

## ARTICLE

# The Role of Civil Society in Protecting Judicial Independence in Times of Rule of Law Backsliding in Poland

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The article discusses approaches to defending the independence of the judiciary – one of the main institutional requirements of the rule of law – adopted by civil society organisations (CSOs) in Poland since 2015. Beginning by describing the rule of law backsliding in context, this article shows how civil society organisations reacted to the orchestrated threats to judicial independence in Poland. The article highlights the negative consequences of rule of law backsliding for the civic space, proving that the role of CSOs was not only to protect the rule of law (judicial independence, in particular), but also to fight the shrinking civic space. This article surveys the concept of the 'rule of law from below' by critically analysing the actions of CSOs in response to attempts to undermine judicial independence, providing a part of a broader 'rule of law backsliding' picture. The article concludes with a detailed analysis of two case studies – reactions from CSOs to Poland's so-called 'reform of the judiciary'.

**Keywords:** rule of law; judicial independence; courts; civil society; Poland

## 1. Introduction

The legislative and political decisions taken by the Polish government since December 2015 have been recognised by the European Commission as a threat to the rule of law.<sup>1</sup> By co-opting the Constitutional Tribunal, the ruling majority were able to control the legislative process and undermine the independence of state institutions, the courts in particular. The ruling majority's implementation of the so-called 'reform of the judiciary'<sup>2</sup> prompted critical comments, statements, and opinions by international and European Union (EU) institutions, as well as numerous cases pending before the international courts. However, what often seems to be missing from the academic analysis of the Polish rule of law backsliding is the reaction of civil society to the government's attack on the courts.

The wide range of civil society actors can be divided into two main groups: organised civil society in the form of associations and foundations, and unorganised civil society, consisting of spontaneous gatherings

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<sup>1</sup> Commission, 'Proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law', COM(2017) 0835 final.

<sup>2</sup> Many academics and judges claim the reform of the judicature in Poland was not a reform, because reform mean changes for the better, whereas these changes were causing devastation in Polish judicature. See: Response to the White Paper Compendium (16 March 2018) <<https://www.iustitia.pl/informacje/2172-response-to-the-white-paper-compendium-on-the-reforms-of-the-polish-justice-system-presented-by-the-government-of-the-republic-of-poland-to-the-european-commission>>, Laurent Pech, Sebastian Platon, The beginning of the end for Poland's so-called "judicial reform"? Some thoughts on the ECJ ruling in Commission v Poland (Independence of the Supreme Court case) <The beginning of the end for Poland's so-called "judicial reforms"? Some thoughts on the ECJ ruling in Commission v Poland (Independence of the Supreme Court case), RECONNECT Blog 2 July 2019 <<https://reconnect-europe.eu/blog/pech-platon-poland-ecj-rule-of-law-reform/>> accessed 20 November 2020.

and groups.<sup>3</sup> The latest research indicates that civil society is no longer dominated by the non-governmental organisations (NGO) community, but is rather populated by more varied groups, both organised and not, which reach beyond traditional definitions and divisions with their novel ways of thinking and acting.<sup>4</sup> Although a certain shift can be observed in how civil society is defined, its role largely boils down to the following three main aspects: watchdogs holding governments to account; awareness raising; and service provision.<sup>5</sup> For the purpose of this article, we understand 'civil society' as both formal and informal organisations established by individuals, which are nonpartisan, non-profit, and independent of public authorities.<sup>6</sup> A similar approach is taken in the Glossary of summaries of EU Legislation under Civil Society Organisations,<sup>7</sup> a wider term present in this text.

The article discusses actions taken in response to Poland's 'reform of the judiciary' – a government-led plan to undermine the independence of the judiciary in Poland. Independent courts and access to judicial review are fundamental institutional and procedural requirements of the rule of law.<sup>8</sup> This article discusses not only the range of methods adopted by civil society, but also the limits of such actions. This institutional perspective – concentrated on non-state actors defending public independent institutions – the courts, suggests a distinctive feature of defending the rule of law 'from below'. The concept of the 'rule of law from below' as examined in this article is linked with a 'functional' aspect of judicial independence – the right to fair trial – which is an indispensable guarantee for the security of civil society. Civil society is not directly entitled (in light of constitutional norms) to make binding political or legislative decisions. They may, however, play the role of 'proxy' between individuals and the state by dealing with issues of public interest. The legitimacy of civil society actors depends on them (?) being able to develop social awareness of their actions which affect public matters, such as the rule of law.

The article begins with a brief presentation of the main elements of the 'reform of the judiciary' proposed and enforced by the ruling majority in Poland since late 2015. Secondly, it analyses how the rule of law backsliding affected the environment for civil society in Poland. Thirdly, the article provides a general overview of how CSOs have reacted to rule of law backsliding, by intensifying their oversight of public institutions, organising advocacy campaigns, and increasing awareness-raising efforts. Finally, the article offers a detailed analysis of two case studies: civil society organisation actions providing practical aspects of the 'rule of law from below', and the results thereof.

## 2. Post-2015 rule of law backsliding in Poland – undermining judicial independence and looking for the 'enemies of the people'

The phrase 'rule of law' (*praworządność*) entered the public debate in Poland in the context of the constitutional crisis in January 2016, when the European Commission initiated action against Poland<sup>9</sup> under its 'Rule of law framework'.<sup>10</sup> In this section, we analyse the consequences of the rule of law backsliding in Poland on two levels – at a general level (affecting independent institutions, including courts, and human rights protection in general) and at a civil society level (showing how the legal and political changes introduced after 2015 affected the functioning of the third sector, as civil society is often referred to, in Poland).

<sup>3</sup> Mareike Alscher, Eckhard Priller, Susanne Ratka and Rupert Graf Strachwitz, *The Space for Civil Society: Shrinking? Growing? Changing?* 2017 Opusculum 104 <<https://nbn-resolving.org/urn:nbn:de:0168-ssoar-54028-9>> accessed 07 June 2021.

<sup>4</sup> World Economic Forum, 'The Future Role of Civil Society' (WEF, World Scenario Series 2013).

<sup>5</sup> Rachel Cooper, 'What is Civil Society? How is the term used and what is seen to be its role and value (internationally) in 2018?' (K4D Helpdesk Report, Brighton UK: Institute of Development Studies 2018).

<sup>6</sup> As a result, institutions and organisations established by binding laws and not by individuals, e.g. the Bar as an association of professional lawyers (*adwokatura*), are not considered as 'civil society organisations'. The core aspects of the functioning of academia will also not be considered as 'civil society', since universities are in some instances privately run businesses, and public universities are usually established in law.

<sup>7</sup> 'A civil society organisation is an organisational structure whose members serve the general interest through a democratic process, and which plays the role of mediator between public authorities and citizens. [...] Examples of such organisations include: social partners, non-governmental organisations, grassroots organisations'. <[https://eur-lex.europa.eu/summary/glossary/civil\\_society\\_organisation.html](https://eur-lex.europa.eu/summary/glossary/civil_society_organisation.html)> accessed 07 June 2021.

<sup>8</sup> Venice Commission, 'Rule of law checklist' (European Commission for Democracy Through Law, Strasbourg 2016, Study No.711/2013, CDL-AD(2026)007).

<sup>9</sup> Commission, 'Rule of law in Poland: Commission starts dialogue', Press release, Brussels 13 January 2016: <[https://ec.europa.eu/commission/presscorner/detail/en/WM\\_16\\_2030](https://ec.europa.eu/commission/presscorner/detail/en/WM_16_2030)> accessed 19 November 2020.

<sup>10</sup> Commission, 'Communication from the Commission to the European Parliament and the Council, "A new EU Framework to strengthen the Rule of Law"' COM (2014) 158 final.

### 2.1. 'Reform of the judiciary' during rule of law backsliding

Both academic writing and media reports highlight the similarities between the institutional changes introduced in Poland by the Law and Justice party (PiS, *partia Prawo i Sprawiedliwość*) and those arranged and implemented in Hungary by Fidesz.<sup>11</sup> The rule of law backsliding in Poland was orchestrated around the capture of the Constitutional Tribunal:<sup>12</sup> first by paralysing its everyday work with numerous *ad hoc* legislative amendments, and then by taking political control over the Tribunal by appointing a loyal president of the court.<sup>13</sup> The Constitutional Tribunal no longer plays the role of 'negative legislator' – it does not *truly* verify whether legislation (especially newly adopted law) is compatible with the Polish Constitution. What it does do is legitimise the legislative amendments of the ruling majority, already drafted and waiting for the Tribunal's green light.<sup>14</sup>

Despite the fact that the above shortcomings were also expressed by the European Commission in December 2017,<sup>15</sup> in its proposal to the EU Council for a decision under Article 7(1) TEU censoring Poland for creating a serious risk of breach of the rule of law, but no such decision has been adopted by the EU Council so far.<sup>16</sup> The absence of any effective international reaction – except for non-binding Venice Commission opinions criticising the legislative changes affecting the Constitutional Tribunal<sup>17</sup> – has allowed the ruling party to take further legislative and political steps constitutionality of which would not be reviewed in the foreseeable future. The further 'reforms' have comprised: taking political control over the public media;<sup>18</sup> uniting the office of the Prosecutor General and the Minister of Justice;<sup>19</sup> passing anti-terrorism law;<sup>20</sup> adding limitations to the freedom of assembly;<sup>21</sup> and changing the organisation of the State Electoral Commission.<sup>22</sup> The above indicates that the changes introduced in Poland after 2015 can be regarded as 'rule of law backsliding', defined as the:

process through which elected public authorities deliberately implement governmental blueprints which aim to systematically weaken, annihilate or capture internal checks on power with a view to dismantling the liberal democratic state and entrenching the long-term rule of the dominant party.<sup>23</sup>

<sup>11</sup> Adam Holesch, Anna Kyriazi 'Democratic backsliding in the European Union: the role of the Hungarian-Polish coalition' (2021) East European Politics; Stefánia Kapronczay, 'War on NGOs in Eastern Europe' (2017) 26 SUR International Journal on Human Rights <<https://sur.conectas.org/en/war-on-ngos-in-eastern-europe>>, accessed 07 June 2021.

<sup>12</sup> Wojciech Sadurski, 'Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler' (2019) 11 Hague Journal on the Rule of Law 63.

<sup>13</sup> Laurent Pech, Patryk Wachowiec, Dariusz Mazur, 'Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action' (2021) 13 Hague Journal of the Rule on the Law 1.

<sup>14</sup> Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press 2019) 79. The Venice Commission stated in its opinion of October 2016 that there is a real threat that constitutional review will not occur (see Opinion 860/2016 on the act on Constitutional Tribunal adopted by Venice Commission at its 108 Plenary Session 14–16 October 2016, CDL-AD(2016)026).

<sup>15</sup> Commission, 'Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law' COM(2017)0835 final.

<sup>16</sup> Laurent Pech, Patryk Wachowiec, '1095 Days Later: From Bad to Worse Regarding the Rule of Law in Poland (Part I) (2019) *VerfBlog*: <<https://verfassungsblog.de/1095-days-later-from-bad-to-worse-regarding-the-rule-of-law-in-poland-part-i/>>; Laurent Pech, Patryk Wachowiec, '1460 Days Later: Rule of Law in Poland R.I.P. (Part I) (2020) *VerfBlog*: <<https://verfassungsblog.de/1460-days-later-rule-of-law-in-poland-r-i-p-part-i/>> accessed 5 December 2020.

<sup>17</sup> Opinion on amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11–12 March 2016), CDL-AD(2016)001-e; Opinion on the Act on the Constitutional Tribunal, adopted by the Venice Commission at its 108th Plenary Session, (Venice, 14–15 October 2016), CDL-AD(2016)026-e).

<sup>18</sup> See Annabelle Chapman, 'Pluralism Under Attack: The Assault on Press Freedom in Poland' (Freedom House, June 2017) <FH\_Poland\_Report\_2017.indd (freedomhouse.org)> accessed 05 December 2020.

<sup>19</sup> See 'Venice Commission, Opinion on the Act on the Public Prosecutor's office', as amended, adopted by the Venice Commission at its 113th Plenary Session (Venice, 8–9 December 2017, CDL-AD(2017)028-e).

<sup>20</sup> Act of 10 June 2016 on anti-terrorist activities, Dz.U. 2016. 904 of 24.06.2016.

<sup>21</sup> See Comments of the Helsinki Foundation for Human Rights to the deputy-sponsored Bill on the amendment to the Assemblies Act (parliamentary paper No. 1044), <[http://citizensobservatory.pl/wp-content/uploads/2016/12/hfhr-opinion-assemblies\\_EN.pdf](http://citizensobservatory.pl/wp-content/uploads/2016/12/hfhr-opinion-assemblies_EN.pdf)>.

<sup>22</sup> Parliamentary Assembly of the Council of Europe, 'The functioning of democratic institutions in Poland, Report'(Doc. 15025, 6 January 2020).

<sup>23</sup> Laurent Pech and Kim Lane Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) 19 Cambridge Yearbook of European Legal Studies, 9.

From the beginning, political declarations on the need to reform the judiciary played a central role in the political agenda of the Law and Justice party.<sup>24</sup> Judicial independence and effective judicial review were presented as judiciocracy (*sędziokracja*).<sup>25</sup> Such 'dikastophobia', a fear of judges, is an intentional populist strategy enabling attacks on judges and their decisions.<sup>26</sup> The narrative presented by the Minister of Justice underlined that the miscarriages of justice by the courts and the wrongdoings of individual judges are the actual problems that need to be resolved to improve the work of the judiciary. The Polish National Foundation (*Polska Fundacja Narodowa*), established by state-owned companies in 2016 to promote Poland and 'to combat the deluge of bad press about the country's ruling Law and Justice party',<sup>27</sup> conducted a 'Fair courts' (*Sprawiedliwe sądy*) campaign – renting billboards to present cases where courts and judges had made allegedly wrong decisions or even committed crimes.<sup>28</sup> Most of the information displayed on the billboards was, however, either misinterpreted or simply false.

The key tool of the 'reform of the judiciary' was to replace the people holding the highest positions. Any structural changes were used as an excuse to 'exchange' those at the top. The main elements of the 'reform' were adopted by the Parliament in July 2017 and all concerned the Supreme Court, National Council for the Judiciary (NCJ), and the organisation of the common courts. The accelerated legislative process and the radical solutions included in those legislative proposals sparked mass protests.<sup>29</sup> In response, the President of Poland vetoed two out of three draft bills. However, a couple of months later the President submitted almost identical drafts to Parliament, which were adopted in December 2017. Neither the criticism from the Venice Commission<sup>30</sup> nor from the EU institutions<sup>31</sup> dissuaded the Parliament from adopting these amendments.

The Minister of Justice of Poland (acting as Prosecutor General) was empowered to remove at his full discretion the presidents and deputy presidents of any common court, without presenting any reasons and without any option for judicial review of such decisions.<sup>32</sup> The retirement age of common courts judges was lowered from 67 to 60 for women and 65 for men.<sup>33</sup> Upon reaching retirement age, a judge would need approval from the Minister of Justice to remain in their post.<sup>34</sup> Similar changes applied to the Supreme Court: the power to extend the term of office of any judge was assigned to the President of Poland, who likewise did not have to justify his discretionary decision. Institutional changes were also introduced with respect to the NCJ, whose judge-members used to be elected by their peers. After the 2017 amendments, the Sejm (lower chamber of the Parliament) obtained the power to choose NCJ members from among

<sup>24</sup> The arguments PiS offered to justify their overhaul of the judiciary include to root out communist-era judges, to fulfil public expectations, to improve efficiency, to replace a special 'caste' with a new elite, and to demonstrate that supervising the judiciary is an national competence of Poland, see A. Wójcik, 'Six arguments PiS uses to justify Poland's judicial overhaul- and why they are wrong' <<https://notesfrompoland.com/2020/01/20/six-arguments-pis-uses-to-justify-polands-judicial-overhaul-and-why-they-are-wrong/>> accessed 10 December 2020.

<sup>25</sup> Jerzy Zajadło, 'Fałszywość hasła „demokracja, a nie sędziokracja” – analiza filozoficzno-prawna' (2017) 3 KRS 5.

<sup>26</sup> Marc de Werd, 'Dikastophobia – a dangerous populist strategy to prevent judges from controlling government power', (: <<https://europeancourts.blogspot.com/2020/02/dikastophobia-dangerous-populist.html>> accessed 7 November 2020.

<sup>27</sup> Maria Wilczek, Jan Cienski, 'Polish public promotion scheme backfires', (2019) 18 Politico <<https://www.politico.eu/article/polska-fundacja-narodowa-polish-public-promotion-scheme-backfires/>>.

<sup>28</sup> On 15 November 2018 a court in Warsaw ruled that the 'fair courts' campaign was incompatible with the aims of the Polish National Foundation. According to this court, the campaign does not promote Poland but undermines its image (Human Rights Commissioner's press release, 6 May 2020: <<https://www.rpo.gov.pl/pl/content/spot-z-pijanym-sedzia-rpo-prosi-nik-o-kontrola-abw-o-zainteresowanie>> accessed 5 December 2020.

<sup>29</sup> Paweł Sobczak, Paweł Florkiewicz, 'Thousands protest after Polish lawmakers approve judiciary overhaul, defying EU', *Reuters* (Warsaw, 20 July 2017) <<https://www.reuters.com/article/us-poland-politics-judiciary-vote-idUSKBN1A510H>> accessed 07 January 2021.

<sup>30</sup> Venice Commission, 'Opinion on the Draft Act amending the Act on the National Council of the Judiciary; on the Draft Act amending the Act on the Supreme Court, proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts, adopted by the Commission at its 113th Plenary Session'(European Commission for Democracy Through Law, Strasbourg 11 December 2017, Opinion No.904/2017, CDL-AD(2017)031-e).

<sup>31</sup> Commission, 'Recommendation of 26.7.2017 regarding the rule of law in Poland complementary to Commission Recommendations (EU) 2016/1374 and (EU) 2017/146' C(2017) 5320 final.

<sup>32</sup> Barbara Grabowska-Moroz, Małgorzata Szuleka, 'It starts with Personnel, Replacement of common court presidents and vice presidents from August 2017 to February 2018' (April 2018) Helsinki Foundation for Human Rights.

<sup>33</sup> Article 7 of the Act of 16 November 2016 amending the law on the Social Insurance System and certain other laws, Dz.U.2017.38 of 05.01.2017.

<sup>34</sup> As a result of the CJEU's ruling in C-192/18 *European Commission v. Republic of Poland*, ECLI:EU:C:2019:924, the retirement age was changed again and is now 65 for both men and women – Article 1 of the Act of 12 April 2018 amending the law on the system of ordinary courts, the law on the National Council for the Judiciary and on the Supreme Court.

judge-candidates supported by 25 other judges or 2000 citizens.<sup>35</sup> The 'New' NCJ was suspended in September 2018 by the European Network of the Councils for the Judiciary, since it did not meet the independence requirement.<sup>36</sup> The new Supreme Court Act<sup>37</sup> established two new chambers – the Disciplinary Chamber and the Chamber of Extraordinary Review and Public Affairs – both staffed entirely by judges selected by the new NCJ. The disciplinary officers appointed by the Minister of Justice initiated a large number of proceedings against judges who criticised the 'reform'.<sup>38</sup> The final decisions in any disciplinary case were reserved to the Disciplinary Chamber.

The 'reform' was publicly criticised by numerous international actors and institutions: the Venice Commission,<sup>39</sup> the Parliamentary Assembly of the Council of Europe,<sup>40</sup> the UN Special Rapporteur on the independence of judges and lawyers,<sup>41</sup> the International Commission of Jurists,<sup>42</sup> and the American Bar Association.<sup>43</sup> In its 2020 annual Rule of Law Report the European Commission found that these reforms to the Constitutional Tribunal, the Supreme Court, ordinary courts, the NCJ, and the prosecution service, 'have increased the influence of the executive and legislative powers over the justice system, and therefore weakened judicial independence'.<sup>44</sup> Contesting judicial independence will undermine trust in the judiciary for years, especially since the politicised NCJ has already appointed high numbers of new judges, causing the cancer of distrust to spread further.

## 2.2. Shrinking space for civil society in context of the rule of law crisis

Rule of law backsliding often affects non-state actors, such as NGOs or private media. Such tendencies have been defined as a 'shrinking', 'closing' or 'squeezing'<sup>45</sup> of civic space and can vary from hostile legislative amendments to verbal and physical attacks against activists or journalists.<sup>46</sup> Definitional differences notwithstanding, these tendencies are often associated with authoritarianism.<sup>47</sup> Poland has not missed this global phenomenon, as the Polish authorities have begun implementing various measures to efficiently obstruct the functioning of the third sector.<sup>48</sup>

<sup>35</sup> Act of 8 December 2017 amending the law on the National Council for the Judiciary and certain other laws, Dz.U.2018.3 of 02.01.2018.

<sup>36</sup> 'ENCJ suspends Polish National Judicial Council', KRS, Press release: <<https://www.encj.eu/node/495>>.

<sup>37</sup> The Act of 8 December 2017 on the Supreme Court., Dz.U.2019.825 (consolidated version) of 06.05.2019; see also Dariusz Mazur, 'Changes to Supreme Court introduced on the 3rd of July 2018' (Archiwum Osiatyńskiego 4 July 2018) <<https://archiwumosiatynskiego.pl/wpis-w-debacie-en/alarming-revolution-within-the-polish-supreme-court/>> accessed 5 November 2020.

<sup>38</sup> Małgorzata Szuleka, Maciej Kalisz, 'Disciplinary proceedings against judges and prosecutors' (2019) <<http://www.hfhr.pl/en/disciplinary-proceedings-against-judges-and-prosecutors/>> accessed 15 November 2020; Komitet Obrony Sprawiedliwości, 'A country that punishes. Pressure and repression of Polish judges and prosecutors'(2019)<[http://komitetobronysprawiedliwosci.pl/app/uploads/2019/02/Raport-KOS\\_eng.pdf](http://komitetobronysprawiedliwosci.pl/app/uploads/2019/02/Raport-KOS_eng.pdf)> accessed 15 November 2020. The best-known examples are the cases of judge Igor Tuleya and judge Beata Morawiec. On 12 October 2020 the Disciplinary Chamber lifted the judicial immunity of Beata Morawiec, judge of District Court in Kraków and chair of Polish Judges Association Themis. She was suspended and a 50% salary cut was imposed: she now faces criminal prosecution. On 18 November 2020 judge Igor Tuleya was deprived his immunity.

<sup>39</sup> Venice Commission, Opinion (n 30).

<sup>40</sup> Parliamentary Assembly of the Council of Europe, 'New threats to the rule of law in Council of Europe member States: selected examples', Report, doc. 14405, 25 September 2017.

<sup>41</sup> Report of the Special Rapporteur on the independence of judges and lawyers on his mission to Poland, 5 April 2018, A/HRC/38/38/Add.1.

<sup>42</sup> Letter from the International Commission of Jurists to President Andrzej Duda regarding the restoration of the independence of the judiciary in Poland, Ruleoflaw.pl 19 July 2018: <<https://ruleoflaw.pl/letter-from-the-international-commission-of-jurists-to-president-andrzej-duda-regarding-the-restoration-of-the-independence-of-the-judiciary-in-poland>> accessed 5 November 2020.

<sup>43</sup> Statement of ABA President Judy Perry Martinez: <<https://www.americanbar.org/news/abanews/aba-news-archives/2019/12/statement-of-aba-president-judy-perry-martinez-re-polish-judici>> accessed 25 October 2020.

<sup>44</sup> Commission, "Rule of Law Report, The rule of law situation in the European Union – Chapter on the rule of law situation in Poland' (Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2020) SWD/2020/320 final.

<sup>45</sup> Antoine Buyse, 'Squeezing civic space: restrictions on civil society organizations and the linkages with human rights' (2018) 22 The International Journal of Human Rights 966.

<sup>46</sup> Tina Divjak and Goran Forbici, 'The future evolution of civil society in the European Union by 2030' Study, European Economic and Social Committee, December 2017, (para. 24).

<sup>47</sup> Jean Bossuyt and Martin Ronceray, 'Claiming back civic space Towards approaches fit for the 2020s?'(2020) ECDPM 7; 'Shrinking space for civil society: the EU response', April 2017-PE578.039 EP Policy Department, Directorate-General for External Policies, 11.

<sup>48</sup> See Adam Ploszka, 'Shrinking Space for Civil Society: A Case study of Poland' (2020) 26(4) European Public Law, 941.



The European Commission's latest annual Rule of Law Report recognised a vibrant civil society in Poland.<sup>49</sup> The process of undermining it is being conducted simultaneously on two levels – a continuous fracturing of the constitutional system alongside the reduction of space for civil society. In contrast with the Commission's report, academic literature describes civil society in Poland as 'underdeveloped' and dependent on donors, with few people being involved in voluntary work,<sup>50</sup> though it does recognise the professionalisation of activism in the country.<sup>51</sup> What the Commission's report did underline, however, is that 'organisations [in Poland] have been subject to unfavourable statements by politicians'.<sup>52</sup> In 2016 the public television (controlled by the ruling party) organised a smear campaign against CSOs (here also meaning non-governmental organizations [NGOs]), with allegations including that they have non-transparent connections with George Soros.<sup>53</sup> The aim was to undermine trust in CSOs and their work, which often critically assess the actions of the ruling party.<sup>54</sup> In fact it could delegitimize CSOs in the public eye and limit their ability to perform.<sup>55</sup>

The government's political agenda directly affects the approach CSOs take when dealing with equality, ecology, LGBT persons, and refugees.<sup>56</sup> In practice, assisting refugees or promoting women's rights disqualifies an CSO from accessing public funds.<sup>57</sup> Limiting CSOs access to financing is one of the basic tools used by states to undermine their position. In the meantime, the government<sup>58</sup> started to develop a 'new civil society'.<sup>59</sup> This was followed by new laws centralising the decision-making for CSOs' access to public funds.<sup>60</sup> A new institution was created to oversee funding for civil society – the National Freedom Institute – Centre for Civil Society Development (*Narodowy Instytut Wolności – Centrum Rozwoju Społeczeństwa Obywatelskiego*).<sup>61</sup> This Institute is tasked with determining which CSOs should receive public funds.<sup>62</sup> From the very beginning the new law exploited protests and fostered doubts about civil society and domestic and foreign experts in

<sup>49</sup> Commission, 2020 Rule of Law Report The rule of law situation in the European Union, COM(2020)580 final. See also Parliamentary Assembly of the Council of Europe, The functioning of democratic institutions in Poland, Resolution 2316 (2020), para. 16.

<sup>50</sup> Siri Hummel, Laura Pfirter, Johannes Roth and Rupert Graf Strachwitz, 'Understanding Civil Society in Europe A Foundation for International Cooperation', Institut für Auslandsbeziehungen 2020: <[https://euagenda.eu/upload/publications/ifa-strachwitz-zg\\_studie\\_en\\_web-1.pdf](https://euagenda.eu/upload/publications/ifa-strachwitz-zg_studie_en_web-1.pdf)>, accessed 12 November 2020. See also for an overview of civil society in Poland, Kerstin Jacobsson and Elżbieta Korolczuk, 'Introduction: Rethinking Polish Civil Society', in Kerstin Jacobsson and Elżbieta Korolczuk (eds.), *Civil Society Revisited. Lessons from Poland*, (Berghahn Books 2017).

<sup>51</sup> Anna Radiukiewicz, 'Activists' Perceptions of their Roles in Civic Organizations: A Case from Poland' (2017) 13(4) Journal of Civil Society 426.

<sup>52</sup> Commission, Rule of Law Report (n 44).

<sup>53</sup> Magdalena Pekacka, 'Countering Shrinking Space in Poland': <<https://dafne-online.eu/news/opinion/countering-shrinking-space-in-poland>>accessed 1 December 2020.

<sup>54</sup> Zuzanna Warso, Piotr Godzisz, Dominika Bychawska-Siniarska, 'Information on the recent challenges faced by human rights defenders and civil society in Poland Overview of challenges faced by human rights defenders and civil society Prepared for the United Nations Special Rapporteur on the situation of human rights defenders', Warsaw November 2016: <<https://www.hfhr.pl/wp-content/uploads/2016/11/HRD-report-30112016-FIN.pdf>> accessed 1 December 2020.

<sup>55</sup> Ibid 7.

<sup>56</sup> Karolina Follis, 'Rejecting refugees in illiberal Poland: The response from civil society' (2019) 15 Journal of Civil Society 307; The government's main focus has been to bring NGOs under stricter control and to target unwanted activities (support for refugees, women's rights) using financial sanctions. E. Wilk, 'Społeczeństwo obywatelskie według PiS': <<https://www.polityka.pl>> accessed 15 November 2020. Filip Pazderski, 'Civil society development in Poland on the crossroads of political game' <<https://visegradinsight.eu/civil-society-development-in-poland-on-the-crossroads-of-political-game>> accessed 15 November 2020; Claudia Ciobanu and Wojciech Koś, 'Warsaw grabs purse strings of Polish NGOs', Politico 8 December 2017: <<https://www.politico.eu/article/pis-polish-ngos-fear-the-governments-embrace/>> accessed 15 November 2020.

<sup>57</sup> Follis (n 56); PACE, The functioning of democratic institutions in Poland, Report, Doc. 15025, 6 January 2020, para. 121: 'This division is of concern, especially since we have received indications that this division is also reflected in the distribution of government funding among CSOs'.

<sup>58</sup> Ploszka (n 48) 945.

<sup>59</sup> Beata Szydło, 'Budujemy społeczeństwo obywatelskie' (23 March 2016) <<https://archiwum.premier.gov.pl/mobile/wydarzenia/aktualnosci/beata-szydlo-budujemy-spoleczenstwo-obywatelskie.html>>; Ewa Wilk (n55). See also Stanley Bill, 'Counter-Elite Populism and Civil Society in Poland: PiS's Strategies of Elite Replacement' *East European Politics and Societies and Cultures* (forthcoming).

<sup>60</sup> Jonathan Day, 'Poland Seizes Control of Civil Society Funding' Liberties (13 December 2017) <<https://www.liberties.eu/en/news/poland-ngo-law-funding/13783>> accessed 25 October 2020.

<sup>61</sup> The Act of 15 September 2017 on the National Freedom Institute – Center for the Development of Civil Society, Dz.U.2017.1909 of 13.10.2017.

<sup>62</sup> Barbara Smith, 'Polish Civil Society. Adapting to New Pressures' (A Report of CSIS Human Rights Initiative December 2018) <[https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/181219\\_PolishCivilSociety.pdf](https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/181219_PolishCivilSociety.pdf)> accessed 17 November 2020. See Bill (n 59).

an effort to nationalise and centralise the third sector.<sup>63</sup> As an authorising entity with substantial financial resources, the Institute allocates money according to its own priorities. According to OSCE/ODIHR,<sup>64</sup> the law should have provided more safeguards against potential government interference from this newly established institution.<sup>65</sup> This insufficiency of safeguards has enabled the biased approach to funding decisions described above.<sup>66</sup> Numerous irregularities have also been detected in the competitions for public funds.<sup>67</sup> A draft law on CSO transparency was recently published by the Ministry of the Environment without the consultation of stakeholders. This new law would impose a special obligation to provide information regarding being financed from abroad.<sup>68</sup>

The systemic problems encountered by the third sector were intensified by the rule of law backsliding. Public consultations are a particularly vivid example of the backsliding in public participation. Attempts to develop public consultations were 'codified' in 2013 in the new Rules of the Council of Ministers, which set out fundamental principles for inclusive public consultations. Despite their imperfect implementation, they were binding norms, an important point of reference for civil society organisations' involvement in the legislative process. The main elements of this system were deleted in 2016.<sup>69</sup> Since the PiS won the elections, no public consultations on relevant draft legislation have ever been organised. This significantly limits the role of the underlying platforms in voicing CSOs' views effectively and prevents them from conducting a dialogue with public authorities.<sup>70</sup> Some have concluded that '[t]he system of public consultation has become a façade'.<sup>71</sup> Draft laws prepared by government ministries, which ought to undergo public consultation, are instead submitted to parliament as private bills by groups of MPs, who are not obliged to conduct any consultation.<sup>72</sup> Access to parliamentary committees is now often denied to civil society organisations, where it used to be a common good practice to invite them. Now the 'government has significantly decreased public dialogue with CSOs'.<sup>73</sup> It results in conditions where the space for dialogue, including CSOs' 'operational space'<sup>74</sup> is limited.

<sup>63</sup> See for example the statement of the Helsinki Committee in Poland: 'In our opinion, the adoption of Institute will result in a dramatic restriction of civic freedoms, in spite of the Act's title' <<https://www.hfhr.pl/en/national-freedom-institute-act-helsinki-committee-in-poland-issues-statement>>.

<sup>64</sup> OSCE/ODIHR Opinion on the Draft Act of Poland on the National Freedom Institute – Centre for the Development of Civil Society, NGO-POL/303/2017[AIC], 22 August 2017, paragraphs 12, 22 and 25 <<https://www.osce.org/odihr/336546>> accessed 17 November 2020.

<sup>65</sup> PACE, New restrictions on NGO activities in Council of Europe member States, Doc. 14570, 7 June 2018.

<sup>66</sup> Nataliya Novakova, 'The Conservative-Liberal Clash Reshaping Poland's Civil Society', <<https://www.gmfus.org/blog/2020/03/10/conservative-liberal-clash-reshaping-polands-civil-society>> accessed 17 November 2020. 'Government policies have created an unequal playing field, marginalizing liberal CSOs and nurturing loyal ones. The opportunities now available to a CSO are much broader if it adheres to values such as conservatism, the protection of so-called traditional values, and the promotion of patriotic education, or if it is affiliated with the Catholic Church. Organizations working on topics not considered useful by the government (such as reproductive health, LGBTQI rights, or migration) have a slimmer chance of getting access to funding.'

<sup>67</sup> Wilk (n 56).

<sup>68</sup> Juliette Bretan, 'Polish ministers propose law making NGOs declare foreign funding and creating public register' (Notes from Poland 9 August 2020) <<https://notesfrompoland.com/2020/08/09/poland-seeks-to-make-ngos-declare-foreign-funding/>>; 'The government is preparing an attack on NGOs in Poland', (Ruleoflaw.pl 12 May 2020) <<https://ruleoflaw.pl/the-government-is-preparing-an-attack-on-ngos-in-poland>> accessed 17 November 2020.

<sup>69</sup> See Statement of the Civic Legislative Observatory regarding draft amendments on Rules of the Council of Ministers, April 2016, available at: <<https://www.batory.org.pl/>>.

<sup>70</sup> PACE, 'The functioning of democratic institutions in Poland', Report Doc. 15025, 6 January 2020, para. 121: 'This has led to an environment where dialogue and consultation between authorities and CSOs is selective and limited, based on ideological proximity. This seems confirmed by the fact that CSOs that are ideologically close to the authorities and their allies do not share the view that the CSO environment is shrinking or deteriorating'. See also 'Poland: Freedom in the World 2021' – <<https://freedomhouse.org/country/poland/freedom-world/2021>>.

<sup>71</sup> Pekacka (n 53); See also: 2019 Civil Society Organization Sustainability Index Poland (July 2020) 6.

<sup>72</sup> One of the most important legislative changes with a direct impact on civil society has been the restriction of peaceful assemblies by introducing so called 'cyclical assemblies', which were given priority over non-cyclical ones. According to the new law, cyclical assemblies are organised by the same organiser at the same place or on the same route at least four times a year or those that were organised at least once a year in the period of last three years. A province governor decides whether an assembly is considered 'cyclical'. The new law imposed restrictions on the right to counter protest. The Act amending the Assemblies Act of 13 Dec. 2016. Journal of Laws of 2017, item 579.

<sup>73</sup> Filip Pazderski, 'Understanding Civil Society's structural Challenges in the Visegrad Region to Build Trust. The Polish Case' Activizenship: Democracy under stress/rebuilding trust/rights for all <<https://civic-forum.eu/publication/view/activizenship-3>> accessed on 21 July 2021.

<sup>74</sup> Quincy Cloet, 'Civil Society Futures in Central Europe' (2020) Visegrad Insight 9 <<http://visegradinsight.eu/app/uploads/2020/06/Civil-Society-Futures-in-Central-Europe-DemocracE-European-Futures-Report-III.pdf>> accessed 1 December 2020.

Paradoxically, it is during this time of restriction of civil society activity that CSOs have become markedly more visible to the general public via their presence in social media, on the streets of Polish cities, or during cultural events. Furthermore, it is these very organisations that are taking the lead in explaining and fighting for fundamental values, such as the rule of law. Numerous positive developments have occurred, such as the establishment of the Committee for the Defence of Democracy (*Komitet Obrony Demokracji*, KOD), a mass civic movement that organised huge demonstrations against government legislation;<sup>75</sup> the launch of the 'It Works' ('*To działa!*')<sup>76</sup> campaign about the third sector in general; the paying of greater attention to physical and data security in CSOs;<sup>77</sup> the construction of circles of supporters around many organisations;<sup>78</sup> and the establishment of independent civic media (e.g. OKO.press).

By taking control of public media, the ruling majority was able to present highly biased political messages to the public. The development of grassroots journalism is thus an important change in the context of the rule of law crisis in Poland, especially for coverage of the 'reform of the judiciary'. For example, Osiatyński Archive (*Archiwum Osiatyńskiego*)<sup>79</sup> is run by a group of journalists and lawyers who gather evidence of the ongoing constitutional crisis and publish it online, to fulfil and follow Osiatyński's idea of creating a 'chronicle of unlawfulness'.<sup>80</sup>

### 3. Civil society and the 'reform of the judiciary' – general landscape and case studies

There are three main reasons why the civic response to the 'reform of judiciary' was challenging. First, as explained above, the smear campaigns, limited financial resources, and the absence of public consultations (directly or indirectly) markedly narrowed the civic space in Poland. What CSOs in Poland have been facing is a twofold issue: on the one hand, there is a pressing need to protect the rule of law; and on the other, to fight against a shrinking civic space. The two are interconnected, since the shrinking civic space in Poland is a consequence of the constitutional crisis and rule of law backsliding.<sup>81</sup> Protecting the space for civic engagement and activities is not particularly straightforward nor easy to achieve in an environment of rule of law backsliding, as opponents of the government are undermined as 'enemies of the people' or an 'extraordinary caste' – a common tactic of populist leaders.<sup>82</sup> Second, safeguarding the independence of the judiciary is generally not considered a particularly interesting topic for the public, as it seems and has been perceived to be an abstract concept. This poor level of understanding and engagement is to a great extent caused by shortcomings in civic education in Poland. Third, from a legal perspective, effective domestic legal tools that could help challenge legislative amendments adopted as a part of the 'reform of the judiciary' were practically unavailable (including a lack of constitutional judicial review), which critically limited the scope of possible legal actions.

Overcoming the problems experienced by civil society described above resulting from government action requires access to effective judicial review. The opportunity and power to respond to a shrinking space for civil society action necessitates binding decisions to enable the review and annulment of political decisions, even those based on purely discretionary and arbitrary grounds. The rule of law assumes the existence of a legal and political framework, where the right to a fair trial will be secured, where courts are independent, and judicial review accessible.

An important aspect of efforts to address the rule of law crisis is the control and oversight of public authorities – the primary task of the watchdog organisations. This involves a broad spectrum of entities: from the pioneering older ones established directly after the collapse of communism which were often

<sup>75</sup> Ireneusz Paweł Karolewski, 'Protest and participation in post-transformation Poland: The case of the Committee for the Defense of Democracy (KOD)' (2016) 49 *Communist and Post-Communist Studies*, 255.

<sup>76</sup> <http://www.todziala.org/>.

<sup>77</sup> Smith (n 62).

<sup>78</sup> Pazderski (n 73).

<sup>79</sup> This is a project established in December 2017 in memoriam of Professor Wiktor Osiatyński, a constitutionalist and human rights defender, who passed away in April 2017. Formally, it is run by the OKO.Press foundation. <<https://archiwumosiatsynskiego.pl/en/>>.

<sup>80</sup> In one of his last interviews Professor Osiatyński encouraged people to 'monitor, record and report about the behaviour of those in power when they breach and disrespect the law and the Constitution', and to provide reliable information about the nature and consequences of such actions to the public (Archiwum Osiatyńskiego, <https://archiwumosiatsynskiego.pl/o-nas/>).

<sup>81</sup> Małgorzata Szuleka, 'Victims or last guardians? The consequences of rule of law backsliding for NGOs – Case studies of Hungary and Poland' (2018) CEPS Paper in Liberty and Security 8.

<sup>82</sup> These terms were used among others by Polish Minister of Justice Zbigniew Ziobro and his deputy Patryk Jaki. See also: Anne Applebaum, 'The Disturbing Campaign Against Poland's Judges' <<https://www.theatlantic.com/ideas/archive/2020/01/disturbing-campaign-against-polish-judges/605623/>> accessed 28 May 2020



linked to the anti-communist opposition<sup>83</sup> (e.g. the Helsinki Foundation for Human Rights and the Batory Foundation); to the relatively new ones (e.g. the Civil Development Forum). Civil society organisations in Poland also operate in a variety of fields: from the general monitoring of human rights to controlling public or private entities with respect to specific objectives (e.g. data protection in case of the Panoptykon Foundation and access to public information for Watchdog Polska). As the Report of the CSIS Human Right Initiative indicates, only eight percent of CSOs work in law, human rights, and political activity.<sup>84</sup> These organisations usually have two main areas of activity: providing expertise (e.g. issuing legal opinions on draft legislation) and initiating strategic litigation (e.g. attempts to obtain a list of judges who supported the candidates for the new NCJ). Strategic litigation is the aspect of civil society activity that requires fair trials and access to judicial review. It was a question from the very beginning of the crisis – to what extent is the ‘rule of law’ justiciable before the domestic and international courts, especially EU Court of Justice?

The initial responses attempted by watchdog organisations to the constitutional crisis were ‘traditional’ in the sense that ‘CSOs tried to respond to it in a way they worked in previous years among others by issuing statements, opinions, analyses and calling upon the governing majority to withdraw from the proposed changes’.<sup>85</sup> The ensuing years brought more experience in dealing with an ‘illiberal state’, which permitted the constitutional crisis to be analysed from a broader perspective and to diagnose the impacts of the legislative amendments enacted on the functioning of the courts.<sup>86</sup> This expertise was often a relevant source of information for international actors.<sup>87</sup>

Resistance to undermining judicial independence required CSOs to cooperate and establish coalitions in order to make their actions more effective. The first attempt to form a coalition, which had as its main aim to coordinate the actions of different organisations, was the Citizens Observatory of Democracy (*Obywatelskie Obserwatorium Demokracji*).<sup>88</sup> This coalition collected CSOs opinions, analyses, and statements about the changes introduced by the government after 2015, such as to the judiciary, education, public media, and the prosecution service. In June 2018 a new initiative was established, the Justice Defence Committee (KOS, *Komitet Obrony Sprawiedliwości*).<sup>89</sup> Its main role is to coordinate the various activities of KOS members’. It runs an ‘Archive of repression’ about actions taken against lawyers who have criticised the ‘reform of the judiciary’.<sup>90</sup> KOS also regularly informs the public via press briefings of the disciplinary proceedings instituted against judges and prosecutors and of the main developments before domestic and international courts.

It seems necessary, however, to underline that civil society is not homogeneous and that the response of civil society actors was neither identical nor always coordinated. One of the reasons for this was that there are organisations that have benefited from the changes to the third sector introduced after 2015, which have received substantial funding from the government and have seen their conservative agendas implemented.<sup>91</sup> However, the central point of criticism of the ‘reform of the judiciary’ for many CSOs was associated with a right to a fair trial – an indispensable tool for the ‘strategic litigation’ conducted by numerous organisations.

In the section below, we specifically concentrate on two civil society organisations, from among a number of actors, which have played an essential role in criticising the ‘reform of the judiciary’: the judges associations and an informal group of lawyers.

<sup>83</sup> Pazderski (n 73).

<sup>84</sup> Smith (n 62) 7.

<sup>85</sup> Szuleka (n 81).

<sup>86</sup> E.g. the impact of the law amending the Act on common courts adopted in July 2017 Grabowska-Moroz (n31), Małgorzata Szuleka, Maciej Kalisz (n37); Komitet Obrony Sprawiedliwości, ‘A country that punishes. Pressure and repression of Polish judges and prosecutors’ (2019) <[http://komitetobronysprawiedliwosci.pl/app/uploads/2019/02/Raport-KOS\\_eng.pdf](http://komitetobronysprawiedliwosci.pl/app/uploads/2019/02/Raport-KOS_eng.pdf)> accessed 15 November 2020.

<sup>87</sup> Giada Negri, ‘How European Civil Society Is Pushing Back Against Democratic Erosion’ (Carnegie Europe 2020) 3 <<https://carnegieeurope.eu/2020/03/12/how-european-civil-society-is-pushing-back-against-democratic-erosion-pub-81254>> accessed 5 December 2020. See also Helsinki Foundation for Human Rights and Hungarian Helsinki Committee, ‘Opinion on the Communication from the Commission to the European Parliament, the European Council and the Council concerning “Further strengthening the Rule of Law within the Union. State of play and possible next steps” COM (2019)163’.

<sup>88</sup> Available at: <<http://obserwatoriumdemokracji.pl/>>.

<sup>89</sup> It was established by eight non-governmental organisations, later increasing to twelve.

<sup>90</sup> The archive is available at: <<https://komitetobronysprawiedliwosci.pl/archiwum-represji/>>. Judges’ associations are an important source of information in this regard, see Jakub Kościerzyński (ed.), ‘Justice under pressure– repressions as a means of attempting to take control over the judiciary and the prosecution in Poland’. Years 2015–2019 (Iustitia.pl 2020) available at: <[https://www.iustitia.pl/images/pliki/raport2020/Raport\\_EN.pdf](https://www.iustitia.pl/images/pliki/raport2020/Raport_EN.pdf)>.

<sup>91</sup> See Paweł Marczewski, ‘Freedom to Exclude: Conservative CSOs in Law and Justice Poland’ (Carnegie Europe 4 October 2018) <<https://carnegieeurope.eu/2018/10/04/freedom-to-exclude-conservative-csos-in-law-and-justice-poland-pub-77377>>; Nataliia Novakova, ‘The Conservative-Liberal Clash Reshaping Poland’s Civil Society’ (GMF 10 March 2020).

### 3.1. Judges' associations

Attacks on judicial independence concentrated on the members of the two main judicial associations as the main 'representatives' of judges in Poland – The Polish Judges Association '*Iustitia*' (*Stowarzyszenie Sędziów Polskich 'Iustitia'*), established in 1990, and the Judges Association 'Themis' (*Stowarzyszenie Sędziów 'Themis'*), established in 2010. Judges associations are a substitute for judicial self-government, which does not exist centrally since the NCJ does not play this role.<sup>92</sup> Despite members being official authorities in professional capacities, the activities of judges' associations are deemed to occur in the civic space. The EU annual Rule of Law Report clearly considered 'strong professional associations of judges and prosecutors, which participate in the public debate' as a part of civil society.<sup>93</sup>

The judges' criticism of the 'reform of the judiciary' was a direct result of the lack of constitutional judicial review in Poland. The Constitutional Tribunal is no longer perceived as an independent arbiter capable of verifying whether new laws are compatible with the constitution. The judges' associations have attempted to make the issue of political attacks on the courts more visible – for citizens, the media, and the international community. A particularly interesting contribution to the 'rule of law from below' movement can be observed in their educational activity. The Polish education system does not in its present form allow much space for legal education.<sup>94</sup> Every year in May the members of the *Iustitia* judges association organise lessons for students at school about the courts and the justice system. Paradoxically, the pandemic created a space in the realm of legal education for including youth in a real discussion on the rule of law.<sup>95</sup> This discussion could be held even in such unexpected environments as rock festivals,<sup>96</sup> and *Iustitia* took part in 'The Academy of Very Fine Arts' (*Akademia Sztuk Przepięknych*), which offers social, civic, and artistic activities at one of the biggest music festivals.<sup>97</sup>

In response to the 'reform of the judiciary', the same judges associations provided legal expertise on numerous legal amendments to the organisation of the judiciary in Poland. Their professional position enabled them to provide relevant information on the 'law in practice', a relevant point of reference in any 'reform of the judiciary'. They regularly publish analyses of the independence of the judiciary,<sup>98</sup> and traditionally issue opinions on draft legislation through public consultation process. The recent absence of consultations at the pre-parliamentary stage of the legislative process suggests that the government is not interested in either their expertise nor any dialogue with the judiciary. This situation undermines the ability of any civil society actor to participate in the legislative process. It seems quite surprising when compared with the situation at the EU level, where the government underlines its readiness for further (meaningless) dialogue with the EU institutions, the Council in particular.

<sup>92</sup> On the role of self-government see Anna Śledzińska-Simon, 'The Rise and Fall of Judicial Self-Government in Poland: On Judicial Reform Reversing Democratic Transition' 19(7) (2018) German Law Journal 1868: 'Since the political capture of the NCJ, the Association of Polish Judges '*Iustitia*' has become the main independent representation of the judiciary vis-à-vis the executive and legislative branches [...] It is also playing an important integrative role and setting standards of ethical conduct for judges who face new challenges to their independence'.

<sup>93</sup> Rule of Law Report (n 44).

<sup>94</sup> The political science curriculum states that one of its goals is to strive to mould of civic and community-building attitudes through value the affirmation of civil society, human rights and democracy. It lacks, however, any reference to or a mention of the rule of law.

<sup>95</sup> On 25 May 2020 *Iustitia* organised an online Legal Education Day – a series of classes on political sciences led by Supreme Court judge Włodzimierz Wróbel, judge Paweł Juszczyszyn and journalist Sławomir Matczak. The event consisted of three classes, each one dedicated to its own topic: the basics of law with a particular role for the Constitution; the separation of powers and the role of the Supreme Court; and the problem of hate speech in our environment. Around two thousand participants joined these sessions, which would have been impossible under normal circumstances.

<sup>96</sup> Two very big festivals held annually in Poland are among the largest of their kind in Europe – the open air festival in Gdynia and the Poland Rock festival in Kętrzyn. Festival sites have zones specifically dedicated to NGOs for promotional purposes. The Civil Opener initiative organises mini lectures, debates and discussions on the issues of relevance in the modern world. NGOs and the Office of the Commissioner for Human Rights, a representative of the European Commission and The Warsaw Bar Association offer a series of events to help young people gain knowledge and understand their rights.

<sup>97</sup> Katarzyna Wesołowska-Zbudniewek, 'Nie tylko rock and roll, czyli „Iustitia” na Pol'and' Rock Festival 2019', (*Kwartalnik Iustitia* 2019) 3(37) <<https://www.kwartalnikiustitia.pl/nie-tylko-rock-and-roll-czyli-iustitia-na-poland-rock-festival-2019,10059>>; *Iustitia* na Pol'and' Rock Festival 2019, <<https://www.iustitia.pl/3211-iustitia-na-pol-and-rock-festival-2019>> accessed 17 November 2020.

<sup>98</sup> In October 2018 *Iustitia* published a report which presents the results of anonymous questionnaires administered to 330 judges. The report states that 15% of judges have already faced direct political pressure and 90% believe that the rule of law is under threat. Report 'Stan niezależnego sądownictwa w Polsce z perspektywy sędziów. Raport Stowarzyszenia Sędziów Polskich Iustitia z 10.10.2018' (*Iustitia.pl* Press release 16 March 2018) <<https://www.iustitia.pl/dzialalnosc/opinie-i-raporty/2657-stan-niezaleznego-sadownictwa-w-polsce-z-perspektywy-sedziow-raport-stowarzyszenia-sedziow-polskich-iustitia-z-10-10-2018>> accessed 20 November 2020.

Since the issue of the judiciary in Poland became an EU matter, the judges' associations have also come to be regarded as relevant advocacy actors and a source of information at the EU level. Despite the high level of secrecy surrounding EU Council meetings held in camera, *Iustitia* prepared a formal response<sup>99</sup> to the 'White Paper'<sup>100</sup> submitted by the Polish government to the EU institutions in response to the Article 7 TEU procedure.<sup>101</sup> 'White Paper' was a publicly available document explaining the government's position in this ongoing procedure at the EU level. A proper assessment of the government's position requires detailed expertise, which may not always be available during a peer-review process like the Article 7 TEU procedure. Such expertise had to be delivered 'from below' by professionals gathered in a civil society organisation, since the official 'channels' for communication (e.g. with the NCJ) were controlled by the government. On numerous occasions, judges' associations encouraged, suggested, and finally urged<sup>102</sup> the EU institutions to take the action necessary to defend the judiciary in Poland, and to initiate infringement actions, in particular. Reaching the supranational institutions to activate tools to protect the rule of law at the domestic level is another aspect of the 'rule of law from below'.

Thirdly, *Iustitia* was one of the co-organisers of mass protests in July 2017.<sup>103</sup> This was a completely new role for a judges' association, as similar interventions had never been attempted previously; but neither had attacks on courts and judges ever reached this level, either. Protesters held candles or posters with the word 'Konstytucja' (the Constitution).<sup>104</sup> In January 2020, the judges' associations organised the 'March of a Thousand Robes' to protest against disciplinary actions against judges. Numerous judges from across the EU Member States took part, wearing their official robes.<sup>105</sup> Such broad European support made the 'March' more visible in Europe and highlighted the key issue behind the protest – disciplinary pressure exerted on judges in Poland. At the same time, the 'March of a Thousand Robes' sparked a debate in Poland about whether judges from other European countries should take part in the event,<sup>106</sup> and reopened the debate on the limits of judges' freedom of expression, especially in the case of judges acting as members of civil society organisations. A free media available to 'all audiences' is indispensable for judges to get their message to relevant stakeholders (e.g. international organisations).<sup>107</sup>

Finally, to make their 'message' heard and understandable, *Iustitia* needed to improve its public communication, both with professional media and on social media platforms. It is oriented towards e.g. bringing judges closer to the public by organising public events for people to discuss legal issues, or by preparing online content. Public communication enabled *Iustitia* to develop their networking connections with relevant actors at the European and international levels.<sup>108</sup> The 'March of a Thousand Robes' showed the scope of such networks and made the cases of individual judges being harassed with disciplinary proceedings more visible in the EU.

<sup>99</sup> Response to the White Paper Compendium (16 March 2018) <<https://www.iustitia.pl/informacje/2172-response-to-the-white-paper-compendium-on-the-reforms-of-the-polish-justice-system-presented-by-the-government-of-the-republic-of-poland-to-the-european-commission>> accessed 20 November 2020.

<sup>100</sup> The Chancellery of the Prime Minister, White Paper on the Reform of the Polish Judiciary (7 March 2018) <[https://www.premier.gov.pl/static/files/files/white\\_paper\\_en\\_full.pdf](https://www.premier.gov.pl/static/files/files/white_paper_en_full.pdf)> accessed 22 November 2020.

<sup>101</sup> *Iustitia* underlined the phenomenon of the 'hostile interpretation of the constitution' consisting e.g. of undermining its value by describing it as 'a post-communist constitution' or 'a constitution for the elites, not for the people'. Document discussing the chilling effect on judges resulting from amendments introduced in law in 2015–2018.

<sup>102</sup> Open Letter to the European Commission (28 March 2021) <<https://ruleoflaw.pl/open-letter-to-the-european-commission/>> accessed 27 April 2021.

<sup>103</sup> Alongside *Akcja Demokracja*.

<sup>104</sup> In the word 'Konstytucja' the syllables 'ty' (you) and 'ja' (I/me) were capitalised to show that under the binding constitutional order there is a space for different individual attitudes and views. This poster is a commonly recognized symbol of the opposition to the violation of the Constitution. See Mirosław Wyrzykowski, 'Experiencing the Unimaginable: The Collapse of the Rule of Law in Poland' (2019) 11 *Hague Journal on the Rule of Law* 422.

<sup>105</sup> 'Judges from around Europe to join protest in Warsaw against Polish court reforms': <<https://notesfrompoland.com/2020/01/09/judges-from-around-europe-to-join-protest-in-warsaw-against-polish-court-reforms/>> accessed 25 October 2020.

<sup>106</sup> 'The Irish Times view on Irish judges protesting in Poland: crossing a line' (The Irish Times 8 January 2020) <<https://www.irishtimes.com/opinion/editorial/the-irish-times-view-on-irish-judges-protesting-in-poland-crossing-a-line-1.4134097>> accessed 25 October 2020.

<sup>107</sup> Tim Schoot Uiterkamp (ed.), 'Independent journalism in contexts of shrinking civic space. Challenges and strategies of media resisting shrinking civic space in Europe' (May 2021) *Free Press Unlimited* 43–44.

<sup>108</sup> Diego Garcia-Sayán, José Igreja Matos, 'Time is fast running out for judicial independence in PiS-ruled Poland' (Euronews 17 December 2019) <<https://www.euronews.com/2019/12/17/time-is-fast-running-out-for-judicial-independence-in-pis-ruled-poland-view>> accessed 15 November 2020.

Despite numerous advances, organising campaigns to strengthen trust in the judiciary is truly challenging. One of the reasons for this is the fact that speaking publicly about judicial independence incites criticism from the government and the public media, which suggest that judges who criticise the 'reforms of the judiciary' are becoming involved in politics and thereby compromising their impartiality. Furthermore, rising social polarisation undermines the effectiveness of CSOs' messaging on judicial independence. With respect to the argument advanced by the government on the need for a transition from the communist past (meaning to exclude judges who decided cases or were even appointed before 1989), young judges have become hostages to this narrative. Nevertheless, the argument for the continued transition from the communist era, almost thirty years after its collapse, is challenging logically and from a rule of law perspective.<sup>109</sup>

### **3.2. Free Courts (*Wolne sądy*) – grassroots initiative that litigates the rule of law (from below)**

During the mass protests in July 2017 against the draft laws on the ordinary courts, the Supreme Court and the NCJ, a group of four lawyers established an informal initiative called 'Free Courts', which was the main motto of the protests. First, they shot short films with both experts and celebrities, which explained the role of independent (free) courts through hypothetical cases that could reach the courts. This illustrated the reality of even minor doubts about the independence of a judge. *Wolne Sądy's* main communication channel was social media.<sup>110</sup> As the 'reform of the judiciary' unfolded, *Wolne Sądy* transformed their activities. Three out of the four lawyers who established 'Free Courts' are barristers who represent Supreme Court judges affected by the new laws in proceedings before domestic and international courts. They challenged *inter alia* decisions of the public authorities regarding lowering the judges' retirement age, the independence of the NCJ and Disciplinary Chamber, and disciplinary proceedings or the delegation of judges. The lack of domestic independent constitutional judicial review prompted these lawyers to turn to alternative procedures to determine whether the post-July 2017 legislative changes undermined judicial independence. These alternatives to constitutional judicial review rely on the preliminary reference procedure before the Court of Justice of the EU.<sup>111</sup>

This possibility was a result of an interpretation of the EU law (Article 19 TEU, in particular) in the *ASJP* ruling.<sup>112</sup> A preliminary reference is one of two judicial procedures (alongside an infringement action) that would allow the Court of Justice to hear a case on undermining judicial independence in one of the Member States and to assess it based on EU law. Such strategic litigation led to an important CJEU ruling of 19 November 2019 in *A.K.*, in which lawyers from *Wolne Sądy* represented judges affected by the decisions of a new NCJ. In *A.K.* the CJEU established criteria (including relevant legal and factual circumstances)<sup>113</sup> by which the independence of the domestic courts should be assessed.<sup>114</sup> The test relied upon in *A.K.* was later implemented by the Polish Supreme Court, which ruled that the newly established Disciplinary Chamber does not meet the requirements of an independent court.<sup>115</sup> In *W.Ż.* a preliminary question was referred by the Supreme Court on the legality of the Chamber of Extraordinary Review and Public Affairs of the Supreme Court, also established in 2018. In his opinion in *W.Ż.* Judge AG Tanchev suggested that:

'the court composed of a single person of the Chamber [...] does not meet the requirements to constitute such a tribunal established by law in a situation where the judge concerned was appointed to that position in flagrant breach of the laws of the Member State applicable to judicial appointments to the Supreme Court',

<sup>109</sup> See Michał Krotoszyński, 'Transitional Justice and the Constitutional Crisis: The Case of Poland (2015–2019)' (2019) 3 *Archiwum Filozofii Prawa i Filozofii Społecznej* 22–39.

<sup>110</sup> Recently, *Wolne Sądy* broadened scope of their activities. The films they produce are more professional (and more expensive) and cover a broader scope of topics, such as the rights of detainees and the importance of participation in presidential elections.

<sup>111</sup> Ewa Łętowska, 'Czego uczą odpowiedzi na pytania prejudycjalne dotyczące polskiego wymiaru sprawiedliwości' (2020) 5 *Palestra* 37.

<sup>112</sup> Case C-64/16 *Associação Sindical dos Juizes Portugueses v Tribunal de Contas* (2018) ECLI:EU:C:2018:117.

<sup>113</sup> Michał Krajewski and Michał Ziółkowski, 'Court of Justice EU judicial independence decentralized: *A.K.*', 57(4) (2020) *Common Market Law Review* 1107.

<sup>114</sup> Joined cases C-585/18, C-624/18 and C-625/18 *A. K. and Others v Sąd Najwyższy* (2019) ECLI:EU:C:2019:982.

<sup>115</sup> Resolution of 23 January 2020 of the Civil, Criminal and Labour and Social Insurance Chambers of the Supreme Court, no. BSA I-4110-1/20.



and formulated additional criteria that should be applied to assess such a 'flagrant breach of the laws'.<sup>116</sup> As many as twenty cases were referred to the Court of Justice regarding Poland's reform of the judiciary and are seen as an effective tool to protect judicial independence, permitting supranational rule of law standards to be initiated 'from below'. There is however a certain contradiction: an independent domestic court is needed to refer a preliminary question to the Court of Justice to discuss the shortcomings of judicial independence in a Member State. Rule of law 'from below' is possible only if judicial independence is secured.

In addition to developments in Luxembourg, the case law of the European Court of Human Rights is becoming highly relevant in framing the debate on Poland's 'reform of the judiciary'.<sup>117</sup> In 2021, deciding the *Xero-Flor v Poland* case,<sup>118</sup> the Strasbourg Court found that 'the actions of the legislature and the executive amounted to unlawful external influence on the Constitutional Court' in Poland. Furthermore, the irregularities in appointing one of the judge to the Tribunal in 2015 'were of such gravity as to impair the legitimacy of the election process and undermine the very essence of the right to a "tribunal established by law"',<sup>119</sup> which amounted to violation of Article 6 of the European Convention on Human Rights.

*Wolne Sądy* represents a case of Polish judge Igor Tuleya currently pending before the Strasbourg court. In his application he argues that the disciplinary and criminal measures used against him by the public authorities taken together 'undermine the authority of the judiciary', 'cast doubt on the applicant's professional competences', and that 'domestic law did not provide procedural safeguards against arbitrary actions of the disciplinary bodies'.<sup>120</sup> The case clearly exemplifies the broader threat to judicial independence resulting from the disciplinary scheme introduced against judges since 2017 in Poland,<sup>121</sup> where judges gathered in associations often fall victim to the disciplinary regime and prosecution service controlled by the government.<sup>122</sup> This litigation of an individual judge's case might have a broader impact and confirm in a binding ruling that justice cannot be done if a judge is inappropriately threatened with disciplinary consequences.<sup>123</sup>

#### 4. Conclusions

Constitutional judicial review – a fundamental tool for protecting the rule of law – was disabled in Poland through legislative amendments (described as the 'reform of the judiciary'), which undermined judicial independence and shrunk the civic space. However, our analysis shows that civil society remained able to play a role in upholding the rule of law in Poland by bypassing the domestic dispute at the international and supranational level. The mosaic picture of the CSOs landscape in Poland provides an overview of how the limited coordination of actions by civic organisations strengthened their practical impact in promoting the rule of law. Our premise was that abstract concepts (judicial independence and the rule of law) can be clearly linked with practical aspects and elements (right to a fair trial) and thereby protected and improved 'from below' by individuals. It makes the rule of law a living instrument. Unsurprisingly, the rule of law has been one of the primary topics in the Polish public debate in recent years. It is imperative to remain aware that rule of law backsliding is still in progress in Poland. Undeniably, civil society could continue to play a crucial role in slowing down this process.

<sup>116</sup> Case C-487/19 *W.Ż.* (2021) ECLI:EU:C:2021:289, Opinion of AG Tanchev, para 106.

<sup>117</sup> For an overview of pending cases, see Marcin Szwed and Katarzyna Wiśniewska, 'Strasbourg. A New Destination on the Road Towards the Rule of Law? A report on cases against Poland before the European Court of Human Rights' (Helsinki Foundation for Human Rights 2020).

<sup>118</sup> *Xero Flor w Polsce sp. z o. o. v Poland* App no. 4907/18 (ECtHR, 7 May 2021) ECLI:CE:ECHR:2021:0507JUD000490718, para 287.

<sup>119</sup> Marcin Szwed, 'What Should and What Will Happen After Xero Flor: The judgment of the ECtHR on the composition of the Polish Constitutional Tribunal' (VerfBlog 9 May 2021) <<https://verfassungsblog.de/what-should-and-what-will-happen-after-xero-flor/>>, accessed 10 June 2021.

<sup>120</sup> *Tuleya v Poland* App no 21181/19.

<sup>121</sup> Katarzyna Gajda-Roszczyńska, Krystian Markiewicz, 'Disciplinary Proceedings as an Instrument for Breaking the Rule of Law in Poland' (2020) 12 Hague Journal on the Rule of Law 451–483.

<sup>122</sup> See, Komitet Obrony Sprawiedliwości 'A country that punishes Pressure and repression of Polish judges and prosecutors' (2019) <[https://komitetobronysprawiedliwosci.pl/app/uploads/2019/02/Raport-KOS\\_eng.pdf](https://komitetobronysprawiedliwosci.pl/app/uploads/2019/02/Raport-KOS_eng.pdf)> accessed 10 December 2020.

<sup>123</sup> In November 2020 judge Tuleya was deprived of his immunity by the Disciplinary Chamber of the Supreme Court after he allowed media access to a sensitive court ruling in 2017 regarding a parliamentary vote on the budget (see Joanna Plucińska, 'Polish judge, government critic loses immunity amid EU rule of law dispute', (Reuters 18 November 2020)). In 2018 he referred a preliminary question to the Court of Justice asking whether new disciplinary scheme against judges complied with EU Law (see Joined Cases C-558/18 and C-563/18, *Miasto Łowicz and Prokurator Generalny zastępowany przez Prokuraturę Krajową, formerly Prokuratura Okręgowa w Płocku v Skarb Państwa – Wojewoda Łódzki and Others* (2020) ECLI:EU:C:2020:234).



Civil society tried to limit the harm resulting from the judicial reforms by inter alia involving international actors in opposing the destruction of the rule of law in Poland. The actions of the CSOs led to the 'Europeanisation' of the issue and resulted in not only political procedures being instituted against Poland (the Rule of law framework, Article 7 TEU procedure, and debates and reports adopted by the European Parliament), but also, and most importantly, in intervention in litigation before the Court of Justice. The attack on constitutional judicial review in Poland was the impetus for civil society actors to become active at the supranational level. By initiating formal proceedings at the domestic level, civil society actors managed to 'receive' a binding rule of law standard 'from above' – from the Court of Justice and perhaps also the ECHR. Moreover, informational activities has had enormous added value, not only in raising Polish people's awareness of their civil rights and responsibilities, but also by creating a civil society that understands the rule of law and is ready to build a common future on its foundation.

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