

Joined Cases C-558/18 and C-563/18 *Miasto Łowicz* [2019] EU:C:2019:775, Opinion of AG Tanchev

Joined Cases C-748/19 to C-754/19 *WB and Others* [2021] EU:C:2021:403, Opinion of AG Bobek

United Nations (Human Rights Committee), 'Concluding observations on the seventh periodic report of Poland' [2016] CCPR/C/POL/7

United Nations (Human Rights Council), 'Report of the Special Rapporteur on the independence of judges and lawyers on his mission to Poland' [2018] A/HRC/38/38/Add.1

2. Academic Sources

2.1 Books

Barnard C and Peers S (eds), *European Union Law* (4th edn, Oxford University Press 2023)

Craig P, 'Development of the EU' in Steve Peers and Catherine Barnard (eds), *European Union Law* (4th edn, Oxford University Press 2023) 10

Drinóczi T and Bień-Kacała A (eds), *Rule of Law, Common Values, and Illiberal Constitutionalism: Poland and Hungary Within the European Union* (Routledge 2021)

Habermas J, *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (Suhrkamp 1992)

Jakab A, *European Constitutional Language* (Cambridge University Press 2016)

Lenaerts K and Van Nuffel P, *EU Constitutional Law* (Tim Corthaut ed, Oxford University Press 2022)

Monnet J, *Mémoirs* (Fayard 1976)

Pospíšil I and Marian K, *In dubio pro libertate. Úvahy nad ústavními hodnotami a právem. Pocta Elišce Wagnerové u příležitosti životního jubilea* (Masaryk University 2009)

Sadurski W, *Poland's Constitutional Breakdown* (Oxford University Press 2019)

Sajó A, *Ruling by Cheating. Governance in Illiberal Democracy* (Cambridge University Press 2021)

Tamanaha B, *On the rule of law: history, politics, theory* (Cambridge University Press 2004)

Verhoeven A, *The European Union in Search of a Democratic and Constitutional Theory* (Kluwer Law International 2002)

2.2 Book Chapters

Bodnar A, 'Poland After Elections in 2023: Transition 2.0 in the Judiciary' in Bobek M and others (eds), *Transition 2.0: re-establishing constitutional democracy in EU member states* (Nomos 2023) 300

Bonelli M, ‘Article 47 of the Charter, Effective Judicial Protection and the (Procedural) Autonomy of the Member States’ in Bonelli M, Eliantonio M, and Gentile G (eds), *Article 47 of the EU Charter and Effective Judicial Protection, Volume 1* (Hart Publishing 2024) 81

Breuer M, ‘Principled resistance to the European Court of Human Rights and its case law: a comparative assessment’ in Aust H P and Demir-Gürsel E (eds), *The European Court of Human Rights: current challenges in historical perspective* (Edward Elgar Publishing 2021) 43

Jakab A, ‘How to Return from a Hybrid Regime into a Constitutional Democracy? Hypothetical Constitutional Scenarios for Hungary and a Few Potential Lessons for Poland’ in Bobek M and Others (eds), *Transition 2.0, Re-establishing Constitutional Democracy in EU Member States* (Nomos 2023) 145

Kelsen H, ‘Who ought to be guardian of the Constitution? Kelsen’s reply to Schmitt’ in Kelsen H and Schmitt C, *The guardian of the Constitution: Hans Kelsen and Carl Schmitt on the limits of constitutional law* (Vinx L ed, Cambridge University Press 2015)

Krajewski M, ‘The EU Right to an Independent Judge: How Much Consensus Across the EU?’ in Bonelli M, Eliantonio M, and Gentile G (eds), *Article 47 of the EU Charter and Effective Judicial Protection, Volume 1* (Hart Publishing 2024) 61

Olsen T V, ‘Liberal Democratic Sanctions in the EU’ in Malkopoulou A and Kirshner A (eds), *Militant Democracy and Its Critics* (Edinburgh University Press 2019) 150

Peirone F, ‘European Values in the Multi-Level Legal System’ in Heringa A W, Nguyen T, and Peirone F, *Textbook on European and National Constitutional Law* (forthcoming)

Prechal S, ‘Article 19 TEU and National Courts: A New Role for the Principle of Effective Judicial Protection?’ in Bonelli M, Eliantonio M, and Gentile G (eds), *Article 47 of the EU Charter and Effective Judicial Protection, Volume 1* (Hart Publishing 2024) 11

Sajó A, ‘The Limits of Judicial Irremovability from the Perspective of Restoring the Rule of Law: A View from Strasbourg’ in Marques F and Pinto de Albuquerque P, *Rule of Law in Europe* (Springer 2024) 55

Scheppele K L and Morijn J, ‘What Price Rule of Law’, in Södersten A and Hercock E (eds), *The Rule of Law in the EU: Crisis and Solutions* (SIEPS 2023) 39

Spaventa E, 'Fundamental rights in the European Union' in Steve Peers and Catherine Barnard (eds), *European Union Law* (4th edn, Oxford University Press 2023)

Van Dijk F and Sterk K, 'The Court of Justice of the European Union and national courts as enforcers of EU law' in Scholten M (ed) *Research Handbook on the Enforcement of EU Law* (Edward Elgar Publishing Limited 2023) 123

Waldron J, 'The rule of law in public law' in Mark Elliott and David Feldman (eds) The Cambridge Companion to Public Law (Cambridge University Press 2015) 56

Wyrzykowski M and Ziółkowski M, 'Illiberal constitutionalism and the Judiciary' in Sajó A, Uitz R, and Holmes S, *Routledge Handbook of Illiberalism* (Routledge 2021) 517

2.3 Journal Articles

Bagińska E and Others, Debate of 4 December 2023 'Przyszłość Trybunału Konstytucyjnego' (2024) 2 Państwo i Prawo (PiP) 118

Bedner A, 'An Elementary Approach to the Rule of Law' (2010) 2(1) Hague Journal On The Rule Of Law 48

Bonelli M, 'A Federal Turn? The European Union's Response to Constitutional Crises in the Member States' (2018) 10(1) Perspectives on Federalism 41

Bonelli M, 'The Taricco saga and the consolidation of judicial dialogue in the European Union' (2018) 25(3) Maastricht Journal for European and Comparative Law 357

Bonelli M and Claes M, 'Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary: ECJ 27 February 2018, Case C-64/16, Associação Sindical dos Juízes Portugueses' (2018) 14(3) European Constitutional Law Review 622

Bonelli M and others, 'Usual and Unusual Suspects: New Actors, Roles and Mechanisms to Protect EU Values' (2022) 7(2) European Papers 641

Capoccia G, 'Militant Democracy: The Institutional Bases of Democratic Self-Preservation' (2013) 9(1) Annual Review of Law and Social Science 207

Claes M, 'Safeguarding a Rule of Law Culture in the Member States: Engaging National Actors' (2023) 29(2) Columbia Journal of European Law 214

Closa C, Kochenov D V, and Weiler J H H, 'Reinforcing Rule of Law Oversight in the European Union' (2014) 25 EUI Working Papers RSCAS

De Witte B, 'Legal Methods for the Study of EU Institutional Practice' (2022) 18(1) European Constitutional Law Review 637

Fallon R H, '"The Rule of Law" as a Concept in Constitutional Discourse' (1997) 97(1) Columbia Law Review 1

Gallie W B, 'Essentially Contested Concepts' (1955-1956) 56(1) Proceedings of the Aristotelian Society 167

Grabowska-Moroz B and Sniadach O, 'The Role of Civil Society in Protecting Judicial Independence in Times of Rule of Law Backsliding in Poland' (2021) 17(2) Utrecht Law Review 56

Granata-Menghini S, 'La Commission de Venise du Conseil de l'Europe: méthodes et perspectives de l'assistance constitutionnelle en Europe' (2014) 55-56 Les Nouveaux Cahiers du Conseil constitutionnel 69

Grimm D, 'The Democratic Costs of Constitutionalisation: The European Case' (2015) 21(4) European Law Journal 460

Haltern U, 'Revolutions, real contradictions, and the method of resolving them: The relationship between the Court of Justice of the European Union and the German Federal Constitutional Court' (2021) 19(1) International Journal of Constitutional Law 208

Janse R, 'Is the European Commission a credible guardian of the values? A revisionist account of the Copenhagen political criteria during the Big Bang enlargement' (2019) 19(1) International Journal of Constitutional Law 43

Koncewicz T T, 'Of institutions, democracy, constitutional self-defence and the rule of law: The judgments of the Polish Constitutional Tribunal in Cases K 34/15, K 35/15 and beyond' (2016) 53(6) Common Market Law Review 1753

Kovács K and Scheppele K L, 'The fragility of an independent judiciary: Lessons from Hungary and Poland–and the European Union' (2018) 51(3) Communist and Post-Communist Studies 189

Kovalčík M, 'The instrumental abuse of constitutional courts: how populists can use constitutional courts against the opposition' (2022) 26(7) The International Journal of Human Rights 1160

Loewenstein K, 'Militant Democracy and Fundamental Rights, I' (1937) 31(3) The American Political Science Review 417

Loewenstein K, 'Militant Democracy and Fundamental Rights, II' (1937) 31(4) The American Political Science Review 638

Mastracci M, 'Judicial Independence: European Standards, ECtHR Criteria and the Reshuffling Plan of the Judiciary Bodies in Poland' (2019) 5(3) Athens Journal of Law 323

Metzger G E, 'Considering Legitimacy' (2020) 18(2) Georgetown Journal of Law & Public Policy 353

Müller J W, 'Should the EU Protect Democracy and the Rule of Law inside Member States?' (2015) 21(2) European Law Journal 141

O'Neill R, 'Effet utile and the (re)organisation of national judiciaries: A not so unique institutional response to a uniquely important challenge?' (2022) 27(1-3) European Law Journal 240

Pech L, 'The Rule of Law as a Constitutional Principle of the European Union' (2009) Jean Monnet Working Paper 04/09

Pech L, 'The Rule of Law as a Well-Established and Well-Defined Principle of EU Law' (2022) 14(1) Hague Journal on the Rule of Law 107

Pech L and Scheppele K L, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) 19(1) Cambridge Yearbook of European Legal Studies 3

Pérez A T, 'From Portugal to Poland: The Court of Justice of the European Union as watchdog of judicial independence' (2020) 27(1) Maastricht Journal of European and Comparative Law 1

Pernice I, 'Multilevel Constitutionalism and the Crisis of Democracy in Europe' (2015) 11(3) European Constitutional Law Review 541

Ploszka A, 'It Never Rains but it Pours. The Polish Constitutional Tribunal Declares the European Convention on Human Rights Unconstitutional' (2022) 15(1) Hague Journal On The Rule Of Law 51

Popelier P, ''Europe Clauses' and Constitutional Strategies in the Face of Multi-Level Governance' (2014) 21(2) Maastricht Journal of European and Comparative Law 300

Rodríguez M, 'Poland Before the Court of Justice: Limitless or Limited Case Law on Art. 19 TEU?' (2020) 5(1) European Papers 331

Rossi L, 'La valeur juridique des valeurs: L'article 2 TUE: relations avec d'autres dispositions de droit primaire de l'UE et remèdes juridictionnels' (2020) 56(3) Revue Trimestrielle De Droit Européen 639

Scheppele K L and others, 'EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union' (2021) 39(1) Yearbook of European Law 3

Szwed M, 'Fixing the Problem of Unlawfully Appointed Judges in Poland in the Light of the ECHR' (2023) 15(1) Hague Journal on the Rule of Law 353

Taekema S, 'Theoretical and Normative Frameworks for Legal Research: Putting Theory into Practice' (2018) 8(1) Law and Method 1

Teubner G, 'Autopoiesis in Law and Society: A Rejoinder to Blankenburg' (1984) 18(2) Law & Society Review 291

Theuns T, 'The Need for an EU Expulsion Mechanism: Democratic Backsliding and the Failure of Article 7' (2022) 28(1) Res Publica 693

Theuns T, 'Is the European Union a militant democracy? Democratic backsliding and EU disintegration' (2024) 13(1) Global Constitutionalism 104

Tinière R, 'The Use of ECtHR Case Law by the CJEU: Instrumentalisation or Quest for Autonomy and Legitimacy?' (2023) 8(1) European Papers 323

Tridimas T, 'Knocking on heaven's door: fragmentation, efficiency and defiance in the preliminary reference procedure' (2003) 40(1) Common Market Law Review 9

Tridimas T, 'The role of the Advocate General in the development of Community law: Some reflections' (1997) 34(6) Common Market Law Review 1349

Sajó A, 'Militant Rule of Law and Not-so-Bad Law' (2024) Hague Journal on the Rule of Law <https://link.springer.com/article/10.1007/s40803-024-00221-8> accessed 10 May 2024

Von Bogdandy A, 'Principle of a systemic Deficiencies Doctrine: How to Protect Checks and Balances in the Member States' Common Market Law Review (2020) 57(3) 705

Wyrzykowsk M, 'Experiencing the Unimaginable: the Collapse of the Rule of Law in Poland' (2019) 11(1) Hague Journal on the Rule of Law 417

2.4 Other Academic Works

Bonelli M, 'A Union of Values' (PhD Dissertation, Maastricht University 2019)

Filipek P, 'Drifting Case-law on Judicial Independence: A Double Standard as to What Is a 'Court' Under EU Law? (CJEU Ruling in C-132/20 Getin Noble Bank)' (*Verfassungsblog*, 13 May 2022) <https://verfassungsblog.de/drifting-case-law-on-judicial-independence/> accessed on 25 January 2024

Hong M, 'Grundrechtsverwirkung und Parteiverbote gegen radikale AfD-Landesverbände (Teil I)' (*Verfassungsblog*, 6 February 2024) <https://verfassungsblog.de/grundrechtsverwirkung-und-parteiverbote-gegen-radikale-afd-landesverbande-i/> accessed on 1 June 2024

Lübbe-Wolff G, 'One-sidedly Staffed Courts, A Problem of Impartiality – not only in Poland' (*Verfassungsblog*, 8 January 2024) <https://verfassungsblog.de/one-sidedly-staffed-courts/> accessed on 9 January 2024

Matczak M, 'Poland's Constitutional Tribunal under PiS control descends into legal chaos' (*Verfassungsblog*, 11 January 2017) <https://verfassungsblog.de/polands-constitutional-tribunal-under-pis-control-descends-into-legal-chaos/> accessed on 3 April 2024

On D, 'Strict liability and the aims of Tort Law: a doctrinal, comparative, and normative study of strict liability regimes' (PhD Dissertation, Maastricht University 2020)

Petersen N and Maciejewski M, 'The Primacy of EU Law and the Polish Constitutional Law Judgment' [2022] Study for the LICE Committee of the European Parliament

Sadurski W, 'Extinguishing the Court' (*Verfassungsblog* 14 August 2022) <https://verfassungsblog.de/extinguishing-the-court/> accessed on 2 May 2024

Sajó A, 'Militant Rule of Law' (*Verfassungsblog*, 20 December 2023) <https://verfassungsblog.de/militant-rule-of-law/> accessed on 5 March 2024

Spieker L D, 'The Lighthouse of EU Law Shines on the Polish Constitutional Tribunal' (*Verfassungsblog*, 26 June 2024) <https://verfassungsblog.de/the-lighthouse-of-eu-law/> accessed on 2 July 2024

Szwed M, 'Rebuilding the Rule of Law' (*Verfassungsblog*, 29 April 2024) <https://verfassungsblog.de/rebuilding-the-rule-of-law/> accessed on 30 April 2024

Szwed M, 'What Should and What Will Happen After Xero Flor' (*Verfassungsblog*, 9 May 2021) <https://verfassungsblog.de/what-should-and-what-will-happen-after-xero-flor/> accessed on 17 January 2024

3. Non-Academic Sources

Bodnar A, 'Incremental Rule of Law Restoration?' (Inaugural lecture for the CEU Democracy Institute Rule of Law clinic, Budapest, 27 May 2024) <https://revdem.ceu.edu/2024/06/07/adam-bodnar-in-budapest/> accessed 28 May 2024

'Były szef MSZ komentuje list Jourovej. "Konia z rzędem, kto znajdzie w traktatach UE definicję praworządności"' (*Niezalezna* 27 December 2019) <https://niezalezna.pl/polska/byly-szef-msz-komentuje-list-jourovej-konia-z-rzedem-kto-znajdzie-w-traktatach-ue-definicje-praworzadnosci/303625> accessed on 12 April 2024

‘Polish Parliamentary Elections 2023’ (*National Electoral Commission*, 17 October 2023) <https://wybory.gov.pl/sejmsenat2023/en> accessed on 9 January 2024

Sadurski W, ‘Sadurski odpowiada Matczakowi: wyzerowanie Trybunału to nie odpowiedzialność zbiorowa’ (*Wyborcza* 9 December 2023) <https://wyborcza.pl/7,75968,30489669,sadurski-odpowiada-matczakowi-wyzerowanie-to-nie-odpowiedzialnosc.html> accessed on 10 April 2024