

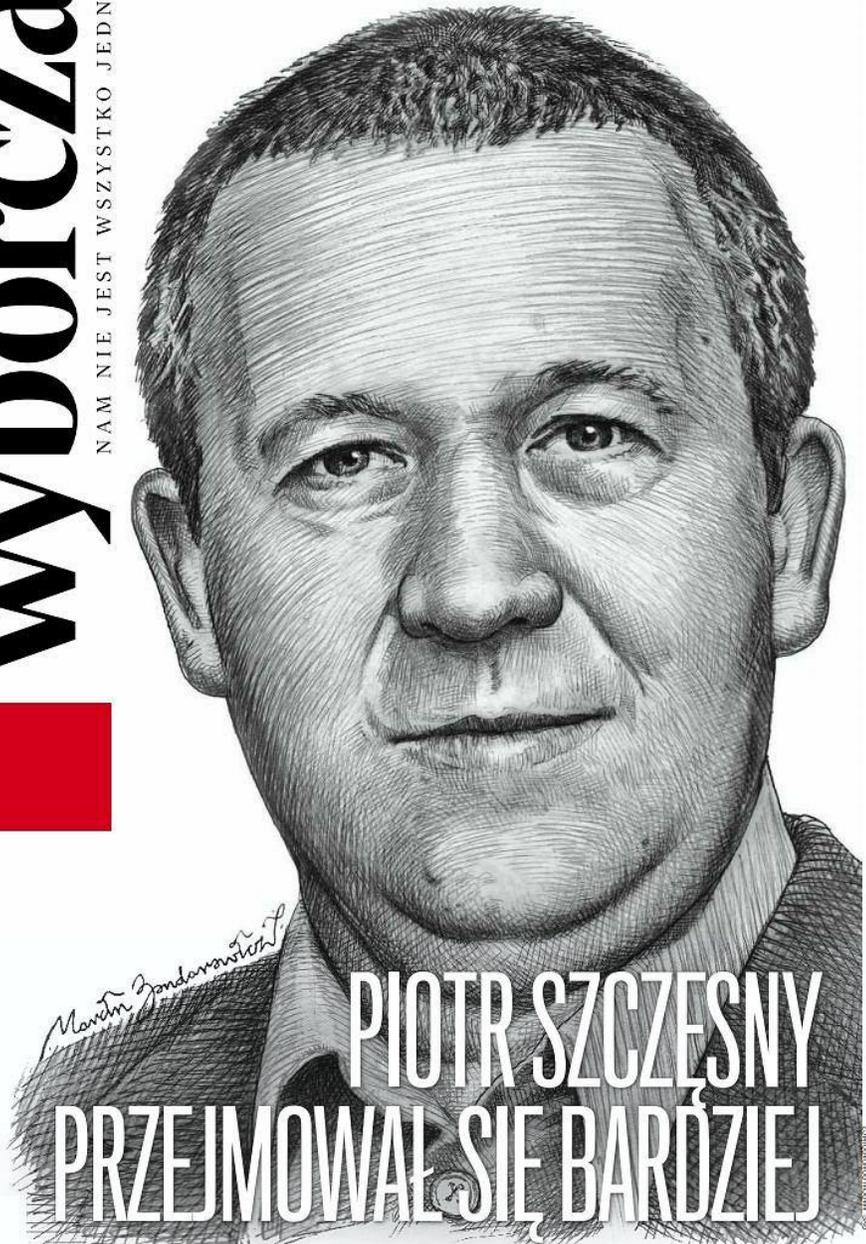
**Uniwersytet  
SWPS**

# Rule of law as a fundamental EU value: Polish reaction

Conference organized by the  
Supreme Administrative Court of the Czech Republic, Brno

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31 October 2022



Ilu z nas Polska boli tak jak jego? - pyta ksiądz Adam Boniecki

S. 6-7

Piotr Szczęsny = Manifesto made in the context of self-immolation on 19 October 2017

**[... ] 2. I protest against the violation of democratic principles by those in power, in particular against the destruction (in practice) of the Constitutional Court and the destruction of the system of independent courts. [...]**

I, an ordinary, grey man like you, urge you all - do not wait any longer. This power must be changed as soon as possible, before it completely destroys our country; before it completely deprives us of our freedom.

And I love freedom above all else. That is why I have decided to self-immolate and I hope that my death will shake the conscience of many, that society will wake up and that you will not wait for the politicians to do everything for you - because they will do nothing!

Title reads: *Piotr Szczęsny was taking care more than anyone. How many of us suffer because of Poland as he did? – Rev. Adam Boniecki asks*

# Defense by the EU of rule of law in Poland

- Legal instruments
  - Fundamental role of C 64/16, *ASJP*
  - Preliminary questions by Polish courts – CJEU judgments
  - Infringement actions by the European Commission (e.g. C-791/19, operation of the Disciplinary Chamber of the Supreme Court, judgment of 15 July 2021);
  - Interim measures (e.g. C-619/18, decreasing retirement age for judges)
  - Penalties for non-enforcement of CJEU judgments
  - European Arrest Warrant cases and CJEU judgments
- Political instruments
  - Article 7 TEU procedure – permanent bilateral veto by Hungary and Poland
  - Rule of Law reports (two editions)
  - Conditionality Regulation (“money for rule of law”); judgments of 16 February 2022, C-156/21 and C-157/21
  - Suspension of the EU Recovery Fund
  - Bilateral pressure by some EU Member States

# Response by the Polish Constitutional Court

- Response to the jurisprudence of the EU Court of Justice
  - 14 July 2021, P 7/20 – compliance with interim measures issued by CJEU
  - 7 October 2021, K 3/21 – Article 19 TEU as being contrary to the constitutional provisions on organization of judiciary (full judicial panel)
- Polish Constitutional Court as a political instrument of legal pressure
- Attempt to redefine a „constitutional identity”
- Sensitive position of judges with respect to jurisprudence by the Constitutional Court (obeying verdicts of the Constitutional Court or judgments of the CJEU?)

# Response by other Polish authorities

- Limited enforcement of the CJEU judgments
  - Interim measure on decreasing retirement age of judges (C-619/18 R, *Commission v. Poland*) – reinstatement of 20 judges to the Supreme Court
  - Elimination of the Disciplinary Chamber – creation of the Chamber of Professional Responsibility (*Izba Odpowiedzialności Zawodowej*); however, it is composed in majority of neo-judges
- Lack of comprehensive reaction to penalties imposed by CJEU and to suspension of the EU Recovery Plan
- Disciplinary measures and suspension of judges defending rule of law (currently suspended judges: Tuleya, Gąciarek, Chmielewski, Ferek)
- Mandatory transfer of “dissident” judges to other divisions of courts
- Regular appointment of new judges by the National Council of Judiciary in its new composition (neo-NCJ)
- Unclear position of the Supreme Administrative Court to judicial nominations made by neo-NCJ
- Practice of mixing judicial panels adjudicating cases (judges and neo-judges)

# Response by independent judges

- Full compliance with CJEU and ECtHR judgments in daily activities, despite the risk of suspension
- Difficult relations with administrative bodies in courts and disciplinary judges
- Growing division between "old" judges and neo-judges (due to new appointments, but also different perception of the rule of law crisis)
- Joint statement of 30 judges of the Supreme Court of 17 October 2022:
  - *„We see no possibility of joint adjudication with persons appointed in a flawed procedure. A judge cannot knowingly violate the citizens' right to a court and expose the Polish State to the obligation to pay high damages. Conduct to the contrary is in opposition to the duty to 'serve the Republic of Poland faithfully' and 'uphold the law and the rule of law', as referred to in the oath of office of a judge."*

# Polish cases before ECHR

- *Astradsson v. Iceland* – opening the gate for judicial nominations cases
- Rule of law crisis in Poland before ECtHR:
  - “double” judges in the Constitutional Court (*Xero Flor*)
  - presidents of courts (*Broda and Bojara*)
  - system of judicial nominations (*Dolińska-Ficek*)
  - operation of the Disciplinary Chamber, suspensions (*Reczkowicz, Juszczyzyn*)
  - freedom of speech of judges (*Waldemar Żurek*)
  - consequences of wrongful judicial nominations (*Advance Pharma, Wałęsa v Poland*, pending)
  - shortening of term of the judge – member of the National Judicial Council (*Grzęda*)
- New strategies by ECtHR
  - Rule of law cases as a priority
  - Interim measures under Rule 39

# Response to the ECtHR cases

- judgments of the Polish Constitutional Court concerning ECtHR
  - Judgment of 24 October 2021, K 6/21
  - Judgment of 10 March 2022, K 7/21
  - Article 6 of the Convention, as interpreted by the ECtHR, contrary to the Polish Constitution
- respect towards interim measures issued by ECtHR
- problems with payment of just satisfaction
- no general measures implemented, especially system of nominations of new judges (operation of the National Council of Judiciary)
- Note: selection procedure of new Polish judge to the ECtHR

# Civil society and rule of law

- from street protests and big social movements (2015-2018) to legal actions (2017-2022); fundamental role of strategic litigation (CJEU, ECtHR) and lobbying at the EU level
- role of independent judicial and prosecutors' associations (*Iustitia, Themis, Lex Super Omnia*); important role of bar associations
- independent well-established and new NGOs fighting for judicial independence (*Helsinki Foundation, „Free Courts” Initiative, Defensor Iuris, Watchdog Poland*)
- coordination of efforts at domestic (strong union of lawyers) and international level (cooperation with experts and international NGOs)
- support to judges and prosecutors being subject of reprisals and suspensions
- bridging the history and the present (Committee to Protect Workers of 1976 supporting current rule of law defenders; role of Adam Strzembosz)
- *“Repairing sails on windy waters”* – value of communication on importance of judicial independence and principles of rule of law; educational activities



March of 1000 Gowns in Warsaw

Photo by Kacper Pempel, Reuters

# Dilemmas for future – what to do “day after”?

- situation of the Constitutional Court: status of „double” judges; potential “constitutional trap” (M. Wyrzykowski’s remark)
- status of neo—judges: how to verify their legal status?
- status of judgments issued by neo-judges (or with neo-judges participating in judicial panels). Invalidity of proceedings or reopening of cases?
- criminal responsibility of certain judges and prosecutors for their abuse of power?
- effectiveness of judiciary vs. necessary institutional reforms: perspective of a regular citizen; legitimacy gap



Igor Tuleya, judge of the Regional Court in Warsaw, suspended by the Disciplinary Chamber of the Supreme Court since 18 November 2020; symbol of fight for rule of law in the EU

Photo:

<https://www.theguardian.com/world/2021/sep/20/last-stop-for-democracy-on-tour-with-polands-rebel-judges>

“You do not become a "dissident" just because you decide one day to take up this most unusual career. You are thrown into it by your personal sense of responsibility, combined with a complex set of external circumstances. You are cast out of the existing structures and placed in a position of conflict with them. It begins as an attempt to do your work well, and ends with being branded an enemy of society.”

Vaclav Havel

# Conclusions

- CJEU and ECtHR are consequent in strategic approach to rule of law case-law
- CJEU jurisprudence delays process of changes, but it does not stop it
- rule of law is a central issue in Polish political life - full compliance depends on results of parliamentary elections in 2023
- civil society response was crucial to strengthen legitimacy of EU actions; it encouraged judges to resist and become heroes
- rule of law crisis is deep and it will require a lot of well-thought institutional changes after elections in 2023
- lesson for other countries:
  - Protecting Institutions, Lesson no. 2 by Timothy Snyder: *"It is institutions that help us to preserve decency. They need our help as well. Do not speak of „our institutions” unless you make them yours by acting on their behalf. Institutions do not protect themselves. They fall one after the other unless each is defended from the beginning. So choose an institution you care about – a court, a newspaper, a law, a labour union – and take its side."*

# Support by the Czech Republic top judges

“For us, the Republic of Poland and its people are an enduring and inseparable part of the community of nations of Central and Eastern Europe, sharing a common destiny for centuries. The heroism of the Polish nation during World War II, its resistance to the dictatorship of the former Soviet Union and to national authoritarian practices, as well as its successful restoration of state sovereignty and the establishment of a democratic system and the rule of law after 1989 have been a significant and lasting inspiration for us.

Over the past year, however, we have witnessed in our close neighbour a process that threatens the very basis of the principles on which the democratic rule of law is based. After the paralysis of the Constitutional Court and the subordination of the public media to current party politics over the past year, an unprecedented attack on the independence of the Polish judiciary is taking place these days. [...]

Even with an awareness of and respect for the sovereignty of the Polish state, we cannot remain silent in the face of steps that threaten its very source, which is the inviolable values of European civilisation, humanism and fundamental rights and freedoms.”

- Letter of 22 July 2017 has been signed by:
  - Pavel Rychetský, President of Constitutional Court
  - Pavel Šámal, President of the Supreme Court
  - Josef Baxa, President of the Supreme Administrative Court
  - Pavel Zeman, Prosecutor General
  - Anna Šabatová, Ombudsman

# Thank you for your attention

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