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Editor's Introduction

The section devoted to the prominent representatives of the Poznań Faculty of Law and Administration of the present volume of the *Adam Mickiewicz University Law Review* begins with the publication of the English version of Professor Krystyna Paluszyńska-Daszkiewicz's text *Exclusion of a Physician's Liability for Performing a Medical Procedure Without the Patient's Consent*, originally published in *Palestra* in 2002.

Professor Paluszyńska-Daszkiewicz, 1924–2025, was one of the most influential representatives of Polish legal scholarship and, for more than seventy years, a leading specialist in criminal law associated with Adam Mickiewicz University in Poznań. Her achievements encompassed both academic work and public service. Her academic achievements include studies on the subjective element of an offence, the theory and purposes of punishment, specific categories of crimes, the history of criminal law, the system of German criminal law, and higher-education didactics. Among her most original contributions were her concepts and proposals concerning the planned offence, homicide and infanticide, recidivism, offences against liberty and honour, and the extraordinary mitigation and aggravation of punishment.

Professor Paluszyńska-Daszkiewicz's research notably examined criminal responsibility for German war crimes and crimes against humanity, abuses of power, and—most prominently—social pathology. Her widely read books *Klimaty bezprawia* and *Traktat o złej robocie* became bestselling works, reflecting

the originality of her scholarship and her ability to link criminal-law theory with judicial practice and legislative critique.

Her work was acknowledged with numerous awards and distinctions, including the Commander's Cross with Star of the Order of Polonia Restituta, awarded for outstanding service to the Republic of Poland, her contribution to democratic transformation, and achievements in professional and social activity; the title of "Meritorious for the City of Poznań"; the Ministry of Education Award; the Ministry of Justice award; awards of the Rector of Adam Mickiewicz University for scholarly and teaching accomplishments; *Homini Vere Academico* and her inclusion in the Golden Book of Polish Science.

Professor Paluszyńska-Daszkiewicz's article was selected for publication in this volume by Prof. Joanna Długosz-Jóźwiak and translated into English for the purposes of the present issue. We wish to express our sincere thanks to all those involved in preparing the text for publication.

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Krystyna Daszkiewicz

Exclusion of a Physician's Liability for Performing a Medical Procedure Without the Patient's Consent[1]

Abstract: The paper is an English translation of the article "Uchylenie odpowiedzialności lekarza za wykonanie zabiegu leczniczego bez zgody pacjenta" published originally in *Palestra*, no. 11–12 from 2002. The text is published as a part of a section of the Adam Mickiewicz University devoted to the achievements of the Professors of the Faculty of Law and Administration of the Adam Mickiewicz University, Poznań.
Keywords: medical law, physician's liability, performing a medical procedure without the patient's consent

The considerations set out in this article are intended to clarify the following issues:

- the scope of the lawful performance of medical procedures without the patient's consent;
- the liability of a physician confronted with a conflict of duties: the duty to save human life on the one hand the duty to obtain the patient's consent on the other;

1 Translated from: Krystyna Daszkiewicz, "Uchylenie odpowiedzialności lekarza za wykonanie zabiegu leczniczego bez zgody pacjenta," *Palestra*, no. 11–12(2002). Translation and proofreading were financed by the Ministry of Science and Higher Education under 848/2/P-DUN/2018.

AMU LR, 17, 2025,

– the impact on a physician's liability for a fundamental error inherent in the new offence introduced into the Criminal Code of 6 June 1997 (Article 192 § 1 of the Criminal Code provides for criminal liability for performing a medical procedure without the patient's consent);
– the legal foundations of the thesis (advanced, inter alia, in textbooks and commentaries) that narrows the scope of defence arguments in cases involving physicians who perform medical procedures without the patients' consent. On the basis of this thesis, the argument premised on a physician acting in a state of necessity is excluded. thesis requires more justification.

It must also be stipulated at the outset that these considerations concern only those situations in which the performance of a medical procedure without the patient's consent would constitute the sole basis of liability, and not those in which other causes determine the physician's liability (eg. so-called professional malpractice, a revealed lack of competence, and the like).

I

In contemporary 'medical law', as well as in other branches of law (not only domestic law), patient consent is regarded as the fundamental basis for a physician's actions. In this respect, the regulation contained in Article 32 of the Act on the Medical Profession of 5 December 1996[2] is unequivocal. It provides that a physician may conduct an examination or provide other health services "after the patient has expressed consent." When the patient is a minor (and thus has not attained the age of 18) or is incapable of expressing informed consent, the consent of the patient's statutory representative is required; where the patient has no statutory representative or where communication with such representative is impossible——the consent of the guardianship court is required.

2 Journal of Laws of 1997, no. 28, item 152.

The cited provision does not introduce any conditions as to the form of the required consent. Article 34(1) of the Act on the Medical Profession, however, imposes a requirement of written patient consent for the performance of a surgical procedure or for the application of a method of treatment or diagnosis involving an increased risk to the patient.

Closely connected with these provisions is Article 15 of the Code of Medical Ethics, which provides that diagnostic, therapeutic and preventive procedures requires the patient's consent.

Also noteworthy in this context is the statement of one of the eminent representatives of medical science.[3] He explained—"for the purpose of avoiding any kind of ambiguity, erroneous interpretations and insinuations"—that, in his view and in the view of the entire surgical community, a fully conscious patient must express consent to the proposed treatment, including operative treatment. For surgeons, he observed, this is a wholly indisputable matter … He further stated that he could not understand why the view is being disseminated that surgeons take a different position … No physicians—and surgeons least of all—not only do not question the individual's right to self-determination, but in fact stand guard over that right.

The performance of medical procedures without the consent required by statute is qualified as an infringement of human freedom. That freedom enjoys fundamental protection under the Constitution of the Republic of Poland of 2 April 1997. This protection is not, however, unlimited. Restrictions may be established by statute where they are necessary, inter alia, for the protection of health or the freedoms and rights of other persons (cf. Article 31 of the Constitution).

3 Tadeusz Tołłoczko, "Problem zgody pacjenta jako dylemat aksjologiczny—refleksje klinicysty," *Prawo i Medycyna*, no. 1 (1999): 90.

II

The already-cited Article 32 of the Act on the Medical Profession expressly provides that a physician may provide health services "after the patient has expressed consent," albeit "subject to the exceptions provided for in the Act."

There are numerous legal provisions under which medical procedures undertaken without the patient's consent are lawful. Several examples may be noted.

Article 118 of the Executive Penal Code of 6 June 1997[4] provides for a situation in which 'the life of a convicted person is in serious danger' (as certified by the opinion of a medical commission). A necessary medical procedure (including surgical intervention) may be performed "even despite the convicted person's objection." In the event of such objection, the decision to perform the procedure is taken by the penitentiary court. However, "in an urgent case, where there is a direct risk of the convicted person's death, the necessity of the procedure is decided by the physician" (§§ 1–3).

The placement of perpetrators of prohibited acts in appropriate institutions in which therapeutic or rehabilitative measures are applied is also provided for in the Criminal Code.[5] The examination of a patient without his or her consent, as well as the possibility of admitting a person suffering from mental illness to a psychiatric hospital without that person's consent, is also provided for by the so-called Mental Health Act.[6] Compulsory treatment may likewise be undertaken in relation to persons dependent on narcotics[7] and, in exceptional situations, also in relation to persons abusing alcohol (where this causes the breakdown of family life, the demoralisation of minors, evasion of work, or systematic disturbance of social order).[8]

4 Journal of Laws of 1997, no. 90, item 557.

5 Cf. Chapter X of the Criminal Code.

6 Act of 19 August 1994 on the Protection of Mental Health (Journal of Laws of 1994, no. 111, item 535).

7 Act of 24 April 1997 on Counteracting Drug Addiction (Journal of Laws of 1997, no. 75, item 468.)

8 Cf. Article 24 of the Act of 27 October 1982 on Upbringing in Sobriety and Counteracting Alcoholism (Journal of Laws of 1982, no. 35, item 230).

Numerous orders concerning the mandatory submission—by not only ill persons but also persons suspected of disease or infection—to examinations, compulsory treatment, compulsory hospitalisation, isolation, quarantine or epidemiological supervision are provided for in the comprehensive Act of 6 September 2001 on Infectious Diseases and Infections.[9] It thus envisages lawful actions by physicians and other persons, notwithstanding that they entail far-reaching restrictions of individual freedom.

Mandatory hospitalisation, isolation or quarantine does not lose its character as lawful action even "in the absence of consent." In such circumstances, however, it is obligatory to inform the person who withholds consent "of his or her right to appeal to a court for the immediate determination of the legality of the deprivation of liberty," to enable such an appeal, and to record this in the medical documentation (Article 30).

III

The questions most frequently raised concerning the legality of medical procedures undertaken without the patient's consent arise in connection with situations in which the physician is faced with a conflict of duties, only one of which can be fulfilled. On the one hand, the physician is under an obligation to save the life of a person directly threatened with its loss; on the other, he is subject to the duty to obtain that person's consent, which he does not receive.

Each of these duties is grounded in the protection of a legally protected interest: on the one hand, human life; on the other, human freedom, within the scope of which lies the right to make autonomous decisions and to choose one's course of action. There can, however, be no doubt that, in the hierarchy of interests protected by law, human life has a superior value. This entails "an important consequence for the application of law: it prompts the adoption of an interpretative directive according to which all possible doubts as to the pro-

9 Journal of Laws of 2001, no. 126, item 1384.

tection of human life should be resolved in favour of that protection (*in dubio pro vita humana*). The particular rank of human life is reflected in the recognition of the 'right to life' as a fundamental legal principle by international legal instruments (Article 6(1) of the International Covenant on Civil and Political Rights, Article 3 of the Universal Declaration of Human Rights of 1948, as well as by the constitutions of certain states)."[10] It should be added that the Constitution of the Republic of Poland of 2 April 1997 likewise belongs to that group, Article 38 of which contains a guarantee of legal protection of life.

The absolute character of the duty to save human life is confirmed both by the provisions of the Act on the Medical Profession and by the provisions of the Criminal Code. Article 30 of the Act on the Medical Profession provides that a physician is under a duty to provide medical assistance in every case "where delay in its provision could result in danger of loss of life, serious bodily injury or serious impairment of health, and in other cases not admitting of delay."

The absolute character of this duty is further indicated by Articles 38 and 39 of the Act on the Medical Profession. Article 38 defines those situations in which 'a physician may decline to undertake or may discontinue treatment of a patient', expressly excluding the situations "referred to in Article 30." Article 39 in turn provides that a physician may refrain from providing health services that are incompatible with his conscience "subject to Article 30." The physician is thus under a duty to provide medical assistance in every such case, while "where possible" consulting his decision with another physician.

The fulfilment by a physician of the duty to provide medical assistance in the situation described in Article 30 of the Act on the Medical Profession therefore constitutes lawful conduct even where he acts without the consent of the persons to whom such assistance is rendered. Moreover, the Act on the Medical Profession legalises the provision of health services without the patient's consent not only on account of the danger of loss of life or serious bodily injury. Such

10 Marian Cieślak in *System prawa karnego, vol. 4, O przestępstwach w szczególności, part 2, ed. Igor Andrejew et al. (Zakład Narodowy im. Ossolińskich, Wydawnictwo Polskiej Akademii Nauk, 1985)*, 291–92.

services are also permissible where the patient requires immediate medical assistance and, by reason of his state of health or age, is unable to express consent, and it is not possible to communicate with his statutory representative or de facto guardian. In such a case the physician should make a note of the circumstances of the matter in the patient's medical records (Article 33(1)–(3)).

It also deserves emphasis that the legal bases discussed above, which under the specified conditions legalise medical procedures performed without the patient's consent, are in conformity with European standards. The so-called European Convention on Bioethics of 4 April 1997[11] provides for situations in which "a physician may be confronted with a conflict of obligations', namely a conflict between the duty to treat and the duty to obtain the consent of the patient or of his statutory representative. Article 8 of that Convention 'authorises the physician to act immediately," limiting such action, however, to "interventions which are medically necessary and do not admit of delay."

A physician who fails to fulfil the duty to provide medical assistance in the situation described in Article 30 of the Act on the Medical Profession (where delay in its provision could result in loss of life or serious bodily injury) cannot escape professional liability by pointing to the fact that the patient did not give consent to such assistance.

The detailed rules of professional liability of a physician who has failed to comply with the duty laid down in Article 30 of the Act on the Medical Profession are regulated by the Act of 17 May 1989 on Medical Chambers[12] and by the Regulation of the Minister of Health and Social Welfare of 26 September 1990 on Proceedings in Matters of Physicians' Professional Liability.[13]

In respect of a physician who incurs professional liability, the following sanctions may be imposed: (1) admonition; (2) reprimand; (3) suspension of

11 *Convention on Human Rights and the Dignity of the Human Being with regard to the Application of Biology and Medicine in: Tadeusz Jasudowicz, Europejskie standardy bioetyczne: Wybór materiałów (TNOiK "Dom Organizatora", 1998).*

12 Journal of Laws of 1989, no. 30, item 158.

13 Journal of Laws of 1990, no. 64, item 406.

the right to practise the medical profession for a period from six months to three years; (4) deprivation of the right to practise the profession.

A physician who has failed to perform the duty to provide immediate medical assistance to a person threatened with loss of life or serious bodily injury, for example permanent disability, is burdened not only with professional liability. In such a case his liability is 'two-track' in nature: it encompasses both professional and criminal liability.[14] Its basis is found above all in Article 162 of the Criminal Code, which provides:

> § 1. Whoever fails to render assistance to a person in a situation of direct danger of loss of life or of serious detriment to health, being able to render such assistance without exposing himself or another person to the danger of loss of life or serious detriment to health, shall be liable to imprisonment for up to three years.
> § 2. No offence is committed by a person who fails to render assistance where doing so would require that person to undergo a medical procedure, or in circumstances in which immediate assistance from an institution or a person designated for that purpose is available.

It is also worth noting that, in several respects, the Act on the Medical Profession regulates a physician's responsibility for failing to provide immediate medical assistance to a person at risk in a more stringent manner, namely:

– The criminal liability provided for in Article 162 § 1 of the Criminal Code concerns situations in which the person in need of assistance is already in a position involving a direct danger of loss of life or serious detriment to health. By contrast, Article 30 of the Act on the Medical Profession imposes an obligation to provide medical assistance where

14 For a broader discussion, see: Krystyna Daszkiewicz, *Przestępstwa przeciwko życiu i zdrowiu: Rozdział XIX Kodeksu karnego; Komentarz* (C.H. Beck, 2000), 402.

the danger may be caused only by delay in the provision of such assistance. Accordingly, situations may arise in which a physician who does not incur criminal liability under the Criminal Code will nevertheless incur professional liability.

– Article 30 of the Act on the Medical Profession also refers to 'other cases not admitting of delay', which entail the physician's obligation to provide medical assistance. In such cases, the physician may be subject only to professional liability.
– Under Article 162 § 2 of the Criminal Code, a person does not commit an offence by failing to render assistance in circumstances "in which immediate assistance from an institution is available," for example at the scene of a road traffic accident in which a person faces a direct danger of loss of life, where a physician happens to be present but there is also an ambulance service on site with a full team and equipment. Article 30 of the Act on the Medical Profession does not release the physician from the duty to provide immediate medical assistance on the ground that "immediate institutional assistance is available."
– Both the physician's professional liability and criminal liability may be associated with the imposition of a prohibition on holding a specified position or practising a specified profession. Where such a prohibition is imposed in addition to a penalty for the offence of failure to render assistance under Article 162 § 1 of the Criminal Code, it may be imposed for a period from one to ten years (Articles 41 § 1 and 43 § 1 of the Criminal Code). By contrast, under Article 42 § 1(4) of the cited Act on Medical Chambers, a physician who incurs professional liability may be deprived of the right to practise the profession indefinitely. The possibility of removing, after a specified number of years, entries concerning sanctions from the register of disciplined physicians (kept by the Supreme Medical Council) does not apply to deprivation of the right to practise the profession (Article 55(3)).

IV

The conflict of duties confronting the physician assumes particular significance where the physician is obliged to save the life of a person directly threatened with its loss, and consent to the intervention is given not by the patient personally but by the patient's statutory representative or de facto guardian.

Such situations arise, for example, where a child is directly threatened with loss of life and the physician considers transfusion of blood products to be necessary, but the child's parents—Jehovah's Witnesses—not only fail to give consent but lodge a "categorical objection."

It would be a peculiar paradox, and contrary to what appears self-evident, if a physician were to incur liability in each of two situations: first, where he yields to the parents' will, complies with their objection and the child dies (or survives only because another physician has fulfilled the duty, performed the necessary procedure and saved the child); and second, where he disregards their objection and performs the necessary procedure, thereby preserving the child's life.

The physician will incur liability only in the first situation, in which, by reason of the parents' objection, he fails to discharge his duty to provide the necessary medical assistance to a child directly threatened with loss of life or serious bodily injury. In the second situation, he will not incur liability, even though he acted not only without the parents' consent but in defiance of their categorical objection. For his conduct to be deemed lawful, however, several conditions expressly specified in the Act on the Medical Profession must be satisfied.

Where the statutory representative of a minor patient does not consent to the physician performing a surgical procedure necessary "to remove the danger of the patient losing life or suffering serious bodily injury or serious impairment of health," the physician may perform the procedure after obtaining the consent of the guardianship court (Article 34(6) of the Act).

Obtaining the consent of the guardianship court, however, requires time. As a rule, that time is unavailable in situations in which immediate action is re-

quired because the child is directly threatened with loss of life. In such circumstances, the Act on the Medical Profession legalises action by the physician undertaken not only without the consent of the child's statutory representative but also without the consent of the guardianship court. The physician may proceed in this way "where delay caused by the proceedings to obtain consent would expose the patient to the danger of loss of life, serious bodily injury or serious impairment of health" (Article 34(7)).

In the situation described, where the physician acts without the consent of the statutory representative and without the consent of the guardianship court, the Act on the Medical Profession imposes the following three obligations:

1) the physician must, "if possible," obtain the opinion of a second physician, "where possible" of the same specialty;
2) the physician must promptly notify the statutory representative, the de facto guardian or the guardianship court of the actions performed;
3) the physician must make an appropriate entry concerning the circumstances of the case in the patient's medical records (Article 34(7)–(8)).

These regulations merit particular attention because they concern recurrent and 'persistently present' issues of medical practice, which give rise to questions and requests for legal opinions. They also have a dimension extending beyond Poland. The literature, for example, cites theses formulated by US courts in cases in which parents who were Jehovah's Witnesses refused consent to a necessary operation for their child. In one such case it was stated that 'the right to religious freedom does not include the freedom to expose a child to death'; in another, that "parents who do not wish to undergo treatment may become martyrs, but they do not have such a right in relation to their children."[15]

If a physician, performing his duty in conditions of direct threat and the necessity of saving a child's life, has saved that child or prevented serious bodily injury

15 Mirosław Nesterowicz, *Prawo medyczne: Prawa pacjenta i obowiązki lekarza, odpowiedzialność cywilna lekarza, odpowiedzialność cywilna zakładu opieki zdrowotnej, odpowiedzialność Kasy Chorych, odpowiedzialność gwarancyjna i ubezpieczeniowa, akty prawne*, 4th ed. (Towarzystwo Naukowe Organizacji i Kierownictwa „Dom Organizatora", 2000), 88.

against the will of the parents, it would be profoundly immoral and contrary to the principles of social coexistence for the parents of the saved child to prosecute him, and in particular to seek financial compensation for the alleged harm.

The literature has analysed a case in which a patient, a Jehovah's Witness, sought "compensation for non-pecuniary harm harm suffered as a result of a blood transfusion performed against her will during a surgical operation." The case was heard by successive courts in Paris. All dismissed the claim, as did the Administrative Court of Appeal in Paris. On 9 June 1998, the full bench of that court held that a physician cannot be said to have acted culpably where, in an emergency and in the absence of alternative methods of treatment, he performs life-saving medical acts contrary to the patient's previously expressed will. The court regarded the protection of human life as an interest of higher value than the individual will of the patient.[16]

Were an analogous case to be considered in Poland, it would fall within Article 35 of the Act on the Medical Profession, which provides as follows:

> 1. Where, in the course of performing a surgical procedure or applying a therapeutic or diagnostic method, circumstances arise such that failure to take them into account would expose the patient to the danger of loss of life, serious bodily injury or serious impairment of health, and it is not possible to obtain promptly the consent of the patient or the patient's statutory representative, the physician is entitled, without obtaining such consent, to alter the scope of the procedure or the method of treatment or diagnosis in a manner that enables those circumstances to be taken into account.

In such a case, the physician is also subject to the three obligations already mentioned: (1) "if possible," to obtain the opinion of a second physician, where possible of the same specialty; (2) to make an appropriate entry in the medical records concerning the changes made; (3) to inform the patient, the statutory representative or the de facto guardian thereof (§ 2).

16 Nesterowicz, *Prawo medyczne*, 91.

Providing consent to a medical procedure, or refusing consent to such a procedure, falls within the scope of human freedom protected by law. Particular attention should, however, also be paid to the thesis long since introduced into textbooks and commentaries that the object of legal protection is "only such freedom as does not constitute an abuse of that freedom."[17] The possibility of such abuses must be taken into account above all in those situations in which one person faces a direct danger of loss of life and another refuses consent to life-saving intervention.

It must also be emphasised unequivocally: an individual has the right to his or her worldview, to choose and prefer certain views and to reject others, for this falls within the scope of legally protected freedom. That legal protection does not, however, extend to acts or omissions which, though grounded in the individual's worldview and value system, infringe "the freedoms and rights of other persons" (as the Constitution phrases it), are contrary to the principles of social coexistence, constitute an abuse of parental or guardianship authority, or—worst of all—fulfil the statutory elements of criminal offences.

In any event, these problems cannot be confined solely to matters associated with the worldview of Jehovah's Witnesses. They are significantly broader in scope. They include, for example, known situations involving children requiring immediate medical interventions where consent is withheld by parents living with them in sects or by their de facto guardians. In 2002 a conviction was handed down against one of the parents of a child who had been subjected to a diet that led to extreme emaciation. Without necessary, immediate medical intervention the child would have died. Other motivations underlie the concealment, in remote villages, of children who are intellectually disabled or physically impaired and require immediate medical interventions to which their parents do not consent. There are also known situations in which close relatives, burdened

17 Cf. e.g. Witold Świda in Igor Andrejew et al., *Kodeks karny z komentarzem* (Wydawnictwo Prawnicze, 1973), 490.

by onerous care of elderly persons, refused consent to necessary, immediate life-saving medical interventions for those elderly individuals.

V

It would be highly desirable for physicians to inform statutory representatives of patients, or their de facto guardians, that by refusing consent to life-saving interventions they are abusing parental or guardianship authority and, moreover, that their conduct may fulfil the statutory elements of criminal offences. Article 31 of the Act on the Medical Profession, which regulates the scope of information and makes its disclosure to other persons dependent "only on the patient's consent," does not provide for such warnings.

For intentional deprivation of life, criminal liability is borne not only by one who, by act or omission, brings about death because he desired it, but also by one who, foreseeing that death, reconciled himself to it.

A refusal of consent to necessary, immediate life-saving intervention may also fulfil the statutory elements of exposing another person to the danger of loss of life (Article 160 of the Criminal Code). A more severe sanction (imprisonment from three months to five years) applies to a person upon whom a duty of care towards the endangered person rests. Such a person will not, however, be subject to punishment if he voluntarily removes the threatened danger, for example by giving consent to the necessary, immediate medical assistance.

There is likewise no doubt that a person exposes another to a direct danger of loss of life or serious detriment to health not only where he moves that person "from a safe state into a state of danger," but also where he moves a person "from one dangerous state into a more dangerous state"; in other words, where he aggravates an existing danger and determines its escalation[18]—for example

18 Cf. e.g.: Judgment of the Supreme Court of 3 October 1973, IV KR 256/73, Supreme Court Bulletin No. 2/1974, item 26; Judgment of the Supreme Court of 21 March 1979, IV KR 62/78, OSNPG No. 2/1979, item 21. See also: Daszkiewicz, *Przestępstwa przeciwko życiu i zdrowiu*, 389.

by delaying consent to a necessary life-saving intervention or refusing it altogether, thereby deepening an already existing danger.

It should also be recalled that criminal liability for failure to render necessary, immediate assistance to a person threatened with loss of life is borne not only by the person who does not provide such assistance despite being able to do so, but also by the person who incites such failure. This liability may therefore attach to, for example, the statutory representative or de facto guardian of a person requiring an immediate, life-saving medical intervention who induces, urges or indeed demands that the physician not provide such assistance (cf. Article 162 § 1 of the Criminal Code in conjunction with Article 18 § 2 of the Criminal Code).

VI

The Criminal Code of 6 June 1997 introduced a new offence in the form of that provided for in Article 192. The provision reads as follows:

> § 1. Whoever performs a medical procedure without the patient's consent shall be liable to a fine, a penalty of restriction of liberty, or imprisonment for up to two years.
> § 2. Prosecution shall take place upon the application of the injured party.

In introducing this new offence into the Criminal Code, a fundamental error was committed, to the detriment of those who perform medical procedures without patients' consent. As has already been indicated, there are numerous situations in which the performance of a medical procedure without the patient's consent is lawful. This, however, was not taken into account in the cited provision. The performance of *any* medical procedure without the patient's consent is threatened with punishment, which is plainly unacceptable.

This error has been noticed, and the forthcoming amendment is intended to modify Article 192 § 1 of the Criminal Code. This is reflected both in the

so-called ‘Presidential draft’ (submitted to the Sejm in December 2001) and in the ‘Parliamentary draft’ of January 2002. Under the first, the penalty set out in the provision is to apply to the performance of a medical procedure without consent “required by statute”; under the second, to performance without consent “contrary to the conditions laid down by statute.”

Representatives of the medical sciences rightly draw attention to the numerous doubts that arise in practice when physicians seek a clear answer to the question whether a patient consents to, or refuses consent to, an operation – for example one that constitutes the only chance of saving the patient’s life. A patient may, within a very short time, consent, withdraw consent, consent again, and so on “in a circle.” A patient may express consent to one physician while refusing it to another.

The Act on the Medical Profession identifies situations in which consent is given by the patient’s statutory representative or de facto guardian. The latter is defined as “a person who, without a statutory duty, exercises constant care over a patient who, owing to age, state of health or mental condition, requires such care” (Article 31(8)). A patient may, however, have both a statutory representative and a de facto guardian. How should a physician proceed where the statutory representative consents to an operation while the de facto guardian categorically objects? The same difficulty may arise in relation to a patient who has attained the age of 16. As a minor, such a patient has a statutory representative who provides consent (in writing) to a surgical procedure. Under Article 34(4), “if the patient has attained 16 years of age, his written consent is also required.” How should a physician proceed where the statutory representative of a sixteen-year-old consents to a surgical procedure that constitutes the only chance of saving the patient’s life, while the patient himself categorically objects?

The Act on the Medical Profession employs the concept of a patient ‘incapable of providing informed written consent’ and the concept of a patient “incapable of providing informed consent,” as well as situations in which “communication with the patient is impossible” (Article 34(3) and (6)). A surgical

procedure requires written consent. How should a physician proceed where a patient gives conscious consent to a necessary operation but is unable to write or cannot write? Is it sufficient for the content of that consent to be dictated to another person?

In medical practice doubts have also arisen as to the criteria on which a physician should rely in classifying a patient as "capable" or "incapable" of expressing informed consent, especially in situations requiring immediate action, where the patient is under the influence of alcohol and is incoherent, is stupefied by narcotics, or expresses consent "on condition" that cannot be met without delay. May consent to a procedure also be presumed consent?

The Act on the Medical Profession also provides for situations in which communication between the physician and the patient or the patient's statutory representative is impossible, as well as those in which the patient—even if legally incapacitated, mentally ill or intellectually disabled—yet possessing sufficient understanding, objects to medical acts (cf. Articles 32–35). On what criteria is the physician to base these assessments where he must save human life without delay and lacks sufficient time even for that?

The Act on the Medical Profession also introduces the crucial requirement that the patient express consent consciously. This is not possible where a person exists "with such changes in the brain as wholly and irreversibly exclude any manifestations of mental life."[19]

Both in the theory of criminal law and in medicine, fundamental importance has long been attached to distinguishing acts of will that are the product of a properly functioning cerebral cortex from reactions closely connected with the functions of subcortical brain centres. This concerns many problems, including the foundations of intent, resolutions and premeditated actions,[20]

19 Cf. e.g.: B. Popielski, "Etyczne i prawne zagadnienia medycyny współczesnej," *Studia Prawnicze*, 282; B. Popielski, "Śmierć człowieka w świetle medycyny i prawa," *Problemy Kryminalistyki*, no. 88(1970).

20 Cf.: Krystyna Daszkiewicz, *Przestępstwo z premedytacją* (Wydawnictwo Prawnicze, 1968), 60 ff.; Krystyna Daszkiewicz, *Przestępstwa z afektu w polskim prawie karnym* (Wydawnictwo Prawnicze, 1982), 19 ff.

the conduct of perpetrators under the influence of affect, reactions to sudden stimuli—for example in situations of defence against a criminal attack—and others.

This issue has rightly been recalled in connection with the strong emotion of fear in a patient who consents to a medical procedure or refuses such consent.[21] Profound fear is hardly an exceptional reaction in cases involving a person directly threatened with loss of life, experiencing severe pain and expecting further suffering, including suffering connected with medical interventions.

The broad range of (merely illustrative) doubts connected with the assessment of patient consent or its absence demonstrates how important, with respect to the offence under Article 192 § 1 of the Criminal Code, is not only the general principle that "irremovable doubts are to be resolved in favour of the accused." It also underscores the relevance of institutions contained in the General Part of the Criminal Code, such as the exclusion of criminal liability for a person who "remains in error as to a circumstance constituting an element of a prohibited act" (Article 28 § 1). A statutory element of the offence in Article 192 § 1 is "the patient's consent" to the procedure. A physician's lawful performance of a medical procedure without consent is also conditioned on compliance with formal requirements, such as recording the circumstances of the case in the medical documentation. An allegation that the physician did so in an overly laconic manner should not determine that the procedure was unlawful. If, however, such an allegation were to constitute a basis for treating the act as an offence (especially given the current erroneous version of the provision), then Article 1 of the Criminal Code should in any event be applied, according to which "an act prohibited by law whose social harmfulness is negligible does not constitute an offence" (§ 2), including in relation to minor formal shortcomings.

21 Tolłoczko, "Problem zgody pacjenta jako dylemat aksjologiczny," 92.

VII

The thesis that acting in a state of necessity – an institution both important and traditional within the General Part of the Criminal Code – is excluded in cases involving medical procedures performed without the patient's consent must likewise be regarded as lacking any legal basis. This institution is provided for in Article 26 of the Criminal Code, which states:

> § 1. No offence is committed by a person who acts in order to avert an immediate danger threatening any legally protected interest, where the danger cannot otherwise be avoided, and the interest sacrificed is of lesser value than the interest saved.

The provision thus has fundamental significance, as it enables verification of pivotal circumstances in concrete cases involving physicians, where the question arises whether, and on what basis, they performed medical procedures without the patient's consent. These circumstances include the immediacy of the danger threatening the patient, action undertaken solely to avert that danger, the absence of any other course of conduct ("the danger cannot otherwise be avoided"), the maintenance of proportionality between the interests sacrificed and saved, and the conflict of duties resting upon the physician of which only one can be fulfilled (Article 26 § 5).

The following arguments speak against the thesis that acting in a state of necessity is excluded in the cases under consideration:

1) This thesis is repeated and introduced into commentaries, textbooks and other studies following the conception of J. Sawicki, who formulated it on the basis of provisions of a different, no longer binding Act on the Medical Profession and of a different Criminal Code. He also cautiously reserved that: "Whether, and to what extent, a 'patient' afflicted by a severe, serious illness directly threatening death is still in a state enabling him consciously to express an effective objection or to refuse consent

belongs to the sphere of assessment of factual, not legal, circumstances … against the background of a concrete case."[22] Such an assessment of "factual circumstances" in the context of a 'concrete case' is precisely what the provisions on acting in a state of necessity are designed to serve. Following J. Sawicki, A. Zoll introduced the thesis into a textbook and commentary already based on different provisions, and others cite it thereafter. Thus, for example: "If the legislature makes the legality of a medical procedure conditional upon the patient's consent, then one cannot, by invoking a state of necessity, undertake procedures for which the patient has not expressed consent in order to save, for example, his life"[23] … "the absence of the patient's consent excludes the legality of medical acts. The possibility of a physician relying on a state of necessity is excluded where the patient has not expressed consent to a procedure that is indispensable owing to a direct threat to life or health … in this case the law accords primacy to the protection of freedom."[24]

2) The principle *lex specialis derogat legi generali*[25] is said to support the exclusion of acting in a state of necessity in these cases. For several reasons, however, that institution cannot be eliminated on such a basis. The exclusion of so fundamental a provision of the General Part of the Criminal Code must be stated expressly. In the presence of any doubts, the 'general' provision remains in force. And in the present context doubts abound. It should also be added that the provisions of the Act on the Medical Profession concern professional liability, whereas both Article 162 (failure to render assistance) and Article 192 (performance

22 Jerzy Sawicki, *Przymus leczenia, eksperyment, udzielanie pomocy i przeszczep w świetle prawa* (Państwowy Zakład Wydawnictw Lekarskich, 1966), 26 ff. and 84–87.

23 Andrzej Zoll in *Kodeks karny: Część ogólna; Komentarz do art. 1–116 kodeksu karnego, ed. Kazimierz Buchała and Andrzej Zoll (Zakamycze,* 1998), 234.

24 Agnieszka Liszewska, "*Problem zgody pacjenta jako dylemat aksjologiczny," Prawo i Medycyna, no. 1(1999):* 86.

25 Andrzej Zoll, citing Jerzy Sawicki, *Odpowiedzialność karna lekarza za niepowodzenie w leczeniu (*Wydawnictwo Prawnicze, 1988), 19.

of a medical procedure without consent) concern criminal liability. Article 26 of the Criminal Code, addressing acting in a state of necessity, likewise concerns the exclusion of criminal liability.

3) Article 15 of the Code of Medical Ethics has also been treated as a basis for excluding acting in a state of necessity. Yet it has little in common with Article 26 of the Criminal Code.[26] It provides that: "Diagnostic, therapeutic and preventive conduct requires the patient's consent. If the patient is incapable of expressing informed consent, it should be expressed by the statutory representative or the person who constantly cares for the patient. The initiation of diagnostic, therapeutic and preventive conduct without that consent may be permissible only in exceptionally special cases of threat to the life or health of the patient or of other persons. Where consent to the proposed conduct is not given, the physician should continue, as far as possible, to provide the patient with medical care."
4) It is further suggested that exclusion of acting in a state of necessity is justified by the conflict, in these cases, between the interest saved and the interest sacrificed belonging to the same person. Yet Article 26 § 1 contains no such limitation. It concerns *any* legally protected interests. Nor does every situation involving medical procedures entail the saving and sacrifice of interests of the same person, since saving a patient's life may depend on a decision of the patient's statutory representative or de facto guardian as to whether consent is to be given.
5) It would also be difficult to accept as a basis for excluding the application of the defence of necessity the peculiar 'argument' that Article 26 of the Criminal Code "constitutes a temptation to justify the legality of a procedure performed without the patient's consent."[27] This contention has already been rightly criticised.[28]

26 Cf. Andrzej Zoll in the collective work: *Kodeks karny: Część szczególna; Komentarz do art. 117–277 Kodeksu karnego (Zakamycze,* 1999), 474.
27 Zoll, ed., *Kodeks karny: Część szczegółna*, 474.
28 Tołłoczko, "Problem zgody pacjenta jako dylemat aksjologiczny," 91.

'Temptations' leading to an unjustified invocation of insanity or diminished responsibility by perpetrators of economic offences are far more common; yet this plainly cannot justify the elimination of Article 31 of the Criminal Code, which provides for such situations.

It must therefore be concluded that there are no legal grounds for excluding, in the cases under consideration, reliance on actions undertaken in a state of necessity.

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Allocating the Burden of Proof in Medical Liability: A Comparative Perspective

Abstract: This article examines the allocation of the burden of proof in medical liability. The paper is oriented toward a comparative law analysis, drawing on examples from various countries. It discusses The Concept of Proof and its Content, the Grounds for Allocating the Burden of Proof, and The Allocation of the Burden of Proof in American, German, and English Law, with particular attention to The Rule for Distributing the Burden of Proof in Medical Law, Reversing the Burden of Proof in Cases of Gross Medical Negligence, and Fully Controllable Risk as a Basis for Reversing the Burden of Proof.

In this context, the legislation and judicial practice of both Continental and Anglo-American law countries are analyzed. The paper provides a detailed discussion of both statutory provisions and case law, as well as doctrinal debates, reflecting the specific challenges faced by plaintiffs in medical disputes.

The study is enriched with examples from judicial practice, which give a practical dimension to the theoretical discussion and highlight the significance of judicial interpretations in shaping the doctrine of medical liability.

Keywords: medical law, causation, burden of proof, medical liability, medical disputes, comparative analysis

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Introduction

This article uses a comparative legal analysis to examine the allocation of the burden of proof in medical liability disputes through. The study explores how different legal systems address causation, evidentiary standards, and the reversal of the burden of proof in cases of gross medical negligence. By situating these rules within the broader framework of tort law and civil procedure, the article contributes to ongoing debates in medical law and comparative law. The findings are particularly relevant to scholars and practitioners interested in how evidentiary doctrines shape access to justice in medical disputes, and how legal systems balance the rights of patients and healthcare providers.

The article aims to examine the problem of determining the burden of proof in medical disputes. In this regard, international legislation and case law will be analyzed. It is beyond doubt that medical disputes are a specific and particularly complex area of law. In such cases, on one side stands the relatively strong party in the relationship, namely, the medical institution, and on the other, the weaker party, the patient, who has suffered harm as a result of the actions of the medical service provider. The challenge in medical disputes lies in the correct allocation of the burden of proof and in the ability of the party to overcome it. Very often, it is not only difficult but even impossible for the party to establish a causal link between the conduct of the medical provider and the harmful result. Moreover, collecting evidence is particularly difficult for the weaker party. Ultimately, this excessively increases the burden of proof on the claimant to such an extent that the satisfaction of their claim becomes practically impossible.

In this context, the legislation and judicial practice of both Continental and Anglo-American law countries are analyzed. The article provides a detailed discussion of both statutory provisions and case law, as well as doctrinal debates, reflecting the specific challenges faced by plaintiffs in medical disputes. This is enriched with examples from judicial practice, which give a practical dimension to the theoretical discussion and highlight the significance of judicial interpretations in shaping the doctrine of medical liability.

The Concept of Proof and Its Content

The Concept of the Burden of Proof in German Law

The principles of the burden of proof are not regulated by law in the German legal system. In German civil procedural law, it is established as a general principle that the burden of proof for facts giving rise to a right lies with the claimant (creditor) or the person exercising the claim. Conversely, the burden of proof for facts that extinguish or impede a right falls on the defendant (debtor). Generally, according to German procedural law theory, the process of presenting, collecting, examining, and evaluating evidence by the parties and the court is referred to as proof. To "prove" something means to convince the court of the accuracy of the facts presented.[2]

In Germany, the Doctrine on the Allocation of the Burden of Proof is regarded as a component of substantive law, not procedural law. Although procedural legislation incorporates the concept of the burden of proof and provides general rules for its distribution, the concrete allocation of this burden in individual cases is determined by substantive legal norms.[3] Accordingly, the rules governing the burden of proof in Germany are regarded as a component of substantive law[4] The German Code of Civil Procedure sets a high standard of proof for civil proceedings. Facts must be established according to a standard of practical certainty; otherwise, the claim is regarded as unfounded.[5]

Although the general standards for the law of evidence are quite clear and understandable, German law provides for various possible deviations from these principles. These deviations arise from circumstances such as general life experience and the judge's efforts to ensure that the distribution of the burden

2 Marc S. Stauch, "The General Approach to Proof," in *The Law of Medical Negligence in England and Germany: A Comparative Analysis* (Hart Publishing, 2008), 62–64.

3 Stauch, "The General Approach to Proof."

4 Judgement of the Federal Court of Justice of Germany of 3 April 2001—XI ZR 120/00; BGHZ 147: 203; Judgement of the Federal Court of Justice of Germany of 1 March 2014—X ZR 150/11; NJW 2014: 2275; Judgement of the Federal Court of Justice of Germany of 16 October 1996—IV ZR 154/95; NJW-RR 1997: 152.

5 Nina Cek, "The Standards of Proof in Medical Malpractice Cases," *Medicine, Law & Society* 13, no. 2 (2020): 185, https://doi.org/10.18690/mls.13.2.173-196.2020.

of proof among the parties adheres to the principle of fairness. However, there are a number of cases where it becomes impossible for a party to meet the burden of proof. This problem is not unique to Georgia but also exists in German courts. One solution is to ease the standards of the burden of proof.[6] For example, in medical malpractice cases, German courts have established a practice that in certain situations, it is justified to reverse the burden of proof. If an injury corresponds to a risk typical of a medical treatment and if the doctor could have objectively controlled it, this is regarded as grounds for a presumption of medical error. In this regard, the German Constitutional Court deliberated and noted that since the court is obligated to ensure the equality of the parties in a proceeding, reversing the burden of proof may be necessary in some cases.[7]

Grounds for the Allocation of the Burden of Proof

General and Special Rules for Allocation of the Burden of Proof

The allocation of the burden of proof is a fundamental aspect of civil litigation. As a rule, the plaintiff must prove the facts upon which their claims are based. Conversely, the defendant must prove the circumstances that provide grounds for denying those claims. In civil cases, the basis for delivering a reasoned judgment lies in identifying the legal foundation from which the dispute between the parties arises. Therefore, the court's primary function in reviewing a dispute is to determine the material basis of the claim and the legal norm on which it is founded. The court is limited by the factual circumstances of the lawsuit. It verifies whether the factual circumstances stated in the lawsuit meet all the prerequisites of the founding legal norm. Only after this initial check should the court examine how the defendant's position refutes the circumstances mentioned in the lawsuit.[8]

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6 *EEOC v. United Parcel Serv., Inc.*, No. 09-cv-5291, 2013 WL 140604, at *4-7 (N.D.Ill. Jan. 11 2013); *Coleman v. Md. Court of Appeals*, 626 F.3d 187, 190-91, 4th Cir. 2010.

7 BVerfG (Constitutional Court of Germany), Decision of 25 July 1979. NJW 1979: 1925.

8 Ruling of the Supreme Court of Georgia of 16 November 2018, Case No. AS 860-860-2018.

Although a general rule for distributing the burden of proof exists in civil procedure, courts sometimes apply a specific rule for distributing the burden of proof, which is directly regulated by law. A special rule for the distribution of the burden of proof applies in tort law, as well as in labor law and anti-discrimination law. This difference is dictated by the specific nature of the legal relationship, the difficulty of proving certain facts, and the objective ability or inability to present evidence.[9] Therefore, in such cases, the burden of proof is reversed, meaning the obligation to prove facts presented by one party may be shifted to the other party.[10]

The Allocation of the Burden of Proof in American, German, and English Law

In German law, the allocation of the burden of proof is not codified in civil legislation but follows established doctrine. Generally, the creditor must prove facts giving rise to a right, while the debtor must prove facts that extinguish it. The burden of proof is assessed under substantive legal norms, making the debtor–creditor relationship central. As in other European countries, Germany treats this doctrine as part of substantive rather than procedural law. Although procedural rules set general principles, the specific distribution in individual cases depends on substantive norms. Thus, the doctrine is firmly rooted in substantive law.[11] In German civil law, it is established that the burden of proof with respect to facts giving rise to a right rests with the creditor or the person exercising the claim, whereas the burden of proof regarding facts that extinguish or impede a right falls on the debtor.

9 Ketevan Meskhishvili, "Procedural Standard for Allocating the Burden of Proof," in *Commentary on the Civil Procedure Code*, *Selected Articles* (2020), 420–21.

10 Decision of the Civil Chamber of the Supreme Court of Georgia of 15 September 2011, Case No. AS-711-670-2011.

11 Judgement of the Federal Court of Justice of Germany of 3 April 2001—XI ZR 120/00; BGHZ 147: 203; Judgement of the Federal Court of Justice of Germany of 1 March 2014—X ZR 150/11; NJW 2014: 2275; Judgement of the Federal Court of Justice of Germany of 16 October 1996—IV ZR 154/95; NJW-RR 1997: 152.

It is also worth noting the "preponderance of evidence" standard in the United States. According to this standard, the plaintiff must demonstrate that the facts supported by their evidence are more than 50% likely to exist.[12] The approach in Great Britain is also interesting, where the standard of proof is lower due to the adversarial principle. The UK uses the "balance of probabilities" standard, which means a party is required to prove that the existence of a fact is more probable than its non-existence.[13]

The Rule for Distributing the Burden of Proof in Medical Law

As mentioned, courts use a special rule for distributing the burden of proof in medical cases. In cases of civil liability, the issue is often the negligence of medical personnel, which occurs when they fail to use all available means to prevent risks.

The established approaches to causation have gradually changed in European countries. It became clear that due to the heavy burden of proof, it was nearly impossible for patients to win medical malpractice lawsuits. As the Canadian Supreme Court pointed out in a *Nell v. Farrell*, a judge can reverse the burden of proof based on the specific circumstances of a case.[14] This trend toward easing the burden of proof is also supported by the Court of Justice of the European Union, which was approached by the French Supreme Court for an interpretation of the EU Product Liability Directive.

In any legal dispute initiated against a medical institution it is essential that the patient proves that the physician's actions did not conform to generally accepted medical standards.[15] Accordingly, in order for a claim for

12 Michael Blome-Tillmann, "'More Likely Than Not'—Knowledge First and the Role of Bare Statistical Evidence in Courts of Law," in *Knowledge First: Approaches in Epistemology and Mind*, ed. J. Adam Carter et al. (Oxford University Press, 2016), 278–90.

13 Cek, "The Standards of Proof in Medical Malpractice Cases," 185.

14 *Snell v. Farrell*, [1990] 2 S.C.R. 311.

15 Marc S. Stauch, "England: The 'But For' Test," in *The Law of Medical Negligence in England and Germany: A Comparative Analysis* (Hart Publishing, 2008), 46–48.

compensation to be granted, the patient must also establish the existence of a causal link.

In medical malpractice cases, establishing a causal link between the actions of the healthcare provider and the harm suffered by the patient presents a particular challenge. This complexity often arises from the interplay of multiple factors or actions, each of which may independently or jointly serve as a necessary condition for the harm. While a specific act may indeed serve as the cause of the damage, it is essential to recognize that, in matters concerning a patient's health, a wide range of additional factors may influence the outcome. These may include the individual characteristics of the patient's body, psychological condition, delayed access to medical care, and other relevant circumstances.

Judicial determinations of causation rely heavily on an expert medical opinion, yet establishing a direct causal link is often difficult or even impossible. Of particular note in this context is the possibility that evidence may be lost or disappear.[16] Moreover, expert reports rarely provide categorical conclusions, often lacking thorough factual analysis and sufficient detail to fully clarify the case.

In a specific case, the plaintiffs filed a lawsuit against the vaccine manufacturer Sanofi. The plaintiffs claimed that the vaccine had caused multiple sclerosis in their relative, which had led to their death in 2011. In its decision, the court discussed Article 4 of the EU Product Liability Directive, stating that under this directive, the plaintiff must prove the existence of causation.

It should be emphasized that the court indicated that when scientific research does not physically allow for the establishment of a causal link between the conduct and the result, the claimant must be granted the right to rely on other evidence to substantiate his or her position. For example, the short period of time between the administration of the vaccine and the onset of the illness, the absence of the disease in the family medical history, and similar circumstances.

16 Stauch, "England: The 'But For' Test," 46.

This judgment illustrates a relaxation of the burden of proof, permitting the defendant to establish causation with less effort by submitting alternative evidence when expert reports cannot confirm a direct link between the doctor's action and the injury. The court evaluates and weighs such evidence in its decision. While certain facts may be inherently difficult or impossible to prove, this should not impose barriers on the plaintiff that undermine the principles of adversarial proceedings and equality.

Instances of Reversing the Burden of Proof

Reversal of the Burden of Proof in Cases of Gross Medical Error

In the process of establishing causation and, consequently, in the redistribution of the burden of proof, particular significance is attached to the case of gross medical error as codified in paragraph 630h VI of the German Civil Code.[17] In particular, according to judicial practice, when a physician commits a gross medical error, which by its very nature entails the possibility of causing harm to life, body, or health, the burden is placed upon the physician to prove the absence of damage, that is, to demonstrate that the harm was not caused by the breach of duty and that it would have occurred even in the absence of the error.[18]

As the Federal Supreme Court notes, a medical error is regarded as gross when, based on the standards of the medical field and the doctor's level of education, the action is clearly wrong. In such a case, gross medical behavior can exist even without carelessness being shown. The key factor is the objectively wrong nature of the action itself, which runs contrary to universally accepted medical standards.[19]

According to Part V of Article 630 of the German Civil Code, if a healthcare provider commits a gross medical error, the burden of proof shifts to

17 Ulich Hagenloch, "Important Trends in German Judicial Practice in the First Half of 2022," *Journal of Medical Law and Management*, no. 1 (2024): 1.

18 Katzenmeier, "§ 630h Burden of proof in liability for errors in treatment and information," in *BeckOK BGB, Hau/Poseck*, 75th ed. as of: 1 August 2025 (C.H. Beck, 2025), 52.

19 "§ 630h Burden of proof in liability for errors in treatment and information," 57.

them.[20] Consequently, the patient no longer has to prove that the harm would not have occurred without the medical error.[21] From a medical perspective, the failure to implement necessary measures constitutes a gross medical error. This includes cases where a doctor fails to perform the required examination, does not conduct all tests specified by standard procedure, and so on.[22] In accordance with the consistent practice of the German Federal Supreme Court, such gross medical errors lead to a reversal of the burden of proof.[23]

An important decision by the German Federal Supreme Court[24] involved a plaintiff seeking compensation for material and non-material damages from a medical error during birth. The mother was admitted to the hospital seven weeks early after her waters broke. Initial cardiotocography (CTG) scans were mostly normal. However, two days later, she reported pain, and CTG showed a decreased fetal heart rate. From 7:00 AM to 7:30 AM, the patient underwent another CTG, and the results no longer showed an alarming rate. On the same day, around 13:10, the mother again reported pain that had begun around 11:00 AM. After a CTG performed at 13:16 failed to detect the fetus's heartbeat, and a subsequent ultrasound showed fetal bradycardia (a slow heart rate), the baby was born at 13:37 via an emergency C-section without breathing or heart activity.

The plaintiff argued that due to this improper treatment, he suffers from severe intellectual disability and significant hearing and vision impairments. He claimed that the doctors failed to inform his mother about the need for immediate action during labor pain, causing her to delay reporting the onset of pain from 11:00 AM until around 13:10.

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20 Marc S. Stauch, "Reversals of Proof in Cases of 'Gross' Treatment Errors," in *The Law of Medical Negligence in England and Germany: A Comparative Analysis* (Hart Publishing, 2008), 87–89.

21 Karl O. Bergmann, Carolin Wever, *Die Arzthaftung: Ein Leitfaden für Ärzte und Juristen* [Medical Liability: A Guide for Doctors and Lawyers] (Springer Berlin Heidelberg, 2014), 14.

22 Tobias Wagner, „BGB § 630h," in *MüKo/BGB*, 8th ed. (C.H. Beck, 2020), Rn. 99.

23 Wagner, „BGB § 630h," Rn. 99.

24 Judgement of the Federal Court of Justice of Germany of 24 May 2022, VI ZR 206/21, NJW 2022, 2747.

The complex issue in this case was whether the hospital fulfilled its duty to provide therapeutic information. The mother's amniotic sac had broken seven weeks early, posing risks of premature birth, complications, and possible death. The hospital failed to inform her of these risks, and the key question was whether proper information could have prevented the plaintiff's adverse outcome.

The court considered how the case's specific circumstances affected the burden of proof for causation. It noted that had the mother received proper therapeutic advice, a CTG would have been performed shortly after 11:00 AM. The Federal Supreme Court reaffirmed that a medical error is gross when a doctor violates established medical rules or standards. The Court emphasized that mere uncertainty about whether the mother would have followed advice is insufficient to deny reversal of the burden of proof, noting it was highly likely she would have reported the pain immediately if fully informed of the risks.

According to German case law, if a violation is gross, the burden of proof falls on the doctor.[25] A gross error involves a doctor failing to diagnose meningitis in a patient, despite clearly expressed symptoms.[26] It would also be a case where a doctor did not perform a mandatory medical examination or treatment that was necessary in a specific situation.[27]

On 23 January 2020, the Higher Regional Court of Munich delivered an important decision. The court based its review on Paragraph 630h (5) of the German Civil Code, which states that if a doctor's conduct constitutes gross medical error and endangers a patient's life or health, it is presumed that the harm was a result of the improper treatment. In this particular case, it was determined that a serious error during treatment caused paraplegia in a minor. Based on this finding, the burden of proof shifted to the medical facility. Ultimately, the clinic was ordered to pay €500,000 in pain-suffering compensation, as well as to fully reimburse all past and future expenses related to the medical error.[28]

25 Judgement of the Federal Court of Justice of Germany of 4 October 1994, VI ZR 205/963.
26 Judgement of the Higher Regional Court Stuttgart of 31 October 1996, ref. 14 U 52/95.
27 Judgement of the Federal Court of Justice of Germany of 29 March 1988—VI ZR 185/87.
28 Judgement of the Higher Regional Court Munich of 23 January 2020, ref. 1 U 2237/17.

The German Civil Code clearly states that in cases of a gross medical error, the burden of proof is reversed. Such an error is so significant and obvious that it creates a presumption of a professional duty breach by the doctor. As a result, it is presumed that the harm to the patient was directly caused by this error. This presumption shifts the obligation to prove the absence of a causal link from the patient to the medical facility.

Fully Controllable Risk as a Basis for Reversing the Burden of Proof

German courts have repeatedly deliberated on standards for easing the burden of proof. The central question in these deliberations was whether a common risk inherent in treatment should be considered a "controllable risk" and thus be a basis for a presumption of medical error.[29]

In response to this issue, German courts developed the "doctrine of fully controllable risks" for medical malpractice cases.[30] The goal of this doctrine is to ease the standard of proof or, in some cases, shift the burden to the medical facility.[31] The doctrine of fully controllable risks implies that if a problem arises entirely within the doctor's sphere of responsibility, it is presumed to be caused by the doctor's negligence. For instance, this could apply if a patient's brain damage is caused by a malfunction in the oxygen system during anesthesia.[32] This approach is also gaining recognition in German law, where the burden of proof is often reversed in favor of the patient to ensure a legal balance. This is why Paragraph 630h of the German Civil Code allows for the burden of proof to be shifted in the patient's favor.[33] Specifically, it is presumed

29 Stefanie Greifeneder, "Germany," in *The Healthcare Law Review*, ed. Sarah Ellson, 5th ed. (The LawReviews, 2021).

30 Marc S. Stauch, "Fully Masterable Risks," in *The Law of Medical Negligence in England and Germany: A Comparative Analysis* (Hart Publishing, 2008), 74.

31 Mauro Bussani et al., *Common Law and Civil Law Perspectives on Tort Law* (Oxford University Press, 2020), 68.

32 Marc S. Stauch, "Medical Malpractice and Compensation in Germany," *The Chicago-Kent Law Review* 86, no. 3 (2010): 1154.

33 Wagner, "BGB § 630h," Rn. 1, 2.

that the risk was fully controllable for the healthcare provider, and therefore, the burden of proof is entirely shifted to the defendant.[34]

English courts share this view, noting that it is often very difficult for a patient to establish a causal link between the actions of a healthcare provider and the harm they suffered. When part of the unlawfulness resulting from the physician's conduct remains unclear, the burden of proof must be shifted in such a way that the uncertainty is not used to the advantage of the defendant.

An interesting example is the case of McGhee. In this case, the plaintiff, an employee of the National Coal Board, filed a lawsuit against the company, arguing that he contracted an illness due to the company's negligence. The company failed to provide adequate washing detergent which forced the plaintiff to ride his bicycle home with dust on his hands. This led to him developing dermatitis. The central issue was whether workplace dust caused the plaintiff's condition. The House of Lords held that the defendant's breach of safety and hygiene regulations substantially contributed to the injury. Although the "but for" test was not satisfied, the court found that the defendant's negligence created a risk of harm, shifting the burden of proof to the defendant to show that their actions did not cause the specific outcome.[35]

A different decision was reached by the court in the case of *Wilsher v. Essex Area Health Authority*.[36] In this case, there were several factors that could have caused the harm, and they all had equal significance in causing the outcome. The case involved a premature baby who became blind during treatment in the defendant clinic's postnatal unit. The court determined that the hospital staff had administered an excessively high dose of oxygen to the infant during the first weeks of its life. Although this factor may have played a decisive role in the child's loss of sight, four or five alternative causes were also identified, each of which had the potential to cause the same outcome. In this case, it was

34 Marc S. Stauch, "Treatment Malpractice—Proof Issues," in *The Law of Medical Negligence in England and Germany: A Comparative Analysis* (Hart Publishing, 2008), 74–75.
35 *McGhee v. National Coal Board* [1973] 1 WLR 1.
36 *Wilsher v. Essex Area Health Authority* [1988] AC 1074.

impossible to determine with certainty that the medical facility's specific action caused the child's blindness. This circumstance failed to meet the requirements of the "but-for" test,[37] because it could not be said with certainty that the child would not have lost his sight without excessive oxygen saturation.[38]

A common ground for reversing the burden of proof is a medical facility's failure to properly maintain records. Physicians are obliged to document all essential measures in line with regulations, including the patient's history, treatment details, and related information.[39] According to Paragraph 630F of the German Civil Code, a medical facility is obligated to maintain complete medical records, which involves the medical facility having to include all procedures performed on the patient and attach all necessary documents.[40]

Courts in both the Continental European and Anglo-American legal systems share a unified approach on this matter. When a medical facility breaches its duty to maintain medical records, the patient is completely relieved of the burden of proof, and this obligation shifts to the medical facility. Paragraph 630h(3) of the German Civil Code explicitly states that if a treating party has not maintained medical records containing information about necessary treatment measures and their results, it will be presumed that the party did not perform these measures or medical procedures.[41]

The English courts take a similar approach, noting that the plaintiff is at a disadvantage compared to the medical facility. The defendant has access to all the medical records and necessary expertise, while the patient does not. Therefore, the medical facility is strictly required to present all necessary documentation during the legal proceedings.[42]

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37 Marc S. Stauch, "Factual Causation," in *The Law of Medical Negligence in England and Germany: A Comparative Analysis* (Hart Publishing, 2008), 48.

38 Marc S. Stauch, "Causation Issues in Medical Malpractice: A United Kingdom Perspective," *Annals of Health Law* 5, no. 1 (1996): 253.

39 Katzenmeier, "§ 630," in *BeckOK BGB*, 53rd ed. (C.H. Beck, 2020), Rn. 113

40 Hagenloch, "Important Trends in German Judicial Practice in the First Half of 2022," 1.

41 Peter Lanzer, ed., *Catheter-Based Cardiovascular Interventions, Knowledge First: Approaches in Epistemology and Mind* (Springer eBooks, 2013), 79.

42 Richard A. Lodge, "A Matter of Fact: Establishing Facts in a Medical Negligence Case," Medical Negligence and Personal Injury Blog | Kingsley Napley (Blog), published 10 May

In both German and English law, missing medical documentation significantly affects the burden of proof and judgment. German courts take a stricter stance, presuming a medical error when record-keeping duties are breached. By contrast, English courts adopt a more flexible approach, allowing facilities to rely on alternative evidence, such as witness testimony, to defend their position.

The Doctrine of Res Ipsa Loquitur

The doctrine of Res Ipsa Loquitur originated in England in 1863 and is now widely used in both English and American legal systems.[43] It is somewhat similar to the German "fully controllable risks" doctrine, as well as the principle of reversing the burden of proof in cases of gross negligence. The essence of this doctrine is that a doctor's conduct is so far below the acceptable standard of care that it is regarded as negligence on the face of it (prima facie). Under Res Ipsa Loquitur, a plaintiff can create a presumption of negligence on the part of the defendant if they can prove the following circumstances: The injury would not have occurred without negligence; the cause of the injury was entirely under the defendant's control; there is no other logical, alternative explanation for the injury.[44] This doctrine is also frequently used by courts in the United States. In such instances, the existence of harm implies that it was caused by negligence, creating a presumption of negligence.[45] Consequently, the burden of proof to show the opposite shifts to the defendant.[46] For this to apply, three preconditions must be met: (1) The incident is of a type that typically does not occur without negligence; (2) The incident was caused by something exclusively under the defendant's control; (3) The plaintiff is not

2025, https://www.kingsleynapley.co.uk/insights/blogs/medical-negligence-and-personal-injury-blog/a-matter-of-fact-establishing-facts-in-a-medical-negligence-case.

43 Marc S. Stauch, "England: Res Ipsa Loquitur," in *The Law of Medical Negligence in England and Germany: A Comparative Analysis* (Hart Publishing, 2008), 70–72.

44 *Ybarra v. Spangard*, 25 Cal. 2d 486 (Cal. Dec. 27, 1944).

45 Stauch, "England," 70–72.

46 *Ybarra v. Spangard*, 25 Cal. 2d 486 (Cal. Dec. 27, 1944).

at fault for the harm (excluding contributory negligence).[47] This doctrine was notably applied in the case of *Byrne v. Boadle*, where a pedestrian was injured by a flour barrel that fell from a shop. In this case, the individuals responsible for securing the barrel were considered prima facie liable for the harm caused to the pedestrian.[48]

Conclusion

Civil procedure is based on the principle of adversarial proceedings, and therefore the allocation of the burden of proof between the parties has a significant impact on the final judgment in a case. It is undisputed that the burden of proof constitutes one of the most problematic issues in the adjudication of medical disputes.

Civil liability of a medical service provider arises only in cases of culpable and unlawful conduct. For liability to be imposed, the presence of certain prerequisites is required—namely, an unlawful act, a causal link, and fault. Among these elements, causation is of particular importance, as it is both essential and one of the most difficult aspects to prove in medical malpractice cases. This difficulty arises from the very nature of healthcare: treatment often involves multiple providers, while patient-specific factors—such as physiological traits or psychological state—can significantly complicate, or even prevent, the determination of a direct causal link.

It is important to note that the patient is inherently the weaker party in a medical relationship, especially when it comes to litigation. It is often very difficult, or even impossible, for a patient to obtain evidence and, consequently, to meet the burden of proof. Ultimately, this results in a failure to uphold the principle of equality of the parties in medical disputes.

In such cases, the court plays a vital role in safeguarding the principles of adversarial proceedings and equality of arms. Medical disputes are inherently

47 *Escola v. Coca Cola Bottling Co. of Fresno* [S. F. No. 16951. In Bank. July 5, 1944.].

48 Judgement of the Exchequer Court of United Kingdom of 25 November 1863, 2 H. & C. 722. 159 Eng. Rep. 299.

imbalanced: medical facilities hold the information and documentation, making it far easier for them to present proof than for the injured patient to do so. To address this disparity, courts must ensure a fair allocation of the burden of proof, which in some situations requires easing the patient's evidentiary burden to preserve equality and the integrity of the proceedings.

The research shows that both European countries and the United States are moving towards easing the burden of proof in medical malpractice cases. The Anglo-American legal approach considers it an excessively heavy burden for patients to prove every element of liability. Therefore, it is held that if a wrongful act creates or increases the risk of harm, a causal link is presumed to exist, and the responsibility to rebut this presumption shifts to the medical facility. Specifically, when it is excessively burdensome for the patient to prove the existence of a particular element, courts may reduce the evidentiary threshold. This is grounded in the principle that claimants should not be subjected to an unreasonably heavy burden of proof, which could otherwise lead to claims being dismissed.

As noted, another instance where the burden of proof is reversed is when a medical facility breaches its duty to maintain medical documentation. The failure to provide this documentation eases the patient's standard of proof and shifts the burden of proof to the medical facility.

The Court of Justice of the European Union also leans toward easing the burden of proof. It allows patients to use evidence other than expert opinions, which require less effort to obtain, in order to prove the existence of a causal link.

From the foregoing, it is evident that the problem lies in the specific nature of the issue itself. However, it is equally important that the courts, taking into account the particular circumstances of each case, properly allocate the burden of proof and balance the inequality between the parties through the correct standard of allocation.[49]

49 Jenny R. Yang and Jane Liu, *Strengthening Accountability for Discrimination: Confronting Fundamental Power Imbalances in the Employment Relationship* (Economic Policy Institute, 2021).

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Contrasting Dynamics of Democracy and Authoritarianism in Sub-Saharan Africa: Historical, Institutional, Judicial, and Sociopolitical Factors

Abstract: This paper examines the current dual political system in Sub-Saharan Africa, where democracy exists side by side with some element of autocracy. It looks at the varying perspectives of history, institutions, judicial, and socio-political factors that all contribute towards influencing regimes' outcomes across the region. Colonial and post-colonial eras have observed the birth of different state structures, often centralized, exclusionary, and resistant to diverse governance. These structures have played a significant role in nation-building. The paper also explores how socio-political factors like international influence, economic backwardness/progress, and grassroots mobilization can play a part in shaping regime outcomes. Consequently, the paper explains the diverse political developments observed across African states, contributing to broader debates on governance, state legitimacy, and democratic transitions in postcolonial contexts.

Keywords: Political regimes, Sub-Saharan Africa, Democratization, Authoritarianism, Colonial legacy, Governance and state-building, Political transitions, Democratic consolidation, Civil society

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Introduction

Africa boasts diverse political trajectories among its member states, showing the continent's historical development and current challenges. The wave of independence swept through African states in the 1950s and 60s, and since then, most African states have seen their political paths shift from autocracy to democracy, to transitional governments, and what we might call a hybrid authoritarian regime.[2] While it can be said that many African states seem to have stabilized their democracy, some others are still traversing the lines between democracy and autocracy. The question that demands an answer is how Africa can ensure that democracy becomes stable across the continent. This multiplicity of political regimes that sway between democracy and autocracy has become a feature of African politics. This study aims to discuss the factors driving this multiplicity through a multidimensional analytical approach.

There is a need to consider three aspects of this discourse. Firstly, how historical legacies, especially colonial and postcolonial state development, influence the structure and logic of modern political regimes; secondly, the impact of institutional strength and integrity on fostering democratic resilience or supporting authoritarian continuation; and thirdly, the importance of sociopolitical factors, such as civil society activism, electoral mobilization, international involvement, and economic changes, in determining regime outcomes.[3]

The Sovereign National Conference held in the 1990s brought promises of democracy and political liberalization,[4] but unfortunately this promise is yet

2 Crawford Young, *The Postcolonial State in Africa: Fifty Years of Independence, 1960–2010* (University of Wisconsin Press, 2012); see David Collier and Steven Levitsky, "Democracy with Adjectives: Conceptual Innovation in Comparative Research," *World Politics* 49, no. 3 (1997): 430; Christian Coulon, "Senegal: The Development and Fragility of Semidemocracy," in *Politics in Developing Countries: Comparing Experiences with Democracy*, ed. Larry Diamond , Juan Linz and Seymour Martin Lipset, 2nd ed. (Lynne Rienner, 1995), 493; d'Olivier Dabène, ed., *Amérique latine, les élections contre la démocratie?* (Presses de la Fondation nationale des sciences politiques, 2008).

3 Daniel Bourmaud, "Aux sources de l'autoritarisme en Afrique: des ideologies et des hommes," *Révue Internationale de Politique Comparée* 13, no. 4 (2006): 625–41, https://doi.org/10.3917/ripc.134.0625.

4 Bourmaud, "Aux sources de l'autoritarisme en Afrique."

to be fulfilled in parts of Africa, especially in West Africa, where even leaders elected by seemingly democratic means systematically bypass constitutional provisions to overstay their mandated terms.[5] This is often referred to as 'de-consolidating revisions' and is presented as legal reforms. However, the aim is often to extend a government's term in power, and this consequently weakens democracy safeguards and diminishes public trust in institutions. Such attempts have also been termed 'constitutional coups', which are characterized by the threat they constitute to the consolidation of democracy, and are often seen where institutional oversight mechanisms are weak and civil societies have their voices stifled. Although it might be said that constitutional coups have occurred several times in the regions that make up Africa, it is encouraging to note that the region of West Africa has the strongest record in refusing acceptance of such constitutional coups. By way of illustration, in 2006, the then President of Nigeria, President Olusegun Obasanjo sought to prolong his time in office through a bill that would enable him to serve three terms in office instead of two; however, the bill was rejected by the legislative arm of government.[6] Civic movements have played their own role in frustrating the efforts of leaders to perpetuate in power like in Burkina Faso, the Citizens' Broom (Le Balai Cito yen) movement, which happened in 2014, led to the ousting of President Compaore.[7] The Y'en, a Marre movement in 2011 in Senegal, led to the removal of President Abdoulaye Wade.[8] However, in Togo, President Gnassingbe Eyadema in December 2002 successfully changed the constitu-

5 Paul Biya (Cameroon), Yoweri Museveni (Uganda), Denis Sassou Nguesso (Republic of Congo), Ismail Omar Guelleh (Djibouti), Pierre Nkurunziza (Burundi, deceased), Faure Gnassingbé (Togo), Alassane Ouattara (Ivory Coast), Alpha Condé (Guinea, ousted).

6 Bayo Wahab, "He Did Everything to Retain Power—Bugaje Debunks Obasanjo's 3rd Term Denial," *Punch Newspaper*, available at https://punchng.com/, accessed 22 September 2025.

7 See Michel Camau, "La disgrâce du chef. Mobilisations populaires arabes et crise du leadership," *Mouvements* 2, no. 66 (2011): 22–29; Marianne Saddier, "The Upright Citizens of Burkina Faso," Africa Is a Country, published 31 October 2014, https://africasacountry.com/2014/10/the-citizens-of-burkina-faso, accessed 23 September 2025.

8 Camau, "La disgrâce du chef. Mobilisations populaires arabes et crise du leadership"; Saddier, "The Upright Citizens of Burkina Faso."

tion, which contained a provision that the president was entitled to two terms of five years each. In effect, the president removed the limits imposed by law for him to remain in power.

For the good of democracy and sustaining its values, very robust, independent, and sincere civil societies and institutions must be prioritised over leaders with dictatorship tendencies in Africa. There is also a pressing need for academics and policy makers to study the causes of failures in our democratic settings. This requires analysing the broader and comparative historical context. This study contributes to ongoing debates about regime stability, change, hybridity,[9] democratic erosion, and the institutional bases of political accountability in Africa. It analyses why some regimes strengthen democratic governance while others regress into authoritarianism. Additionally, the discussion examines how internal and external actors can effectively promote democratic norms in environments characterized by political volatility and institutional fragility.

Historical Factors: Colonial Legacies and Post-Independence Trajectories

This topic can be examined from two perspectives: firstly, the European colonization era, and secondly, the postcolonial era. Speaking of colonization, it is worth noting that the European Colonial masters, regardless of ethnic realities, grouped and divided Africans, which have led to African states still battling for compatibility and political stability to this day. After gaining independence,

9 The concept of hybrid regimes has gained significant scholarly attention over the past two decades. Levitsky and Way (2002) introduced the term "competitive authoritarianism" to describe regimes that combine formal democratic institutions with authoritarian practices. Their work highlighted how such regimes maintain the appearance of democracy while systematically undermining its foundations. Similarly, Diamond (2002) emphasized the emergence of "pseudo-democracies" or "electoral authoritarianisms," arguing that many regimes conduct regular elections that are neither free nor fair. See: Steven Levitsky and Lucan A. Way, "The Rise of Competitive Authoritarianism," *Journal of Democracy* 13, no. 2 (2002): 51–65, https://doi.org/10.1353/jod.2002.0026; Larra Diamond, "Elections Without Democracy: Thinking About Hybrid Regimes," Journal of Democracy 13, no. 2 (2002): 21–35.

many African countries adopted the institutions introduced by their colonial masters, without any form of rethinking or amending; hence, just as the Europeans had ruled, the states remained centralized and undemocratic, with the people not adequately represented. On the other hand, the pre-colonial political/community structures were mostly preserved by the colonialists as agents of indirect rule. Most of these pre-colonial African structures were authoritarian in nature, but for the few that appeared to be democratic,[10] the colonialists came with their own style of leadership, which is centralized with a head of state/governor or by whatever name termed that controls most of the power, with often no checks and balances. This is another form of authoritarianism. The combination of these precolonial and colonial administrative methods all played a part in shaping the authoritarianism we witness in Africa. Britain introduced indirect rule in Nigeria; hence, it is no wonder that, since its independence, Nigeria has maintained a more decentralized administration, which has made it seamless for democratic transitions, though this democracy may not be described as perfect and is very much a work in progress. On the other hand, countries like Guinea and Angola that were administered by their colonial masters directly continued after their colonial era with fragile institutions and more authoritarian governments. Upon gaining independence, many African states chose to operate a one-party system which they felt would help them build national unity. African leaders like Kwame Nkrumah of Ghana, Modibo Keïta of Mali, Félix Houphouët-Boigny of Côte d'Ivoire abolished multi-party systems in their countries, establishing centralized governments, where the ruling party controlled all institutions.[11] The period between 1960 and the 1990s saw several coup d'états across African states, which introduced military regimes. Such regimes were a pure definition of autocracy, with democratic constitutions and institutions deposed, and the military leader becoming the head authority and law maker. These coups are usually rationalized as aiming to bring stability or

10 Renske Doorenspleet and Lia Nijzink, eds., *Party Systems and Democracy in Africa* (Palgrave Macmillan, 2014), https://doi.org/10.1057/9781137011718.

11 Doorenspleet and Nijzink, eds., *Party Systems and Democracy in Africa*.

fighting corruption, but more often than not they brought greater instability, cronyism and repression. Recently, the ghost of military coup d'états seem to be returning to Africa with a military man, Ibrahim Traore, still standing as the leader of Burkina Faso. Apart from Burkina Faso, countries like Côte d'Ivoire and Niger have recently experienced coup d'états, factors which often encourage these coups are the questions of the legitimacy of civilian government, which emerge from a seeming rigged process, poor governance and so on.[12]

Institutional Factors: Role of State Structures and Governance Mechanisms

Any nation striving to implement democratic principles, must establish strong political institutions. It is the characteristics of these political institutions that show whether a nation is following the democratic path or the autocratic path. The principle of separation of powers is essential to democracy; this ensures that power is not concentrated in one person or authority, thereby creating checks and balances. It is on the basis of such checks and balances that the power to make laws is given to the legislators, while the executive arm of government executes the laws and the judiciary administers the laws. These powers may not be concentrated in one person or authority. Outside that, there are also tiers of government, for example, federal, state, and local government. With every tier of government there are powers ascribed, and each functions within its own list. For example, under the Nigerian Constitution, there is an exclusive list for the federal government, a residual list for the states, and a concurrent list for the states and the federal government. Montesquieu explained this idea clearly and systematically in his work *The Spirit of the Laws* (1748). According to him, political freedom can only exist if power is checked by other powers; simply put, when powers are divided, it enables different authorities to supervise each other rather than submitting to one another. These checks

12 Doorenspleet and Nijzink, eds., *Party Systems and Democracy in Africa*.

and balances are there to see that citizen's rights are not breached and that the polity remains stable. Another principle closely related to that of separation of power is the independence of institutions. Firstly, there cannot be a true separation of powers unless the arms of government (executive, legislature, and judiciary) are independent of each other politically and economically. Then there are crucial agencies of the executive that must also remain independent to ensure a stable democracy. For example, electoral commissions are essential, as there can be no stable democracy without free and fair elections conducted in line with the country's constitution and other relevant laws.[13]

Judicial Factors: The Impact of Judicial Institutions on Democratic Governance

The judiciary is called the last hope of the common man, as that is the avenue through which individuals in a state may enforce their rights, which may include political rights, and ensure that their voice is heard in a democracy. The importance of the judiciary in a democratic setting can never be overemphasized: it protects constitutional integrity, democratic accountability, and the principles of the rule of law. This is why judicial independence is crucial to the survival of democracy. The fragility of the judiciary in Sub-Saharan Africa has weakened democracy in the region**.** For example, in Togo, the deficiency of judicial independence significantly facilitated President Gnassingbé Eyadéma's constitutional amendment in 2002, which sought to prolong his tenure and consolidate authoritarian rule.[14]

In Nigeria, the executive's interference in the judiciary has always raised questions. O such question refers to the manner in which the former Chief Justice of Nigeria, Justice Onnoghen, was removed before the 2019 election, an

13 For instance, The Constitution of the Federal Republic of Nigeria, 1999 in its 2nd schedule contains the residual and exclusive lists. The Constitution also creates and empowers the different arms of Government.

14 Denis M. Tull and Claudia Simons, "The Institutionalization of Power in Africa: The Case of Togo," *Journal of Modern African Studies* 55, no. 2 (2017): 200.

action that many Nigerians still believe had a political undertone and sought to ensure that the ruling party kept control of the judiciary prior to the election at the time. Recently, the President of the Nigerian Bar Association, Mazi. Afam Osigwe, SAN, suggested that the needs of the judiciary should be contained in the budget and the funds handled by the judiciary itself, as that will reduce the judiciary's dependence on the executive.[15]

The judiciary is the body empowered to uphold free and fair elections, while also quashing any electoral victory obtained by fraud and other forms of irregularity. In fact, the judiciary is empowered to intervene in proceedings concerning elections, from the pre-election declaration of interests to the process of candidates' nominations by parties, and post-election matters.[16] Given that it is the job of the judiciary to interpret the laws guiding a state, it is also the task of the judiciary to interpret the law that outlines when a political office is vacant and prevents usurpers from occupying such an office.[17]

Ghana and Senegal demonstrate how independent judiciaries support the consolidation of democratic processes. Ghana's judiciary has consistently maintained transparent electoral procedures, fostering stable democratic governance. In Senegal, judicial rulings in 2011 backed civic movements like Y'en a Marre, ensuring electoral fairness and preventing any backsliding into authoritarianism.[18] Similarly, Senegal's judiciary played a pivotal role in 2011 by endorsing civic resistance against President Abdoulaye Wade's efforts to prolong his term, thereby strengthening democratic institutional norms.[19] Weak judi-

15 Tosin Oyediran, "Judges Shouldn't Be Beggars, NBA President Slams Govs' Gift to Judges," *Punch Newspaper*, 16 August 2025, https://punchng.com, accessed 20 September 2025.

16 In Nigeria, for instance, the constitution and other relevant legislations have empowered different tribunals and courts to handle cases concerning the processes of an election, for example, Section 285(1) of The Constitution of The Federal Republic of Nigeria as amended created the National Assembly Election Tribunal.

17 Section 272(3) of The Constitution of The Federal Republic of Nigeria as amended grants the Federal High Court of Nigeria the power to determine when an office of a House of Assembly member, State Governor or Deputy Governor is vacant.

18 A. Carl LeVan, "Nigeria's Democratic Rollercoaster: Obasanjo's Third-Term Bid and Its Aftermath," *African Affairs* 114, no. 456 (2015): 346.

19 LeVan, "Nigeria's Democratic Rollercoaster."

ciaries often struggle to challenge constitutional abuses, allowing authoritarian practices to take hold. The 2002 constitutional revision under Eyadéma, which removed term limits, was enabled by a judiciary that accepted it, showing how a fragile judicial system can lead to such outcomes as authoritarianism.[20]

Where there is a weak judiciary, electoral irregularities often go unpunished; this will cause a public loss of confidence and interest in the electoral process and may lead to social unrest. Recent military coups in Mali and Burkina Faso exemplify concerns regarding electoral integrity, further aggravated by judicial shortcomings in safeguarding the fairness of electoral processes.[21] In Nigeria too, a secessionist group known as the Indigenous People of Biafra (IPOB) have used incidents of electoral malpractice, amongst other things, as an excuse to discourage people from participating in elections.[22]

Many courts across Africa face significant challenges, such as a lack of funding, limited expertise, and corruption, which hinder their ability to uphold democratic principles. The key issue is that underfunded courts often struggle to handle complex constitutional cases or to issue timely decisions, which ultimately weakens their role as defenders of democracy. When civil society and international partners back the judiciary, it becomes more effective. For example, civil society groups like Senegal's Y'en a Marre and Burkina Faso's Le Balai Citoyen have teamed up with judicial institutions to push back against authoritarian practices, which boosts the judiciary's impact.[23]

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20 LeVan, "Nigeria's Democratic Rollercoaster."

21 E. Gyimah-Boadi, "Africa's Waning Democratic Commitment," *Journal of Democracy* 26, no. 1 (2015): 112.

22 Lawrence Njoku, "IPOB and Web of Election Boycott in the Southeast" *The Guardian Newspaper*, 18 February 2023, https://guardian.ng, accessed 25 September 2025.

23 Daniel Branch and Nik Cheeseman, "Populism and the African State," *Africa* 86, no. 1 (2016): 1–10; Alcinda Honwana, *Youth and Revolution in Tunisia* (Zed Books, 2013); A Gueye, "Y'en a Marre: « Le ras-le-bol » citoyen et la lutte pour la démocratie au Sénégal," *Politique africaine* 131, no. 3 (2013): 43–58; M Bamouni, "Le Balai Citoyen et l'insurrection populaire d'octobre 2014 au Burkina Faso," *Afrique contemporaine* 255, no. 3 (2015): 31–48; International Crisis Group, *Burkina Faso: Transition et tension* (Africa Report No. 223) (International Crisis Group, 2015).

The judicial institutions in countries like Ghana and Senegal deserve praise for their role in upholding democracy in their respective countries. However, unfortunately, many African countries are still afflicted with a very weak judiciary and are highly dependent on the executives. Such a case is Togo, where the judiciary upheld the constitutional coup that gave the president the ability to extend his term in office in 2002.[24] When the executives assume an authoritarian approach and the legislative arm becomes a mere rubber stamp, the masses should be able to turn to the judiciary. Unfortunately, in some Sub-Saharan African countries, the executive chooses what court orders to obey and which to ignore. The famous human rights lawyer from Nigeria, Femi Falana, SAN, decried that the late Muhammadu Buhari administration, which lasted from 2015 to 2023, saw more substantial disregard for court orders than even the country's military regimes.[25]

The judiciary does not only act as a check on the executive but also on the legislative arm, where they use their powers in a manner that does not meet the standards set by the law, for instance, the impeachment of Enyinnaya Abaribe by the Abia State House of Assembly was challenged in court for failing to meet the standards set by law.[26] The judiciary also partners civil societies and international groups to uphold the rule of law and democracy in a state.

The Role of Civil Society and Citizen Mobilizations in Political and Democratic Transformation

Civil society is a collection of organizations, pressure groups, associations and individuals outside government who make contributions to democratic processes by mobilization, advocacy, and citizen oversight. Such organizations

24 Adewale Banjo, "Constitutional and Succession Crisis in West Africa: The Case of Togo," *African Journal of Legal Studies* 2, no. 2 (2008): 147–61, https://doi.org/10.1163/22109708-00202004.

25 Taiwo Adebulu, "Falana Asks Osinbajo to Stop Disobedience of Court Orders," https//www.thecable.ng//Falana-asks-osibanjo-to-stop-disobedience-of-court-orders/, accessed 6 August 2025.

26 *Abaribe v. Abia State House of Assembly* (2002)14 NWLR (pt 788) 466.

ensure that institutions are performing as they should and serving the needs of the citizens instead of just the leaders. The wave of protests that started in the early 2010s across the Maghreb and Mashreq countries, often called the "Arab Spring," clearly demonstrated civil societies' power to challenge political systems long seen as unchangeable.[27] The Citizen's broom (Balai Citoyen) movement in Burkina Faso as earlier mentioned is a perfect example: by rallying young people and putting consistent pressure on Blaise Compaoré's regime, it played a crucial role in the regime's collapse in 2014 after 27 years in power.[28] This shows what can be achieved by an organized, purposeful, and sincere civil society in pushing citizens' demands and holding the government accountable. Such movements are backed by the fundamental rights like the right to freedom and the press,[29] and the right to peaceful assembly and association.[30] Such rights are also contained in many international treaties, like Article 19 of the International Covenant on Civil and Political Rights. This freedom is also supported by regional agreements, such as the African Charter on Human and Peoples' Rights. It is crucial that such organizations/bodies/societies remain peaceful and operate within the tenets of the law.

There is an obligation for states to allow the public to have access to information and protect fundamental freedoms, as enshrined in target 16.10 of the Sustainable Development Goals (SDGs), as well as Aspiration 3 of the African Union's Agenda 2063, which further strengthens this legal and political duty. It is essential to note that civil society organizations have faced challenges in operating in certain African countries. In November 2023, the President of the Nigerian Labour Congress, who went to Imo State Nigeria to organize a peaceful protest for improvement of workers welfare, accused the Nigerian Police force of arresting him and handing him over to thugs, who consequently beat

27 Michael Safi et al., "How the Arab Spring Engulfed the Middle East and Changed the World," *The Guardian*, 25 January 2021, https://guardian.ng, accessed 20 September 2025.
28 Ibid at n 4.
29 Section 39 (1) Constitution of the Federal Republic of Nigeria, 1999.
30 Section 40 Constitution of the Federal Republic of Nigeria, 1999.

him up.[31] Several calls made by civil societies like the Nigerian Bar Association against President Bola Ahmed Tinubu of Nigeria's suspension of the democratically elected Government of Rivers State in 2025 fell on deaf ears, As a result of this act, the Nigerian Bar Association termed 'an alarming Breach of the Nigerian federal structure' refused to hold its Annual General Conference in Port Harcourt Rivers State as earlier scheduled.[32]

For an active civil society, there is a need for a free press; however, in certain parts of Sub-Saharan Africa, like Eritrea and Rwanda, the press is still heavily regulated, and the voices of the masses are stifled. In countries like South Africa and Kenya, where free press is allowed, we see a more robust political debate and participation and government accountability.[33] At the African Media Convention held in Arusha in May 2022, stakeholders from the press, civil society, and the public and private sectors emphasized the need to strengthen regional collaborations to combat the digital assault on independent journalism. This kind of multidimensional collaboration now seems essential for protecting freedom of expression and maintaining an open civic space. The role of civil societies and citizen mobilization is key in every society where democracy must thrive; it is the tool through which citizens express their approval or disapproval of the government's actions and inactions. Social media has also been a very helpful tool for civil societies and citizenship mobilization. The #ENDSARS protest that rocked Nigeria between September and October 2020 started on social media. It is little wonder that some governments with authoritarian tendencies will try to prevent their citizens from using social media.[34]

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31 Francis Adebayo-Folorumsho, "I Can't Explain the Beating I Received in Imo," *Punch Newspaper*, 10 November 2023, available at https://punchng.com/, accessed 22 September 2025.

32 Emmanuel Agbo, "Emergency Rule: NBA Condemns Tinubu's Suspension of Rivers' Governor, Elected Officials," Premium Times, 19 March 2025, https://www.premiumtimesng.com, accessed 1 September 2025.

33 Reporters Without Borders, "Africa: Media Independence Undermined by Ownership Consolidation and Pressure from Advertisers," RSF, https://rsf.org/en/region/africa, accessed 1 September 2025.

34 The Administration of Muhammadu Buhari of Nigeria banned Twitter, now known as X, for about seven months following the removal of an offensive post made by his official account,

The Impact of International Actors on Political Trajectories Under International Law

One issue that comes to mind in discussing the role played by international actors is that of sovereignty and legality of international interference in a state's domestic affairs.[35] Some international organizations, such as the African Union, ECOWAS, and those outside Africa, notably the European Union, United Nations agencies, and international financial institutions, are incorporating a normative dimension into their assistance efforts, emphasizing respect for human rights, the rule of law, and democratic principles. The recent military takeover in Mali, Niger, and Burkina Faso was not received warmly by international organizations, including ECOWAS, which threatened sanctions.

At the centre of the role that can be played by international organizations and foreign states lies the principle of non-interference in the internal affairs of sovereign states, as enshrined in Article 2(7) of the United Nations Charter. This principle emphasizes that the UN and other international actors must refrain from intervening in matters essentially within the domestic jurisdiction of any state. The respect for state sovereignty has been a cornerstone of international law since the mid-20th century, reflecting a balance between collective security and national autonomy (Charter of the United Nations, 1945). In practice, this means that international bodies are limited in the actions they can take when states violate human rights or democratic norms internally. Typically, responses are confined to diplomatic measures, economic sanctions, arms embargoes, or suspension of development assistance, rather than direct physical intervention.[36] For instance, when governments uppress civil movements or manipulate constitutional orders, international actors may condemn such actions and pressure the regime through punitive measures. However, except

which caused outrage amongst many Nigerians. Sami Olatunji and Temitayo Jaiyeola, "Buhari Lifts Twitter Ban After 222 Days Suspension," *Punch Newspaper*, 13 March 2022.

35 Richard Banégas and Jean Merckaert, "Mobilisations citoyennes, répression et contre-révolution en Afrique," *Revue Projet* 2, no. 351 (2016): 6–11.

36 Thomas M. Franck, "The Emerging Right to Democratic Governance," *American Journal of International Law* 86, no. 1 (1992): 46–91, https://doi.org/10.2307/2203138.

in cases where the United Nations Security Council authorizes coercive action under Chapter VII of the Charter, no foreign power or international institution may lawfully intervene militarily or forcefully. This inherent tension between sovereignty and international responsibility often limits the practical impact of external actors, leaving local political dynamics to shape outcomes on the ground.[37]

Autocracy in the Robe of Democracy

In recent times, an authoritarian regime and a democratic one could have almost the same structures, but the difference will always lie in how they implement their core principles.[38] They may both use written constitutions, frequently based on international standards, declaring the universality of fundamental rights and enshrining the separation of powers in their constitution, but these will remain superficial. An authoritarian government may even emerge from an insincere electoral process. What makes a government democratic is its acceptance of democratic principles and values. For instance, the principle of separation of powers must be allowed to operate as it should, without any attempt to cross the boundaries of powers set for another arm of government or tier of government. Fundamental rights must be fully respected.

37 Michael W. Doyle, *The Question of Intervention: John Stuart Mill and the Responsibility to Protect* (Yale University Press, 2018); Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law* (Oxford University Press, 2001); ICISS, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (International Development Research Centre, 2001).

38 Juan Linz, "Totalitarian and Authoritarian Regimes," in *Handbook of Political Science: Macropolitical Theory, Vol. 3*, ed. Fred I. Greenstein and Nelson W. Polsby (Addison-Wesley Publishing Company, 1975), 175–411; Jérôme Heurteaux, "Les impensés non-démocratiques en Pologne postcommuniste," in *Autoritarismes démocratiques et démocraties autoritaires au xxie siècle. Convergences Nord/Sud*, ed. Olivier Dabène et al. (La Découverte, 2008), 113–32.

Conclusion and Recommendations

Africa's political landscape is characterized by the diversity of movements toward democracy and back toward authoritarianism. This may be attributed to a complex blend of history, levels of institutional autonomy, and dynamic sociopolitical atmosphere that affect state development. It is widely noted across the world that democracy remains a better form of governance than autocracy, because democracy ensures that the populace is carried along in decision-making; hence, international bodies all over the world will always encourage democracy over autocracy, and even countries under a monarchy have started remodelling their monarchy to embody democracy.

Some African countries have managed to stabilize their democracy, while others are still battling internal and external forces that hinder their progress. This has brought about a form of governance that wears the robe of democracy but operates as an autocracy. This false democracy is the type that emerges through a flawed electoral process and undermines every principle and standard of democracy, including undue interference in the running of other arms of government, especially by executives.

For democracy to strive in a nation or state, the individuals at the helm are key. Hence, Africa is in need of leaders who are truly committed to the overall good of their nation or state over their own selfish interest with sincerity. Such leaders will not force themselves on the people they lead, thus cases of electoral malpractice aimed at achieving a result not desired by the majority of voting citizens will be less common. Such leaders will also uphold existing laws and make more laws to see that the will of the people thrives over the selfish desires of government officials.

Africa's judicial institutions must be strengthened and independent, both in funding and operation; as seen in the discussion above, the weakness of the judicial arm of government has contributed greatly to the weakness of democracy in Africa.

Concerned and knowledgeable citizens should help in educating the less knowledgeable to know that they have rights to demand accountability from

their leaders and that the leaders ought to obey both the law of the land and the will of the masses. An active civil society and citizens ready to battle for their democratic rights are vital in the struggle for a true and stable democracy. Considering that leaders are selected by citizens, it is also crucial that citizens reassess values and prioritize the collective good of their country over personal gain. Moreover, it is imperative to state here that calling for citizens to take up activism is not an endorsement to riot or undertake other forms of violent and unlawful protest; citizenship education should rather teach peaceful and lawful means of airing grievances of citizens, even in time of protests.

Armed institutions like the police force should also be educated that they should not turn themselves into the weapons fashioned against the citizens when they air their views about the government in a lawful manner. Such institutions must play their part in ensuring adherence to the laws during election periods.

For multi-cultural countries in Africa like Nigeria, where issues of cultural compatibility and tribalism have somehow hindered democracy, this paper recommends that they embrace federalism in the true sense. In this view, the central authority becomes weaker than its constituent units in a sense that every unit gets to take charge of its resources while contributing a portion to the central to sustain it and help any units that are struggling. This move is designed to mitigate the struggle by people from different tribes to seize central leadership through any means, thus reducing tribal frictions.

Adherence to international standards of democracy is also highly important; however, even in such considerations, leaders in Africa should take note that democracy is primarily designed to uphold the desires of most of a state's citizens, not to pander to international pressure.

International organizations, especially those within the African continent like the African Union and the Economic Community of West African States (ECOWAS), must also take issues concerning democracy seriously and implement sanctions wherever a manifest breach of democracy occurs.

One thing that empowers an authoritarian regime is the knowledge that the people's played no role in its coming to power, and may still not matter when

it remains in power, hence they behave as they wish, irrespective of the voices and choices of the citizens. Hence, there is an urgent need to maintain strong institutions, such as the electoral commission and the judiciary, to uphold electoral laws and ensure that fundamental rights are not breached.

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Rule of Law and National Autonomy in the European Union: Who Defines the Boundaries?[2]

Abstract: This article examines the evolving tension between national autonomy and the European Union's common concept of the rule of law, with a particular focus on judicial independence. While Article 2 TEU frames the rule of law as a value common to all Member States, recent jurisprudence—especially involving Poland—has exposed significant divergences between national and EU-level interpretations. The independence of the judiciary has become a key issue, raising questions about the autonomy Member States have when changing their justice systems and the limits of EU intervention. The article analyses how the EU defines and enforces the rule of law and whether a genuinely "common" understanding exists. In this context, the Polish case illustrates the legal and institutional difficulties involved in restoring the rule of law, highlighting the complex interplay between EU legal obligations and national constitutional identity.

Keywords: rule of law, judicial independence, EU law, national autonomy, Poland, Article 2 TEU, constitutional identity, European Court of Justice, judicial reform

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Introduction

Among the EU's values, the rule of law stands out as one of the most contested and dynamic, both legally and politically. It continues to prompt significant debate, particularly in light of disputes between the European Commission and Member States such as Poland and Hungary, as well as emerging concerns over recent developments in Slovakia.[3]

In Poland, a newly elected government is now attempting to restore adherence to rule-of-law standards, but the process is proving to be far from straightforward.[4] These developments illustrate that the rule of law is not merely a static or rhetorical value but a living principle subject to evolving interpretations, power dynamics, and legal challenges.

Within the European Union, the rule of law is enshrined in Article 2 of the Treaty on European Union (TEU), where it is described as a value common to all Member States. Despite this legal recognition, tensions persist between the national and supranational levels—raising the question of *whether a truly "common" understanding of the rule of law exists* and *who holds the authority to interpret it?*

Hungary, for instance, has openly contested the idea of a uniform definition, suggesting instead that Member States retain the right to interpret such values in accordance with their own constitutional traditions.[5]

3 See the European Parliament's resolution denouncing the attacks on the fight against corruption in Slovakia from 17 January 2024. European Parliament, *Resolution of 17 January 2024 on the Planned Dissolution of Key Anti-Corruption Structures in Slovakia and Its Implications for the Rule of Law* (2023/3021(RSP)), P9_TA(2024)0021, OJ C/2024/5712 of 17 October 2024.

4 In February 2024, the Polish government presented an Action Plan to restore the rule of law in Poland: https://www.gov.pl/web/justice/polish-minister-of-justice-presents-action-plan-for-restoring-the-rule-of-law. For debate over its implementation, see: Anna Wójcik, *Restoring the Rule of Law in Poland: An Assessment of the New Government's Progress* (German Marshall Fund of the United States, 2024), https://www.gmfus.org/news/restoring-rule-law-poland-assessment-new-governments-progress; or *Where Are We After a Year of Restoring the Rule of Law? [DEBATE]*, https://ruleoflaw.pl/where-are-we-after-a-year-of-restoring-the-rule-of-law/; Marcin Szwed, "To Void or Not To Void: On the Legal Effect of the Constitutional Tribunal's Rulings," VerfBlog, published 13 October 2023, https://verfassungsblog.de/to-void-or-not-to-void/, https://doi.org/10.59704/2619f6f8193204f1.

5 This position is notably articulated in the Hungarian Constitutional Court's Decision 22/2016 (XII. 5.), which emphasized that Hungary's constitutional identity must be preserved even

This tension is further complicated by the ongoing debate about whether the rule of law is a legal concept at all or rather a political or philosophical ideal.[6] While it certainly has relevance in political science and sociology, this article deliberately approaches the rule of law from a legal perspective, focusing on its normative and institutional implications under EU law.

The central aim of this article is to examine how the common understanding of the rule of law interacts with the autonomy of Member States within the EU legal order. Particular attention is given to the independence of the judiciary—an essential element of the rule of law and the subject of significant recent case-law by the Court of Justice of the European Union (CJEU), especially in relation to Poland.

This issue illustrates the broader tension between EU legal standards and national constitutional identities. The article seeks to clarify how the EU defines and enforces judicial independence, and where the boundaries of such enforcement lie with respect to national sovereignty.

This article does not seek to assess whether the European Union itself consistently upholds the rule of law, nor does it provide an exhaustive analysis of the various instruments available in the EU's rule of law "toolbox."[7] Instead,

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in the face of European Union obligations. See Fruzsina Gárdos-Orosz, "The Reference to Constitutional Traditions in Populist Constitutionalism—The Case of Hungary," *Hungarian Journal of Legal Studies* 61, no. 1 (2021): 23–51, https://doi.org/10.1556/2052.2021.00298. See also public announcements of Hungarian officials: „Note by the Hungarian Government on the Resolution adopted by the European Parliament on 12th of September 2018 on Hungary," About Hungary, published 9 November 2018, https://abouthungary.hu/speeches-and-remarks/note-by-the-hungarian-government-on-the-resolution-adopted-by-the-european-parliament-on-12th-of-september-2018-on-hungary.

6 See, for example, *Stanford Encyclopedia of Philosophy*, which notes that the rule of law is often considered one ideal among others in liberal political morality, such as democracy, human rights, and social justice. This plurality of values indicates that the rule of law does not operate in isolation but interacts with other principles (Jeremy Waldron, "The Rule of Law," *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta and Uri Nodelman (Stanford University, Fall 2023 Edition), published 22 June 2016, https://plato.stanford.edu/archives/fall2023/entries/rule-of-law/). For deeper insights, see also: Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, 2004).

7 The EU's rule of law "toolbox" refers to the mechanisms the EU uses to protect and enforce the rule of law among its Member States. For deeper insights, see, for example: Cris-

the focus rests on the substantive legal interpretation of the rule of law as developed by EU institutions and the Court of Justice of the European Union (CJEU), and its interaction with Member States' autonomy—particularly in the area of judicial independence.

While the article will touch upon the role of the Council of Europe, and the European Court of Human Rights (ECtHR) will be referenced where relevant, the primary emphasis is placed on EU primary and secondary law, the jurisprudence of the CJEU, and relevant academic literature.

By situating the analysis within this legal framework, the article aims to contribute to a clearer understanding of the evolving role of the rule of law within the EU legal order and its implications for the balance between common European values and national autonomy.

Rule of Law as the Value Shared Among the EU States

In discussing the rule of law as a concept of European law, we are referring to one of the core values said to be shared among all Member States, as enshrined in Article 2 of the Treaty on European Union (TEU). Its placement in primary law indicates that today's EU considers the rule of law to be one of its foundational values,[8] derived from the constitutional traditions common to the Member States.

In addition to the rule of law, Article 2 TEU also sets out other shared values,[9] including respect for human dignity, freedom, democracy, equality, and the pro-

tina Fasone et al., eds., *EU Rule of Law Procedures at the Test Bench: Managing Dissensus in the European Constitutional Landscape* (Palgrave Macmillan, 2024), https://doi.org/10.1007/978-3-031-60008-1.

8 According to Pech, even a linguistic interpretation of this article shows that the listed values form the fundamental pillars of the Union. For more, see Laurent Pech, "'A Union Founded on the Rule of Law': Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law," *European Constitutional Law Review* 6, no. 3 (2010): 359–96, https://doi.org/10.1017/S1574019610300034.

9 In the Maastricht Treaty, the term used was "principles," while the Lisbon Treaty introduced the term "values." This change sparked debate about whether the two should be distinguished. However, the Court of Justice often uses both terms interchangeably in its case-law, indicating that it does not view the distinction as legally significant. See, Tom L. Boekestein, "Making

tection of human rights, particularly the rights of persons belonging to minorities. While these values are closely interconnected,[10] each represents a distinct and independent concept within the EU's legal and political framework.

While these concepts are relatively broad and not further defined in primary law,[11] they cannot be regarded as merely symbolic or non-binding. This is evidenced by the mechanism established under Article 7 TEU, which foresees sanctions in cases of a "serious and persistent breach" of the values enshrined in Article 2 by a Member State.

Even though these values now appear inextricably linked with the European Union, the concept of the rule of law was explicitly mentioned for the first time by the CJEU in its case-law in *Les Verts v. European Parliament* in 1986.[12] The current form of Article 2 TEU largely stems from its formal incorporation into EU law with the Maastricht Treaty. That treaty also introduced Article 49 TEU, which established respect for and promotion of the rule of law as a precondition for applying for EU membership. This demonstrated the rule of law's close connection to the Union's enlargement policy.[13]

We see that the rule of law is firmly embedded in the EU's primary law, but does the EU have a clear and autonomous understanding of what the 'rule of law' entails?

Historically, the concept of the rule of law has evolved within European legal traditions alongside the emergence of the modern state, fundamentally

Do With What We Have: On the Interpretation and Enforcement of the EU's Founding Values," *German Law Journal* 23, no. 4 (2022): 431–51, https://doi.org/10.1017/glj.2022.33.

10 See also UNGA, Res 67/1 (30 November 2012) UN Doc A/RES/67/1, para. 5. In this declaration, the states further affirmed that "human rights, the rule of law and democracy are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations."

11 However, as will be shown in the case-law section of this article, Article 19 TEU plays a key role in upholding the rule of law and is often seen as its concrete expression within the EU legal order.

12 Court of Justice of the European Union, Case C-294/83, *Parti Ecologiste 'Les Verts' v. Parliament*, 1986, ECLI:EU:C:1986:166.

13 In 2006, Olli Rehn, then EU Commissioner for Enlargement, stated that "it is values that define the borders of Europe." See Nicholas Watt, "Nappy Mirth Day to EU," Guardian, published 8 November 2006, http://www.guardian.co.uk/world/2006/nov/08/eu.worlddispatch.

serving as a safeguard against absolute or arbitrary forms of government.[14] The basic meaning of the rule of law then comes down to the subordination of the law to another kind of law, which may not be changed at will by the sovereign of that state.[15] Even today, at the supranational level, this concept remains focused on protecting individuals from the arbitrary exercise of state power.

Still, the rule of law is often regarded as a classic example of a notoriously difficult-to-define concept. As scholars have pointed out, a certain amount of disagreement over its precise meaning is likely the price to be paid for the broad consensus on its overall importance.[16]

As Kochenov points out, the European Union, like its Member States and the academic community, has found it difficult to define the concept precisely.[17] However, to engage meaningfully with the rule of law in the context of EU legal debates, it is essential to identify its core elements, which have been largely shaped by the Court of Justice case-law and European Commission documents.

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14 We can see this clearly in the French legal tradition, where the Rule of Law appears as État de droit, and in the German tradition, where it is known as Rechtsstaat. The Anglo-Saxon concept of the Rule of Law also emerged from the tension between governmental power and individual rights, but it was shaped gradually through case law developed by the courts. In other words, it evolved from bottom up, rather than being proclaimed by a central authority. See, for example, in Czech: Emmanuel Sur, "Od nejistého k implicitnímu (Význam principu právního státu a jeho ochrana ve Smlouvě o Evropské unii)," in *Evropský delikt. Porušení základních hodnot Evropské unie členským státem a unijní sankční mechanismus*, ed. Luboš Tichý (Univerzita Karlova, 2017), 44–52.

15 See Gianluigi Palombella, "Principles and Disagreements in International Law (with a View from Dworkin's Legal Theory)," in *General Principles of Law—The Role of the Judiciary*, ed. Laura Pineschi (Springer Cham, 2015), n 2. See also Gianluigi Palombella, "The Rule of Law and Its Core," in *Relocating the Rule of Law*, ed. Gianluigi Palombella and Neil Walker (Hart Publishing, 2009), n 40, 17, at 30.

16 The Rule of Law has been recognised by the Court of Justice of the European Union (CJEU) as a 'constitutional principle of the Union'. See: Joined Cases C-402/05 P and C-415/05 *P Kadi and Al Barakaat International Foundation v. Council and Commission* ECLI:EU:C:2008:461, paras 281 and 285. More also in: Simon Chesterman, "An International Rule of Law?" *American Journal of Comparative Law* 56, no. 2 (2008): 331–61; or Werner Schroeder, "The Rule of Law as a Constitutional Mandate for the EU," *Hague Journal on the Rule of Law* 15, 2023: 1–17, https://doi.org/10.1007/s40803-022-00185-7.

17 Dimitry Kochenov, "EU Law Without the Rule of Law: Is the Veneration of Autonomy Worth It?" *Yearbook of European Law* 34, no. 1 (2015): 74–96, https://doi.org/10.1093/yel/yev009.

In seeking a clear definition of the rule of law and its components, the European Commission proves particularly helpful.[18] The European Commission also draws on the case-law of the ECtHR and the work of the Venice Commission of the Council of Europe.

In its New Rule of Law Framework,[19] the European Commission identified the following elements of the rule of law: "1. Legality, meaning a transparent, accountable, democratic, and pluralistic process of lawmaking. 2. Legal certainty. 3. Prohibiting the arbitrary exercise of executive power. 4. Effective judicial protection by independent and impartial courts. 5. Effective judicial review, including respect for fundamental rights. 6. Separation of powers. 7. Equality before the law."

This definition does not introduce particularly novel elements. In fact, the European Commission largely adopts the six-point rule of law framework developed by the Venice Commission in its Rule of Law Checklist. The influence of Council of Europe mechanisms on the EU's understanding of the rule of law is thus clear.[20] This is logical, given that the activities of these two European international organizations are, to some extent, complementary, and that all EU Member States are also members of the Council of Europe.

The European Commission defines the rule of law as a principle that includes both formal and substantive elements. In other words, its understanding

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18 See also the definition provided in the European Commission's first Rule of Law Report (*2020 Rule of Law Report: The Rule of Law Situation in the European Union*, COM(2020) 580 final, 30 September 2020).

19 Communication from the European Commission to the European Parliament and the Council: A new EU Framework to strengthen the Rule of Law, COM(2014)158 final.
In his State of the Union address in September 2012, Commission President Barroso stated that this Communication is significant precisely because it contains a public, comprehensive definition of the rule of law from an EU institution. He emphasized that, in doing so, the Commission contributed to a pan-European understanding of the concept, thereby filling a gap left by the founding treaties, which did not include such a definition.

20 For a comparison of both definitions, see Laurent Pech et al., *Meaning and Scope of the EU Rule of Law: Work Package 7—Deliverable 2* (2020), 39; Venice Commission, *Report on the Rule of Law*, point 55; or Laurent Pech, "The Rule of Law as a Well-Established and Well-Defined Principle of EU Law," *Hague Journal on the Rule of Law* 14, 2022: 107–38, https://doi.org/10.1007/s40803-022-00176-8.

favors the 'thick' (substantive) conception, which goes beyond a mere checklist of institutional features and legal norms emphasized by the 'thin' (formal) view.[21] This substantive approach highlights the law's role in achieving tangible, positive effects for society.[22]

This development partly responds to criticisms of the Court of Justice's early case-law on rule of law issues. In its initial rulings—especially those concerning Hungary—the Court tended to focus on the principle of legality, reflecting a formal or procedural understanding of the rule of law, while giving less attention to its substantive or material dimensions.[23]

However, the Court's stance has evolved. In more recent rulings, the Court of Justice has not only assessed the legality of EU legal acts with direct applicability but has also addressed broader concerns relating to the observance of the Union's foundational values.[24]

Although the EU's primary law does not provide a single overarching definition of the rule of law, most national constitutions of the Member States likewise refrain from offering an explicit or comprehensive definition. Instead, historical legal traditions and a broad international consensus have contributed to shaping a relatively clear understanding of its core elements.[25]

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21 The distinction between the 'thin' and 'thick' concepts of the Rule of Law—also referred to as the formal and substantive approaches—was described by R. Dworkin in his keynote speech at the conference "The Rule of Law as a Practical Concept," held at Lancaster House, London, on 2 March 2012. For different approaches, see also Raz or Hayek. For example: Joseph Raz, "The Rule of Law and Its Virtue," in *The Authority of Law: Essays on Law and Morality* (Clarendon Press, 1979), 210–29.

22 See Martin Evald John Krygier, "Rule of Law (and *Rechtsstaat*)," *UNSW Law Research Paper*, no. 52 (2013). SSRN: https://ssrn.com/abstract=2311874.

23 See Case C-286/12, where the CJEU ruled that Hungary's decision to lower the mandatory retirement age for judges breached EU law. The Court's judgment centered on the principle of non-discrimination and the infringement of EU employment directives without delving into broader concerns about judicial independence or the rule of law.

24 See below. Notable cases include *Commission v. Poland* (Independence of the Supreme Court) (C-791/19 R), *Commission v. Hungary* (C-156/21 and C-157/21) regarding the rule of law and judicial independence, and *Commission v. Poland* (Disciplinary Chamber) (C-487/19).

25 For an alternative perspective, see W. B. Gallie, "Essentially Contested Concepts," *Proceedings of the Aristotelian Society* 56, 1956: 167.

However, within the EU context, this ambiguity is sometimes strategically exploited by certain actors. Some Member States argue that defining the rule of law should not be the prerogative of EU institutions. While they challenge the definitions put forward by the EU, they often fail to offer a clear definition of their own.

The key issue, therefore, is not merely definitional, but institutional: namely, the question of *who* holds the authority to interpret and enforce the rule of law at the EU level, where multiple institutional actors are involved, and national sovereignty claims frequently come into play.

The CJEU has increasingly asserted its role in this domain, particularly through its evolving interpretation of Article 19 TEU, which obliges Member States to ensure effective judicial protection. This provision has served as a legal gateway for the Court to examine national judicial reforms and to articulate substantive components of the rule of law.[26]

However, this judicial expansion continues to raise significant constitutional and political concerns. Some legal scholars contend that the CJEU should take an even more active stance by making the values enshrined in Article 2 TEU fully justiciable.[27] Others caution that the Court is already operating at the outer limits of its institutional mandate, potentially risking judicial overreach and undermining its own legitimacy.[28]

For example, Poland, in its legal arguments, did not propose a comprehensive alternative interpretation of the rule of law. Instead, it primarily challenged the EU's competence to assess and enforce it. Hence, it is necessary to break down the question: When it comes to interpreting the rule of law, does the EU place limits on the autonomy of its Member States?

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26 See below.

27 Kim Lane Scheppele, "EU Commission v. Hungary: The Case for the 'Systemic Infringement Action'," VerfBlog, published 22 November, https://verfassungsblog.de/eu-commission-v-hungary-the-case-for-the-systemic-infringement-action/, https:/doi.org/10.17176/20171006-142028.

28 Dimitry Kochenov, "On Policing Article 2 TEU Compliance—Reverse Solange and Systemic Infringements Analyzed," *Polish Yearbook of International Law* 33, 2013: 163.

Since this article largely focuses on the example of Poland, its scope is deliberately limited to the justice sector and the independence of the judiciary, which is a key element of the broader rule of law concept. It will briefly examine key case-law—especially relating to Poland—that has brought this issue to the forefront.

To address this question meaningfully, it is first necessary to clarify what is meant by the "autonomy" of EU Member States and how this concept interacts with the EU's evolving legal order.[29]

Autonomy in Context: Where EU Law Draws the Line

The question of the limits of Member State autonomy is closely linked to the division of powers between the Union institutions and the national authorities of the Member States, as the EU is based on the coexistence of multiple political entities. The primary issue here is to determine the scope of the EU's competences.[30]

The EU, as an international actor, operates on the basis of the principle of conferred competences, meaning it can act only within the limits of the powers expressly granted to it by the Treaties. This principle is enshrined in Article 5(1) and (2) TEU.[31] The competences conferred upon the EU are further categorized into three types, as outlined in Articles 2 to 6 TFEU: exclusive,

29 At the same time, there is the question of autonomy of EU law. On this, see Koen Lenaerts, "The Autonomy of European Union Law," *Post di Aisdue*, no. 1 (2019), https://www.aisdue.eu/wp-content/uploads/2019/04/001C_Lenaerts.pdf; or Opinion 2/13 (Accession of the European Union to the ECHR) of 18 December 2014, EU:C:2014:2454.

30 Compétence/Kompetenz/Competenza/Competencia is a traditional continental public law concept which has no proper translation in standard English but has become common in the language of European law through the English version of the European Treaties. See, for example, Loic Azoulai, ed., *The Question of Competence in the European Union* (Oxford University Press, 2014).

31 Article 5(2) TEU: "Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States."

shared, and supporting competences. Consequently, the Union's powers are limited, and as explicitly stated in Article 5(2) TEU, "competences not conferred upon the Union in the Treaties remain with the Member States."

It is therefore undeniable that Member States retain a significant degree of autonomy. This autonomy is evident, firstly, in policy areas where the EU has no competence. Secondly, Member States remain sovereign entities—they possess the capacity to enter international commitments and, importantly, they hold the unilateral right to withdraw from the Union, as established by Article 50 TEU. Also known as *Kompetenz-Kompetenz*, which remains with the Member States (who must, however, comply with the obligations assumed in the EU Treaties).[32]

Autonomy, however, should be distinguished from national sovereignty. While sovereignty refers to the supreme authority of a state over its territory and legal order,[33] autonomy in the EU context reflects the capacity of Member States to exercise self-governance within the limits set by EU law.

Contrary to the claims of some EU critics, national sovereignty remains with the Member States. However, in the context of debates on the European Union and its shared values, the term is often misused or misinterpreted.[34]

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32 The notion of Kompetenz-Kompetenz, originally developed in the late nineteenth century to distinguish a federation from a confederation, refers to the authority to determine the extent of one's own competences. In its Maastricht Judgment (12 October 1993, 2 BvR 2134/92 and 2 BvR 2159/92), the Bundesverfassungsgericht held that the EU does not possess Kompetenz-Kompetenz; only the Member States have the authority to confer competences upon the EU. This position was reaffirmed in the Lisbon Judgment (30 June 2009, 2 BvE 2/08), which emphasized that the EU's powers derive from the Member States, who retain ultimate control over their scope.

33 National sovereignty is largely defined by public international law, notably in the UN Charter (Article 2(1)), which affirms the sovereign equality of states. Additionally, many European countries enshrine sovereignty in their constitutions. For example, Article 20(2) of the German Basic Law (Grundgesetz) states that all state authority emanates from the people, reflecting the principle of popular sovereignty. For a scholarly discussion on sovereignty in the European context, see Armin von Bogdandy and Jürgen Bast, eds., *Principles of European Constitutional Law*, 2nd ed. (Hart Publishing, 2009).

34 See, for example, *The Great Reset: Restoring Member State Sovereignty in the European Union*, co-authored by the Hungarian think tank Mathias Corvinus Collegium (MCC) and the Polish Ordo Iuris Institute for Legal Culture (Rodrigo Ballester et al., *The Great Reset: Restoring Member State Sovereignty in the European Union; A Two Scenario Proposal Through Institutional Reform for a New EU from Mathias Corvinus Collegium And Ordo*

At the same time, using the terminology of the CJEU, the 'transfer of competences' by the Member States to the EU can be described as a 'permanent limitation of their sovereign rights'. This was clearly articulated by the Court in its landmark *Van Gend en Loos* judgment.[35]

Still, the EU is not sovereign under international law, as sovereignty is traditionally attributed only to states—currently the only legal entities recognized as possessing full sovereignty in the international legal order.[36]

The autonomy of Member States cannot be regarded as absolute, being limited by obligations arising from EU membership, the primacy and direct effect of EU law, as well as the duty of sincere cooperation (Article 4(3) TEU).[37] According to this duty, Member States must ensure the effective application of EU law, which necessarily includes maintaining an independent and impartial judiciary capable of providing legal protection in all areas governed by EU law.[38]

At the same time, EU primary law expressly safeguards the preservation of national identities in Article 4(2) TEU,[39] a provision often invoked in debates on the meaning and scope of the rule of law within the Union.[40]

Iuris Institute (Academic Publishing House of the Ordo Iuris Institute for Legal Culture and Mathias Corvinus Collegium, 2025).

35 There the Court stated: "The [European Economic Community] constitutes a new legal order of international law, for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only the Member States but also their nationals." See Judgment of 5 February 1963, *van Gend & Loos*, 26/62, EU:C:1963:1.

36 For the perspective of international law, see Bardo Fassbender, "Are the EU Member States Still Sovereign States?" *The Perspective of International Law. European Papers* 8, no. 3 (2023): 1629–43, https://doi.org/10.15166/2499-8249/733.

37 "Member States shall facilitate the achievement of the Union's tasks and refrain from any measures that could jeopardise the attainment of the Union's objectives. Moreover, the Court of Justice of the European Union recognizes this as a self-standing obligation, meaning that even when Member States exercise their residual competences, they must ensure that their actions do not hinder the EU in fulfilling its tasks. See, for example, Opinion 1/03 Lugano EU:C:2006:81, para 119, C266/03, *Commission v. Luxembourg*, EU:C:2005:341, para 58; C433/03, *Commission v. Germany*, EU:C:2005:462, para 64.

38 See *Commission v. Hungary*, C-78/18.

39 "The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government."

40 For the scholarly debate, see Mary Dobbs, "Sovereignty, Article 4(2) TEU and the Respect of National Identities: Swinging the Balance of Power in Favour of the Member States?,"

Still, as Komárek rightly notes,[41] the so-called *national identity clause*[42] of Article 4(2) TEU, which obliges the EU to respect Member States' national identities and constitutional structures, cannot be interpreted as an absolute safeguard of the special role of constitutional courts, as this provision often implies a conflictual rather than a mutually reinforcing relationship between the EU and its Member States.

This tension is not new. Since the landmark Costa v. ENEL ruling by the CJEU in 1964, the principle of the primacy of EU law has required national authorities—including constitutional courts—to set aside domestic provisions that conflict with directly applicable EU law. This development has, in effect, stripped constitutional courts of their exclusive competence to review national legislation.

It is therefore unsurprising that some constitutional courts have attempted to reassert this role.[43] Poland is not the only case in point. As the President of the Czech Constitutional Court once remarked in connection with the CJEU's ruling in the *Landtová* case: "If there is a national authority whose supremacy is most threatened by EU law, it is the Constitutional Court."

Tensions between national constitutional identity and the primacy of EU law are inevitable in a multilevel legal order.[44] However, this does not grant national constitutional courts the authority to disregard EU law—or parts of

Yearbook of European Law 33, no. 1 (2014): 298–334, https://doi.org/10.1093/yel/yeu024. Or Barbara de Witte, "Article 4(2) TEU as a Protection of Institutional Diversity of the Member States," *European Public Law* 27, no. 3 (2021): 559–70.

41 Jan Komárek, "The Place of Constitutional Courts in the EU," *European Constitutional Law Review* 9, no. 3 (2013): 420–50.

42 Also commonly referred to as "constitutional identity clause" or "national constitutional identity clause." The wording of Article 4(2) TEU is as follows: "The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government."

43 See, for example, Horatius Dumbravă, "The Effects of Constitutional Court Judgments in the Context of EU Integration: The Case of Romania as an EU Member State," *ERA Forum* 25, 2024: 61–78, https://doi.org/10.1007/s12027-024-00794-9.

44 Monica Claes and Jan-Herman Reestman, "The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the *Gauweiler* Case," *German Law Journal* 16, no. 4 (2015): 917–70. https://doi.org/10.1017/S2071832200019957.

it—altogether, as was the case with the judgment of the Polish Constitutional Tribunal in case K 3/21 of 7 October 2021.[45]

It is true that several national constitutional courts have, at various points, challenged or scrutinized the primacy of EU law, especially where they perceived EU institutions as overstepping their competences.[46] However, the Polish Constitutional Tribunal's judgment in case K 3/21 is particularly salient for its scope, tone, and legal implications.

This is precisely why it would not make sense to designate constitutional courts as the ultimate arbiters of the rule of law at the EU level. Constitutional courts themselves may include unlawfully appointed judges or fail to meet fundamental rule of law standards. This creates the risk of a paradoxical situation where a "captured" constitutional court is tasked with ruling on its own independence or on the independence of other courts subject to similar political influence.

Moreover, even if we consider constitutional courts that fully comply with judicial independence criteria, the EU comprises 27 Member States, each with its own constitutional court and potentially divergent interpretations of what the rule of law entails. This diversity risks producing fragmented and inconsistent understandings of a foundational EU value.

The CJEU therefore remains the most logical institution to hold the authority to interpret judicial independence as a core aspect of the rule of law—a common value shared by all Member States. However, the values enshrined in Article 2 TEU are, so far,[47] not directly justiciable. This is primarily due

45 In that ruling, the Tribunal directly challenged the principle of the primacy of EU law, declaring several provisions of EU primary law, as interpreted by the Court of Justice of the European Union (CJEU), to be incompatible with the Polish Constitution. Most notably, the Tribunal rejected the binding effect of Articles 1, 2, and 19(1) TEU, to the extent that they were understood to authorize the EU to assess the structure and independence of Poland's judiciary.

46 For example, in Germany, where the Maastricht and the Lisbon treaties were objects of intense constitutional scrutiny. See BVerfGE 89, 155 (1993); BVerfGE 123, 267 (2009).

47 This may change with the Court's ruling in *Commission v. Hungary* (Case C-769/22, the so-called 'anti-LGBTQ' case), expected in December 2025. In her Opinion delivered on 5 June 2025, Advocate General Ćapeta argued that the justiciability of the values enshrined in Article 2 TEU should be affirmed by the Court. She based her reasoning on

to their open-ended—some would argue vague—formulation, which makes it difficult to meet the traditional criteria for direct effect, namely clarity and unconditionality.[48]

Despite this limitation, the CJEU has developed a robust body of case law operationalizing the rule of law through other Treaty provisions—most notably Article 19(1) TEU (which guarantees judicial independence) and relevant provisions of the Charter of Fundamental Rights. This approach, often triggered by infringement proceedings initiated by the European Commission or preliminary references submitted by national courts, allows the Court to uphold the values of Article 2 TEU indirectly.

In the next section of this article, I will examine this case-law in more detail, focusing on its implications for the Polish judicial system.

Judicial Independence: A Shared Responsibility?

To examine the limits of Member State autonomy, this article uses the example of the judicial reforms in Poland, which unfolded over recent years and led to a significant conflict with the European Union bodies regarding the interpretation of the rule of law. After 2015, the Polish government[49] undertook a series of controversial judicial reforms, invoking national sovereignty and

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a textual, contextual, and historical interpretation of the provision. The Advocate General proposed a test for identifying a violation of these values: in her view, Article 2 TEU is breached when the denial of the values forms the root cause of the infringement of EU law. This determination should be made through a contextual analysis that takes into account the specific circumstances of each case. See the Opinion of Advocate General Ćapeta, delivered on 5 June 2025, Case C-769/22, *European Commission v. Hungary*, ECLI:EU:C:2025:408.

48 See, for example, L. D. Spieker, "Defending Union Values in Judicial Proceedings: On How to Turn Article 2 TEU into a Judicially Applicable Provision," in *Defending Checks and Balances in EU Member States*, ed. Armin von Bogdandy et al. (Springer, 2021), https://doi.org/10.1007/978-3-662-62317-6_10. Also, Armin von Bogdandy and Luke D. Spieker, "Countering the Judicial Silencing of Critics: Article 2 TEU Values, Reverse Solange, and the Responsibilities of National Judges," *European Constitutional Law Review* 15, no. 3 (2019): 391–426. https://doi.org/10.1017/S1574019619000324.

49 Now ex-government, led by PiS (Prawo i Sprawiedliwość), in English 'Law and Justice'.

the need to "cleanse the judiciary of remnants of communist-era structures" as justification.[50]

The key changes included:

- Establishment of the Disciplinary Chamber of the Supreme Court, which was granted powers to discipline, suspend, or remove judges—raising concerns over political control and judicial intimidation.
- Lowering the mandatory retirement age for Supreme Court judges, which allowed the government to prematurely replace a significant number of judges, potentially undermining judicial independence.
- Increasing political influence over the National Council of the Judiciary (Krajowa Rada Sądownictwa – KRS), the body responsible for nominating judges. This shift enabled the executive and legislative branches to exert substantial control over judicial appointments.[51]

The CJEU has repeatedly ruled[52] that these reforms violate EU legal standards on judicial independence, which are integral to the rule of law and protected under Article 2 TEU. The European Commission has launched several infringement procedures against Poland, and in some cases, the CJEU has issued interim measures to suspend the application of the contested laws.

50 See White Paper on the Reform of the Polish Judiciary from 2018, available on-line: https://www.statewatch.org/media/documents/news/2018/mar/pl-judiciary-reform-chanceller-white-paper-3-18.pdf; for a further commentary on this see: Jan van Zyl Smit, "After Poland's Attempted Purge of 'Communist-era' Judges, Do We Need New International Standards for Post-authoritarian Countries Reforming Their Judiciary? (Part I)," United Kingdom Constitutional Law Association, published 15 January 2019, https://ukconstitutionallaw.org/2019/01/15/jan-van-zyl-smit-after-polands-attempted-purge-of-communist-era-judges-do-we-need-new-international-standards-for-post-authoritarian-countries-reforming-their-judiciary.

51 This happened through restructuring the composition of the KRS. After the reform (via the 2017 Law on the National Council of the Judiciary), the 15 judicial members were elected by the Sejm (lower house of Parliament), not by fellow judges. This arguably gave the parliamentary majority direct influence over who sits on the KRS, thus undermining the separation between the judiciary and the legislature/executive.

52 Namely Case C-192/18, *Commission v. Poland*, Joined Cases C-585/18, C-624/18 and C-625/18, *A.K. v. Krajowa Rada Sądownictwa and Others*, Case C-791/19, *Commission v. Poland*, Case C-204/21, *Commission v. Poland*, Case C-216/18 PPU, *Minister for Justice and Equality v. LM*.

This conflict illustrates a broader tension within the EU legal order: the assertion of national sovereignty and autonomy by a Member State versus the Union's commitment to upholding common values—especially the independence of the judiciary as a cornerstone of the rule of law. The Polish case thus serves as a concrete example of how far Member States can go in reforming their judicial systems before breaching their obligations under EU law.

The CJEU's landmark judgment in *Associação Sindical dos Juízes Portugueses* (Case C-64/16, *ASJP*)[53] laid the foundation for its subsequent case-law on the rule of law, particularly in relation to Poland. A brief overview of this case is essential to understanding how the Court's interpretation of the rule of law has evolved, particularly since several legal scholars consider *ASJP* the most significant ruling in defining both the meaning and scope of the rule of law as a general principle of EU law.[54]

The key element of this case lies in the fact that the CJEU assessed judicial independence in a Member State based on the EU principle of effective judicial protection, without relying on specific provisions of secondary legislation.[55]

Instead, the Court grounded its reasoning in Article 19(1) TEU, interpreting it as obliging Member States to ensure that judicial bodies which may

53 Judgment of the Court of Justice of 27 February 2018 in Case C-64/16, *Associação Sindical dos Juízes Portugueses*.

54 Alongside the Case 294/83 *Parti écologiste "Les Verts" v. European Parliament* and C-896/19 – *Repubblika v. Il-Prim Ministru*. See Laurent Pech and Sébastien Platon, "Judicial Independence Under Threat: The Court of Justice to the Rescue in the *ASJP* Case," *Common Market Law Review* 55, no. 6 (2018): 1827, https://doi.org/10.54648/cola2018146. See also 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," *European Constitutional Law Review* 14, no. 3 (2018): 622, https://doi.org/10.1017/S1574019618000330.

55 This stands in contrast to earlier judgments, such as the Court of Justice of the European Union, Case C-286/12, *European Commission v. Hungary*, ECLI:EU:C:2012:744. For a more detailed analysis, see: Laurent Pech and Dimitry Kochenov, *Respect for the Rule of Law in the Case Law of the European Court of Justice: A Casebook Overview of Key Judgments since the Portuguese Judges Case* (Swedish Institute for European Policy Studies, 2021), available at SSRN: https://ssrn.com/abstract=3850308.

interpret and apply EU law provide effective judicial protection. Crucially, the Court emphasized that such protection presupposes respect for judicial independence, which is a fundamental component of the rule of law.[56]

In this respect, the Court of Justice implied that the organization of national judicial bodies is not exclusively a matter for individual Member States, which instead have an obligation to ensure that their courts and judges are independent "in the fields covered by EU law."[57]

An example of the above-mentioned approach being applied to the scope of EU law within proceedings under Article 258 TFEU[58] is the case of *Commission v. Poland* from 2019 concerning the Law on the Supreme Court.[59]

In this case, the European Commission argued that Poland had breached EU law by lowering the retirement age of Supreme Court judges and granting the President discretionary power to extend their mandate, thereby undermining judicial independence. This was found to violate Article 19(1) TEU and Article 47 of the Charter of Fundamental Rights of the EU.[60]

Contrary to earlier case-law, the Commission did not rely on the argument of age discrimination but instead focused on the principles of judicial independence and the irremovability of judges as core elements of the rule of law. Moreover, the Court of Justice emphasized the obligation of every Member State to uphold

56 Paragraphs 38–40 of the Judgment of the Court of Justice of 27 February 2018, in Case C64/16, *Associação Sindical dos Juízes Portugueses.*

57 However, this does not automatically mean that the Court of Justice has adopted a similar approach to other elements that make up the definition of the Rule of Law under Article 2 TEU. Within EU law, the principle of effective judicial protection can be considered particularly significant. This was confirmed in the opinion of Advocate General Tanchev in the case *Miasto Łowicz*. See Opinion of Advocate General Tanchev in Case C-558/18, *Miasto Łowicz*, paragraph 92.

58 Infringement proceedings initiated by the European Commission against a Member State that is believed to be failing to fulfill its obligations under EU law.

59 Court of Justice of the European Union, judgment of 24 June 2019, Case C-619/18, ECLI:EU:C:2019:531.

60 Core principles enshrined in Article 47: Right to an Effective Remedy, Right to a Fair Trial and Right to Legal Representation and Legal Aid. We can say that this article mirrors Article 6 and Article 13 of the European Convention on Human Rights (ECHR). The CJEU also held that: "Article 47 of the Charter secures in EU law the protection afforded by Article 6(1) of the ECHR." See Case C-199/11 Otis [2012] ECR 000.

its commitments under EU law and implicitly suggested that Poland did not act in good faith when adopting the national legislation in question.[61]

Poland, on the other hand, argued that the organization of its judiciary falls exclusively within national competence, as the European Union does not have general legislative authority in this area. In support of this position, Poland invoked Articles 4(1), 5(1), and 5(2) TEU, highlighting the principle of conferral.[62]

In this case, the CJEU clearly stated that while Member States may organize their judicial systems, they must do so in compliance with EU law. Under Article 19(1) TEU, they are required to ensure effective legal protection, which includes judicial independence. As courts like Poland's Supreme Court may apply EU law, national measures affecting them fall within the scope of EU law, even if judicial organization is a national competence.

At the same time, this does not mean that it is currently[63] possible to directly invoke a violation of any of the values under Article 2 TEU to initiate this type of proceeding before the CJEU although some scholars and experts have argued in favor of such a possibility.[64]

In the case of *A.K. and Others* (C-625/18), the CJEU examined whether Poland's newly created Disciplinary Chamber of the Supreme Court met the EU's standards of judicial independence. The case focused on Article 47 of the Charter of Fundamental Rights. The Court found that the method of appointing judges to the Chamber raised serious concerns. Judges were appointed by

61 In paragraph 82 of the judgment, the Court expresses its "serious doubts as to whether the reform of the retirement age of Supreme Court judges" was genuinely aimed at achieving the stated objectives, rather than "with the intention of removing a specific group of judges from that court." For more, see: Pech and Kochenov, *Respect for the Rule of Law in the Case Law of the European Court of Justice*.

62 Furthermore, Poland argued that the contested measures did not implement EU law and thus fell outside the scope of Article 47 of the Charter of Fundamental Rights of the European Union, citing Article 51(1) of the Charter. Additionally, Poland maintained that the reform of the retirement age pursued a legitimate objective.

63 See footnote 45.

64 See Spieker, "Defending Union Values in Judicial Proceedings."

the National Council of the Judiciary (KRS), which had been restructured to increase political influence. This, according to the Court, created legitimate doubts about the Chamber's independence and impartiality.

In this case, the CJEU held that judicial bodies must be independent and impartial not only in law but also in practice. It emphasized that systemic threats to judicial independence can undermine the effective judicial protection required by EU law. It concluded that the Disciplinary Chamber's lack of independence could discourage judges from exercising their functions freely, particularly when they risk facing disciplinary sanctions for applying EU law or for referring preliminary questions to the CJEU.[65]

This judgment reaffirmed that judicial independence is an essential component of the rule of law, a foundational value of the European Union enshrined in Article 2 TEU, and that Member States are required to guarantee this independence in accordance with Article 19(1) TEU, which ensures the right to effective judicial protection.

If we then accept that the CJEU has competence to review national judicial reforms on the basis of Article 19(1) TEU, which secures the right to effective judicial protection, *how does the Court determine whether such reforms comply with the principles of the rule of law?*

To determine whether judicial reform complies with the principles of the rule of law, the CJEU applies a substantive test grounded in key elements of judicial independence. This includes institutional autonomy from the executive and legislature, protection from arbitrary disciplinary measures, and the appearance of independence to ensure public trust. These criteria are well rooted in the Court's case-law. In this context, I will refer to two additional relevant judgments.

65 For more, see: Michał Krajewski and Michał Ziółkowski, "EU Judicial Independence Decentralized: *A.K.*," *Common Market Law Review* 57, no. 4 (2020): 1107–38, https://doi.org/10.54648/cola2020717. Or Paweł Filipek, "Only a Court Established by Law Can Be an Independent Court: The ECJ's Independence Test as an Incomplete Tool to Assess the Lawfulness of Domestic Courts," VerfBlog, published 23 January 2020, https://verfassungsblog.de/only-a-court-established-by-law-can-be-an-independent-court/, https://doi.org/10.17176/20200123-181754-0.

In case C-791/19, *Commission v. Poland* (2021), the Court held that the Disciplinary Chamber of the Polish Supreme Court did not offer sufficient guarantees of independence and impartiality, primarily because of the manner in which its members were appointed.[66] The Court emphasized that the body responsible for disciplinary proceedings against judges must be free from external influence, particularly from the executive or legislative branches.[67]

In Case C-204/21, *Commission v. Poland* (2021), the CJEU focused on the disciplinary regime for judges, concluding that the Polish legal framework enabled the imposition of disciplinary liability on judges for the content of their judicial decisions, including for making preliminary references to the CJEU. This had a 'chilling effect' on judicial independence and was incompatible with the right to effective judicial protection.[68]

In the relevant cases, the Court underscored that judicial independence must be assessed both subjectively (impartiality of individual judges) and objectively (structural safeguards to prevent undue influence). Equally important is the perception of independence: even the mere appearance of political influence can erode public trust in the judiciary, which is a fundamental pillar of the rule of law.

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66 The reform in question allowed the Polish President to appoint members of the Disciplinary Chamber based on recommendations from the National Council of the Judiciary (KRS)—a body whose independence was itself compromised due to the premature termination of the mandates of its previous members and the dominant role of Parliament in appointing new ones. This was found to pose a structural threat to judicial independence.

67 For more in-depth analysis, see Laurent Pech, *Protecting Polish Judges from Poland's Disciplinary 'Star Chamber': Commission v Poland. Case C-791/19 R, Order of the Court (Grand Chamber) of 8 April 2020, EU:C:2020:277* (2020), available at SSRN: https://ssrn.com/abstract=3683683 or http://dx.doi.org/10.2139/ssrn.3683683.

68 The Court found that the broad and vague nature of disciplinary offences, coupled with a lack of effective procedural safeguards, enabled disciplinary action to be used as a tool of political control, thereby undermining judicial impartiality. For more, see also Jakub Jaraczewski, "Polexit or Judicial Dialogue?: CJEU and Polish Constitutional Tribunal in July 2021," VerfBlog, published 19 July 2021, https://verfassungsblog.de/polexit-or-judicial-dialogue/, https://doi.org/10.17176/20210720-015954-0. More on the importance of the judicial dialogue: Ruairi O'Neill, "Defending Judicial Independence in Court: A Subjective Right to Independence in EU Law," *Liverpool Law Rev* 46, 2025: 65–84, https://doi.org/10.1007/s10991-024-09376-8.

In summary, the CJEU affirms that judicial independence is a fundamental and non-negotiable component of the rule of law. National reforms must guarantee effective judicial protection for individuals under EU law and comply with EU legal standards, particularly Articles 2 and 19 TEU. Any discretionary powers introduced by such reforms must be shielded from political influence and accompanied by adequate safeguards. Moreover, reforms must pass tests of proportionality and necessity to ensure that they do not unjustifiably undermine judicial independence.

A closer look at the CJEU's reasoning shows that it did not develop in isolation. Judicial independence is a concern shared by other international actors. In its case-law, the Court explicitly referred to judicial independence as a principle also protected under Article 6(1) of the European Convention on Human Rights (ECHR).

The ECtHR similarly interprets this provision as requiring judges to be independent, including from the executive and legislative branches.[69] Although the CJEU is not formally bound by ECtHR rulings, it has referred to them as persuasive authority in support of its interpretation of EU legal obligations.[70]

At the same time, the roles of the CJEU and the ECtHR remain distinct, even in the area of the rule of law. The ECtHR operates under the European Convention on Human Rights, with the main aim of protecting individual human rights. The CJEU, on the other hand, focuses on interpreting and enforcing EU treaties, ensuring the uniform application of EU law across Member States.[71]

69 In *Campbell and Fell v. the United Kingdom*, judgment of 28 June 1984, the ECtHR interpreted Article 6(1) of the ECHR, emphasizing that: "In determining whether a body can be considered 'independent' … regard must be had inter alia to the manner of appointment of its members and the duration of their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence."

70 See, for example, the relevant case-law: *Reczkowicz v. Poland*, Application no. 43447/19, Judgment of 22 July 2021, European Court of Human Rights (First Section), CE:ECHR:2021:0722JUD004344719.

71 There are more aspects which remain distinct. The ECtHR, as an international court under the Council of Europe, issues declaratory judgments—it may find a violation of the European Convention on Human Rights but cannot annul national laws or decisions, nor compel compliance. In contrast, the CJEU, as a supranational court of the European Union, issues

Back to What? Poland's Efforts to Restore the Rule of Law

The response to the main question: *Has Poland's autonomy in judicial matters clashed with the boundaries of EU law?* is affirmative. The CJEU has repeatedly ruled that while Poland, like any EU Member State, has the right to organize its judicial system, this autonomy is limited by its obligations under EU law, particularly regarding judicial independence, which is considered a core principle of the rule of law. Apart from Article 19(1) TEU and Article 47 of the Charter of Fundamental Rights, Polish authorities clearly disregarded the principle of sincere cooperation (Article 4(3) TEU).

Judicial independence is a key part of the common values protected by EU law, and it is up to the CJEU to define what this principle means. National judges play a special role in making sure EU law is applied correctly. They do this through direct effect, the primacy of EU law, and by working with the CJEU through the preliminary ruling procedure in Article 267 TFEU. As O'Neill argues, judges can become targets when the rule of law is undermined, particularly due to political pressure from the government or parliament, precisely because of their crucial role in upholding EU law.[72]

However, in light of the recent shift in Poland's political direction and the new government's declared commitment to rebuilding trust with other EU Member States, a critical question arises: What are the next steps? It is my considered view—though perhaps not widely shared—that even well-intentioned judicial reforms may carry the risk of further distorting the rule of law, rather than restoring it to its proper constitutional balance.[73]

binding judgments with direct effect within EU Member States. National authorities and courts are required to give full effect to CJEU rulings, and under the principle of primacy, must disapply conflicting national law.

72 For more, see O'Neill, "Defending Judicial Independence in Court."

73 For more elaborate analysis, see, for example, Marcin Szwed, "Rebuilding the Rule of Law: Three Guiding Principles," VerfBlog, 29 April 2024, https://verfassungsblog.de/rebuilding-the-rule-of-law/, https://doi.org/10.59704/794ecd417ad8ac53. Sadurski, on the other hand, suggested that elements of transitional justice might be needed to redress the damage done to democratic institutions, especially the judiciary. See Wojciech Sadurski, "Transitional Constitutionalism versus the Rule of Law?," *Hague Journal on the Rule of Law* 8, no. 2 (2016): 337–55, https://doi.org/10.1007/s40803-016-0029-7.

From the perspective of European law, such changes clearly fall within the competence of the Member State, not the EU. Unlike bodies such as the Venice Commission of the Council of Europe,[74] the EU offers limited guidance on such matters.

In this area, the EU typically intervenes only ex post—either through soft-law instruments such as the European Commission's Annual Rule of Law Report, which monitors developments in all Member States and serves as a political and preventive tool, or when specific legal issues arise and are brought before the CJEU, notably through infringement proceedings under Article 258 TFEU.[75]

So far, the European Union has welcomed the new Polish government's declared commitment to restoring the rule of law. However, due to the different stance of the President and the Constitutional Tribunal, no tangible legislative changes to the judiciary have been implemented. The EU had two primary tools at its disposal to address rule of law deficiencies: the Article 7 TEU procedure—often referred to as the "nuclear option" due to its political nature—and the conditionality mechanism linked to EU funds.

The Article 7 procedure was discontinued after several years without Poland providing concrete legal guarantees. Many legal scholars argue this step was premature.[76] Similarly, the EU unfroze previously withheld funds based on the submission of a reform plan by the new government, rather than waiting

74 The Polish government formally requested guidance from the Venice Commission on structuring judicial reforms in compliance with European standards on 10 July 2024. The Commission issued its opinion on 14 October 2024, addressing questions from the Polish Minister of Justice about the constitutionality of judicial appointments, their possible invalidation, and the rights of appointed judges to seek legal recourse. For more, see the full opinion here: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2024)029-e.

75 In cases of a serious and persistent breach of EU values, the Union may resort to the procedure laid down in Article 7 TEU. However, this requires strong political will and a high degree of consensus among Member States, making its activation and effectiveness particularly challenging.

76 For more, see: Maciej Krogel, "The Closure of the Article 7(1) TEU Procedure Against Poland: The Weight of Intentions and the Risk to Common Values in the Twilight of Illiberalism," *Maastricht Journal of European and Comparative Law* 32, no. 3 (2025): 315–25, https://doi.org/10.1177/1023263X251338198.

for the actual implementation of reforms—another move some critics view as overly optimistic.[77]

The recent presidential election in Poland resulted in the victory of a candidate backed by the former ruling party (PiS), raising concerns that meaningful judicial reforms may continue to be stalled or blocked by presidential vetoes.[78]

This outcome underscores the fragility of the reform process and the challenges that lie ahead in rebuilding judicial independence and restoring the rule of law. Also, had the EU maintained these instruments until more concrete reforms were enacted, it could have played a stronger role in safeguarding the rule of law during this delicate transition.

Conclusion

To conclude this brief exploration of the rule of law as a common European Union value in relation to the national autonomy of Member States, a few final reflections are in order.

It is important to remember that national constitutional orders and the law of European integration are not interchangeable, but rather complementary systems, each grounded in distinct normative foundations. While they often pursue shared values—such as democracy, human rights, and the rule of law—they are grounded in different normative sources: national constitutions on the one hand, and the EU treaties and supranational legal order on the other.

77 Daniel Freund, a Green member of the European Parliament, said the Commission had unfrozen the funds to Poland "prematurely". "The release of the funds was subject to the submission of a plan instead of waiting until the reforms actually take effect," Freund told the FT. See https://www.ft.com/content/a5a62d01-194b-4fca-9783-9217f7a84f3d?accessToken=zwAAAZcwonYWkdOlpi0BGUtPytOXg5IX96hPPQ.MEYCIQCCi8QOdqlTEZ-PL0nVl9DHf-rOol21ARTFZspHz2BvDIAIhAJUARa0cc9d9j9PIrsOWgxM4uXALVx-IlitV5DR5xP0C&segmentId=e95a9ae7-622c-6235-5f87-51e412b47e97&shareType=enterprise&shareId=f44a7abb-a476-49a3-9eac-1707d0c64a84.

78 See, for example, comments by Jaraczewski, an EU lawyer of Polish origin: https://lnkd.in/dVeH4W4f.

The relationship between state sovereignty and international cooperation remains therefore inherently complex. As several scholars have observed, European supranational integration continues to represent a notable exception in a world predominantly structured around nation-states and the principle of national sovereignty.[79]

At the same time, the European Union is deeply rooted in the legal traditions of its Member States, shaped in no small part by their national constitutions and the jurisprudence of their constitutional courts.[80] It must be noted that since the EU's legal foundation derives from the Member States by way of the treaties, this gives national constitutions considerable leeway to "influence" EU law.[81]

The values enshrined in Article 2 TEU can therefore indeed be called *common values*—they are not imposed externally but should reflect the foundational commitments of the Member States.

While Member States' autonomy grants them a degree of discretion in shaping their legal and institutional frameworks, it does not confer absolute freedom. Member States are bound to respect the Union's shared values, including the rule of law, as reaffirmed by the Court of Justice in C-64/16 *Associação Sindical dos Juízes Portugueses*.

Notably, neither national identity nor constitutional traditions—despite being protected under Article 4(2) TEU—can be invoked to justify violations of these fundamental values. Judicial independence, as an essential component of the rule of law, cannot be compromised under the guise of constitutional particularities or domestic legal reforms.

79 Fassbender, "Are the EU Member States Still Sovereign States?".

80 But some critics have argued that in the EU, diversity is acceptable only insofar as it does not jeopardize unity. See Chris Shore, "The Cultural Policies of the European Union and Cultural Diversity," *Council of Europe Research Position Paper*, no. 3 (2003), available at http://www.coe.int/t/dg4/cultureheritage/Completed/Diversity/EN_Diversity_Bennett.pdf.

81 One can also call it a "filter" for primary law. For more, see Dieter Grimm, *The Constitution of European Democracy* (Oxford University Press, 2017).

Although the rule of law in Article 2 TEU is a broad and open-ended concept,[82] its importance is widely acknowledged. While EU primary law does not provide a single definition, a commonly accepted core understanding has developed. This understanding has been shaped mainly by the case law of the CJEU and by various European Commission instruments, such as Rule of Law reports and the Rule of Law Framework.[83]

Such interpretations are not made in a vacuum but draw on historical traditions: the rule of law in the Anglo-American context, the German *Rechtsstaat*, and the French *État de droit*—each shaping the modern European understanding of the rule of law.

In addition, broader European and international standards have complemented this development, particularly through the case-law of the ECtHR, the opinions of the Venice Commission within the Council of Europe, and principles promoted by the United Nations and other international bodies.[84]

The recent dispute is therefore less about *what* the rule of law means[85] and more about *who* has the authority to determine whether a particular situation complies with it.

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82 Some scholars even question whether it imposes any obligations at all. See Jan-Werner Müller, "Should the EU Protect Democracy and the Rule of Law inside Member States?," *European Law Journal* 21, no. 2 (2015): 141, https://doi.org/10.1111/eulj.12124.

83 Furthermore, a definition of the rule of law is provided in Regulation (EU, Euratom) 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 ("the Rule of Law Conditionality Regulation"). This legislation, including its definition of the rule of law, was approved by the Council of the European Union, meaning the Member States themselves endorsed the text.

84 For example, the Organization for Security and Co-operation in Europe (OSCE) defined the rule of law in its 1990 Copenhagen Document as more than formal legality. It is described as "justice based on the recognition and full acceptance of the supreme value of the human personality," ensured by institutions that enable its fullest expression. The OSCE also stresses that democracy is an inherent component of the rule of law. See https://www.osce.org/files/f/documents/4/7/103448.pdf.

85 Even though Hungarian officials, including Prime Minister Viktor Orbán, have repeatedly claimed that the EU's interpretation of the rule of law is "ideologically biased" or reflects a liberal-progressive agenda, they themselves have not provided a comprehensive or coherent alternative conception of the rule of law.

In the case of Poland, the deficiencies were relatively clear, as both the CJEU and ECtHR developed substantial case-law outlining the violations—particularly regarding judicial independence. Nevertheless, the Polish government, along with some of the country's highest judicial bodies, including the Constitutional Tribunal, contested these findings and asserted that no violations had occurred.[86]

In this context, the role of the CJEU in interpreting and safeguarding the rule of law acquires particular importance. The absence of a supranational "higher arbiter" over the CJEU raises valid concerns about the limits of judicial authority and the scope of its interpretation. Nonetheless, given the potential for national actors to fail in protecting or even to actively dismantle the rule of law, a centralized judicial interpretation appears to be the only viable option within the EU legal framework.

While it is important that the CJEU stays within its institutional mandate, its case-law offers a necessary common denominator for the application of Article 2 TEU values. Without this legal guidance, the consistency of the EU legal order would be at risk, and the mutual trust upon which many areas of EU cooperation depend—including the functioning of the internal market and the Area of Freedom, Security and Justice—would be difficult to maintain.[87]

The CJEU's broader perspective enables consistent interpretation across the Union and allows comparison with other key international bodies, notably the ECtHR.

The current Polish government's efforts to rebuild trust and legal certainty show how complex judicial reforms are—both in process and substance—and

86 The Polish Constitutional Tribunal (Trybunał Konstytucyjny, TK) has issued several rulings rejecting the CJEU's authority to assess judicial independence in Poland, arguing that the CJEU exceeded its competences and that the Polish Constitution takes precedence over EU law in this area. Key rulings include Cases P 7/20, K 3/21, and K 6/21, where the Tribunal found CJEU interpretations of EU treaties incompatible with the Polish Constitution in national judicial matters.

87 See Court of Justice of the European Union, PPU – *Minister for Justice and Equality v. LM* (*Celmer case*), Case C-216/18, Grand Chamber, 25 July 2018.

how serious their impact is on upholding the rule of law. Even well-intentioned reforms risk falling short of rule-of-law standards if implemented hastily or without sufficient institutional safeguards.

Considering those risks, the Polish government formally requested guidance from the Venice Commission on structuring judicial reforms in compliance with European standards. However, the future of these reforms remains uncertain, as they continue to be stalled due to the veto of the president and the rulings of the Constitutional Court.[88]

On the other hand, the European Union's current ability to influence the restoration of the rule of law in Poland is significantly limited because the EU, largely due to political considerations, prematurely suspended key tools—namely, the Article 7 TEU procedure and the conditionality tied to EU funds.

Although it is not the EU's role to directly comment on judicial reforms in Member States, this approach only delays addressing the problem, as it relies on mechanisms that respond ex post when rule of law breaches may already be serious.

After observing the extensive scholarly debate, the involvement of external legal experts and NGOs in drafting legal proposals,[89] and the request for guidance from the Venice Commission regarding Poland, I must conclude that restoring the rule of law there will, in a sense, "take a village": it is not merely a matter of determining who has the authority to interpret the law—it requires a collective effort from a broad range of actors.

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88 Even after the 2025 election of Karol Nawrocki as Polish president, the prospects for restoring the rule of law remain uncertain. Nawrocki was mainly supported by PiS, the party responsible for the judicial reforms between 2015 and 2023. His comments on the current government raise questions about the future of judicial independence and public trust. For an analysis of how the presidential election may affect judicial reforms, see Maria Skóra, "Poland's Polarised Presidency," VerfBlog, 22 May 2025, https://verfassungsblog.de/polands-polarised-presidency/, https://doi.org/10.59704/c2d7d069b2014393.

89 See *Where are we after a year of restoring the rule of law?*. Or Paul Naumann and Ewelina Lipska, "Two Proposals to Re-Establish the Rule of Law," Heinrich Böll Stiftung, published 21 March 2025, https://pl.boell.org/en/2025/03/21/two-proposals-re-establish-rule-law.

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Legal Protection of Historical Sites and Cultural Artifacts in Poland and Jordan

Abstract: Cultural heritage is created the axiological foundation of society. The pillars of each nation and ethnicity are built on traditional values and the legacy of ancestors passed from generation to generation. The aim of this article is to discuss the legal protection of historical sites and cultural artifacts in the light of Polish and Jordanian law. For this purpose, the arguments are supplemented with a comparative methodology. The Jordanian legislator adopted two concepts of antiquities–one broad and including any immovable or movable property that the state considers an antiquity, and the other narrow, limiting antiquities to what was created by humans. Since Jordan considers antiquities to be the public property of the state, they may not be seized or disposed of by sale or mortgage; individual ownership of antiquities is an exception, and the state places many restrictions on them. In Polish law, among the forms of protection of monuments, considerations are focused on entry into the register of monuments, recognition as historical monuments, and protection that affects the status of monuments. The article will provide examples of implementing provisions on bilateral cooperation between Poland and Jordan, in particular, in the cooperation developing in the sphere of culture.
Keywords: cultural heritage, monuments, Jordanian law, Polish law, archaeology of memory, custodians of heritage

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Introduction

The cultural sphere consists of tangible and intangible monuments. Currently, the concept of "heritage" is increasingly invoked. It includes not only cultural figments, material monuments, digital cultural goods, but also natural heritage and landscapes.[3] In order to preserve identity, the spatial perspective in the formation of a human being should be taken into account. This article will discuss the protection of historical sites and cultural artifacts in the light of Polish and Jordanian law. Each culture has unique and singular features rooted in history, customs, religion, and customs. When taking protective measures, one should not standardise or apply schematic solutions. Diversity is an attribute of humanity and a guarantor of social development in keeping with regional cultural tradition. The UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage[4] emphasises that the damage or destruction of any property belonging to the cultural or natural heritage constitutes an impoverishment of the heritage of all nations of the world. Jordan ratified the Convention on 5 May 1975, while Poland did so on 29 June 1976. The aim of this article is to demonstrate that the axiology of heritage is the basis for establishing and conducting cooperation between societies from different cultural and geographical circles in the spirit of dialogue, mutual respect and understanding. The axiology of heritage is the foundation of the functioning of nations and ethnic groups based on timeless, universal values. The article will show that in Poland the basis for the formation of cultural identity is a sense of social and linguistic community, and solidarity between people. Nevertheless, values such as respect for cultural traditions, spiritual heritage and hospitality are also close to the inhabitants of Jordan. The Hashemite Kingdom of Jordan

3 Gábor Sonkoly and Tanja Vahtikari, *Innovation in Cultural Heritage: For an Integrated European Research Policy* (European Commission, 2018), 10. See: Inga-Lill Aronssona and Susanna Price, "Culture, Heritage, Memory: Toward a Resonant Cultural Solution for Resettlement," *Human Organization* 83, no. 3 (2024): 220.

4 Convention Concerning the Protection of the World Cultural and Natural Heritage, was adopted by the General Conference of UNESCO on 16 November 1972 by the General Conference of the United Nations Educational, Scientific and Cultural Organization.

is characterized by anthropogenic diversity, which is rooted in an intergenerational history.

Hypotheses and Research Methods

The analytical and the dogmatic-legal method was used in the analysis of legal acts and documents. Bearing in mind that the aforementioned regulations come from different cultural and geographical circles, the comparative method was also used. Jordan and Poland are parties to treaties on the protection of cultural heritage. For this reason, when discussing the provisions of national law, the authors also took into account the norms of European law and international law in the scope necessary to ground the formulated research theses. The aim of the analysis is to discuss the norms of Jordanian and Polish law in the area of protection of historical sites and cultural artifacts as a factor in the formation of social heritage and memory. Therefore, in order for the mark on the map and a point in space to start to have impact, the axiological layer, which was the impulse to create them, should be taken into account. In this way, spatial arrangements and cultural artifacts "come to life" and can "speak" to us today with the voices of their former inhabitants.

Monuments, Cultural Artifacts and Testimonies of the Memory

The Concept of a Monument in Poland—a Link Between the Past and the Present

In Polish law, regulations on the protection of cultural heritage are contained in the Act of 23 July 2003 on the Protection of Monuments and the Care of Historical Monuments (Journal of Laws of 2003, No. 162, item 1568 as amended, hereinafter: APMH). The Act entered into force on 17 November 2003. The above legal act does not define the concept of "cultural heritage", but the con-

cept of "monument", around which the regulations are centred. According to Polish law, "monument" means immovable or movable property, or parts or groups thereof, which are the work of human beings or are related to their activity and which constitute a testimony to a past era or event, their preservation is in the social interest due to their historical, artistic or scientific value (Article 3, pt. 1).[5] A monument is a product of human activity, whereby the object originally did not have to be covered by a protective clause but could perform a practical function, e.g. factories, railway stations, bridges and viaducts. The passage of time could have imbued it with historical value that arouses reflection and strikes a sensitive chord in emotions, mind, or memories, e.g. ancestral epistolography, diaries, and book collections.

In general, an object considered a monument should have a historical, artistic, or scientific value. The "or" conjunction used in the statutory definition indicates that the aforementioned values do not have to occur cumulatively, because this is conditioned by the specificity and scale of the object, as well as its location and original function, e.g. necropolises, which are a place of remembrance, but due to the craftsmanship that went into their creation, they can bear the features of artistry. The Powązkowski Cemetery in Warsaw, located on 43 hectares, which remains under the strict protection of the monument conservation authorities remains an example. Dating back to the 18th century, the cemetery is a place of national remembrance, the Polish Pantheon. Monuments, tombstones, sculptures, and objects of small architecture made by outstanding Polish and foreign artists are works of art, integrated into the greenery and tree alleys. The

5 Due to cultural diversity and long traditions' impact on cultural heritage in Jordan, the legislator devotes special attention to archaeological monuments. In light of Article 2, point 7 of the Antiquities Law No. 21 for the year 1988 (promulgated in the Official Gazette, No. 3540 dated 17 March 1988 as amended) the definiens of the term "antiquities" include: movable and immovable objects constructed, written, discovered or modified by man before 1750 AD, e.g. caves, pottery objects, manuscripts, sculptures, numismatics and other products that be a reflection of the development of science, technology, crafts, art, and testimonies of spiritual values (Article 2, item 7a); any movable or immovable object referred to above dated after 1750 AD, which the Minister requests to be considered an antiquity by a decision published in the Official Gazette (Article 2, item 7b); and human, plant and animal remains dating from before 600 AD (Article 2, item 7c).

buried include distinguished secular and clerical figures, artists, poets, writers, lawyers, doctors, scientists, industrialists, politicians, prisoners of concentration camps, and insurgents. The necropolis also has merits not listed in the legal Act: emotional, sentimental, and educational. Cognising funeral rites is a source from which to "reconstruct the life of past societies"[6] and stop time in the axiology of memory that connects the past with the present. Religious beliefs, local culture, climatic conditions, and topographic location influence funeral customs.

While the spatial arrangements of cemeteries were usually carefully designed, the passage of time, air pollution, soil instability, gradual degradation of materials, and the lack of landscape protection can accelerate the deterioration of monuments, resulting in the transformation of "space into gravel-granite deserts."[7] This issue goes beyond the legal sphere, requiring a combination of specialist qualifications in the field of conservation and renovation of monuments with knowledge of an interdisciplinary nature, including the impact of atmospheric factors on the monuments, knowledge of historic building materials, spatial development, botany and landscape architecture.

In Polish law, monuments are formally divided into immovable, movable and archaeological. Immovable monuments as qualified by the legislator include urban and rural layouts, works of secular and sacral architecture, defensive buildings, technical objects, parks and gardens. On the other hand, the group of movable monuments includes library materials, musical compositions and instruments, works of fine art, folk art, ethnographic handicrafts, numismatic pieces, seals, and flags. In turn, archaeological monuments include the remains of historical settlements, relics of economic, artistic, and religious activities, and burial mounds.[8] Each of the groups of monuments in the light of

6 Abdulla Al-Shorman and Ali Khwaileh, "Burial Practices in Jordan from the Natufians to the Persians," *Estonian Journal of Archaeology* 15, no. 2 (2011): 88.

7 The Ministry of Culture and National Heritage, Guidelines of the General Conservator of Monuments regarding historic cemeteries, reference number DOZ-KiNK.070.22.2023, Warsaw, 7 December 2023, 2.

8 Immovable, movable monuments and archaeological artefacts have been listed pursuant to Article 6 item 1, pt. 1b–e, g; Art. 6 item 1, pt. 2a, c, e, f–g and Art. 6 item 1, pt. 3a, c–d APMH.

Polish law does not constitute a closed catalogue, which means that researchers, along with the development of knowledge and modern research technologies, may reveal further previously unknown pages of history. It should be pointed out that, in practice, these groups may overlap. The above is illustrated by the Lusatian settlement (Bronze Age) from 3,000 years ago, which was discovered in Warsaw's Białołęka district in 2020. The archaeological site contains immovable artefacts (e.g. the residential and manufacturing part of the settlement) and movable ones (e.g. ceramic vessels, everyday objects made of wood). It was found that the settlement was erected near a stream flowing nearby. Hence, the site contains features of a cultural landscape—a space that combines forms of anthropogenic activity with natural elements.

It should be noted that although a given object may be considered a monument in the public consciousness (e.g. a former filter station, customs chamber), according to the Polish law recognition as a monument does not occur automatically. An administrative decision must be issued by the voivodeship monument conservator in this respect. Every voivodship keeps a register of monuments in the form of separate books for immovable (marked with the symbol "A"), movable ("B") and archaeological monuments ("C"). The Decree of the Minister of Culture and National Heritage details the procedure for keeping the register of monuments in Poland.[9]

At this point, it should be clarified that immovable monuments are entered in the register *ex officio* or at the request of the owner of the historic property or the perpetual usufructuary of the land on which the object is located. The voivodship conservator of monuments may also enter in the register the surroundings of the monument (e.g. park-arboretum), as well as a historical, geo-

9 The Decree by the Minister of Culture and National Heritage of May 26, 2011 on keeping a register of monuments, national, provincial and municipal records of monuments and the national list of monuments stolen or exported abroad illegally (Journal of Laws of 2011, No. 113, item 661 as amended). See in Jordanian law: Article 5, item f, the Antiquities Law No. 21 for the year 1988 (promulgated in the Official Gazette, No. 3540 dated 17 March 1988 as amended).

graphical or traditionally functioning name.[10] The name of the monument indicates an intangible link between the object and regional or national heritage. The name reflects the values of the local community, for which a given object may have significance beyond the material sphere, e.g. roadside shrines, meeting places that can be located in open spaces (a forest clearing, a city square, etc.). The message of the Venice Charter remains valid to this day: the concept of a monument refers not only to monumental architecture, but also to modest objects that may only gain cultural significance over time.[11] Returning to the Polish regulation on the register of monuments, movable objects are entered on the basis of a decision of the provincial monument conservator issued at the request of the owner of the monument. On the other hand, an *ex officio* decision may be issued in the event of a justified fear of damage, destruction or an unlawful removal of a monument abroad or removal of a monument of exceptional historical, artistic or scientific value abroad (Article 10, item 1–2). The above situation may occur in the case of attempts to move abroad the legacy of an outstanding writer, artist or scientist who has permanently impacted science and national culture.

The law provides for a category of objects not subject to entry in the register of monuments. However, this does not mean that they are devoid of historic features. This is due to the fact that they already benefit from legal protection. For clarification, in accordance with the provisions of Polish law, the register does not include monuments: (a) included in the Heritage Treasures List; (b) entered in the museum inventory; (c) included in the national library resource (Article 11). The issues covered by items "b" and "c" are regulated by separate legal acts.[12] Hence, this article will focus on the List of Heritage Treasures,

10 Article 9 item 1–2 APMH.

11 Article 1, International Charter for the Conservation and Restoration of Monuments and Sites (The Venice Charter). II International Congress of Architects and Technicians of Historic Monuments, Venice, 1964.

12 More in Act of 21 November 1996 on museums (Journal of Laws of 1997, No. 5, item 24 as amended) and the Act of 27 June 1997 on libraries (Journal of Laws of 1997, No. 85, item 539 as amended). Book collections and museums, although regulated under separate

which, despite its similarity to the UNESCO programme, is a separate undertaking introduced in Poland in 2016. This list falls under the authority of the Minister of Culture and National Heritage. The catalogue of objects that are eligible to receive the above status is not enumerative (Article 14a, item 2). However, these are movable monuments of particular value for cultural heritage. Among the exemplary categories that may be included in the Heritage Treasures List, the legislator listed archaeological monuments that are more than 100 years old which are part of archaeological collections or were acquired during archaeological research or as a result of accidental discovery; elements that are an integral part of architectural monuments, interior design, statues and works of artistic craftsmanship that are more than 100 years old; photographs, films with negatives that are more than 50 years old, worth more than 15,000 euros, and are not the property of their creators; single incunabula or collections thereof, manuscripts and musical scores that are more than 50 years old; single books or collections thereof that are more than 100 years old and worth more than 50,000 euros; printed maps that are more than 200 years old.[13] The Heritage Treasure List was established in order to increase the effectiveness of the protection of monuments. Nevertheless, in practice, it has prompted numerous discussions about the legislative technique, as well as the construction of the regulations themselves.[14] The phrase "heritage treasure" has not been defined in law. Interpretative ambiguities are also caused by the phrase of "special value for cultural heritage". In the context of the axiology

regulations, constitute an integral component of cultural heritage. The Act of 27 June 1997 defines libraries and their collections as a "national good", which constitutes a carrier of values and information, providing access to the achievements of science and culture of humanity (See: Article 3, item 1), whereas the Act of 21 November 1996 indicated that museums are envisaged as collecting and permanently protecting tangible and intangible goods that are part of the cultural and natural heritage (Article 1). Each of the listed cultural institutions plays a significant role in the protecting heritage, multiplying knowledge and nurturing the memory of the past and people from different nations who contributed to creating Polish science and culture.

13 Legal basis: Article 14a, item 2, pt. 1–2, 8–11.

14 Cf. Aleksandra Guss, "Lista Skarbów Dziedzictwa – niepotrzebna forma ochrony zabytków?," *Studia Iuridica Toruniensia* 29, 2021: 53–72.

of heritage, monuments have immeasurable value, which is why it is often found controversial to apply material monetary value. The art market has been a well-established phenomenon for some time now. Awareness of the importance of monuments in shaping human identity should, however, prevent the monuments from being considered solely through the mercantile prism.

A Historical Monument as a Mirror of Culture and Social Remembrance

Historical monuments have a special status among Polish artefacts. The unique character is evidenced by the procedure of recognising the object as a monument of history. The act of recognition is performed by the President of the Republic of Poland at the request of the Minister of Culture and National Heritage by way of an ordinance. An immovable monument or a cultural park of special value to culture can be entered into the register and considered a historical monument (Article 15, item 1).[15] Bogusław Szmygin points out that "the situation and condition of the Monuments of History has an impact on shaping the image of the entire Polish heritage, i.e. the achievements of Polish culture … The value and importance of these monuments should be reflected in the most careful protection and care."[16] Recognition as a historical monument is a challenge, but also a responsibility for common cultural heritage. Secular and sacral structures associated with various rites and religions, whose followers have contributed to the development of Polish public life, science and art are considered to be monuments of history. The adoption of the above procedure is aimed at promoting tolerance, dialogue and understanding for people from other cultures. Historical monuments include also technical structures and objects integrated into natural areas, which indicates the need to maintain a har-

15 See, more broadly: Janusz Tomczak, „Park kulturowy w systemie ochrony zabytków w Polsce," *Kwartalnik Krajowej Szkoły Sądownictwa i Prokuratury* 4, no. 36 (2019): 39–56.

16 Bogusław Szmygin, „Pomniki historii – forma ochrony, forma promocji, forma zarządzania?," *Ochrona Dziedzictwa Kulturowego* 7, 2019: 208.

monious relationship between man and nature. For example, on 6 March 2024, the President of the Republic of Poland recognized Kamieniec Ząbkowicki, an architectural and landscape complex located in the Lower Silesian Voivodeship, as a historical monument. The justification indicates that the facility is unique due to its historical, artistic and scientific values, as well as scenic and spatial values (§ 2). It is based on the architectural and landscaping concept, which consists of a 19th-century palace and park complex (including a palace garden on the terraces, a park, a stable with a carriage house) with the buildings of the former Cistercian abbey. The whole complex was erected in accordance with the ideological and compositional models that characterised the Romantic era.[17] A topographical description with a map is attached to each ordinance recognising a given structure as a historical monument. Other recognised monuments of history include, e.g. Puławy—a palace and park complex,[18] Bóbrka—the oldest oil mine,[19] Janów Podlaski-a horse stud,[20] Ciechocinek—a graduation tower and saltworks complex with Tężniowy and Zdrojowy parks,[21] Warsaw—a complex of historic religious cemeteries in Powązki,[22] Bohoniki and Kruszyniany—mosques and mizarshes,[23] Duszniki Zdrój—a paper mill,[24] the Augustów Canal,[25] Tarnowskie Góry—the historic silver-bearing ore mine

17 § 2, The Ordinance of the President of the Republic of Poland of 6 March 2024 (Journal of Laws of 2024, item 410).

18 The Ordinance of the President of the Republic of Poland of 31 May 2021 (Journal of Laws of 2021, item 1019).

19 The Ordinance of the President of the Republic of Poland of 10 December 2018 (Journal of Laws of 2019, item 75).

20 The Ordinance of the President of the Republic of Poland of 22 November 2017 (Journal of Laws of 2017, item 2250).

21 The Ordinance of the President of the Republic of Poland of 22 November 2017 (Journal of Laws of 2017, item 2276).

22 The Ordinance of the President of the Republic of Poland of 3 July 3 2014 (Journal of Laws of 2014, item 956).

23 The Ordinance of the President of the Republic of Poland of 22 October 2012 (Journal of Laws of 2012, item 1275).

24 The Ordinance of the President of the Republic of Poland of 20 September 2011 (Journal of Laws of 2011, No. 217, item 1282).

25 The Ordinance of the President of the Republic of Poland of 25 April 2007 (Journal of Laws of 2007, No. 86, item 572).

and the Czarny Pstrąg Adit,[26] and St. Anna Mountain—a cultural and natural landscape.[27] Cultural goods considered to be a historical monument should be under comprehensive protection, which should not be limited to the declaration that a specific object has special value. Monuments of history are qualified monuments and should be accompanied by adequate protection and monitoring measures. For this purpose, it is necessary to analyse the processes taking place inside the monuments and in its surroundings (e.g. erosion of building materials due to the passage of time or, if it is still in use, as a result of wear and tear). In this context, it is worth quoting the Venice Charter, which emphasises that the monument is inextricably linked to the history of which it is a witness and to the environment in which it is incorporated (Article 7). Monuments of history are common goods in need of prudent custodians and such protective methods that they do not lose the values which they are a to transmit in society.

Among the objects with the status of historical monuments in Poland are objects showing relations to other nations and cultures, e.g. the oldest Muslim mosque in Poland, located in Kruszyniany and originating in the 18th century. The second historical building connected with the culture and religion of Islam is the mosque in Bohoniki, combining the traditions of sacral wooden architecture with intangible values. The mentioned historical objects are an example of the unique cultural heritage of Muslims, and testify to both social diversity and religious tolerance on Polish soil.

Cultural goods recognized in Poland as historical monuments may be presented to the World Heritage Committee for entry on the UNESCO World Heritage List. Entry to the List involves international protection under the Convention Concerning the Protection of the World Cultural and Natural Heritage.[28] This list includes historical objects and natural creations of outstanding univer-

26 The Ordinance of the President of the Republic of Poland of 14 April 2004 (Journal of Laws of 2004, No. 102, item 1062).

27 The Ordinance of the President of the Republic of Poland of 14 April 2004 (Journal of Laws of 2004, No. 102, item 1061).

28 Article 15 item 4, UOZO.

sal value from the point of view of science, art, history or for the preservation of natural processes occurring in ecosystems. This is gaining in importance due to human life being embedded in a designated cultural landscape and the natural environment.

Legal Protection of Antiquities and Heritage in Jordan

The legal framework related to the preservation of antiquities and heritage in Jordan is determined by two separate legal acts: the Antiquities Law No. 21 of 1988[29] and the Urban Heritage Law No. 5 of 2005. Cultural Heritage consists of tangible and intangible elements. As previously indicated in the discussion, the Jordanian legislator defined "antiquities" according to three criteria. Firstly, a chronological criterion (before 1750), and, secondly, an administration criterion. It should be noted that the Antiquities Law protects architectural heritage dating back to before 1750 AD. Subsequent monuments are not subject to legal protection, leaving unprotected large layers of built heritage, such as heritage belonging to the Ottoman era, although the Ministry of Tourism and Antiquities has the right to add what is after 1750 using the powers granted in the Jordan law. The third criterion relates to animal, human, and plant remains dating back to before 600 AD. Human remains should be given due respect: mounds and burial sites are subject to special care and emphasis because they are the key to understanding the route of human. However, distinct rules are applicable to the protection of material heritage and the urban fabric in which run of social activities.

For this, reference should be made to the Protection of Urban and Architectural Heritage. Based on Article 2 of the Jordanian Law No. 5 of 2005 of Protection of Urban and Architectural Heritage, a "heritage site" means "a building or site that has heritage value in terms of building style or its relationship to historical figures or important national, or religious events, and

29 Jordanian Official Gazette no. 3540, 17 March 1988, p. 605.

was erected after the year 1750 AD in a manner that does not conflict with the effective Antiquities Law No. 12 of 1988 by the provisions of this law. This includes the following: the heritage building itself: architectural installations and vocabulary that have architectural, historical, or cultural characteristics that tell specific events; the urban site: the urban fabric, public squares, residential neighbourhoods, and landscaping of sites that represent fixed values that the culture of the population was built on." The definition of urban heritage points to the inherited cultural fabric, including buildings, cultural spaces, corridors, and arches, and because of their importance because they represent what the ancestors of previous civilizations built from inside or outside the cities.

The Jordanian Law for the Protection of Urban and Architectural Heritage is expected to reform this sector, provide standards for the protection of architectural and urban heritage, prepare a list of all heritage sites, provide the necessary funds for restoration, and fairly compensate the owners of heritage sites. The purpose is to encourage the owners of heritage sites to protect the buildings they own. This includes caves, sculptures, coins, pottery, manuscripts, and other types of artifacts that indicate the emergence and development of sciences, arts, crafts, religions, and traditions of previous civilizations, or any part that was added to that thing or reconstructed after that date.

In light of the above, the term "heritage" is broader in scope than "antiquities": the former is a loose term, includes archaeological cultural elements and expresses the customs and traditions of each country, and it includes things of an artistic, scientific or intellectual nature that are tangible and intangible elements. Antiquities and heritage participate together in formulating the identity of the group because they give the product of mankind and have an artistic, scientific, historical, and administrative nature. Antiquities and heritage are only applied to old objects that is passed down between generations, and they also share facets in terms of their nature, as they both include real estate and movables and if the state has an interest in protecting and preserving them. Although similarities exist between the two terms, there are points of difference:

antiquities can only be tangible, while heritage can be tangible or intangible; antiquities are arranged within the specific time frame outlined in Antiquities Law No. 12 of 1988, amended by Law No. 19 of the year (2004), and the tangible heritage is subject to a specific period, while the intangible heritage is not subject to a specific period because it represents artistic, literary, or scientific value, thus the tangible heritage can be transformed into antiquities by the passing of the period specified by the law or if the state guarantees without being bound by the period.[30]

Protection of Immovable Heritage in Jordanian Law

Through the Antiquities Law of 1988 and the Jordanian Law No. 5 of 2005 of Protection of Urban and Architectural Heritage of 2005, the Jordanian legislator established legal mechanisms and guarantees aimed at embodying the legal protection of all types of heritage, including immovable heritage. It is subjected to a protection system as follows:

1) Registration in the inventory list is the first legal mechanism that the Jordanian legislator devoted to the protection of archaeological objects and immovable antiquities. Article 4 of the Antiquities Law limits the authority to specify archaeological sites that must be registered in the Non-Portable Antiquities Register to the Minister of Tourism, in cooperation with the Department of Lands and Survey, which documents the sites in its records and maps. This means that the legislator did not allocate specifications for registering archaeological sites and portable antiquities, and was content only with registering immovable property as a safe/antiquities. At the same time, immovable antiquities purchased by amateurs from outside Jordan must be registered and documented following legal procedures within seven days from the

30 Safaa' Mahmoud Al-Sweilmieen and Abdul Ra'ouf Ahmad Al-Kasasbeh, "The Extent of Administrative Protection for Antiquities in the Jordanian Legal System," *Journal of Legal, Ethical and Regulatory Issues* 24, no. 1 (2021): 5.

date of their possession. The legislator is also limited to publishing a list containing the names of archaeological sites and their boundaries in the Official Gazette, provided that these lists are public (Articles 5–6). UNESCO developed forms for registering antiquities and these include the following types of data: (1) type of object; (2) Materials and techniques used; (3) Measurements (height, length, width, depth, weight); (4) Additional measures and observations; (5) Inscriptions and signs; (6) Distinctive features; (7) All other data that provides a detailed report on the impact. Thus, the UNESCO Guidelines not only provide comprehensive data for the registration of antiques but also include information on their discovery, conservation, or loan. Registration is important to preserve, restore, and document antiquities to prevent their smuggling or theft. There is no history without documents, as it is evidence of identity for antiquities. Documentation prevents random demolition and attacks on the heritage building.

2) Classification of historical monuments: archaeological sites and historical monuments are subject to classification as one of the final procedures for protection, as the latter are classified according to a decision issued by the minister in charge of culture after consulting the National Committee for Cultural Properties based on his initiative or from any person who sees an interest in that.
3) Expropriation for the public benefit: resorting to the expropriation procedure is a means to preserve real cultural property, classified or unclassified. The Urban Heritage Law related to development and urbanization, included several provisions governing construction and reconstruction operations and several restrictions imposed on the construction of buildings that pose a threat to the real estate heritage. The above legal document identifies practical mechanisms to protect real estate antiquities, considering them cultural real estate property that can also be included among antiquities or archaeological sites, which

requires imposing special protection on the building rules applied to these areas.

The law in Jordan provides facilities to owners of heritage buildings for their restoration and reconstruction, including licenses, legal refunds, loans, aid, tax exemptions, and reduced fees, in addition to paying compensation to the owner whose antique property is expropriated. However, it was decided that it is not permissible to change the features of the sites or add to them except with the approval of the competent committee and following the approved standards. The regulations deal with the new buildings within heritage cities and the necessity of preserving their distinctive urban fabric and character.

The Urban Heritage Law has guaranteed significant legal protection for immovable heritage in particular cultural antiquities, as it has subjected them to a set of controls and procedures that are in themselves legal guarantees for the preservation of archaeological and historical sites and the real estate heritage aspect.

This law was not limited to providing legal protection for heritage only in some of its aspects, but also extended to granting it penal protection, as Article 41 of this law allowed legally established associations to take the initiative in protecting the environment, construction, and cultural, historical and tourist attractions and to establish themselves as a civil party concerning violations affecting this law. Therefore, it can be said that the law relating to expansion areas and tourist sites is instrumental in preserving antiquities. Its provisions contributes greatly to protecting and preserving real estate heritage both directly and indirectly.

To make protection more effective, international cooperation is being developed. For example, the British Research Council in the Levant announced a project, funded by the World Heritage Fund, to produce a comprehensive record of Oman's heritage houses. Houses in Jabal Al-Lweibdeh and Jabal Amman with a distinctive architectural character and historical and cultural

value are registered using the IMENA methodology. The project aims primarily to record and evaluate the condition of archaeological and heritage sites in the Middle East and North Africa region, to identify the dangers and threats to which they are exposed, and to include related resources such as photos, maps, and architectural documentation in a comprehensive database that is easy to use and generally accessible. The first phase of the project, which lasted six months, registered approximately 75 heritage houses in the Jabal Amman and Al-Lweibdeh regions, distinguished by their high architectural, historical, political, and social value, and dating back to an important era in the history of Amman.

Legal Protection of Archaeological Monuments in Jordan

Jordan has given attention to the issue of preserving historical monuments and archaeological sites. This is evidenced by its ratification of the Convention for the Protection of Cultural and Natural Heritage of 1972 and by issuing the Antiquities Law of 1988 and the Jordanian Law for the Protection of Architectural and Urban Built Heritage of 2005. The tasks of preserving archaeological monuments and historical sites in Jordan are divided among several official departments, such as the Ministry of Culture, the Ministry of Tourism and Antiquities,[31] and especially the Department of Public Antiquities, which is considered the main responsible body for related heritage issues including historical monuments and sites.[32]

Jordanian law clarifies the tasks of the Department of Antiquities, including the management and maintenance of heritage, the management of reserves and sites, and their maintenance and restoration. However, it does not clarify

31 Abdelkader Ababneh et al., "The Management of Natural and Cultural Heritage: A Comparative Study from Jordan," *The Historic Environment Policy & Practice* 7, no. 1 (2016): 3–24.

32 Hani Hayajneh and Giorgia Cesaro, "The UNESCO Contribution to Safeguarding and Preserving Jordan's Cultural Heritage," *Jordan Journal For History and Archaeology* 16, no. 3 (2022): 389.

the foundations or standards according to which maintenance or restoration is carried out, which led to errors in the restoration and the destruction of archaeological monuments, or their alteration, damage or distortion through the use of harmful chemicals or stones different from the original. This may result in some sites being removed from the World Heritage List in the future. For example, mismanagement was embodied in the attacks on the ancient city of Jerash, the lack of harmony between the historical buildings and modern buildings, the construction of streets, and urban sprawl.[33]

In Jordan's Antiquities Law No. 21 of 1988, an "archaeological site" is defined as "any area in the Kingdom that has been considered a historical site, based on previous regulations, or any other area that the Minister decides contains antiquity or is related to important historical events, and the Minister's decision must be announced in the Official Gazette". Antiquities might be fixed monuments or non-fixed. The fixed monument was defined by Antiquities Law as "those attached to the ground and are also built above the ground or located underground. It includes objects found under internal and territorial waters."

In the 1970s, Jordan made efforts to create a computer database with archaeological sites in the country. Several decades later, in the 1990s, the first nationwide database was launched. Currently, digital technologies that complement the traditional archaeological conservation of monuments in Jordan[34] provide an example for implementing innovative solutions in other regions of the world. Data contained in digital databases are helpful in designing and

33 Catreena Hamarneh et al., "Documentation of Mosaic Tangible Heritage in Jordan/Jarash Governorate," *Annual of the Department of Antiquities of Jordan* 52, 2008: 139.

34 See, e.g. Husam Osama Ababneh and Monther Mahmoud Jamhawi, "Virtual Reconstruction of Archaeological Sites, Interpretation and Presentation using Modern ICT Applications: A Case Study of the Umayyad Mosque at the Citadel of Amman—Jordan," *Dirasat: Human and Social Sciences* 52, no. 3 (2025): 1–14; A'kif Al-Fugara et al., "A Multi-Resolution Photogrammetric Framework for Digital Geometric Recording of Large Archeological Sites: Ajloun Castle-Jordan," *International Journal of Geosciences* 7, no. 3 (2016): 425–39. Cf. Mariusz Drzewiecki, "Komputerowa baza stanowisk archeologicznych Jordanii," *Ochrona Zabytków* 2, 2015: 229, 230.

planning urban development with respect for cultural heritage and the natural environment.

Article 14 of the Antiquities Law regulates the protection from a natural or legal person carrying out exploration and excavation operations in archaeological sites in search of gold and burials. It should be noted that this law prohibits searching for burials in archaeological sites, and anyone who discovers an antiquity or learns of its discovery must report it as soon as possible. Article 15 grants a financial reward upon notification of such a discovery.

By contrast, Article 16/B of this law prohibited the excavation of antiquities by any person, even in non-archaeological sites, even if they were the owner. Article 26 defines the crimes against antiquities including excavation, trafficking, export, dealing, forgery, vandalism, mutilation, bulldozing, theft, and failure to declare the antiquities one owns. This law regulates crimes of imitation and destruction of antiquities, such as pasting advertisements and billboards on archaeological sites, landmarks, and places.

The Jordanian legislator stipulates the termination of excavations or the cancellation of licenses if the licensed party violates the conditions related to excavation, or if the Minister deems it necessary to end excavations based on the recommendation of the director in the Antiquities Department where these excavations threaten the safety of the excavation mission or require. In Article 20, the legislator permits the cancellation of licenses if drilling work did not begin within one year from the date of the license being granted, or for two seasons in two consecutive years without cause. We find that the current situation stipulates the signing of an administrative contract with the driller licensed to begin drilling work. Such a contract entails the imposition of administrative sanctions in case the driller violates the terms.

Challenges facing the preservation of heritage and archaeological sites include population growth and large urban sprawl,[35] which has had a clear im-

35 Leen A. Fakhouri and Naif A. Haddad, "Aspects of the Architectural and Urban Heritage: From Registers to Conservation for Adaptive and Modern Use at the Historic Cores of Salt and Irbid, Jordan," *International Journal of Architectural Research* 11, no. 2 (2017): 204.

pact on these sites. Moreover, this problem is exacerbated by the increase in cases of asylum and displacement due to political crises in some neighbouring countries.

Added to these challenges are the lack of archaeological awareness,[36] and the interest of a large number of community members, including the owners of archaeological sites themselves, in preserving archaeological sites, which is represented by wrong practices towards archaeological sites and neglect towards them in light of government negligence in the supervision and control of these sites. Some practices have harmed archaeological buildings, such as using them to hold festivals and parties, unregulated tourism,[37] humidity and heat, and the use of cameras and sound machines. Part of stones have been used to build modern buildings.[38] This requires greater awareness through the media and the Internet,[39] integrating issues of heritage preservation and promotion as an important value into the curricula in schools and universities.[40]

Jordan has launched its new archaeological heritage management strategy for 2023–2027, which will work to enhance the preservation of the holy sites, as detailed by the Jordanian News Agency, and safeguard archaeological assets while promoting sustainable utilization in line with global best practices by creating a robust legal and institutional framework for heritage management.

36 Claudia Trillo et al., "Towards a Systematic Approach to Digital Technologies for Heritage Conservation: Insights from Jordan," *Preservation, Digital Technology & Culture*, 5 July 2021: 125.

37 Abdelkader Ababneh, "Qusair Amra (Jordan) World Heritage Site: A Review of Current Status of Presentation and Protection Approaches," *Mediterranean Archaeology and Archaeometry* 15, no. 2 (2015): 34.

38 Fekri Hassan et al. (eds.), *Cultural Heritage and Development in the Arab World*, foreword Ismail Serageldin (Bibliotheca Alexandrina, 2008), 15.

39 Mason Seymore, *From Monuments to Ruins: An Analysis of Historical Preservation in Jordan*, Independent Study Project (ISP) Collection 1930, 2014: 15.

40 Ruba Seiseh, "Management of Heritage Sites in Jordan—Tell Hisban as a Case Study" (PhD diss., Ruhr-Universität Bochum, 2017), 11.

Archaeological Sites on the World Heritage List and UNESCO Strategic Programs

Jordan has registered seven archaeological sites on the UNESCO World Heritage List: Petra, Wadi Rum, Qusair Amra, Umm al-Rasas, Bethany (Al-Maghtas), the city of Salt and recently Umm el-Jimalare are now classified as World Heritage Sites.[41] The UNESCO Office in Amman works with the Department of Antiquities and several government agencies (NGOs) to ensure the sustainable protection and effective management of World Heritage sites, and to support the preparation of nomination files.[42] The Department of Antiquities has begun collecting and archiving scientific documents and reports that play key roles in recovering, preserving, and understanding this heritage. A general policy was adopted to give cultural and natural heritage a function in the life of society and to integrate the protection of this heritage into comprehensive planning programmes (Article 5, 1972). The UNESCO Amman Office supports Jordan in developing systems that promote and protect cultural and natural heritage, and to promote intercultural dialogue and cultural diversity for development.[43]

Examples of Jordan's historic sites inscribed on the World Heritage List include the following conservation measures and legal aspects:

PETRA

Petra, formerly the capital of the Nabataeans, an ancient people of semitic origin, is one of the most important archaeological sites in Jordan. It represents a historical and archaeological landmark of exceptional value. Petra is distinguished by its unique character in that it is a city built of pink rocks in the middle of mountains, and finally, because of the presence of a sophisticated water management system.

41 Fakhouri and Haddad, "Aspects of The Architectural and Urban Heritage,"196; Nadine Al-Bqour, "The Impact of World Heritage Site Designation on Local Communities— The Al-Salt City as a Predicted Case Study", *Journal of Civil and Environmental Engineering* 10, no. 4 (2020), https://doi.org/10.37421/jcde.2020.10.348.

42 Seymore, *From Monuments to Ruins*.

43 Trillo et al., "Towards a Systematic Approach to Digital Technologies for Heritage Conservation," 121.

Petra was included in the World Heritage List in 1985. The city contains several important sites such as the Treasury and the Siq, which is the only passage through which tourists can reach the city. Scientific expeditions have been operating in Petra since the first half of the twentieth century.[44] Scientists are making efforts to protect Nabataean architecture for the current and future generations. However, this poses a challenge in terms of conservation, as Petra, embedded in the geological system and rocks, includes monumental spatial structures.

The Jordanian authorities have noted the importance of preserving this site due to its historical and archaeological importance and because it is threatened by environmental and natural factors such as earthquakes, floods, landslides and rockslides. The Jordanian authorities' concerns have been reinforced by the increasing number of tourists and large groups on the site. In this context, UNESCO cooperates with the Petra Tourism Development Zone Authority and the Department of Antiquities and has funded a range of emergency assistance measures for this site, including the following: December 11, 1987, contributing to research on weathering and subsequent protection of Petra properties; 14 October 2001 Workshop on Developing World Heritage Skills for Youth in the Arab Region; 14 June 2010 Urgent Investigation into the Stability of Rocks in the Siq at Petra.

WADI RUM

Located in southern Jordan, Wadi Rum is a site that combines natural and cultural heritage. This site includes geological formations, picturesque views, unique rock drawings spanning the ages, including Nabataean and Thamudic inscriptions, in addition to archaeological sites dating back to the Neolithic era. It is located in a desert area with diverse terrain of narrow valleys, natural arches, towering cliffs and steep roads, in addition to large piles of collapsed rocks and a number of caves. The site has been inhabited by several human

44 Piotr Kołodziejczyk, "Naturalne i antropogeniczne zagrożenia dla zabytków architektury nabatejskiej na terenie Petry i w południowej Jordanii / Natural and Anthropogenic Threats to the Monuments of Nabataean Architecture: the Case of Petra and Selected Sites in Southern Jordan," *Wiadomości Konserwatorskie / Journal of Heritage Conservation* 36, 2013: 64.

groups that interacted with the surrounding environment, a fact clearly evident from the inscriptions and drawings on the rocks and the archaeological remains found at the site. Wadi Rum also encapsulates the development of agriculture, farming and urban life in the region.[45] The Aqaba Special Economic Zone Land Use Plan covers the entire Aqaba Governorate. The property has an up-to-date management plan and an effective management unit, including guards and other staff dedicated to managing the property.[46] This management plan should focus on managing the natural and cultural values of the property.

QUSEIR AMRA

Quseir Amra is a palace built in the early 8th century and was listed as a UNESCO World Heritage Site in 1985. The site's distinctive artistic character consists of a castle formerly used as a shelter for guards and the residence of the Umayyad caliphs. It is equipped with a meeting hall and a bathhouse filled with pictorial paintings on the walls, the secular art that was prevalent at that time.[47] The UNESCO office in Jordan has participated in conserving, repairing, and maintaining this site in cooperation with the Department of Antiquities and the Ministry of Tourism.[48] On 26 February 2013: Preservation of mosaic floors at the Quseir Amra World Heritage Site, 13 November 1998[49]: Quseir Amra Visitor Center, and in January 1995, Urgent work at the Quseir Amra site.[50]

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45 See: https://whc.unesco.org/en/list/1377.

46 Diala Atiyat, *The Diversity of Architectural and Urban Heritage in Southern Jordan and Northwestern Saudi Arabia: The Local Experience of the Two Countries in Conserving Heritage and Its Development*, 13, https://www.academia.edu/33795225/The_diversity_of_architectural_and_urban_heritage_in_southern_Jordan_and_northwestern_Saudi_Arabia_The_local_experience_of_the_two_countries_in_conserving_heritage_and_its_development.

47 See: https://whc.unesco.org/en/list/327/.

48 Ababneh, "Qusair Amra (Jordan) World Heritage Site," 27–44.

49 Angela Atzori et al., "Managing World Heritage Sites in Jordan: From Practical Experience to Operational Guidelines," *Studies in the History and Archaeology of Jordan* 13, 2019: 109.

50 Eman Ahmad Safouri, "Jordan's World Heritage and UNESCO Strategies to Enhance It in Cooperation with the National Authorities," *Journal of Cultural Linguistic and Artistic Studies. International Scientific Periodical Journal* 22, 2022: 323.

UMM AR-RASAS

Umm ar-Rasas is an important landmark and world heritage site recognized by the United Nations Educational, Scientific and Cultural Organization (UNESCO) in 2004. Its history dates back to the end of the third century AD, when it was a Roman military site represented by a defensive fortress with towers at its corners, in order to consolidate influence and protect trade routes heading from the Arabian Peninsula to the Levant and vice versa. During the Byzantine and Islamic periods, many religious buildings were built, such as churches, chapels, and private buildings, for example, houses and presses inside and outside the fortress. Umm ar-Rasas embodies the meaning of brotherhood between the Islamic and Christian religions, and the importance of its monuments, including the Church of Saint Stephen and its mosaic floor, which was built during the Abbasid rule in the eighth century AD, in addition to the vertical hermit tower, approximately 15 metres high, used in ancient times by monks seeking isolation. The Ministry of Tourism and Antiquities has taken an interest in this site in cooperation with the European Union to attract more tourists, building a visitor centre, tourist trails, signboards and interpretive signs, and acquiring large parts of the archaeological site. It also provides services to the local community, impacting positively on it and creating job opportunities for local people. The conservation of this site was funded by the European Commission as part of the program "Protecting and Promoting Cultural Heritage in the Hashemite Kingdom of Jordan."[51] On 16 February 2009 UNESCO conducted investigations and emergency measures for the restoration of Al Amoudi Tower in Umm Ar-Rasas.[52] The involvement of local community is key in maintaining this site in order to ensure its effective protection[53] while enhancing the

51 Safouri, "Jordan's World Heritage and UNESCO Strategies," 323.

52 Atzori et al., "Managing World Heritage Sites in Jordan," 109.

53 Moayad Mohammad et al., "The Satisfaction of Local Communities in World Heritage Site Destinations: The Case of the Petra Region, Jordan," *Tourism Management Perspectives* 39, 2021: article 100841.

local community financial resources and employment opportunities, especially in the tourism sector.[54]

AL-MAGHTAS

Located in the Jordan Valley and north of the Dead Sea, it represents a religious and historical value. It is the site where Jesus Christ and his followers were baptized, and includes two main archaeological areas: Tell al-Kharrar, known as "Tel Mar Elias" or "Prophet Elijah", and the area of the churches of "John the Baptist", which contains remains dating back to the Roman and Byzantine eras. These include churches, small temples, monasteries and caves that were used as shelters for hermits, in addition to water pools designated for baptism.[55] The baptism site (Al-Maghtas) is classified as an archaeological site according to Antiquities Law No. 21/1988).In cooperation with UNESCO, represented by the World Heritage Committee, Jordan has adopted several measures to preserve this site. The Baptism Site Committee was established to manage this site and organise its financial resources. A special board of trustees was appointed by the King for this purpose. The Jordanian authorities issued a decision to prohibit and stop construction at this site, exempting from this decision all works aimed at protecting the archaeological remains. For its part, the World Heritage Committee urged the concerned States Parties to focus on protecting the western banks of the River Jordan.[56]

The best conservation practices combined with modern technologies are currently used in the protection of archaeological sites and monuments. Professor Karol Myśliwiec pointed out that archaeology is an international science that brings together researchers and archaeologists from different cultural circles.[57]

54 Ababneh et al., "The Management of Natural and Cultural Heritage," 3–24.
55 See: https://whc.unesco.org/ar/list/1446
56 Safouri, "Jordan's World Heritage and UNESCO Strategies," 324.
57 Karol Myśliwiec, *W cieniu Dżesera: Badania polskich archeologów w Sakkarze* (Fundacja na Rzecz Nauki Polskiej, 2016), 7.

Polish archaeologists have been conducting research in Jordan for many years,[58] thereby contributing to the protection of its cultural heritage.

On 26 October 2021, a cooperation programme in the field of culture, science and education was signed between the Government of the Republic of Poland and the Government of the Hashemite Kingdom of Jordan.[59] Articles 16–22 contain provisions on cooperation in the field of restoration and conservation of archaeological sites, the exchange of experts, and presentation of scientific research results. On the basis of Article 23, Jordan and Poland support the cooperation of the UNESCO National Committees in the fields of science, culture, education, and promotion of mutual respect and intercultural dialogue.

Prospective Protection of Historic Sites, Urban and Cultural Artifacts

Historical Spatiality and the Surroundings of Monuments in the Light of Law

The concept of "historical urban landscape" is defined as the result of the historical overlap of cultural values that go beyond the historical centre and a buildings complex, creating a broader context consisting of a tangible and intangible layer, geographical location and natural surroundings.[60] For this purpose, the spatial organization, topography, hydrology, geomorphology and

58 See, for example, Jarosław Bodzek et al., "Zagrożenia dziedzictwa kulturowego i jego ochrona w Jordanii—analiza trzech przypadków / Threats to Cultural Heritage and Its Protection in Jordan—Three Case Studies," *Wiadomości Konserwatorskie / Journal of Heritage Conservation* 57, 2019: 38–49; Kołodziejczyk, "Naturalne i antropogeniczne zagrożenia dla zabytków architektury nabatejskiej na terenie Petry i w południowej Jordanii," 61–72.

59 Program współpracy między Rządem Rzeczypospolitej Polskiej a Rządem Jordańskiego Królestwa Haszymidzkiego w dziedzinie kultury, nauki i oświaty na lata 2021–2024, podpisany w Warszawie dnia 26 października 2021 r. (Journal of Laws of 2022, item 181 as amended).

60 See: Article I, pt. 1a, Recommendation concerning the Safeguarding and Contemporary Role of Historic Areas (RCRHA), was adopted on 26 November 1976 in Nairobi by the General Conference of the United Nations Educational, Scientific and Cultural Organization at the nineteenth session. The influence of the above definition is reflected in Article I, pt. 8, UNESCO Recommendation on the Historic Urban Landscape (RHUL), was adopted on 10 November 2011 in Paris.

natural features of the terrain should be taken into account. Law, as an aspect of culture, is not created in a vacuum, but reflects the traditional legal culture adopted in a given region or country. Hence, the provisions of laws on the protection of historical urban landscapes and historical spaces should take into account cultural significance resulting from tradition, aesthetic and architectural values. The present builds on the past, which is why a stable and secure future cannot be constructed by cutting off from the historical cultural heritage.

UNESCO highlights that historical urban areas are an expression of human desires and aspirations in time and space. For centuries, urban centres have attracted people from different cultures and religions, a process contributing to a multicultural social mosaic. For this reason, beneath the material layer is a treasure trove of life experiences, and the traditional knowledge and skills of many generations. In the context of historical urban landscapes and urban complexes, we can also talk about the accumulation of values that constitute a communication channel and an intergenerational binder. Hence, one could conclude that historical urban areas ensure the "living presence of the past" (Preamble RCRHA). Currently, we observe the dynamic development of urban planning, economic and industrial centres that can weaken or destroy the former artefacts of urban life or traces of human settlements in rural areas.

Separating the axiological layer from the buildings means that, as a consequence, the historical social fabric which lies at the source historical structures is at risk. In the light of the law, "historical and architectural areas" refers to buildings and complexes of buildings, as well as open spaces, including archaeological and paleontological sites that create the cohesion of human settlements in the urban and rural environment (Article I, pt. 1a RCRHA). Therefore, architectural objects and their constituent parts, together with spatial layouts and connections with the surrounding environment,[61] should be considered as

61 In this respect, it is necessary to take into account natural areas created as a result of acts of nature, as well as greenery shaped by humans (e.g. orchards, gardens, tree alleys, dendraria). See: Article I, pt. 1 and 5, Recommendation concerning the Safeguarding of Beauty and Character of Landscapes and Sites, was adopted on 11 December 1962 in Paris by the

a whole. Restoration and conservation work should be undertaken based on verified knowledge and scientific principles in the pursuit of authenticity (Article II, pt. 4 in relation to Art. IV, pt. 19). Contemporary architects and engineers should take care when considering the development of cities in order that historical urban/rural buildings, which are still a determinant of social identity, are not destroyed (e.g. as a result of the location of industrial plants and communication arteries near historic buildings), but become a harmonious part of the modern life of residents.

It should be noted that current construction techniques, instead of protecting diversity, often create a uniform and monotonous mass that blurs individual cultural features. In order to maintain authenticity, historical areas should be protected against the introduction of artificial installations that could distort their image or intergenerational message. In this regard, the UNESCO Recommendation of 1976 mentions such features as electricity poles, telephone cables, television aerials, neon advertisements and commercial signs.[62] Yet since the document was drawn up, social life has changed, and science and technology have undergone dynamic transformations. Contemporary threats to historical areas include negative climate change, natural disasters, water shortages, fragmentation of the law, as well as the development of the phenomenon of globalisation, which unifies models and ideas on a global scale, putting economic factors at the forefront.[63] There needs to be a restoration of the awareness that historical urban structures, although contributing to the economic development of given hubs and regions, are still primarily a cultural good, thanks to which human personality and creativity could develop. The UNESCO Recommendation of 2011 emphasises that modern and future-oriented policies for the protection of historic urban areas require the implementation of measures that identify and take into account historical layers, while ensuring a balance of cultural and natural val-

General Conference of the United Nations Educational, Scientific and Cultural Organization at the twelfth session.

62 Article IV, pt. 30, RCRHA.

63 Atzori et al., "Managing World Heritage Sites in Jordan," 110.

ues.[64] Therefore, best practices for the protection of natural and urban landscapes should be taken into account in construction solutions.

Cooperation in the EU Structures

Poland's accession to the EU was a landmark event confirming a democratic identity, shared common European values, respect for human rights, and legal standards. Poland submitted its application for accession to the European Union in 1994,[65] becoming an EU member state on 1 May 2004. However, systemic transformation is not a one-time process: it requires continuous work and efforts to implement the values that underlie the European heritage.

The Preamble to the Charter of Fundamental Rights of the European Union emphasizes that the Member States are determined to work for a future of peace, freedom and security based on common values rooted in the indivisible and universal values of the human person.[66] Article 22 states that the EU respects cultural, religious and linguistic diversity. Jordan shares such values as advocating for peace, acting in the name of solidarity between people, and caring for moral and cultural heritage. In 1977, Jordan signed a cooperation agreement with the European Economic Community.[67] The Jordan Association Agreement with the European Union came into force on 1 May 2002. Under the Association Agreement, the parties committed to developing lasting relations based on reciprocity and partnership, strengthening political stability in

64 Article III, pt. 21, RHUL.

65 Stanisław Kluza (ed.), *Polska w Unii Europejskiej: Bilans korzyści* (Instytut Debaty Eksperckiej i Analiz Quant Tank, 2023), 9.

66 The Charter of Fundamental Rights of the European Union (2000/C 364/01) (Official Journal of the European Communities, C No. 364 of 18 December 2000).

67 Marzena Mruk, "Stany Zjednoczone i Unia Europejska w polityce zagranicznej Haszymidzkiego Królestwa Jordanii w XXI wieku—zarys problematyki / The United States and the European Union in the Foreign Policy of the Hashemite Kingdom of Jordan in the 21st Century—Outline of the Problem," *Wrocławskie Studia Erazmiańskie / Studia Erasmiana Wratislaviensia*, no. 13 (2019): 371.

the region, dialogue on scientific, technological, artistic and cultural issues.[68] Among the countries of the Middle East, the Hashemite Kingdom of Jordan is one of the key strategic partners. Cooperation with the EU mainly includes the economic area, although this cooperation is also being developed in the field of renewable energy sources, services, the aviation sector, conducting humanitarian actions, and counteracting terrorism.[69]

Diplomatic relations between Poland and Jordan have been conducted on the basis of international norms since the 1960s. The Ambassador Extraordinary and Plenipotentiary of Poland to the Hashemite Kingdom of Jordan was appointed in 1964. Over subsequent decades, trade, social, cultural, educational and scientific relations were successfully developed, including in the field of archaeological research. Polish-Jordanian relations were strengthened after the first-ever visit of the President of Poland to Jordan in 2016. The agreements signed by Poland and Jordan are included, e.g. bilateral treaties on cooperation between the Government of the Republic of Poland and the Government of the Hashemite Kingdom of Jordan in the fields of culture, science and education, tourism and defence.[70] The developing cooperation between Jordan and Poland

68 Preamble, Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Hashemite Kingdom of Jordan, of the other part, was signed in November 1997 and ratified by the Government of Jordan in September 1999.

69 See, e.g. 2008/216/EC: Council Decision of 25 June 2007 on the Signing and Provisional Application of the Agreement between the European Community and the Hashemite Kingdom of Jordan on Certain Aspects of Air Services (Official Journal of the European Union L No. 68 of 12 March 2008, p. 14); Decision No 1/2016 of the EU-Jordan Association Council of 19 December 2016 agreeing on EU-Jordan Partnership Priorities [2016/2388] (Official Journal of the European Union L No. 355 of 24 December 2016, pp. 31–46), 3–5.

70 Umowa między Rządem Rzeczypospolitej Polskiej a Rządem Jordańskiego Królestwa Haszymidzkiego o współpracy w dziedzinie turystyki sporządzona w Warszawie dnia 1 września 2004 r. (Polish Monitor of 2007, No. 38, item 432); Umowa między Rządem Rzeczypospolitej Polskiej a Rządem Jordańskiego Królestwa Haszymidzkiego o współpracy w dziedzinie obronności podpisana w Ammanie dnia 11 maja 2014 r. (Polish Monitor of 2018, item 946); Program współpracy między Rządem Rzeczypospolitej Polskiej a Rządem Jordańskiego Królestwa Haszymidzkiego w dziedzinie kultury, nauki i oświaty na lata 2021–2024 podpisany w Warszawie dnia 26 października 2021 r. (Journal of Laws of 2022, item 181).

confirms the essence of the words of the Preamble to the Vienna Convention on the Law of Treaties that international agreements can be "a means of developing peaceful cooperation among nations, whatever their constitutional and social systems."[71]

Conclusions

Archaeological monuments and cultural artifacts are a testimony of history and the development of human society. They contain a material layer and elusive phenomena from the spiritual sphere. Material monuments are an expression of creative invention and testify to scientific and technological development. Nevertheless, it is the intangible heritage that, through its axiological layer, creates the materialised product of human thought able to impact future generations. Therefore, it is important to be aware that identity is shaped on the coexistence of cultural phenomena with the natural environment where human life proceeds.

For this reason, the process of registering and documenting cultural heritage represents a key priority to help heritage specialists and decision-makers protect these sites. Heritage lists also play an important role in influencing the decisions of policymakers who plan infrastructure development plans. In a country like Jordan, cultural heritage resources require careful remediation and maintenance, as research sites are constantly exposed to natural and human hazards that accelerate their deterioration.

It should be pointed out that while Polish law allows the removal of a monument from the register, this is only done in strictly defined circumstances following a decision by the Minister of Culture and National Heritage. However, issuing a decision in this respect requires analysis based on objective criteria and recognition of the actual condition of the monument.

71 The Vienna Convention on the Law of Treaties, adopted on 22 May 1969, entered into force on 27 January 1980.

Archaeological sites are an important source of income, especially in the tourism[72] and cultural sector in light of the absence of petroleum products in Jordan. It is also an important factor for sustainable development. However, in recent years, due to challenges such as Covid-19 pandemic and some regional conflicts that impact the tourism activity, the national economy has faced major challenges that require government agency intervention. It is also necessary to highlight how climate change, various environmental factors, and industrial pollution pose challenges to preserving urban heritage, and not only in this geographical region.

Heritage consists of "living" cultural phenomena. Human life takes place in a specific natural and spatial environment, hence the holistic combination of elements that form the social and biological tissue of heritage is indicated in the course of this article.

To safeguard monuments, necessary protective measures must be taken in advance to prevent their deterioration. Admittedly, each loss of a monument is detrimental to the functioning and impact of cultural heritage understood as a whole and consisting of diverse but mutually complementary cultural phenomena and historical objects. Bilateral cooperation between Poland and the Hashemite Kingdom of Jordan shows the perspective of shared cultural values. Membership of international organizations strengthens diplomatic relations based on the axiology of international law. Cultural diplomacy in effect supports the process of protecting archaeological monuments and historical artifacts in both countries, which at the same time constitute the heritage of humanity.

72 Martine Bakker, "A Review of 'World Heritage Sites and Tourism: Global and Local Relations'," *Tourism Geographies* 20, no. 3 (2018): 577–79.

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The Balance Between National Sovereignty and Economic Migration: Are Quota Systems Discriminatory and Do Foreigners Have a Right to Work Permits?

Abstract: This article examines delves into the intricate regulatory framework of residence permits for non-European Union nationals, with a specific focus on quota systems of employment-based permits. Anchored in Article 79 of the Treaty on the Functioning of the European Union (TFEU), the research navigates the complex legal landscape that governs immigration policies. The study aims to critically analyse the extent of sovereign discretion exercised by Member States in issuing residence permits, with particular attention to potential discriminatory practices based on applicants' national origins.

Utilising the Czech Republic as a strategic case study, the research explores the nuanced variations in labour migration regulations across the European Union. The investigation seeks to unpack the significant divergences in national admission policies and permit allocation strategies, illuminating the multifaceted challenges inherent in managing cross-border migration. By examining legislative provisions and judicial interpretations, the article offers a comprehensive scholarly critique of contemporary immigration frameworks.
Keywords: migration, labour law, quota systems, non-discrimination

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Introduction

Residence permits for non-European Union nationals represent a complex and multifaceted regulatory landscape, encompassing a diverse array of administrative classifications. These permits span a comprehensive spectrum, ranging from short-term visas enabling stays up to 90 days to more extensive long-term visas, residence permits for extended periods, familial residency provisions, and ultimately, permanent residence authorizations.

The foundational legal framework for this intricate system is articulated in Article 79(1) of the Treaty on the Functioning of the European Union (TFEU), which delineates an ambitious vision for a holistic immigration policy. This policy is strategically designed to achieve multifaceted objectives: orchestrating migration flows with sophisticated management techniques, ensuring equitable treatment of third-country nationals legally domiciled within Member States, and implementing robust preventative and combative measures against illegal immigration and human trafficking.

Specifically, TFEU's Article 79, Paragraph 2(a) empowers the European Parliament and Council to promulgate comprehensive legislative measures. These regulations meticulously define entry and residence conditions, establishing standardized protocols for the issuance of long-term visas and residence permits, with particular emphasis on facilitating family reunification processes.

Predicated on this legislative mandate, the European Union has progressively developed a series of targeted directives that systematically regulate the conditions under which third-country nationals may secure residence permits, calibrated to the precise motivations underlying their territorial presence.[3]

The present scholarly examination focuses specifically on residence permits issued for employment purposes—a domain of particular academic interest. As will be substantiated in subsequent analysis, labour migration repre-

3 To name some of the key EU directives: Nos. 2016/801, 2014/36/EU, 2021/1883, 2014/66/EU or 2011/98/EU.

sents a remarkable anomaly within European regulatory frameworks, characterized by persistent and significant divergences in Member States' approaches regarding both the quantitative allocation of residence permits and the nuanced modalities of national admission policies.

The article's primary scholarly objective is to conduct a rigorous investigation into the extent of sovereign discretion exercised by Member States in the process of issuing employment-based residence permits. Of particular analytical focus will be the potential for discriminatory practices predicated on applicants' national origins. To contextualize this investigation, the analysis will prominently feature relevant provisions of Czech legislation, supplemented by a critical evaluation of pertinent Czech judicial determinations.[4]

On the Legal Entitlement to a Residence Permit and Article 79(5) TFEU

Article 79(5) of the TFEU presents a nuanced constitutional provision that ostensibly preserves Member States' sovereign prerogative to determine the quantitative parameters of third-country nationals' entry for employment purposes. This provision immediately raises a fundamental jurisprudential question: Does this constitutional clause effectively negate legal entitlement to various employment-related residence permits?

The fundamental jurisprudential principle underlying administrative decision-making posits that when an applicant satisfies prescribed legal requirements, the administrative authority is inherently obligated to grant the requested authorization. Drawing substantively from the scholarly work of Pavel Porizek[5]—a distinguished scholar in migration law—this analysis critically examines the legal entitlement of foreigners to a residence permits is-

4 The methodological selection of the Czech Republic as a case study is deliberate and multifaceted. Beyond the author's personal national affiliation, the Czech Republic has instituted a distinctive economic migration regulatory system that merits thorough scholarly scrutiny.

5 Pavel Porizek is the Head of the Ombudsman's Office of the Czech Republic.

sued for employment purposes in accordance with Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State (hereinafter: Directive 2011/98/EU).[6]

Porizek's claims can be summarized as[7]:

(i) In the case of residence permits issued for the purpose of seasonal work pursuant to Directive 2014/36/EU of the European Parliament and of the Council of 26 February on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers (hereinafter: Directive 2014/36/EU), the grounds for refusal of the application (Art. 8 of the Directive 2014/36/EU), the withdrawal of the issued authorisation (Article 9 of the Directive 2014/36/EU) and the non-renewal of the authorisation (Article 15 of the Directive 2014/36/EU) are expressed exhaustively, which also applies to the criteria and requirements for the admission of a foreigner (Article 6 of the Directive 2014/36/EU). Critically, according to Porizek, if the requirements laid down are fulfilled and there is no reason to refuse the application, the Member State is obliged to issue the permit.

(ii) In the case of a Blue Card issued pursuant to Directive 2021/1883 of the European Parliament and of the Council of 20 October 2021 on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment, and repealing Council Directive 2009/50/EC (hereinafter: Directive 2021/1883), it follows

6 Pavel Porizek, "Další příspěvek k výkladu výhrad veřejného pořádku v zákoně o pobytu cizinců (kde chybí judikatura SDEU) a jak je tomu s nárokovostí zaměstnanecké karty a dalších pobytových titulů," in *Ročenka uprchlického a cizineckého práva: 2022* [*Yearbook of Asylum and Migration Law: 2022*], ed. Dalibor Jílek and Pavel Pořízek (Kancelář veřejného ochránce práv [Ombudsman's Office of the Czech Republic], 2023), 21–101.

7 Porizek, "Další příspěvek k výkladu výhrad veřejného pořádku v zákoně o pobytu cizinců," 101.

from Article 9(1) of the Directive 2021/1883 that a foreigner who fulfils the admission criteria set out in Article 5 and who is not subject to the grounds for refusal under Article 7, "shall be issued with an EU Blue Card." Again, therefore, there is an entitlement to a residence permit.

(iii) In the case of an intra-corporate transfer pursuant to Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer (hereinafter: Directive 2014/66/EU), if the foreigner fulfils the admission criteria set out in Article 5 of the directive and the conditions for the application of the grounds for refusal pursuant to Article 7 of the directive are not established, the directive again gives rise to a legal entitlement to the issue of a permit.

(iv) In the case of the single permit issued under Directive 2011/98/EU, there is no exhaustive list of substantive grounds for refusal of an application, its amendment or extension of its validity. At the same time, the criteria and requirements for issuing a residence permit are not provided. The legal regulation of such matters thus remains entirely within the competence of the Member States, whose powers in this area are limited only by recital 17 of the directive, according to which: "The conditions and criteria on the basis of which an application to issue, amend or renew a single permit can be rejected, or on the basis of which the single permit can be withdrawn, should be objective and should be laid down in national law including the obligation to respect the principle of Union." However, according to Porizek, the non-existence of entitlement to the issue of a permit is only illusory. Porizek refers to Article 4(2) and (4) of the directive, which states that: "Member States shall examine an application made under paragraph 1 and shall adopt a decision to issue, amend or renew

> the single permit if the applicant fulfils the requirements specified by Union or national law. A decision to issue, amend or renew the single permit shall constitute a single administrative act combining a residence permit and a work permit" and: "Member States shall issue a single permit, where the conditions provided for are met, to third-country nationals who apply for admission and to third-country nationals already admitted who apply to renew or modify their residence permit after the entry into force of the national implementing provisions." Based on this, Porizek concludes that where a foreigner meets the requirements laid down by national law or EU law, the directive, pursuant to its Article 4(2) and (4), obliges the Member State to issue, amend or renew the single permit, thereby clearly limiting the discretionary powers of the national authorities.[8]

In synthesis, with the exception of permits issued under Directive 2011/98/EU, a legal entitlement to the requested residence permit emerges whenever prescribed grounds for refusal are absent and the requisite admission conditions are comprehensively satisfied. For single permits under Directive 2011/98/EU, the entitlement is contingent upon the specific conditions articulated in national legislative frameworks—though once these conditions are fulfilled, a corresponding legal right to the residence title crystallizes.

This judicial interpretation may potentially elicit significant institutional resistance from Member States, as it effectively establishes a normative pathway that could systematically facilitate labour migration for all applicants meeting objective criteria. Consequently, one might legitimately question whether such an outcome aligns with the European legislator's original strategic intent.

Ultimately, Article 79(5) TFEU remains the sole substantial mechanism through which Member States can modulate migratory flows, enabling them to determine the quantitative parameters of foreign entry. This provision rep-

8 Porizek, "Další příspěvek k výkladu výhrad veřejného pořádku v zákoně o pobytu cizinců," 101.

resents a critical constitutional mechanism that must be conceptually distinguished from the substantive assessment of legal entitlements when directive-prescribed (or nationally legislated) conditions are unequivocally met.

Determining the Volume of Entries under Article 79(5) TFEU—Assessing Discretionary Powers in Migrant Worker Admission

The critical examination of Article 79(5) TFEU prompts a profound question: Does this provision constitute an efficacious and comprehensive mechanism for Member States to mitigate the potential legal imperative of issuing residence permits to migrant workers? Can Member States leverage this provision to modulate migratory flows through a non-discriminatory approach by selectively determining admission quotas from specific source countries?

A closer look at the relevant texts of the relevant directives reveals the following:

(i) Directive 2021/1883 (Blue Card): The directive's preamble, specifically paragraph 15, explicitly preserves Member States' discretionary powers under Article 79(5) TFEU. It unambiguously articulates the right of Member States to either reject or declare an application inadmissible based on this constitutional provision. Article 6 further reinforces this discretion by affirming the state's prerogative to regulate foreign national entry volumes. Notably, Article 24 mandates transparent communication, requiring states to render entry volume restrictions easily accessible to potential Blue Card applicants.

(ii) Directive 2011/98/EU (Single Permit): Paragraph 6 of the preamble unequivocally acknowledges the individual states' competence in regulating foreign national entry quantities. Article 8(3) provides a particularly robust mechanism, explicitly permitting states to consider applications inadmissible on grounds of managing overall ad-

mission volumes, thereby absolving them of the obligation to process such applications.

(iii) Directive 2014/66/EU (Intra-Corporate Transfers): Article 6 provides clear provisions allowing Member States to declare applications for intra-corporate transfers inadmissible or reject them when invoking the restrictions outlined in Article 79(5) TFEU.

(iv) Directive 2014/36/EU (Seasonal Workers): Consistent with the intra-corporate transfers directive, Article 7 offers comparable provisions enabling Member States to either deem applications inadmissible or reject them under the aegis of Article 79(5) TFEU.

First of all, it should be pointed out that all of these directives, in our view, implicitly provide that a foreigner will at least be allowed to deliver his/her application to the disposal of the state authorities: "… consider an application for an EU Blue Card to be inadmissible; An application may be considered as inadmissible …; … application for an intra-corporate transferee permit may either be considered inadmissible or be rejected; … an application for an authorisation for the purpose of seasonal work may be either considered inadmissible or be rejected." The directives always refer to an application, i.e. an existing legal act, and do not stipulate that the state can just prevent foreigners from entering the territory for the purpose of work by not giving them a chance to submit it. In our opinion, this is also the case with Directive 2011/98/EU, although it states that: "an application … need not to be processed." However, in order for an application to be "an application", a wish to make such a submission must be formed and manifested. However, this conclusion is not universally accepted. To demonstrate this, the legal system of the Czech Republic must be examined.

The application of Article 79(5) TFEU in the Czech Republic is reflected in Section 181b of Act No. 326/1999 Coll, on the residence of foreigners in the territory of the Czech Republic (hereinafter: Residence Act). This legislative provision mandates that the government establishes regulatory mechanisms to

determine the maximum number of applications permissible within a single calendar year. Specifically, these quotas apply to applications for:

- Visas for stays exceeding 90 days for business purposes;
- Long-term residence permits for investment purposes;
- Employee cards issued under Directive 2011/98/EU.

Critically, the legislation allows for strategic allocation of these quotas, permitting the reservation of entire allocation blocks or specific portions exclusively for government-approved economic migration programs designed to facilitate the entry of skilled workers. The relevant embassy is required to maintain transparent communication by publishing current quota information, including available 'vacancies', on both official notice boards and websites.

The implementation is operationalized through the Government Regulation No. 220/2019 Coll., which establishes precise quotas for designated Czech embassies. In certain instances, entire quotas are exclusively reserved for governmental economic migration programs, effectively precluding applications from "non-privileged" foreign nationals.

A pivotal procedural constraint is that (except for some minor exemptions[9]) residence permit applications must be submitted at the Czech embassy located in the applicant's country of origin,[10] eliminating possibilities for jurisdictional arbitrage or "forum shopping".[11]

Complementing this framework, Section 169f of the Residence Act introduces an additional administrative mechanism. Embassies are empowered to mandate pre-arranged appointment dates for application submissions. In contemporary practice, this has become a de facto requirement, rendering spontaneous applications impossible.

9 Nationals of the countries listed in Decree of the Ministry of Interior no. 429/2010 Coll.

10 Alternatively, at the nearest embassy of the Czech Republic in the case of countries where there is either no embassy of the Czech Republic or no consular section.

11 Or in a country where he/she is a long-term or permanent resident and has been lawfully residing for at least 2 years. See section 169g(1) of the Residence Act.

The operational implications are profound: when quota allocations are exhausted, applicants receive only minimal notification—typically a referral to Section 181b and the relevant Government Regulation. No formal administrative procedure is initiated, and no substantive decision is rendered. But what do the national courts think of such a procedure?

This approach was recently scrutinized in a significant judicial review by the Regional Court in Brno.[12] The court controversially argued that European legal frameworks permit not only limitations on actual residence permit issuances but also on application submissions themselves. The court additionally highlighted the inherent capacity constraints of embassy processing systems.

We believe that the arguments of the Regional Court in Brno are flawed. The judgment fundamentally misinterprets the nature of an "application" under relevant directives.[13] A genuine application, in our view, requires the applicant's formal intent to be placed before the public authority—a threshold not met by merely expressing interest in an embassy appointment.

The Regional Court's assessment that Article 8(3) of Directive 2011/98/EU does not imply that the Member States are obliged to accept the application first and can only then declare it inadmissible because of the fact that the article in question is intended to mean that the application does not have to be processed at all is, in our view, not correct.

In our opinion, in order for an application to be considered an application within the meaning of the directive, it is necessary that the will of a person to obtain a specific permit (= of the applicant) is placed at the disposal of the public authority, whereas mere interest in an appointment at the embassy is not enough. It is only after the application has been submitted that it could subsequently be assessed as inadmissible on the grounds of the existence of quotas. This conclusion is drawn in light of the reasoning on the grounds for the decision set out below.

12 Judgement of the Regional Court in Brno, Case No. 55 A 38/2022—155, 21 February 2024.
13 The Czech Republic has only introduced quotas in relation to Directive 2011/98/EU.

An unresolved legal question remains: Can Member States effectively regulate incoming migration by strategically managing embassy staffing and processing capacities? In the Czech context, even when specific embassy quotas are not explicitly defined, the application process remains constrained by the embassy's willingness and capacity to accept applications.

Decision on the Application and Its Justification

If we accept that a Member State should at least accept the foreigner's submission, a critical jurisprudential question emerges: Is it legally sufficient to provide a perfunctory response citing quota exhaustion, or does procedural fairness demand a more substantive explanation that elucidates (i) the rationale underlying quota implementation, and (ii) the methodological considerations determining specific numerical limitations?

This issue has been addressed by Johan Rochel.[14] In her article on proportionality and procedural safeguards in the field of European migration law, she argues that the national regulation of labour migration in the Member States is substantially constrained by European legal frameworks and the foundational principles undergirding EU jurisprudence. Central among these principles is the fundamental right to a comprehensively reasoned administrative decision.[15] According to Rochel, when a foreigner's application is deemed inadmissible (under Article 79(5) TFEU and the above-mentioned directives), it is necessary for the Member State to provide: "… empirical background for its decision, such as the number of current labour immigrants, current figures on the unemployment rate, and current figures on situation of specific economic sectors."[16] Rochel derives this obligation both from the right of the person

14 Johan Rochel, "Working in Tandem: Proportionality and Procedural Guarantees in EU Immigration Law," *German Law Journal* 20, no. 1 (2019): 89–110, https://doi.org/10.1017/glj.2019.1.

15 Rochel, "Working in Tandem," 98.

16 Rochel, "Working in Tandem," 105

concerned to be told the empirical considerations leading to the decision on the application and from the simple observation that any different approach would be disrespectful to the applicant.[17] Although in labour migration cases the justification may be relatively minimalist, according to Rochel, it should not be entirely absent.[18] These conclusions are supported by the case-law of the CJEU confirming the right of a person to a reasoned decision[19] or Article 18 of the non-binding European Code of Good Administrative Behaviour.[20] The discussion will return to these arguments later in the article.

Given that in the field of labour migration, the broad discretion of Member States in regulating migration flows clashes with the right to a proper justification of the decision on the application, Rochel proposes an approach based on the application of the principle of proportionality, i.e. to provide applicants with at least a justification that reveals the basic information on why the application should be considered inadmissible.

What Rochel characterizes as an "extreme case"—rejecting applications solely through quota mechanisms without substantive justification[21]—paradoxically emerges as the standard administrative approach within the Czech legal system. Notably, national judicial frameworks have consistently found no procedural irregularity in such practices.

17 Rochel, "Working in Tandem," 105.

18 Rochel, "Working in Tandem," 105.

19 Rochel, "Working in Tandem," referring to the decision of CJEU in the case no. C-269/90, *Technische Universität München v. Hauptzollamt München-Mitte*, 1991 E.C.R. 1991 05469.

20 Stating that (1) "Every decision of the institution which may adversely affect the rights or interests of a private person shall state the grounds on which it is based by clearly indicating the relevant facts and the legal basis of the decision"; (2) "The official shall avoid making decisions which are based on brief or vague grounds, or which do not contain an individual reasoning"; (3) "If it is not possible, because of the large number of persons concerned by similar decisions, to communicate in detail the grounds of the decision and where standard replies are therefore sent, the official shall subsequently provide the citizen who expressly requests it with an individual reasoning." In: European Ombudsman, *European Code of Good Administrative Behaviour* (European Union, European Ombudsman, 2015), https://doi.org/10.2869/61059. Accessible via: https://www.ombudsman.europa.eu/pdf/en/3510.

21 Rochel, "Working in Tandem," 106.

The implementation of quota systems inevitably precipitates fundamental inquiries into their substantive motivations. Potential justifications may encompass diverse considerations, ranging from contemporary unemployment metrics to broader strategic imperatives of migratory flow regulation.[22]

In the absence of explicit decisional reasoning,[23] the only other possible source of information remains the explanatory memorandum to the relevant legislation. In this respect, as the Regional Court in Brno points out in the above-quoted decision, the justification for the introduction of the quota system states that the capacities of the embassies are limited and that in the main source countries of labour migration, the interest of foreigners in working in the Czech Republic far exceeds the capacity of the embassies to accept applications.[24]

However, do the reasons for the inadmissibility of the application set out in the explanatory memorandum withstand rigorous scrutiny against the fundamental requirements for a proper and individualized statement of reasons? We contend that they do not, and this assessment extends beyond the procedural observation that applicants bear no obligation to consult an explanatory memorandum that lacks the normative status of legislative enactment.[25]

Critically, it becomes imperative to interrogate the extent to which the information articulated in the explanatory memorandum corresponds to empirical realities. A particularly revealing analytical vector emerges through comparative quota allocation: Why are 10,550 permits allocated to Philippine nationals, while merely 200 are granted to Vietnamese nationals? This stark differential demands sophisticated interrogation. What distinctive characteris-

22 Then, according to Rochel, the foreigner could raise questions such as why does the public authority consider it problematic or how does it fit into the delivered decision? In: Rochel, "Working in Tandem," 106.

23 Moreover, in the case of the Czech Republic, we cannot even say that it is *an application*.

24 See the decision of the Regional Court in Brno no. 55 A 38/2022—155 of 21 February 2024 and the explanatory memorandum to Act No. 176/2019 Coll., which introduced quotas in the Czech Republic pursuant to Article 79(5) TFEU.

25 Unlike with the laws, where the principle *ignorantia iuris non excusat* would apply.

tics render Philippine workers ostensibly more desirable? Can one genuinely assert an objective basis for such dramatically disparate allocation?[26]

As previously discussed, by precluding foreign nationals from even applying for the relevant residence permit, we eliminate any opportunity to critically assess the rationale behind the specific setting of quotas in individual cases. In doing so, we circumvent the application of the principle of proportionality, which, as Rochel suggests, could serve as a vital mechanism for balancing the considerable discretionary authority of Member States with the applicant's right to a well-reasoned decision. Without access to information beyond the explanatory memorandum accompanying the legislation, we are left with an inherently static framework—one that, by its nature, can only reflect the circumstances prevailing at the time the legislation was enacted.

For the sake of completeness, we would like to reference the reasoning presented in the decision of the Regional Court in České Budějovice.[27] The court asserts that the justification for the admissibility of the quota system reflects the absence of a legal entitlement to a residence permit under Directive 2011/98/EU, thereby granting the state the discretion to determine which foreign nationals may enter its territory. According to the court, this discretion is rooted in "various national or international political reasons."

In our view, this reasoning is problematic, primarily due to the conflation of two distinct issues: (i) whether there exists a legal entitlement to the issuance of a single permit under Directive 2011/98/EU (as we have discussed above), and (ii) whether the application of legislation adopted under Article 79(5) TFEU can

26 It should be added that according to the report of the Ministry of the Interior of the Czech Republic on migration for the first quarter of 2024, a total of 68,181 persons of Vietnamese nationality and 7,416 persons from the Philippines resided in the territory—it is therefore impossible to argue that the Philippines is a country whose nationals traditionally reside in the Czech Republic and have a significant presence here compared to other foreigners. See Ministerstvo vnitra České republiky, *Statistická příloha ke čtvrtletní zprávě o migraci I. 2024*, 7. Accessible via: https://www.mvcr.cz/soubor/zpravy-o-migraci-ctvrtletni-zprava-o-migraci-i-2024-priloha.aspx.

27 Judgement of the Regional Court in České Budějovice, Case No. 61 A 21/2023—42, dated 31 October 2023.

effectively circumvent the need to adjudicate on an individual's entitlement to a residence permit. Nevertheless, the concerns expressed earlier remain pertinent in relation to the reasoning in this decision. Specifically, the foreign national is not required to familiarize themselves with national case-law or explanatory memorandums, and, more critically, the reasoning offered in the decision fails to provide concrete, verifiable justifications for the introduction of the restriction in question.

Discrimination Against Foreigners from Third Countries?

With the exception of Directive 2014/66/EU, all of the aforementioned directives addressing labour migration contain provisions mandating their implementation without discrimination. However, the criterion of distinction based on nationality is always absent from the list of discriminatory grounds, referring to the wording of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation and Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, which similarly state in their preambles and Articles 3(2) that: "This Directive does not cover differences of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons in the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned." It is also essential to reference Article 21(2) of the Charter of Fundamental Rights of the European Union (hereinafter: the Charter), which enshrines the prohibition of discrimination on the grounds of nationality within the scope of the TFEU and the Treaty on European Union (hereinafter: the Treaties). However, the provision in question also specifies that certain provisions of the Treaties may exclude this discriminatory criterion. It is precisely Article 79(5) TFEU, along with the related directives (as discussed above), that constitutes such an exception.

In the context of Czech national law, the Supreme Administrative Court addressed this issue regarding the application of the quota system in one decision.[28] The Court noted that while Article 21(2) of the Charter generally prohibits discrimination based on nationality, it specifically refers to discrimination among Union citizens based on the nationality of a Member State. In contrast, within the realm of migration and access to the labour market for third-country nationals, the criterion of nationality is not considered, thus permitting differential treatment. This view is also acknowledged in the Handbook on European Non-Discrimination Law, published by the European Union Agency for Fundamental Rights.[29]

Nevertheless, does this imply that Member States are entirely exempt from considering the principles derived from EU law when regulating the volume of entry and residence of foreigners? We believe not.

In our view, the restriction of fundamental rights in the context of regulating the volume of entry of workers based on their nationality presents another critical dimension—unequal treatment in the exercise of the fundamental right to a reasoned decision. The argument put forward by Johan Rochel now aligns closely with our own.

We refer to the Opinion of Advocate General Gerhard Hogan of 2 March 2021 in case C-94/20, *Land Oberösterreich v. KV*. In his opinion, Advocate General Hogan asserts that when a Member State invokes an exception under one of the Treaties relating to fundamental freedoms or an overriding reason of general interest to justify legislation that interferes with the exercise of fundamental freedoms,[30] this justification, which is governed by EU law, must be

28 Decision of the Supreme Administrative Court of the Czech Republic no. 4 Azs 14/2022—34 of 14 June 2022.

29 European Union Agency for Fundamental Rights, *Handbook on European Non-Discrimination Law* (Publications Office of the European Union, 2020), 27, https://doi.org/10.2811/0294. Accessible via: https://fra.europa.eu/en/publication/2018/handbook-european-non-discrimination-law-2018-edition.
Rochel, "Working in Tandem," 106.

30 E.g. free movement of services.

interpreted in accordance with the general principles of EU law, particularly the fundamental rights enshrined in the Charter.[31] Thus, such exceptions can only be applied to the legislation in question if they comply with fundamental rights, which the CJEU ensures are respected. In this regard, he also refers to the CJEU's (then ECJ) judgment in C-540/03, *Parliament v. Council* (27 June 2006), where the Court considered whether certain exceptions in Directive 2003/86 on the right to family reunification were consistent with fundamental rights. The Court held that the exceptions in the directive did not entitle Member States, either expressly or by implication, to adopt implementing provisions that contravened fundamental rights, even though they retained a margin of discretion—one that was sufficiently broad to allow them to apply their rules while still respecting the requirements of fundamental rights protection.[32]

One of the fundamental rights that can be derived from the right to a fair trial is the right to a statement of reasons, as Johan Rochel rightly emphasizes.

At this point, it is worth quoting the CJEU's reasoning in the previously mentioned case C-269/90, *Technische Universität München v. Hauptzollamt München-Mitte*, where it was held that respect for the rights guaranteed by the Community legal order in administrative procedures is of fundamental importance. These guarantees include, in particular, the duty of the competent institution to examine carefully and impartially all relevant aspects of the individual case, and the right of the person concerned to express their views and to receive an adequately reasoned decision. The right to a proper statement of reasons is intrinsically linked to the principle of sound administration.[33]

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31 Judgment in the case C-390/12 *Pfleger and Others* of 30 April 2014, paragraphs 34 to 36.

32 Opinion of Advocate General Gerhard Hogan of 2 March 2021 in case C-94/20 *Land Oberösterreich v. KV*, paragraph 69 and CJEU judgment in case C-540/03 *Parliament v. Council* of 27 June 2006.

33 See, for example, the decision of the General Court (formerly the Court of First Instance) in Case T-410/03 *Hoechst GmbH v. Commission of the European Communities* of 18 December 2003: "… among the guarantees conferred by the Community judicial order in administrative procedures is, in particular, the principle of sound administration, which entails the obligation for the competent institution to examine carefully and impartially all the relevant elements of the case," sub-section 129.

Thus, in our view, when directives grant discretion to Member States—in this case, regarding how to manage labour migration of third-country nationals—that discretion must always be exercised in a manner that aligns with the fundamental rights of the individuals concerned. In the domain of the right to a reasoned decision and the state's duty of sound administration, no distinction can be made based on nationality.[34] Therefore, while the mere existence of a restriction on labour migration is not inherently discriminatory, its implementation by a Member State that interferes with qualitatively different rights—such as the right to enter and remain in the territory or the legal entitlement to a residence permit—may be.

Conclusions

The foregoing analytical exploration of Member States' capacities to modulate foreign entry through Article 79(5) TFEU, illustrated by the Czech Republic's context, reveals a nuanced and complex regulatory landscape. While the selection of eligible foreign nationals based on nationality does not inherently transgress non-discrimination principles and aligns with the Charter's provisions, such a juridical determination proves insufficient to categorically preclude the broader substantive rights of prospective residents seeking employment-related permits.

Consequently, two critical jurisprudential inquiries emerge: (i) the procedural guarantees afforded to foreign nationals in articulating their intent to pursue residency, and (ii) the potential institutional responses to entry limitation mechanisms. The fundamental principle of administrative transparency necessitates that applicants be afforded a minimally substantive opportunity to

34 In fact, the principle of sound administration is often included in the provisions of national legislation on administrative procedures. In the case of the Czech Republic, it is Sections 2 to 8 of act no. 500/2004 Coll., the Administrative Code, which enshrine the basic principles of the activities of administrative authorities, while Section 8(2) of this act explicitly mentions the concept of "sound administration".

present their case. Specifically, individuals should retain the right to submit applications and receive a concise, reasoned decision elucidating the grounds for inadmissibility. Such an approach not only preserves fundamental rights but also mitigates concerns regarding potential arbitrary administrative discretion.

Moreover, the implementation of labour migration quota systems—whereby specific national contingents are strategically delineated for residency permit allocation—inherently generates systemic vulnerabilities. These mechanisms invariably incentivize circumventive strategies, potentially compelling applicants to exploit alternative residency pathways. Paradigmatic illustrations include residence permits predicated on academic research, educational exchanges, or cultural programs, as stipulated in Directive 2016/801 of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing (hereinafter: Directive 2016/801). While beyond the immediate analytical scope, it is noteworthy that Member States encounter comparatively diminished discretionary latitude in rejecting study-related permits versus employment-oriented applications, not least because Member States cannot make use of a similar right to that conferred by Article 79(5) TFEU.

Using the Czech Republic as a paradigmatic case study, we can elucidate a critical systemic vulnerability wherein the quantitative restrictions on employment-related residence permits under Directive 2011/98/EU have resulted in a strategic circumvention mechanism. Specifically, foreign nationals have increasingly leveraged the ostensibly unrestricted avenue of study-purpose applications to facilitate an almost immediate transition to employment status. The judicial landscape surrounding this practice remains notably fragmented, with administrative courts presenting divergent interpretative approaches.

Some judicial bodies have contended that such procedural manoeuvres do not contravene extant national or European Union legal frameworks.[35]

35 See the judgments of the Supreme Administrative Court of the Czech Republic in cases nos. 1 Azs 158/2024 and 5 Azs 149/2024.

Conversely, other judicial perspectives align more closely with the European Court of Justice's jurisprudence, particularly the recent C-14/23 *Perle* decision, which explicitly affirms the applicability of the fundamental EU legal principle prohibiting systematic abuse.[36] The latter perspective compellingly argues that unrestricted permission of such procedural tactics would effectively render Article 79(5) TFEU meaningless, fundamentally undermining Member States' discretionary capacity to regulate economic migration through quota mechanisms.

The potential normalization of such procedural strategies resurrects a fundamental legal interrogation: Do the normative conditions articulated in relevant directives—and specifically in Directive 2011/98/EU's national implementations—genuinely confer a substantive legal entitlement to residence permit issuance? If interpreted affirmatively, such a hermeneutic approach would provide a relatively straightforward mechanism for circumventing Member States' carefully constructed migratory barriers.

Resolving this complex regulatory challenge defies simplistic solutions. However, a potentially pivotal interventionary strategy emerges, namely, mandating that Member States provide comprehensive, substantive rationales when declining and non-processing residence permit applications. This approach, previously advocated by scholarly voices such as Johan Rochel, represents a nuanced mechanism for introducing procedural transparency. While inevitably failing to eliminate all circumventive strategies, such a framework would substantially mitigate concerns regarding administrative arbitrariness and unwarranted discretionary practices.

Despite the current jurisprudential framework that permits nationality-based differentiation in migration policies (and does not consider them as discrimination), the critical examination undertaken in this study ultimately points towards a more profound aspiration: the progressive refinement of legal mechanisms

36 Judgment of the CJEU in case C-14/23 *Perle* of 29 July 2024, paragraph 42. See also the judgment of the Regional Court in Brno no. 41 A 23/2024—28 of 19 September 2024.

to ensure substantive equality. While non-EU foreigners may not successfully claim direct discriminatory treatment based on nationality, the analytical trajectory of our research suggests that the ongoing dialogue between legal principles, administrative practices, and fundamental rights can incrementally enhance the normative framework governing third-country nationals' mobility. The ultimate telos of such scholarly and legislative endeavours should transcend mere procedural technicalities, instead focusing on cultivating a more nuanced, transparent, and equitable approach to migration governance that genuinely respects individual dignity while maintaining the sovereign prerogatives of Member States.

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Prohibition of Discrimination on Grounds of Disability in Slovak, Czech, and Polish Labor Law[3]

Abstract: The article examines the prohibition of discrimination on the grounds of disability in Slovak, Czech, and Polish labor law, with a particular focus on the definition of disability and its alignment with European Union law. While Slovakia and Poland emphasize a formalized recognition of disability through administrative decisions, Czech legislation provides a more material definition consistent with the case-law of the Court of Justice of the European Union. The comparative analysis highlights differences in legal frameworks and the challenges of harmonizing national concepts with the EU's substantive approach. The study underscores that effective protection requires not only legislative transposition of Directive 2000/78/EC but also its practical implementation, aiming to ensure both formal and substantive equality in employment for persons with disabilities.

Keywords: disability, discrimination, labor law, European Union law, equal treatment

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Introduction

The prohibition of discrimination is a fundamental right that belongs to everyone without distinction and essentially creates the basic framework for the application and implementation of all subjective rights. It is impossible to speak of the fair exercise of law if it is contrary to the principle of equal treatment. However, when complying with the prohibition of discrimination, it is necessary to bear in mind a basic principle: treat equals equally and unequals unequally. This means that the principle of equal treatment cannot be fulfilled in all circumstances by formally equal behavior alone; in certain situations, especially in cases of obvious inequality of opportunity, the introduction of special rules and measures to protect the weaker party is required.

In this context, we can talk of the material concept of non-discrimination, which applies more than any other reason to disability. The prohibition of discrimination on grounds of disability is regulated at European Union level by Council Directive 2000/78/EC of 27 November 2000, which establishes a general framework for equal treatment in employment and occupation (hereinafter: Directive 2000/78/EC). Directive 2000/78/EC is binding on each Member State, including the Slovak Republic, the Czech Republic, and the Republic of Poland, in terms of the result to be achieved, while the choice of forms and methods is left to the national authorities. The article focuses on identifying the chosen forms and methods of transposing Directive 2000/78/EC into Slovak, Czech, and Polish labor law.

As part of the analysis and comparison of individual legal systems, the article draws attention to the approach of Member States to the definition of the concept of disability itself. Unlike other grounds for discrimination (e.g., race, gender, age), the meaning of the term disability may not be obvious at first glance, which is why Member States are seeking to define it. On the other hand, Directive 2000/78/EC does not define the concept of disability and does not refer to national law in this regard. This means that the concept of disability is an autonomous concept in European Union law. The aim of this article

is to examine the prohibition of discrimination on the grounds of disability in Slovak, Czech, and Polish law, and to assess the compliance of these legal systems with European Union law, with an emphasis on defining the concept of disability.

Disability in Slovak Law

In Slovak law, the legal regulation of working conditions for employees with disabilities is the subject of Act No. 311/2001 Coll. Labor Code, as amended (hereinafter: Slovak Labor Code). This legislation includes a prohibition of discrimination (Article 1 of the Basic Principles and Section 13(1) and (2) of the Slovak Labor Code), increased protection upon termination of employment (Section 66 of the Slovak Labor Code), special conditions for the organization of working time (Section 87(3) of the Slovak Labor Code) and obstacles to work (Section 141(2)(f) of the Slovak Labor Code), but, above all, the creation of suitable conditions for the performance of work and retraining (Sections 158–159 of the Slovak Labor Code).

The Slovak Labor Code also contains a legal definition of the term "employee with a disability." According to Section 40(8) of the Slovak Labor Code, an employee with a disability for the purposes of this Act is an employee recognized as disabled under a special regulation who submits a decision on disability pension to their employer. The legal regulation of disability assessment in the Slovak Republic is governed by Act No. 461/2003 Coll. on social insurance, as amended (hereinafter: Slovak Social Insurance Act).[4] According to Section 71 of the Slovak Social Insurance Act, an insured person is disabled if, due to a long-term adverse health condition, their ability to perform gainful activity is reduced by more than 40% compared to a healthy person. A long-term adverse health condition is a health condition that causes a reduction in

4 For more on the relationship between labor law and social security law, see: Věra Štangová, "The Relationship between Social Security Law and Labor Law," *The Lawyer Quarterly* 7, no. 4 (2017): 264–65.

the ability to perform gainful activity and which, according to medical science, is expected to last longer than one year. The reduction in the ability to perform gainful activity is assessed by comparing the physical, mental, and sensory abilities of an insured person with a long-term adverse health condition with the physical, mental, and sensory abilities of a healthy person.

In practice, it is debatable which specific documents an employee should submit to their employer in accordance with Section 40(8) of the Slovak Labor Code. Despite the wording of the legal definition of an employee with a disability, it is not reasonable to require an employee to submit a decision on disability pension. According to Section 70(1) of the Slovak Social Insurance Act, an insured person is entitled to a disability pension if they have become disabled and have acquired the necessary number of years of pension insurance. This means that not every insured person who has become disabled is entitled to a disability pension. However, it would not make sense if the definition of an employee with a disability only applied to those who are entitled to a disability pension and not to those who have been assessed as disabled without being entitled to a disability pension.[5] In view of the above, it is sufficient for an employee to be recognized as disabled, i.e., to have a long-term adverse health condition that reduces their ability to perform gainful employment by more than 40% compared to a healthy person. According to the Regional Court in Banská Bystrica, it is sufficient if the employer is presented with a confirmation from the Social Insurance Agency regarding disability and the degree of reduction in the ability to perform gainful activity. This contains a statement that the employee's health condition was assessed for the purposes of pension benefits by a medical examiner, with the conclusion that the employee was recognized as disabled.[6]

5 For more details, see: Milena Barinková, "Persons with Disabilities and the Pitfalls of Their Comprehensibility in Legal Terminology," *Studia Iuridica Cassoviensia* 6, no. 1 (2018): 95.

6 See further: judgment of the Regional Court in Banská Bystrica of July 23, 2014, ref. no. 15 CoPr 5/2014. See also: judgment of the Regional Court in Trnava of January 30, 2018, ref. no. 10 CoPr 4/2017.

With more specific regard to the principle of equal treatment, reference should be made to Article 1 of the fundamental principles and Section 13(1) and (2) of the Slovak Labor Code, which prohibit discrimination in labor relations and, at the same time, provide an exhaustive list of prohibited grounds for discrimination.[7] These grounds also include poor health and disability. The listing of both of these grounds side each other is somewhat contradictory, because according to the definition of an employee with a disability (Section 40(8) of the Slovak Labor Code) or the term disability (Section 71(1) of the Slovak Social Insurance Act), disability is always the result of poor health. Therefore, if discrimination occurs on the grounds of disability, discrimination on the grounds of poor health also occurs. From this point of view, enshrining disability as a specific basis for discrimination seems superfluous. On the other hand, it is true that disability is linked to the employer's obligation to take positive measures (e.g., Section 158 of the Slovak Labor Code, according to which the employer is obliged to create conditions for the employee to have the opportunity to find employment, and improve workplace equipment so that they can achieve, if possible, the same work results as other employees and so that their work is made as easy as possible), which do not apply in the case of (other) adverse health conditions.

The Slovak Labor Code, in connection with the establishment of the principle of equal treatment, refers to Act No. 365/2004 Coll. on equal treatment in certain areas and on protection against discrimination and on amendments to certain acts (the Anti-Discrimination Act), as amended (hereinafter: Slovak Anti-Discrimination Act). The Slovak Anti-Discrimination Act regulates the application of the principle of equal treatment and establishes means of legal protection in the event of a violation of this principle. It should be emphasized

7 This calculation is exhaustive in formal terms, but it includes the discriminatory ground of "other status," which makes this calculation open-ended. See more: Nikolas Sabján and Michal Cenkner, *Výklad pojmu iné postavenie z pohľadu zákazu diskriminácie v judikatúre súdov* [Interpretation of the Term "Other Status" from the Perspective of the Prohibition of Discrimination in Court Case Law] (Wolters Kluwer, 2018), 8. See also: Marek Švec et al. *Zákonník práce / Zákon o kolektívnom vyjednávaní: Komentár* [Labor Code / Collective Bargaining Act: Commentary], vol. 1 (Wolters Kluwer, 2019), 31–32.

that, in relation to discrimination on the grounds of disability, this Act regulates the employer's obligation to take measures to enable persons with disabilities to have access to certain employment, to perform certain activities in employment, to a functional or other promotion in employment, or to access to vocational training (Section 7 of the Slovak Anti-Discrimination Act). However, the Slovak Anti-Discrimination Act does not define the term "disability" itself.

Disability in Czech Law

Act No. 262/2006 Coll., the Labor Code, as amended (hereinafter: Czech Labor Code) uses the term "person with a disability." Unlike Slovak law, the Czech Labor Code uses the term "disability" in a more general sense. According to Section 103(5) of the Czech Labor Code, an employer is obliged to provide, at its own expense, technical and organizational measures for employees who are persons with disabilities, in particular, the necessary adjustment of working conditions, adjustment of workplaces, reservation of jobs, training or instruction of these employees, and improvement of their qualifications in the performance of their regular employment. Apart from this general obligation, the Czech Labor Code does not contain any specific legal provisions aimed explicitly at persons with disabilities.[8] Unlike Slovak legislation, the Czech Labor Code does not define the term "person with a disability" itself.

According to Section 237 of the Czech Labor Code, employers' obligations to employ persons with disabilities and to create the necessary working conditions for them are laid down in special legal regulations. However, Section 237 of the Czech Labor Code refers to Sections 67 to 84 of Act No. 435/2004 Coll. on Employment, as amended (hereinafter: Czech Employment Act). According to Section 67(2) of the Czech Employment Act, three categories of persons with disabilities can be distinguished. Persons with disabilities under this provision are natural persons who are recognized by the social se-

8 See more: Jan Pichrt et al., *Zákoník práce. Zákon o kolektivním vyjednávání* [Labor Code: Collective Bargaining Act] (Wolters Kluwer, 1997), 692.

curity authority as having a third-degree disability, a first- or second-degree disability, or a health disadvantage.

The Czech Employment Act refers to Section 39 of Act No. 155/1995 Coll. on pension insurance, as amended, for the definition of disability and its degrees. The provision in question also defines the concept of work capacity and the basic criteria for assessing its decline. The concept of a person with a health disadvantage is defined in Section 67(3) of the Czech Employment Act.[9] In individual cases, disability is proven by an assessment, confirmation, or decision of the social security authority.

For the purposes of this work, it is not necessary to pay further attention to the aforementioned legislation, as the Czech legal system contains a specific definition of disability in relation to the prohibition of discrimination. However, this definition is not included in the Czech Labor Code, and the Czech Labor Code does not even establish disability as a separate ground for discrimination. According to Section 16(1) of the Czech Labor Code, employers are obliged to ensure equal treatment of all employees in terms of their working conditions, remuneration for work and the provision of other monetary benefits and benefits of monetary value, professional training, and opportunities for promotion or other advancement in employment. This is followed by the provision of Section 16(2) of the Czech Labor Code, which contains an illustrative list of prohibited grounds for discrimination. Among the prohibited grounds for discrimination is health status, but not disability. From a linguistic point of view, however, it can be said, as we have indicated in the context of Slovak legislation, that the concept of health status is broader than the concept of disability, and therefore the prohibition of discrimination on the basis of health status also includes the prohibition of discrimination on the basis of disability.

Subsequently, Section 16(3) of the Czech Labor Code stipulates that the concepts of direct discrimination, indirect discrimination, harassment, sexual

9 Persons with health disabilities do not receive disability pensions, but from the perspective of employment law, they are classified as persons with disabilities. See more: Petr Hůrka, *Zákoník práce. Komentář* [Labor Code: Commentary] (Wolters Kluwer, 2020), 481.

harassment, persecution, instructions to discriminate and incitement to discriminate, and cases where different treatment is permissible, are regulated by Act No. 198/2009 Coll. on equal treatment and legal remedies against discrimination and on amendments to certain laws (the Anti-Discrimination Act), as amended (hereinafter: Czech Anti-Discrimination Act).

The Czech Anti-Discrimination Act defines in more detail the right to equal treatment and the prohibition of discrimination in matters including employment, service relationships, and other dependent activities, including remuneration. The definition of disability is contained in Section 5(6) of the Czech Anti-Discrimination Act, according to which, for the purposes of this Act, disability means a physical, sensory, mental, intellectual or other impairment that prevents or may prevent persons from exercising their right to equal treatment in the areas defined by this Act; it must be a long-term disability that lasts or, according to medical science, is expected to last at least one year.

A closer look reveals that the reference in the Czech Labor Code to the Czech Anti-Discrimination Act does not concern the concept of disability (or health condition), but only the concepts of direct discrimination, indirect discrimination, harassment, sexual harassment, victimization, instructions to discriminate and incitement to discriminate, and cases where different treatment is permissible. However, this problem is only apparent because the definition of direct discrimination under Section 2(3) of the Czech Anti-Discrimination Act includes a definition of prohibited grounds for discrimination, which already includes disability. Similarly, the definition of other forms of discrimination refers to the list of discriminatory grounds under Section 2(3) of the Czech Anti-Discrimination Act. It can therefore be concluded that the Czech Labor Code indirectly refers to the definition of disability in Section 5(6) of the Czech Anti-Discrimination Act.

It follows from the above that in Czech law, a distinction must be made between the contexts in which the term disability is used. In order for persons with disabilities to be entitled to individual benefits under the Czech Employ-

ment Act (e.g., job preparation, specialized retraining courses), their disability must be formally recognized by the competent social security authority (first to third degree disability or health disadvantage). On the other hand, in the area of claims arising from the prohibition of discrimination based on the definition of disability in the Czech Anti-Discrimination Act disability is understood as a factual condition. This does not, of course, preclude the court from examining (including through expert evidence) in a possible dispute over claims arising from discriminatory conduct whether the person asserting these claims is actually disabled.

Disability in Polish Law

The Act of June 26, 1974—Labor Code (Journal of Laws of 2023, item 1465, hereinafter: Polish Labor Code) differs from Slovak and Czech legislation in that it focuses on comprehensive regulation of the principle of equal treatment. The provisions of Article 11(3), Article 18(3a), Section 1, and Article 94(2b) of the Polish Labor Code enshrine the prohibition of discrimination and contain an illustrative list of prohibited grounds for discrimination. These grounds include disability, which is not defined in the Polish Labor Code. Unlike in Slovak and Czech legislation, health status and adverse health status are not included in this list.

The Polish Labor Code itself, in Article 18(3a) § 2 to § 6, defines the various forms of discrimination. The Polish Labor Code also allows for the adoption of positive measures in favor of employees with disabilities. According to the provisions of Article 18(3b) § 2(3) of the Polish Labor Code, the principle of equal treatment in employment is not violated by measures that are appropriate for achieving a legitimate objective consisting in differentiating the legal status of an employee, including, inter alia, measures that differentiate the legal status of an employee on the grounds of disability. Article 18(3b) § 3 of the Polish Labor Code allows for the adoption of temporary compensatory measures, i.e. mea-

sures to equalize opportunities for all employees or a significant number of employees excluded on one or more discriminatory grounds, by reducing the actual inequalities to the extent specified in that provision in favor of those employees.

For the sake of completeness, it should be added that the Polish legal system also includes the Act of December 3, 2010, on the implementation of certain European Union regulations on equal treatment (Journal od Laws of 2023, item 970, hereinafter: Polish Equal Treatment Act). However, according to Article 2(2) of the Polish Equal Treatment Act, the provisions of Chapters 1 and 2 of this Act (i.e. essentially the entire Polish Equal Treatment Act, with the exception of the legal regulation of the authorities competent to deal with violations of the principle of equal treatment) do not apply to employees to the extent regulated by the provisions of the Polish Labor Code. The Polish Labor Code therefore constitutes a special legal regulation that takes precedence over the provisions of the Polish Equal Treatment Act.

Apart from establishing a prohibition of discrimination, the Polish Labor Code does not regulate the legal aspects of disability.[10] In Polish law, these issues are regulated by a special act of August 27, 1997, on the professional and social rehabilitation and employment of persons with disabilities (Journal of Laws of 2023, item 100 as amended, hereinafter: Polish Act on the Employment of Persons with Disabilities), which also defines the concept of disability. According to Article 2(10) of the Polish Act on the Employment of Persons with Disabilities, disability means a permanent or temporary inability to perform social tasks as a result of a permanent or long-term decline in bodily functions, resulting in particular in an inability to work.

10 The Polish Labor Code establishes a general obligation for employers to protect the health and lives of employees by ensuring safe and hygienic working conditions with the appropriate use of scientific and technical knowledge. In addition, employers are required to take into account the protection of the health of young people, pregnant or breastfeeding employees, and employees with disabilities as part of the preventive measures adopted (Article 207 § 2(5) of the Polish Labor Code). In addition, the Polish Labor Code provides special protection for employees who care for family members with disabilities (see Article 67(19) § 6, Article 142(1) § 1(3)(a) and Article 186 § 3 of the Polish Labor Code).

The Polish Act on the Employment of Persons with Disabilities regulates a whole range of diverse institutions and measures aimed at supporting persons with disabilities. From the perspective of the working conditions of persons with disabilities, these include the employment rights enshrined in Chapter 4 of the Polish Act on the Employment of Persons with Disabilities. These include, for example, special arrangements for working hours, additional breaks at work, additional leave, and special time off work (Articles 15–20 of the Polish Act on the Employment of Persons with Disabilities). A person with a disability is entitled to these employee rights from the date on which they were included in the employment of persons with disabilities pursuant to Article 2a of the Act on the Employment of Persons with Disabilities. Under this provision, a person with a disability is considered a person with a disability from the date of submission of the disability certificate to the employer. This means that, in a similar way to Slovak legislation, Polish legislation requires an assessment of the state of health and formal proof of its result to the employer.

The term 'person with a disability' is relatively broad. It primarily includes persons whose disability has been confirmed by an assessment classifying them into one of three degrees of disability (i.e., severe, moderate, or mild). The decisive factors for classification into the relevant degree of disability are the impact of the decline in physical functions on the ability to perform work and the degree of dependence of the person in performing social tasks (Article 4 of the Polish Act on the Employment of Persons with Disabilities). The term "person with a disability" also includes persons whose disability has been confirmed by an assessment of total or partial incapacity to perform work in accordance with specific regulations. In this context, according to the Act of December 17, 1998, on pensions and annuities from the Social Insurance Fund (Journal of Laws of 2023, item 1251 as amended), a person who, due to the deterioration of their physical functions, has completely or partially lost the ability to perform gainful activity and is unlikely to regain this ability despite retraining is considered incapable of performing work. Finally, persons whose disability was confirmed by a disabil-

ity assessment before reaching the age of 16 are also considered disabled. Such individuals are considered disabled if they have a physical or mental disability with an expected duration of more than 12 months, caused by a congenital defect, long-term illness, or physical injury, for which it is necessary to provide them with comprehensive care or assistance in meeting their basic living needs to an extent exceeding the needs of a person of their age.

Disability in European Union Law

The EU regulation prohibiting discrimination on the grounds of disability is based on primary law in Article 19 of the Treaty on the Functioning of the European Union (hereinafter: TFEU). According to Article 19(1) TFEU, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may adopt measures to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. This enabling provision was subsequently reflected in Joint Directive 2000/78/EC, which builds not only on primary European Union law, but also on a number of international community documents that are binding on all Member States.

The purpose of Directive 2000/78/EC is to establish a general framework for combating discrimination in employment and occupation on the grounds of religion or belief, disability, age or sexual orientation, with a view to putting into effect in the Member States the principle of equal treatment. Anti-discrimination EU law in relation to persons with disabilities is characterized by the fact that its application is not limited to compliance with the prohibition of discriminatory conduct, but focuses more broadly on positive measures to compensate for the disability of persons with disabilities, with a view to ensuring not only formal but also substantive equality.

Directive 2000/78/EC emphasizes in its introductory points that measures to accommodate the needs of people with disabilities in the workplace play

an important role in combating discrimination on the grounds of disability. Employers should take effective and practical measures, which could include adapting the workplace to the disability, for example, by adapting the premises or work equipment, adjusting working hours, distributing tasks, or providing training and integration opportunities. Employers should, where necessary, take appropriate measures to enable a person with a disability to enter, participate in, or advance in employment or training, unless such measures would impose a disproportionate burden on the employer. This burden will not be disproportionate if it is sufficiently offset by measures existing under the disability policy of the Member State concerned.

The concept of disability is not defined in Directive 2000/78/EC itself, nor does the Directive refer to the right of Member States to define this concept in order to determine its meaning and scope. This means that a separate and uniform EU interpretation of this concept is required, which must take into account the context and objective pursued by the relevant legislation.[11] Since the European Union has acceded to the United Nations Convention on the Rights of Persons with Disabilities, the provisions of that convention have been an integral part of the legal order of the European Union since its entry into force, and Directive 2000/78/EC must be interpreted as broadly as possible in accordance with that convention.[12] According to Article 1 of that Convention, persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which, in interaction with various barriers, may hinder their full and effective participation in society on an equal basis with others.[13] The preamble

11 See further: Judgment of the Court of Justice of the European Union in Case C-327/82 (*Ekro BV Vee- en Vleeshandel v. Produktschap voor Vee en Vlees*). See also: Judgment of the Court of Justice of the European Union in Case C-323/03 (*Commission of the European Communities v. Kingdom of Spain*).

12 See: Judgment of the Court of Justice of the European Union in Joined Cases C-335/11 and C-337/11 (*HK Danmark*). The United Nations Convention on the Rights of Persons with Disabilities was approved on behalf of the Union by Council Decision 2010/48/EC of 26 November 2009 (Official Journal of the European Union L 23, 2010, p. 35).

13 This definition is contained in Article 1 of the United Nations Convention on the Rights of Persons with Disabilities, which defines the purpose of the Convention, not in Article 2, which contains individual definitions. For this reason, some authors consider whether this

to the Convention emphasizes that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others.

However, the decisive definition of the term disability can be found in the case-law of the Court of Justice. In the Chacón Navas case, a preliminary question was referred to the Court of Justice for a preliminary ruling on whether the general framework established by Directive 2000/78/EC to combat discrimination based on disability provides protection to a person who has been dismissed by their employer solely on the grounds of illness. In its reasoning, the Court also considered the definition of the term "disability", establishing that this term should be understood as meaning a limitation resulting in particular from a physical, mental or psychological impairment which hinders the participation of the person concerned in professional life. In order for a particular limitation to be covered by the concept of disability, it must also be likely that this limitation will be long-term.[14]

The long-term nature of the health restriction and its assessment were subsequently addressed by the Court of Justice in the Daouidi case. In that case, the Court of Justice stated that the indications from which it may be inferred that the impairment is long-term include the fact that at the time of the allegedly discriminatory act, the incapacity of the person concerned is not precisely limited in time as regards its prospect of ending in the short term, or the fact that this incapacity for work may be significantly prolonged before the person concerned recovers. In order to verify the long-term nature of the restriction on the person's ability to work, the national court must rely on all the objective information available to it, in particular, documents and certificates relating to

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is a deliberate attempt not to define disability. For more details, see: Jiří Šamánek et al., *Antidiskriminační právo v judikatuře a praxi* [Anti-Discrimination Law in Case Law and Practice] (C.H. Beck, 2017), 32.

14 See: Judgment of the Court of Justice of the European Union in Case C-13/05 (*Sonia Chacón Navas v. Eurest Colectividades SA*).

that person's condition, drawn up on the basis of current medical and scientific knowledge and data.[15]

Disability from the Perspective of the Relationship Between European Union Law and National Legislation

From the perspective of European Union law, several points should be made in relation to individual national regulations. Slovak and Polish legislation share common features, which allow them to be assessed together. Both legal regulations establish a formalized process for assessing disability, which results in the issuance of a formal act (decision, assessment, confirmation) declaring the existence of a disability.[16] If a person's health condition is not objectified in this way and proven to the employer, that person cannot be considered a person with a disability.

In contrast, European Union law perceives the concept of disability in a material sense. European Union law does not require (and thus excludes) the existence of a disability to be linked to the issuance of a formal document. The Court of Justice has explicitly stated that the assessment of disability must be based on all available objective information, not solely on a document issued by the competent authority, which would be the only body authorized to assess the existence of a disability. For this reason, the Slovak and Polish definitions of the term "employee (or person) with a disability" (Section 40(8) of the Slovak Labor Code, Article 2a of the Act on the Employment of Persons with Disabilities) contradict the Court's conclusions on the meaning of the term "disability."

However, it should be noted here that, in addition to discrimination on the grounds of disability, Slovak law also prohibits discrimination on the grounds

15 See: Judgment of the Court of Justice of the European Union in Case C-395/15 (*Mohamed Daouidi v. Bootes Plus SL and Others*).

16 This process is also enshrined in Czech law, but for the purposes of prohibiting discrimination, it contains a specific definition of disability, in which disability is perceived as a factual condition.

of unfavorable health status (Article 1 of the Basic Principles, Section 13(2) of the Slovak Labor Code). According to the case-law of the Court of Justice, the principle of consistent interpretation of national law requires national courts to do everything within their power, taking into account the whole of national law and applying the methods of interpretation recognized by it, in order to guarantee the full effectiveness of the directive and to arrive at a solution that is consistent with the purpose pursued by the directive.[17] The use of the term "adverse health condition," which is not defined in the legal system, makes it possible to achieve the objective of Directive 2000/78/EC. We are convinced that the term "disability" can also be understood to include limitations resulting in particular from physical, mental or psychological impairments which prevent the person concerned from participating in professional life, i.e. disability within the meaning of the case-law of the Court of Justice.

As regards Polish law, although the Polish Labor Code does not contain a prohibition of discrimination on the grounds of poor health, the list of grounds for discrimination in Article 113 of the Polish Labor Code is demonstrative. It is therefore debatable whether unfavorable health status can be included among these grounds, as is (explicitly) the case in Slovak and Czech law. In any case, according to the case-law of the Court of Justice, a national court may not apply a provision of national law if the application of that provision would be contrary to the objective pursued by the directive, whereas non-application of that provision would result in the national law being in conformity with European Union law.[18] In this case, it concerns the provision of Article 2a(1) of the Polish Act on the rehabilitation and employment of persons with disabilities, according to which a person with a disability is considered to be a person with a disability from the date of submission of the disability certificate to the employer (but also the provision of Section 40(8) of the Slovak

17 See: Judgment of the Court of Justice of the European Union in Case C-212/04 (*Konstantinos Adeneler and Others v. Ellinikos Organismos Galaktos (ELOG)*).

18 See: Judgment of the Court of Justice of the European Union in Case C-262/97 (*Rijksdienst voor Pensioenen v. Robert Engelbrecht*).

Labor Code, which requires the recognition of disability and the submission of a disability pension decision to the employer).

In this context, the question arises as to whether a distinction should be made between two meanings of the term "disability" in national legislation (both Slovak and Polish). It is clear that in cases falling within the scope of European Union anti-discrimination law, it is necessary to proceed on the basis of the concept of disability as defined in the case-law of the Court of Justice. However, it is debatable how to proceed in other cases (i.e., outside the scope of European Union law). In the literature, we encounter the view that the case-law of the Court of Justice defines the concept of a person with a disability for the purposes of prohibiting discrimination.[19] This could suggest that in other cases, the concept of disability should be based on Section 40(8) of the Slovak Labor Code or Article 2a(1) of the Polish Act on the Employment of Persons with Disabilities.

Two comments should be made on this issue. First, as we have repeatedly emphasized, the prohibition of discrimination cannot be understood merely as formal compliance with equal treatment in all circumstances, but also as a requirement that persons in unequal situations be treated differently. National legislation on the status of employees with disabilities therefore falls within the scope of European Union law, not only as regards the principle of equal treatment in the formal sense, but also (and above all) in terms of reasonable accommodation to enable a person with a disability to enter, participate in or advance in employment or to undergo vocational training (see Article 5 of Directive 2000/78/EC). It follows from the above that the scope of European Union anti-discrimination law is relatively broad when it comes to the protection of persons with disabilities. For example, the Court of Justice has ruled that Article 5 of Directive 2000/78/EC must be interpreted as meaning that a reduction in working hours may also constitute one of the reasonable accommodation measures referred to in that article.[20] Furthermore, EU law covers

19 See: Helena Barancova et al., *Zákoník práce* [Labor Code] (C.H. Beck, 2019), 436.

20 See further: Judgment of the Court of Justice of the European Union in joined cases C-335/11 and C-337/11 (*HK Danmark*).

not only the protection of persons who are themselves disabled, but also the protection of persons caring for children with disabilities.[21] It could even be argued that it is difficult to find cases that fall outside the scope of European Union law (if we disregard national social security systems, which are excluded from the scope of Directive 2000/78/EC, see below). Secondly, if we identify such cases, the general principle of interpretation of law is that if the legislator has used the same terms in a legal provision, he or she also meant the same content. A rational legislator uses terms with a uniform meaning. There must be serious reasons for assigning two different meanings to one term.[22]

In conclusion, with regard to Slovak and Polish legislation, it may be added that the above-mentioned principles concerning the relationship between European Union law and national law also apply vice versa. In the Ruiz Conejero case, the Court of Justice explicitly stated that the fact that a person has been recognized as a person with a disability under national law does not automatically mean that they are a person with a disability within the meaning of Directive 2000/78/EC.[23] Disability as a concept of European Union law and as a concept of national law may therefore be two different concepts. We note in passing that the Court of Justice did not state in the Ruiz Conejero case that European Union law precludes the adoption of a specific national definition of a person with a disability. It must be respected that Member States have the right to determine the specific meaning of this concept in cases that fall outside the scope of European Union law (e.g., national social security systems).[24]

21 See further: Judgment of the Court of Justice of the European Union in Case C-303/06 (*S. Coleman v. Attridge Law and Steve Law*).

22 See: Filip Melzer, *Metodologie nalézání práva* [Methodology of Finding Law] (C.H. Beck, 2011), 93.

23 See: Judgment of the Court of Justice of the European Union in Case C-270/16 (*Carlos Enrique Ruiz Conejero v. Ferroser Servicios Auxiliares SA and Ministerio Fiscal*).

24 According to Article 3(3) of Directive 2000/78/EC, this Directive does not apply to any benefits provided by public or similar schemes, including public social security or social protection schemes. Member States may therefore establish, for example, their own method of assessing disability as a prerequisite for entitlement to a disability pension (or other benefits), which is the primary objective of legislation on the material security of employees (e.g., the Slovak Social Insurance Act). See also: Jana Žuľová and Monika Minčičová, *Posudzovanie zdravot-*

From the perspective of European Union law, the Czech legal framework is more favorable than the Slovak and Polish legal frameworks. Czech legislation contains a specific definition of disability (Section 5(6) of the Czech Anti-Discrimination Act), which is based on the principles described by the Court of Justice in its case law. For this reason, there is no need for a conforming interpretation of national law or to refuse to apply the relevant provision of national law. Nevertheless, as we have already mentioned, in Czech law, a distinction must be made between the contexts in which the term "disability" is used. Incorrect identification of this context may ultimately result in the interpretation of national (Czech) law being contrary to European Union law.

An example of this problem is the provision in Section 103(5) of the Czech Labor Code, according to which an employer is obliged to provide, at its own expense, technical and organizational measures for employees who are persons with disabilities, in particular the necessary adjustment of working conditions, workplace adjustments, job reservations, training or instruction for these employees, and improving their qualifications in the performance of their regular employment. The question arises as to how the term "person with a disability" should be interpreted in this case, since the provision in question does not refer to the Czech Anti-Discrimination Act or the Czech Employment Act. The professional literature tends to take the view that for these purposes, the definition of a person with a disability under Section 67(2) of the Czech Employment Act should be used.[25] We disagree with this view, because according to Section 3(2) of the Czech Anti-Discrimination Act, indirect discrimination on the grounds of disability also entails refusing or failing to take reasonable measures to enable a person with a disability to have access to a particular job, to perform work activities, or to be promoted or otherwise advanced in employment. The provisions of Section 103(5) of the Czech Labor Code and Section 3(2) of the

nej a psychickej spôsobilosti na prácu (v podmienkach Slovenskej republiky) [Assessment of Physical and Mental Fitness for Work (in the Slovak Republic)] (Leges, 2021), 24–25.

25 See, in more detail: Miroslav Bělina et al., *Zákoník práce* [Labor Code] (C.H. Beck, 2015), 616 and 991. See also: Pichrt et al., *Zákoník práce*, 692.

Czech Anti-Discrimination Act are also transpositions of Article 5 of Directive 2000/78/EC. The obligation to take reasonable measures therefore applies to persons with disabilities under Section 5(6) of the Czech Anti-Discrimination Act, in accordance with the case-law of the Court of Justice.

Conclusion

Legal protection for persons with disabilities is clearly present in the Slovak, Czech, and Polish legal systems. The starting points and objectives of this protection are common to all three cases, but each country approaches them using different methods. While in the Slovak Republic the regulation of working conditions for employees with disabilities is relatively broadly elaborated in the Slovak Labor Code, the Czech Labor Code regulates this issue only in general terms. The Polish Labor Code focuses on comprehensive regulation of the principle of equal treatment, while the employment of persons with disabilities is subject to a separate Polish law on the employment of persons with disabilities.

The term "disability" is defined in all three legal regulations, but the approaches of the individual countries differ. The differences are not only in the sources of law that contain the individual definitions but also in their content. Slovak and Polish legislation establish a formalized process for assessing disability, which results in the issuance of a document declaring the existence of a disability. Czech legislation also provides for this process, but it additionally contains a specific definition of disability for the purposes of prohibiting discrimination.

From the perspective of European Union law, the definition of disability in individual Member States is problematic. In the Slovak and Polish legal systems, the emerging contradictions need to be overcome by a Euro-compliant interpretation of national law or by rejecting the relevant provision of national law that conflicts with European Union law. In the Czech legal system, which contains a specific definition of disability for the purposes of prohibiting dis-

crimination, the problem remains of correctly identifying the legal context in which the term "disability" is used.

The results of the comparison indicate that, although all three countries have taken significant measures to protect persons with disabilities, differences remain that may cause difficulties in application. In particular, the requirement for a formal act in Slovak and Polish legislation is contrary to the substantive understanding of the concept of disability as interpreted by the Court of Justice of the European Union. In the future, it will therefore be necessary for national courts and legislators to take greater account of the factual circumstances and practical consequences of health limitations.

At the same time, legislation alone is not sufficient without its consistent implementation. The effectiveness of anti-discrimination mechanisms depends on the active approach of employers, the functioning of supervisory institutions, and the willingness of courts to enforce a Euro-compliant interpretation. At the European level, it can be expected that the case-law of the Court of Justice will continue to play a key role in harmonizing different national approaches.

The protection of persons with disabilities thus remains an open and dynamic area that will require not only legislative innovation but also social change in the understanding of inclusion. The challenge for the coming years is therefore not only to achieve formal equality, but also to ensure material equality, which will enable persons with disabilities to participate fully in working life and thus in society as a whole.

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Piercing Liability in the Polish and German Legal Systems

Abstract: Piercing liability is one of the most important and interesting issues in company law. It refers to a process of "breaking" or even "piercing" the legal separateness of several related companies in order to provide legal protection for the interests of creditors of one of them. This issue is linked to the improper, and consequently undesirable, exploitation of the distinctiveness of a subsidiary company by the parent that controls it. In a nutshell, piercing liability is seen as a legal instrument whose purpose is to give protection to creditors, even if this involves disregarding the legal personality of a particular company or even rejecting the legal and organisational personality of the entity. It is a response to the abuses of those who misuse legal personality, but also a response to the needs of the modern economy. At the same time, it raises serious doubts and even controversies in every legal system in which it is applied. This is due to the fact that clear criteria for the application of piercing liability have not been formulated in any of the legal systems mentioned. In the article, I will characterise the reasons for the introduction and development of piercing liability in the Republic of Poland and in the Federal Republic of Germany.
Keywords: piercing liability, Republic of Poland, Federal Republic of Germany, procedural solutions, comparative analysis

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Introduction

Piercing liability is one of the most important and interesting issues in corporate law. It is related to the concept derived from US law of '*piercing (lifting) the corporate veil*'.[2] It is the United States that is the cradle of piercing liability, as it was the US courts that first proposed the possibility of '*piercing the corporate veil*'.[3] Yet piercing liability also appears in many other foreign academic studies. There are various formulations, such as the concept of '*Durchgriff*' (piercing) used in German legal doctrine, the Rozenblum doctrine, or the theory of '*gerance de fait*' (de facto management) found in French-language academic literature, and the concept of '*superamento della personalità giuridica*' (abuse of legal personality) used in Italian legal doctrine.[4]

Piercing liability is a kind of process of 'breaking' or even 'piercing' the legal separateness of several related companies in order to provide legal protection to the legitimate interests of the creditors of one of them. However, this is a very complex and difficult issue. A creditor may be a business counterparty of the company, a minority shareholder of the company, or even an employee. This issue is linked to the inappropriate and consequently undesirable use of the subsidiary's distinctiveness by the parent that controls it. In fact, the subsidiary is reduced to a tool of the dominant entity.

Of course, nowadays it is possible to operate on the market within a network of relationships between companies that are controlled by the same parent. This is an economically acceptable solution. However, liability management in this type of situation may be to the detriment of the creditors of the subsidiaries. Therefore, they should be protected against a parent company that is harming the interests of its counterparties. In a nutshell, the management of liability is seen as a legal instrument designed to protect creditors, even

2 Maurice Wormser, "Piercing the Veil of Corporate Entity," *Columbia Law Review* 12, no. 6 (1912): 497.

3 Karen Vandekerckhove, *Piercing the Corporate Veil* (Wolters Kluwer, 2007), 15–16.

4 Magdalena Zmysłowska, "Odpowiedzialność przebijająca w prawie amerykańskim i włoskim," *Prawo w działaniu. Sprawy cywilne*, no. 34 (2018): 73.

if this involves disregarding the legal personality of a particular company or even rejecting the legal and organisational personality of the entity.[5] This legal mechanism is not only a response to abusive individuals who misuse legal personality, but also a response to the needs of the modern economy.

However, piercing liability raises serious doubts and even controversy in every legal system in which it is applied. This is due to the fact that clear criteria for the application of this mechanism have not been formulated in any of the legal systems mentioned.[6] The catalogue for the application of piercing liability has not been standardised in any way, which makes it extremely flexible. However, the aim is invariably to guarantee the protection of companies' creditors.

Piercing Liability in the Polish Legal System

The principle of limited liability (the irresponsibility of shareholders for the company's obligations) represents a milestone in the evolution of both Polish company law and also the market economy. It is inextricably linked to the axiology and the very essence of the market economy. However, it must be interpreted correctly. It limits the economic risk of the company's partners. This consists in the possibility to protect the personal assets of the partner against the claims of the company's creditors. It applies to situations in which the company does not have the capacity to settle its obligations. However, it does not serve to protect the assets of the partner, or of partners who conduct their business activities in an improper manner and thus act to the detriment of creditors.[7] Sometimes they do so criminally, which cannot be condoned.

5 Magdalena Zmysłowska and Paweł Mazur, *Odpowiedzialność przebijająca* (Wydawnictwo Instytutu Wymiaru Sprawiedliwości, 2019), 21.

6 Mariusz Stanik, *Zasada przejrzystości stosunków korporacyjnych w polskim prawie grup spółek* (Wolters Kluwer, 2017), 395.

7 Aleksander Kappes, "Odpowiedzialność wspólników za zobowiązania spółki kapitałowej w prawie polskim de lege lata," *Przegląd Prawa Handlowego*, no. 9 (2017): 30.

Unfortunately, in a market economy, this principle is often distorted and used as a 'shield' for such 'damaging partners'.

A private limited company is itself liable for its obligations towards its own creditors. Sometimes exceptions are provided for in order to increase creditor protection. Some countries have developed just such mechanisms, which are referred to as piercing liability. This applies to reprehensible behaviour by shareholders towards the company itself or its creditors. In such situations, despite the statutory exclusion of liability of the shareholders for the company's debts, they are held so liable.[8]

To date, no single and official definition of the concept of piercing liability has emerged in the Polish literature. The doctrine commonly uses concepts such as 'omission of legal distinctiveness related to abuse of legal personality', 'legal mechanisms related to piercing liability', 'piercing of the corporate veil'.[9] This is because piercing liability involves the use of legal mechanisms in different legal orders in situations of misuse of certain legal institutions. Most often, this action targets the principle of limited liability of the shareholders of a private limited company, or the very aspect of the company's separateness.

Generally speaking, piercing liability refers to the liability of the shareholders of a private limited company for its unsatisfied claims against its creditors.[10] This is a rather broad formulation. Thus, this definition by Wiórek covers not only liability of partners for the company's liabilities, i.e. piercing liability sensu stricto, but also cases of liability in its broad sense, e.g. liability for tort damage caused to the company's creditors that occurred as a result of

8 Kappes, "Odpowiedzialność wspólników," 30.

9 Zmysłowska and Mazur, *Odpowiedzialność przebijająca*, 22.

10 Piotr Marcin Wiórek, *Ochrona wierzycieli spółki z o.o. poprzez osobistą odpowiedzialność jej wspólników. Koncepcja odpowiedzialności przebijającej i nadużycia formy prawnej spółki w prawie niemieckim i polskim* (E-Wydawnictwo. Prawnicza i Ekonomiczna Biblioteka Cyfrowa. Wydział Prawa, Administracji i Ekonomii Uniwersytetu Wrocławskiego, 2016), 77 and next.

certain conduct of the partners. It is worth emphasising that such a case is no longer included in piercing liability in the strict sense.[11]

Unfortunately, only a few representatives of the Polish company law doctrine discuss piercing liability and these are extremely restrained. Among the representatives of science, a negative approach prevails. The reasons for this can primarily be attributed to the legal basis in force, which does not allow liability for the company's obligations to be attributed to the company's partners, or even relatively for the damage caused to creditors by the company's insolvency.[12]

There are doubts in the academic discourse as to what the future basis for liability in respect of damages arising from the business activities of a subsidiary company would be. A good direction is to make use of certain models from competition law. This is primarily the concept of a single economic entity,[13] and is an integral part of antitrust rules. It relies on the fact that it is not the legal form of the business or the legal status of the entity itself that is of predominant importance in determining whether it is a separate business or merely a component of it. This is related to the extremely interesting issue of the so-called boundaries of an undertaking.[14] This situation was best put by Wils with the following formulation [when] 'one enterprise ends and another begins'.[15] The concept of a unitary organism constitutes an attempt to solve the problem concerning the understanding of the term 'enterprise'. The most difficult situations are those where several apparently independent entities may in fact constitute a 'single economic organism'. Some of the competition law doctrine highlights the parallels between piercing liability and the single eco-

11 Wiórek, *Ochrona wierzycieli*, 78.

12 Kappes, "Odpowiedzialność wspólników," 30.

13 Piotr Semeniuk, *Koncepcja jednego organizmu gospodarczego w prawie ochrony konkurencji* (Wydawnictwo Naukowe Wydziału Zarządzania Uniwersytetu Warszawskiego, 2015), 19.

14 Semeniuk, *Koncepcja jednego organizmu gospodarczego*, 21.

15 Wouter Wils, "The Undertaking as Subject of E.C. Competition Law and the Imputation of Infringements to Natural or Legal Persons," *European Law Review* 25, no. 2 (2000): 100.

nomic organism concept, in particular, in the framework of the attribution of antitrust liability.[16]

The Act of 21 April 2017 on Claims for Damage Caused by Breach of Competition Law is relevant in this respect.[17] It implements Directive 2014/104/EU324 referred to as the Damages Directive.[18] It is also the result of almost 10 years of work by EU bodies on harmonising standards for the recovery of damages for breach of competition law. This work has taken into account the extensive case law of the Court of Justice of the European Union on the private law consequences of anti-competitive practices.[19] It concerns the recovery of damages by both those directly and indirectly harmed by a breach of competition law. Nevertheless, this liability is of a different nature from the situation of applying piercing liability mechanisms. Firstly, the purpose of the introduction of the Act is different, as it is primarily intended to prevent parties from avoiding liability relating to infringements of competition law, while at the same time guaranteeing the deterrent nature of the penalties imposed by the antitrust authorities. Moreover, it is joint and several liability. These solutions are also universal in nature. Situations in which it is possible to punish a shareholder for some kind of abuse of the business activity carried out by a private limited company are of an exceptional nature. This legal mechanism is not intended to be applied universally, but in extreme cases.[20]

A further indication in defining piercing liability can be found in the body of case law of the Chamber of Labour and Social Security of the Supreme Court

16 Marco Bronckers and Anne Vallery, "No Longer Presumed Guilty? The Impact of Fundamental Rights on Certain Dogmas of EU Competition Law," *World Competition: Law and Economics Review* 34, no. 4 (2011): 560.

17 Journal of Laws of 2017, item 1132.

18 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance (Official Journal of the European Union L No 349 of 5 December 2014, pp. 1–19).

19 Uzasadnienie do projektu ustawy o roszczeniach o naprawienie szkody wyrządzonej przez naruszenie prawa konkurencji, 1, https://www.sejm.gov.pl/sejm8.nsf/druk.xsp?nr=1370.

20 Zmysłowska and Mazur, *Odpowiedzialność przebijająca*, 130.

in this regard. However, it should be made clear that the Supreme Court has issued few judgments in which it has advocated piercing liability. Although this jurisprudence predominantly concerns cases involving the liability of a parent company for the obligations of a daughter company towards its employees, it indirectly contains references to the concept of abuse of the separate legal personality of the company and even to precisely piercing liability.[21]

Of significance for piercing liability are the regulations of corporate (holding) law, which arouse great interest among legal theorists and practitioners. Attempts to regulate it have been made for years, e.g. in the draft amendment to the Commercial Companies Code (hereinafter: CCC) of 28 July 2009 prepared by the Civil Law Codification Commission, which is a response to the needs of the economy and entrepreneurs and initiates the discussion on the Polish law of conglomerates.[22]

The authors of the draft amendment proposed the creation of a new Section IV entitled 'Groups of companies' (Articles 211–215 of the CCC), the creation of a definition of a 'group of companies', and the removal of the criticised Article 7 of the CCC. The amendment was to introduce new obligations for companies participating in such a group, including disclosure of participation through entry in the register of entrepreneurs, consideration of the interests of creditors and minority shareholders, as well as reporting obligations regarding contracts and links with the parent company. In addition, minority shareholders would obtain the right to request a court-appointed auditor of the group's accounts, which was intended to ensure control over the group's activities.[23]

21 For example: Judgement of the Supreme Court of the Republic of Poland of November 5, 2013, II PK 50/13, LEX no. 1408889; Judgement of the Supreme Court of the Republic of Poland of September 18, 2014, III PK 136/13, LEX no. 1554335.

22 Adam Opalski and Michał Romanowski, "O potrzebie zasadniczej reformy polskiego prawa spółek," *Przegląd Prawa Handlowego*, no. 6 (2008): 7; Tomasz Staranowicz, "Podstawowe problemy regulacji koncernu w prawie spółek," *Kwartalnik Prawa Prywatnego*, no. 2 (2009): 391.

23 Andrzej Szumański, "Próby regulacji prawa grup spółek w Polsce (2009–2011)," *Monitor Prawniczy*, no. 24 (2011): 8.

This project was undoubtedly a legitimate attempt to regulate legal issues related to the operation of corporate groups. The form of limited legal regulation of company groups was appropriate, because the proposed amendment to the CCC provided an opportunity for the unhindered functioning of a capital group while simultaneously safeguarding the interests of shareholders and creditors of subsidiaries.

The holding company law was finally regulated by the amendment to the Code of Commercial Companies of 9 February 2022.[24] The law was introduced despite criticism from most representatives of the doctrine.[25] This amendment narrowly implemented the protection of creditors of companies operating as part of a group of companies, the definition of which is found in Article 4 §1 point 51 The essence of the liability regulated in Article 2114 §1 of the CCC liability is that when enforcement against a subsidiary participating in a group of companies proves to be ineffective, the parent company is liable for damage caused to a creditor of the subsidiary, unless it is not at fault or the damage did not arise as a result of the subsidiary's performance of a binding order.

It is worth noting that the drafters of the bill introducing this provision themselves explicitly indicated that this liability is not in the nature of piercing liability.[26] According to the drafters, introducing this type of liability would violate the principle of non-liability of a shareholder for the obligations of a private limited company. The authors also pointed out that the introduction of piercing liability could cause a justified fear of potentially discouraging entrepreneurs from using the structure of groups of companies, and also prevent the creation of strong economic organisms that are competitive on both the Polish and foreign markets. The regulation itself appears to be quite narrow and very

24 Ustawa z dnia 9 lutego 2022 r. o zmianie ustawy – Kodeks spółek handlowych oraz niektórych innych ustaw (Journal of Laws of 2022, item 807).

25 Aleksander Kappes, "Rzekoma ochrona wierzycieli spółki zależnej w prawie holdingowym: Czas na odpowiedzialność przebijającą?," *Przegląd Prawa Handlowego*, no. 10 (2022): 10.

26 Uzasadnienie projektu ustawy z dnia 9 lutego 2022 r. o zmianie ustawy—Kodeks spółek handlowych oraz niektórych innych ustaw, 14.

limited. According to the authors of the draft, this is a deliberate assumption, which is to make it impossible to recognise this liability as a guarantee.[27] Thus, the drafters limited the scope of liability of the parent company, which does not foster the protection of the interests of the subsidiary's creditors. At the same time, however, they introduced solutions that strengthened their position to a certain extent. These include a presumption of fault on the part of the parent company and a presumption of a causal link between the damage and the subsidiary's performance of a binding instruction, as well as the possibility of holding the parent company more broadly liable. This model of liability can be seen as an attempt to balance the interests of both parties.[28]

Such a narrow view of the scope of the parent company's liability is without prejudice to provisions establishing a more far-reaching liability of the parent company.[29] This is of great importance, as usually subsidiary companies are treated instrumentally, which may ultimately lead to their insolvency. Consequently, creditors also have other grounds to obtain satisfaction for other damages. Piercing liability is important in this context. It appears that its basis is now to be found in the Civil Code. This issue is still under consideration by the doctrine. The possibility of using the institution of abuse of subjective right under Article 5 of the Civil Code in the context of abuse of the corporate form, abuse of legal personality, as well as the tort grounds set out in Article 415 of the Civil Code is currently under discussion.[30]

Considerations concerning the use of Article 5 of the Civil Code are justified, as the usual consequence of the abuse of the company form is the insolvency of the company. This problem was already apparent in Poland in the

27 Andrzej Dunikowski and Przemysław Furmaga, in *Prawo holdingowe: Praktyczny komentarz*, ed. Mateusz Baran and Aleksandra Czarnecka (Wolters Kluwer, 2022), 36.

28 Dunikowski and Furmaga, in *Prawo holdingowe*, 37.

29 Kappes, "Rzekoma ochrona wierzycieli," 10.

30 Rafał Szczepaniak, *Nadużycie prawa do posługiwania się formą osoby prawnej* (Towarzystwo Naukowe Organizacji i Kierownictwa "Dom Organizatora", 2009); Wiórek, *Ochrona wierzycieli*; Tomasz Targosz, *Nadużycie osobowości prawnej* (Kantor Wydawniczy Zakamycze, 2004).

1930s. However, the use of the abuse of subjective right as an independent cause of action is argued against by the fact that in the Polish doctrine the view of the defensive character of Article 5 of the Civil Code prevails. It is seen only as a means of defence of the defendant and not as a cause of action.[31] However, this provision does not have to be used at all as an 'offensive' basis. Articles 151 § 4 and 301 § 5 CCC constitute a 'shield' for the shareholders of a private limited company against its creditors.

A further problem regarding Article 5 of the Civil Code is the choice of the specific subjective right on the basis of which the exercise would constitute an abuse. It is commonly held that the legal position of a shareholder cannot be viewed within the framework of a subjective right. Advocates of the use of Article 5 of the Civil Code consider these arguments to be overly conservative and even anachronistic. It should be pointed out that in this case the subjective right can be understood in a broad sense. After all, it is usually defined in a general way as 'a certain complex situation of a legal subject',[32] or as 'a sphere of possibilities to act in a certain way'.[33] Thus, only subjective rights understood as a bundle of rights are not subject to the allegation of abuse of subjective rights, but individual rights are. If we accept Radwański's concept, we must conclude that the individual elements of this situation are also subject to Article 5 of the Civil Code. The shareholder's non-responsibility for the obligations of the private limited company is in this case his privilege or even entitlement not to be held liable. This can be seen as an essential element of his legal status as a shareholder, i.e. his complex legal situation. In such a case, invoking the status of a shareholder who is not liable for the company's obligations can most certainly be regarded as an abuse of the right.[34] Furthermore, if it is assumed that the op-

31 Małgorzata Pyziak-Szafnicka, in *System Prawa Prywatnego: Prawo cywilne—część ogólna. Tom 1*, ed. Marek Safjan (C.H. Beck, 2012), 269–70.

32 Zbigniew Radwański, in *Prawo cywilne – część ogólna*, ed. Zbigniew Radwański and Adam Olejniczak (C.H. Beck, 2011), 77.

33 Stefan Grzybowski, in *System prawa cywilnego: Część ogólna. Tom 1*, ed. Witold Czachórski (Zakład Narodowy im. Ossolińskich, 1985), 216.

34 Kappes, "Rzekoma ochrona wierzycieli," 15.

eration of Article 151 § 4 of the Code of Commercial Partnerships and Companies is repealed by Article 5 of the Civil Code, the result of such considerations will be the possibility of bearing liability of a guarantee nature for the obligations of the company by the shareholder. The prerequisite for such liability would be reprehensible behaviour of the shareholder towards the company, in the light of the principles of social co-existence, and, relatively, the use of the principle of irresponsibility contrary to its social and economic purpose.

The second possibility is to use Article 415 of the Civil Code. This basis is strictly tortious in nature: it is not so much about liability for the obligations of a particular company, but about a tort committed by a partner. A partner who violates an elementary interest and separateness of the company also commits a tortious act against the company's creditors. This is due to the fact that by his conduct towards the company he has led to its insolvency, and, in turn, the result of this state of affairs is the failure to satisfy its creditors. This is indirect damage, which relates to the unsatisfied claim together with interest for delay and possible costs of proceedings against the company,[35] Contrary to the views of some representatives of the Polish doctrine, indirect damage is also subject to indemnification. This occurs if the other prerequisites of tort liability are met, in particular, in the context of the subsequent links of causation remaining within the normative consequence. It is therefore not indemnity in the strict sense, but its purpose and effect are the same.[36]

A certain substitute for piercing liability under the Commercial Companies Code itself is Article 299 of the Commercial Companies Code. However, it is a specific solution. It was created as part of the Polish legal heritage of the 1930s.[37] It is characterised by the fact that the piercing of the corporate veil does not involve the shareholders, but the members of the management board

35 Andrzej Koch, in *Kodeks cywilny. T. 1. Komentarz. Art. 1–44911*, ed. Maciej Gutowski (C.H. Beck, 2016), 1458.

36 Kappes, "Rzekoma ochrona wierzycieli," 16.

37 Art. 299 wzorowany jest na regulacjach rozporządzenia Prezydenta Rzeczypospolitej z 27.06.1934 r.—Kodeks handlowy (Journal of Laws, item 502).

of the company. This liability is related to the fulfilment of the obligation to file a bankruptcy petition against the company in a timely manner. The purpose of introducing this regulation was to guarantee protection to creditors in the face of ineffective enforcement against the company.[38] The limitations of this liability are particularly evident in two aspects. Firstly, as this liability applies only to a limited liability company, it cannot be said to be universal. Secondly, the very conditions necessary for a given member of the management board to be held liable are shaped in such a way that he or she can very easily exempt themselves from this liability. The provision only applies when enforcement against the company proves ineffective. Furthermore, board members will not be liable if they show that they filed such a petition in due time if the failure to file the bankruptcy petition in time was not due to their fault, and if the creditor's position was not worsened as a result of the failure to file the petition in time.[39]

Piercing liability has recently been the subject of debate in Polish doctrine. It is also penetrating more and more into practice, which can be clearly seen in the jurisprudence of Polish courts. At the same time, it is a rather lengthy process and will probably only gradually develop in the years to come. The position represented by the German legal system should therefore serve as a model for Polish doctrine and practice, as quite a number of possibilities for the application of piercing liability have been developed there.

Piercing Liability in the German Legal System

'Piercing liability' (*Durchgriffshaftung*) has not been statutorily defined in the German legal system.[40] Moreover, its very interpretation is a source of doubt for representatives of the doctrine. At present, the prevailing view is that pierc-

38 Marcin Jagodziński, "Odpowiedzialność członków zarządu spółki z o.o. na podstawie art. 299 k.s.h.—rozważania de lege ferenda," *Przegląd Prawa Handlowego*, no. 5 (2018): 44.

39 Jagodziński, "Odpowiedzialność członków zarządu spółki z o.o.," 45.

40 Karsten Heider, in *Münchener Kommentar zum Aktiengesetz: AktG, Monachium 2015, komentarz do § 1 AktG*, ed. Mathias Habersack and Wulf Goette (C.H. Beck München, 2022), 63.

ing liability applies to situations in which the partners are personally, unlimitedly, and jointly and severally liable for the company's obligations towards its creditors. However, it does not cover situations in which it is the partners who are liable for a self-inflicted tort against the creditors, if the source of the partners' liability is a legal act in which they undertook to be liable for the company's obligations. This is known as *unechte Durchgriffshaftung*.[41]

In the German legal system, it is not accepted that the personal creditors of the company's partners can seek satisfaction from the company's assets. Such a situation is referred to as reverse piercing liability i.e. *umgekehrter Haftungsdurchgriff*. Accepting such a possibility would be dangerous for the interests of the company's creditors. In addition, it would increase the likelihood of unsatisfied claims, and this would significantly reduce the attractiveness of performing legal transactions with entities in the form of private limited companies.[42]

However, it is clear that allowing shareholders to avoid liability for the company's obligations by using the institution of a private limited company would consequently be contrary to equity and the sense of justice.[43] Therefore, in certain cases, German law permits the use of piercing liability and consequently holding the shareholders personally liable for the company's obligations.

Piercing liability is not a single legal institution, but instead refers to a number of different situations in which it becomes possible to hold shareholders liable for the company's obligations.[44] An attempt to systematise this issue has led to the development of two basic theories.[45]

41 Piotr Marcin Wiórek, "Odpowiedzialność przebijająca w prawie niemieckim," *Przegląd Prawa Handlowego*, no. 9 (2017): 20.

42 Heider, in *Münchener Kommentar zum Aktiengesetz*, 63.

43 Lutz Michalski, in *Kommentar zum Gesetz betreffend die Gesellschaften mit beschränkter Haftung, Monachium 2010, komentarz do § 13 GmbHG* (C.H. Beck München, 2023), 55.

44 Lorenz Fastrich, in *Gesetz betreffend die Gesellschaften mit beschränkter Haftung. Kommentar, Monachium 2017, komentarz do § 13 ust. 2 GmbHG*, ed. Adolf Baumbach and Alfred Hueck (C.H. Beck München, 2023), 5.

45 Wiórek, "Odpowiedzialność przebijająca," 20.

The first is the theory of abuse (*Misbrauchlehre*) developed by Serick in the 1950s. According to its wording, piercing liability applies in the case of abuse of the form of a legal entity.[46] It is also referred to as a subjective concept, as piercing of the corporate veil only occurs when a shareholder deliberately and consciously uses the institution of the legal person to disadvantage other participants in trade or to circumvent the law. Examples include the use of the corporation to evade restrictions imposed on the shareholder by a contractual provision or by statute.[47]

The second theory has developed under the influence of the case law of the Federal Court of Justice (*Bundesgerichtshof*).[48] This is the concept of objective abuse of the legal entity form, although it is also referred to as the institutional theory. According to its wording, it is assumed that the use of the institution of the company by a shareholder in a manner contrary to its purpose and intended use may, as a consequence, make such a person liable for the obligations of the company. This is not affected by whether he acted with the intention of harming creditors or circumventing the law.[49]

There is also an alternative concept that focuses on the purpose of norms providing the privilege of limiting the liability of shareholders for the company's obligations, the so-called *Haftungsprivileg*. Its originator is Müller-Freienfels,[50] whose considerations have had a great influence on the contemporary concept

46 Rolf Serick, *Rechtsform und Realität juristischer Personen: ein rechtsvergleichender Beitrag zur Frage des Durchgriffs auf die Personen oder Gegenstände hinter der juristischen Person* (Mohr Siebeck, 1955), 86.

47 Targosz, *Nadużycie osobowości prawnej*, 122.

48 This refers to the BGH judgment of 14 December1959, (II ZR 187/59, NJW 1960). At that time, it was recognized that it was possible to hold the partners liable for the company's obligations in the event that the company was significantly undercapitalized. It was made clear that, in certain situations, invoking the separate legal personality of the company and the shareholder would contravene the legal order and thus violate the bona fide order expressed in § 242 BGB.

49 Wiórek, *Ochrona wierzycieli*, 98 and next.

50 Wolfram Müller-Freienfels, "Zur Lehre vom sogenannten "Durchgriff" bei juristischen Personen im Privatrecht: Rechtsform und Realität juristischer Personen. Ein rechts-vergleichender Beitrag zur Frage des Durchgriffs auf die Personen oder Gegenstände hinter der juristischen Person by Rolf Serick," *Archiv für die civilistische Praxis*, no. 156 (1958): 534.

of so-called teleological reduction. For the proponents of this concept, the justification of piercing liability lies in the view according to which the principle of limited liability is the conscious result of a decision of the legislator and not an immanent feature of the use of the construction of legal persons.[51] In their view, it is perfectly feasible to create the minimum conditions assumed by the legislator, on the maintenance of which the exclusion of liability of shareholders is conditional. If these minimum conditions are not ensured, the shareholder may be deprived of the privilege of disclaimer (*Haftungsprivileg*) and will consequently bear personal and unlimited liability for the company's obligations.[52]

Interestingly, German case law has not unequivocally endorsed any of the above concepts. Instead, there is a noticeable intermingling of different concepts in the decisions of the Federal Supreme Court.[53]

In German doctrine, it is not only problematic to indicate the dogmatic justification of piercing liability, but also to define the very cases in which it occurs. It is generally accepted that the privilege of limited liability of the shareholders for the obligations of the company i.e. *Haftungsprivileg* does not apply in the situation of confusion of the spheres of action of the company and the shareholders, i.e. the *Sphärenvermischung* and in the case of material undercapitalisation of the company i.e. *materielle Unterkapitalisierung*.[54] In addition, the possibility of holding shareholders liable for the company's debts when they take action to annihilate the existence of the company has been debated in recent years. This is the case when, among other things, assets necessary for the business are removed from the company or the company is deprived of its economic opportunities, i.e. the *Existenzvernichtung*.[55]

51 Hanno Merkt, in *Münchener Kommentar zum Gesetz betreffend die Gesellschaften mit beschränkter Haftung (GmbHG), Monachium 2015, komentarz do § 13 GmbHG*, ed. Holger Fleischer and Wulf Goette (C.H. Beck München, 2023), 332.

52 Wiórek, *Ochrona wierzycieli*, 112.

53 Florian Wünscher, *Die Durchgriffshaftung wegen Sphärenvermischung im deutschen und* österreichischen *GmbH-Recht* (Verlag Graz, 2014), 15.

54 Merkt, in *Münchener Kommentar*, 332.

55 Rüdiger Wilhelmi, *Beck'scher Online-Kommentar GmbHG, Beck-online 2017, komentarz do § 13 GmbHG*, ed. Hildegard Ziemons and Carsten Jaeger (C.H. Beck München, 2017), 143.

In the context of the confusion of the property masses of the company and the partners, it is important to limit the liability for the obligations of the company to its own assets and, consequently, to emphasise the principle of the separation of the activities and assets of the company and its partners, i.e. the *Trennungsprinzip*. This group of cases includes the mixing of the spheres of action of the company and the partner as a mixing of their assets. Confusion of spheres of activity occurs in situations where the separation of the activities of the company and the partner is problematic for third parties. Confusion of assets, on the other hand, is the inability to comply with the principle of separation of the assets of the company and the partner. It is the result of the transfer of assets between one's own and the company's assets without any relevant formalities. As a consequence, it is not known which asset belongs to the partner and which to the company.[56]

Interestingly, this is the only generally accepted and unquestioned by both doctrine and case law group of cases in which piercing liability applies.[57] In such cases, the basis for the liability of the partners is Section 128 HGB applied *per analogiam*. According to its wording, partners of partnerships are liable for the obligations of the partnership. This is most often the case where the company does not keep accounts. However, German case law indicates that it is only permissible for partners to benefit from the privilege of limited liability if there has been a clear separation of the company's assets from those of the partners. This separation manifests itself in the keeping of the company's accounts.[58]

Piercing liability does not apply when the spheres of operation of the company and the partner are mixed. The interests of creditors are protected in such situations through mechanisms other than piercing the corporate veil. These include the rules on declarations of intent and the theory of legal appearance (*Rechtscheinhaftung*), which applies to power of attorney.[59]

56 Adam Opalski, "Problematyka pominięcia prawnej odrębności spółek kapitałowych," *Przegląd Prawa Handlowego*, no. 8 (2012): 19.

57 Merkt, in *Münchener Kommentar*, 344.

58 Till Fock, in *AktiengesetzQ, komentarz do § 1* AktG, ed. Gerald Spindler and ed. Eberhard Stilz (C.H. Beck München, 2022), 57.

59 Wünscher, *Die Durchgriffshaftung*, 22.

A second widely discussed possibility for the application of personal liability of the partners for the obligations of the company is cases of material undercapitalisation.[60] This refers to situations in which the partners do not provide the necessary funds to the company. This may take the form of debt financing (e.g. the provision of a loan) as well as equity financing (e.g. an increase in share capital). It is generally acknowledged that shareholders cannot benefit from the privilege of limited liability when they furnish highly disproportionate funds to a particular company in the course of business.[61] Evidently, creditors of such companies would bear a very high risk. Such shareholder behaviour currently poses one of the biggest challenges for creditor protection in Germany.

Although the indicated concept is common in German doctrine, it was rejected by the Federal Court of Justice in its ruling of 28 April 2008 in the Gamma case (II ZR 264/06). The Court pointed out that holding shareholders liable for failing to equip the company with adequate capital would undermine the very essence of limited liability companies. Although the case law does not exclude that in certain situations the material undercapitalisation of a company may constitute a tort. Consequently, this could be a basis for liability for damages claimed against the shareholders by the company or its creditors. However, such liability would be in tort, and the specific starting point would be the provision of Section 826 BGB.[62]

The most doubtful and controversial issue in recent years has been the possibility of claiming liability for shareholders' actions aimed at annihilating the existence of the company. It has been expressed in a number of decisions of the Federal Court of Justice over the years. This possibility was first mentioned in the Bremer Vulkan judgment of 17 September 2001 (II ZR 178/99). Thus, a certain line of case law has been formed.[63]

60 Holger Altmeppen, in *Gesetz betreffend die Gesellschaften mit beschränkter Haftung: GmbHG. Kommentar. Komentarz do § 13 GmbHG*, ed. Günter Roth and Holger Altmeppen (C.H. Beck München 2015), 139.

61 Altmeppen, in *Gesetz betreffend*, 140.

62 Wünscher, *Die Durchgriffshaftung*, 16.

63 Wünscher, *Die Durchgriffshaftung*, 17.

The model of creditor protection in limited liability companies has many shortcomings that can be used to the detriment of its creditors. The German legal provisions do not guarantee the protection of company assets against the actions of shareholders, apart from leading to a comprehensive breach of the provisions on the maintenance of share capital. Nevertheless, such actions of shareholders unequivocally negatively affect the companies as a whole and their solvency in particular. Examples of such negative behaviour include depriving the company of important fixed assets or means of production, depriving the company of business opportunities by financing development projects from the company's assets, and entrusting the implementation to other parties, providing security for the benefit of shareholders or third parties without creating adequate reserves, or concentrating all economic risks on only one of the companies. These risks led the Federal Court of Justice, in this precedent-setting judgment, to guarantee the assertion of liability for the company's debts directly against the shareholder in situations where the company's creditors cannot be satisfied by returning the capital taken from the company on the basis of the share capital protection provisions. The court held that the privilege of limited liability cannot be applied to shareholders who interfere with the company's assets without regard to the company's ability to satisfy its obligations.[64]

The Federal Court of Justice departed from this line of jurisprudence after six years with its judgment of 16 July 2007 (II ZR 3/04) concerning the Trihotel case. At that time, the possibility of asserting piercing liability in the event of a partner carrying out actions that could lead to the annihilation of the company's existence was negated. At the same time, it was highlighted that it is possible for the company and its creditors to claim damages from shareholders taking such actions under the general rules for the tort regime, i.e. pursuant to Section 826 BGB.[65]

64 Wünscher, *Die Durchgriffshaftung*, 17.

65 Gerhard Wagner, in *Münchener Kommentar zum Bürgerlichen Gesetzbuch: BGB. Band 6: Schuldrecht – Besonderer Teil IV, §§ 705–853, Partnerschaftsgesellschaftsgesetz, Produkthaftungsgesetz. Komentarz do art. 826 BGB*, ed. Mathias Habersack (C.H. Beck München, 2015), 172.

Conclusion

As a general rule, a private limited company is liable to its creditors for its debts. However, there are statutory provisions against it. Unfortunately, these are often inadequate in not sufficiently protecting creditors. For this reason, the mechanisms of piercing liability have been implemented in many countries. This applies in particular to situations in which shareholders are held liable for the company's obligations towards its creditors despite the statutory exclusion of such liability. This is related to reprehensible behaviour by shareholders towards their own company or its creditors.

Piercing liability operates in the legal systems of many countries, including the United States, Germany, Italy or France. Although the possibility of applying piercing liability is recognised in the jurisprudence of Polish courts, as well as in Polish doctrine, it has still not been statutorily regulated in Polish law. There have been numerous discussions on this topic for many years. Representatives of the Polish legal doctrine have long debated the legal basis for holding members of a company liable for its obligations towards its creditors. Over the years, a wide variety of ideas have emerged on how to regulate this particular issue. In this context, the amendment to the Commercial Companies Code of 9 February 2022 was crucial. It provided some protection to the creditors of companies within groups of companies on the basis of Article 2114 of the Commercial Companies Code. This effectively solved a particular impasse concerning this issue. Further avenues for protecting creditor rights are based on Article 5 of the Civil Code and Article 415 of the Civil Code. In view of the above, creditors currently have two possibilities to pursue their claims, i.e. Article 2114 of the Commercial Companies Code as well as Article 5 of the Civil Code in connection with Article 151 § 4 of the Commercial Companies Code, and 415 of the Civil Code. However, it seems most relevant to invoke the provisions of the Civil Code.

In contrast to the situation in the Polish legal system, the issue of piercing liability in Germany has long been regulated. In German doctrine, as well as

in the jurisprudence of the German courts, several possibilities have been developed for applying piercing liability. The wording of the provisions of the German Civil Code is commonly adopted as the legal basis. Importantly, the solutions introduced are truly modern and flexible, as the piercing liability mechanism is applied in a wide variety of cases. The most important of these cases include the mixing of property spheres, undercapitalisation of the company or annihilation of the company's existence. The essence is primarily the reprehensible attitude of the shareholder towards the company or its creditors.

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Recalibrating Pre-trial Detention in the EU: Key Findings and Recommendations from the RELEASE Project

Abstract: This article presents the key findings of the EU-funded RELEASE project, which examined the use of pre-trial detention and its alternatives in five Member States: Bulgaria, Croatia, Greece, Poland, and Slovakia. It reviews the applicable European legal standards, analyses national practices, and highlights good practices identified over the course of the project. The article concludes with policy recommendations aimed at fostering a more consistent and rights-compliant use of pre-trial detention across the EU, through enhanced professional practice, targeted training, and awareness-raising.
Keywords: pre-trial detention, alternative measures, European Supervision Order, European Court of Human Rights, European Union

Introduction

While pre-trial detention should be a measure of last resort, empirical evidence suggests that its application in some EU member states frequently strays from this principle.[3] One reason for this may be the limited range of viable alterna-

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3 Commission Recommendation (EU) 2023/681 of 8 December 2022 on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions, Official Journal od The European Union L No. 86 of 24 March 2023, 44–57, Recitals 13–16.

AMU LR, 17, 2025, © The Author(s) 2025. Published by the Adam Mickiewicz University, Faculty of Law and Administration, ISSN Online 2450-0976, ISSN Print 2083-9782.

tives, which places practitioners in a difficult position between ensuring effective proceedings and addressing concerns related to fundamental rights.

Against this backdrop, the RELEASE project—"Reducing the Excessive usage of pre-trial detention via harmonisation & support to alternatives"[4]—was funded by the European Union. The project's primary objective was to research the use of pre-trial detention, assess the availability and effectiveness of its alternatives, and promote the consistent application of EU and the Convention on the Protection of Human Rights and Fundamental Freedoms (hereinafter: ECHR) standards. Focusing on five Member States—Bulgaria, Croatia, Greece, Poland, and Slovakia—the project combined case-law analysis, stakeholder engagement, and mutual learning to map divergences, identify good practices, and develop actionable recommendations.

This article presents the key findings of the RELEASE project, based primarily on its three main deliverables: the Handbook, Policy Brief, and Gaps and Needs Analysis Report.[5] It begins by outlining the legal framework for pre-trial detention and its alternatives, emphasizing the ECHR standards and EU efforts. Sections 3 and 4 build upon the project findings, providing an overview of national practices and good practices identified during the project that promote the proportional use of pre-trial detention and enhance the effectiveness of its alternatives. The article concludes with a summary of policy recommendations developed by the project consortium.

Legal Environment on Pre-trial Detention in the EU

The RELEASE project is grounded in the European legal environment, particularly the standards developed by the European Court of Human Rights (hereinafter: ECtHR), as well as EU initiatives.

4 Grant Agreement № 101090815.

5 Available at: https://zenodo.org/records/13736147.

EU Law and Policy

The EU's efforts date back to 2004, when the Hague Programme recognised that detention and alternatives to detention were an important area of EU justice policy. In 2009, the EU introduced the European Supervision Order (hereinafter: ESO).[6] It addresses a gap in equal treatment, where non-residents are often detained pending trial under circumstances where residents would likely be released. The instrument provides a mechanism to avoid this disparity by enabling the imposition of non-custodial measures on non-resident suspects, allowing them to await trial under supervision in their home Member State. The ESO empowers judicial authorities in the issuing Member State to transfer the supervision of alternative measures to the executing Member State, where the suspect ordinarily resides. While it offers significant potential to reduce unnecessary detention, its practical application remains limited, underlining the need for greater awareness, training, and institutional support.[7]

In the 2019 Council Conclusions on Alternatives to Detention,[8] Member States agreed that detention should be used only as a last resort and that, when appropriate, non-custodial sanctions and measures should be applied instead of detention, particularly with a view to the social rehabilitation and reintegration of offenders. The same document confirmed that in many Member States pre-trial detention is not used as a measure of last resort and that alternatives to pre-trial detention are used to a very limited extent.[9]

6 Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention, Official Journal of the European Union L No. 294 of 11 November 2009, 20–40.

7 Policy Brief, 17.

8 Council conclusions on alternative measures to detention: the use of non-custodial sanctions and measures in the field of criminal justice, Official Journal of the European Union C No. 422 of 16 December 2019, 9–13.

9 Council conclusions on alternative measures to detention: the use of non-custodial sanctions and measures in the field of criminal justice, 3.

The Commission Recommendation of December 2022[10] further elaborates on Member States' obligations. It reiterates that pre-trial detention should only be used as a last resort and encourages the development of a wide range of alternative measures, including bail, reporting obligations, restrictions on movement, and electronic monitoring. The Recommendation also calls for procedural safeguards, including reasoned decisions, regular review, and proportionality. The table below outlines key elements of the Recommendation.[11]

Commission Recommendation 2023/681	
Definitions (5)	'Alternative measures' should be understood as less restrictive measures as an alternative to detention.
General principles (10)	Member States should use pre-trial detention only as a measure of last resort. Alternative measures to detention should be preferred, in particular where the offence is punishable only by a short sentence of imprisonment or where the offender is a child.
Minimum standards for procedural rights of suspects and accused persons subject to pre- trial detention (14)	Member States should impose pre-trial detention only where strictly necessary and as a measure of last resort, taking due account of the specific circumstances of each individual case. To this end, Member States should apply alternative measures where possible.

Key ECHR's Case-Law

The following table provides an overview of the key points stemming from the case-law of the European Court of Human Rights relating to pre-trial detention and its alternatives.[12]

10 Commission Recommendation (EU) 2023/681 of 8 December 2022 on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions, Official Journal of the European Union L No. 86 of 24 March 2023, 44–57.

11 Full table is available on pages 16–17 of the Handbook.

12 The table mirrors pages 11–12 of the Handbook.

Obligation to consider alternatives to pre-trial detention	
Idalov v. Russia, § 140 Sulaoja v. Estonia, § 64	When deciding whether a person should be released or detained, the authorities have an obligation under Article 5(3) ECHR to consider alternative measures for ensuring his or her appearance at trial.
Vrencev v. Serbia, § 76	Whenever the danger of absconding can be avoided by bail or other guarantees, the accused must be released, it being incumbent on the national authorities to always duly consider such alternatives.
Jabłoński v. Poland, § 84	Consideration has to be given to the possibility of imposing other 'preventive measures'—such as bail or police supervision—to secure the proper conduct of the criminal proceedings.
Bail	
Muşuc v. Moldova, § 42	Bail may only be required for as long as reasons justifying detention prevail.
Toshev v. Bulgaria, § 68	The amount set for bail must take into account the accused's: • assets, • relationship with the persons who are to provide security, • citizenship, • age, and • occupation so that the prospect of loss of security, in the event of non-appearance at trial, will act as sufficient deterrent to dispel any wish on his part to abscond.
Iwańczuk v. Poland, § 66	Since the fundamental right to liberty guaranteed by Article 5 ECHR is at stake, the authorities must take as much care in fixing appropriate bail as they do in deciding whether or not the accused's continued detention is indispensable.

Georgieva v. Bulgaria, §§ 15 and 30–31, Mangouras v. Spain, § 37	The amount set for bail must be duly justified in the decision fixing bail.
House arrest	
Buzadji v. The Republic of Moldova, § 104	House arrest is considered, because of its degree and intensity, to amount to deprivation of liberty within the meaning of Article 5 ECHR. This type of deprivation of liberty requires relevant and sufficient reasons, just as with pre-trial detention.
Navalny v. Russia, § 60	The house arrest was ordered primarily on the grounds that the applicant had breached the previous preventive measure, an undertaking not to leave Moscow during the investigation, presumably indicating the risk of absconding. When imposing the house arrest, the domestic court had not indicated any specific facts which had not been previously identified, and had failed to show the emergence of those risks that would justify the application of house arrest.
Restrictions on movement (Article 2 of Protocol to ECHR No. 4)	
Gochev v. Bulgaria, § 44	Any measure restricting the right of movement must be in accordance with the law, pursue one of the legitimate aims referred to in the ECHR, and be necessary in a democratic society for the achievement of that aim. Such a measure must strike a fair balance between the public interest and the individual's rights.
Popoviciu v. Romania, §§ 91,95	The restriction on movement may be justified in a given case only if there are clear indications of a genuine public interest which outweigh the individual's right to freedom of movement. Periodic reassessment on maintaining restrictions on an individual's freedom of movement for a lengthy period is mandatory.

Miażdżyk v. Poland, § 35 Popoviciu v. Romania, § 91	The duration of the restriction in itself cannot be taken as the sole basis for determining whether a fair balance was struck between the general interest in the proper conduct of the criminal proceedings and the applicant's personal interest in enjoying freedom of movement. This issue must be assessed according to all the special features of the case. The restriction may be justified in a given case only if there are clear indications of a genuine public interest which outweighs the individual's right to freedom of movement.
Popoviciu v. Romania	Example of the Court finding no violation of freedom of movement. The specifics of the case are as follows: • the prohibition on leaving the country was imposed for a period of three months and eight days; • the applicant had the opportunity to challenge the application of the preventive measure before the courts, and pleaded that the measure had prevented him from pursuing his business, which involved travel abroad; • there was a reasonable suspicion that the applicant had committed the offence with which he had been charged, and that revoking the restriction would impede the proper administration of justice; • the complex nature of the proceedings against the applicant, which involved extensive evidence, could justify, for a limited period of time, the prohibition on the applicant's leaving the country so that his immediate presence could be ensured if necessary;

	• a reassessment took place every thirty days; and • the domestic courts lifted the preventive measure imposed on the applicant when they considered that it was no longer necessary for the proper administration of justice, although the criminal proceedings against him were still pending.
Antonenkov and Others v. Ukraine	Example of the Court finding no violation of freedom of movement. The specifics of the case are the following: • the obligation not to leave their area of residence was imposed on the applicants for a period of approximately five years and three months; • the preventive measures were not automatically applied for the whole duration of the criminal proceedings; and • whenever the applicants applied to leave their place of residence they were granted permission.
A.E. v. Poland	Example of the Court finding there was a violation of freedom of movement. In this case, a travel ban was imposed for a period of eight years, and: • a reassessment took place only once, at the applicant's request, which would indicate that the travel ban was in reality an automatic, blanket measure of indefinite duration; and • the Court considered that this ran counter to the authorities' duty under Article 2 of Protocol No. 4 to take appropriate care to ensure that any interference with the applicant's right to leave Poland remained justified and proportionate throughout its duration.

Prescher v. Bulgaria	Example of the Court finding there was a violation of freedom of movement. In this case, the ban on leaving the country lasted for about five years and three months. The Court reiterated that: • even if justified at the outset, a measure restricting an individual's freedom of movement may become disproportionate if it is extended over a long period; and • the authorities did not consider whether the applicant's presence continued to be necessary after so many years of investigation.
Police supervision	
Zmarzlak v. Poland, §§ 44–52	The applicant was under police supervision for a period of 12 years. The ECtHR stated that: • the risk that a person charged may disrupt the proper course of proceedings decreases over time; • any measure that results in limiting the freedom to exercise rights relating to the sphere of an individual's private life must be interpreted narrowly and applied with restraint; and • it is for the authorities to ensure that measures restricting the rights and freedoms of an individual do not jeopardise the maintenance of a fair balance between the interests of that individual and the general interest, in this case, respect for the interests of justice. The Court found a violation of Article 8 ECHR (right to privacy).

Forfeiture of bail	
Lavrechov v. The Czech Republic, §§ 43–57	Although a forfeiture of bail constitutes interference by the state with the applicant's property rights, it pursues the legitimate aim of ensuring the proper conduct of criminal proceedings and, more generally, of fighting and preventing crime, which undoubtedly falls within the general interest as envisaged in Article 1 of Protocol No. 1. Turning to the proportionality test, the Court noted that the bail of approximately EUR 400,000 was a substantial amount of money, but stated that the appropriate time for discussing the proportionality of the amount of security for bail is when the bail is set, not when it is forfeited.

Practices in the Consortium States

The RELEASE project's empirical activities revealed marked discrepancies in how pre-trial detention and its alternatives are implemented across the five participating Member States. Despite the common legal framework and shared commitments under EU and ECHR law, national practices vary considerably in both frequency and reasoning of pre-trial decisions.

In Croatia and Bulgaria, official data and stakeholder testimonies highlight persistent overuse of pre-trial detention, with pre-trial detainees occupying a disproportionate share of prison populations. In Croatia, for example, some detention facilities operate at more than 200% capacity. In Greece, 25% of detainees are held for more than one year while awaiting trial. In Slovakia, stakeholders report practical and technical barriers to implementing alternatives. In Poland, a wide range of alternative measures exists, but their practical application is limited.[13]

13 Gaps & Needs Analysis Report, 32–73.

One conclusion from the RELEASE project is that a recurring issue across jurisdictions is the lack of structured, evidence-based risk assessments to support decisions on alternatives. While all five states offer various non-custodial measures, such as bail, house arrest, reporting obligations, and restrictions on movement or association, these options are not fully used. Additionally, limited judicial familiarity with the full suite of available measures, and concerns about enforceability, contribute to the preference for custodial solutions.

Across all consortium states, use of the European Supervision Order remains negligible. Legal practitioners report low awareness of the ESO, insufficient training, and practical doubts about cross-border coordination as significant barriers to its application.

Good Practices Identified Through Mutual Learning

The RELEASE project facilitated a series of national and international workshops, enabling judges, prosecutors, defence lawyers, and civil society actors to share insights and evaluate current practices. This cross-professional exchange brought to light several practices that could inform broader reforms across the EU. These are outlined below.

Defence lawyers play a pivotal role in protecting the rights of the accused and advocating for the use of alternative measures. Their early involvement in the proceedings—particularly during the initial police detention—can influence the course of the preventive decision. The project found that effective representation requires timely access to case files, client interviews, and the ability to collect and present personal circumstances relevant to the imposition of non-custodial measures. Good practices identified include proactively proposing specific alternatives, ensuring that these are tailored to the suspect's situation, and challenging poorly reasoned or generic detention decisions. In several partner states, lawyers reported difficulties in accessing information early enough to formulate such proposals, especially under tight deadlines.[14]

14 Handbook, 18–22.

Prosecutors exert substantial influence over whether pre-trial detention is sought in the first place. The project highlighted the need for prosecutors to carry out individualised assessments of the suspect's circumstances before requesting custodial measures. Collaboration with probation officers and access to rehabilitation or treatment programmes were flagged as important avenues to support non-custodial solutions. The RELEASE project also underscored the prosecutor's responsibility to provide transparent, detailed justification when seeking pre-trial detention, and to explain why alternatives would be insufficient. Several stakeholders stressed the need for more robust internal guidelines and training on how to apply this reasoning in practice.[15]

Judges are ultimately responsible for authorising or rejecting pre-trial detention. Their decisions must be based on a comprehensive understanding of the case file and informed by relevant legal standards. According to the RELEASE findings, judicial decisions often lacked individualised reasoning and failed to demonstrate why alternatives were not suitable. Judges reported time constraints and limited access to reliable monitoring frameworks as barriers to broader use of non-custodial measures. Nonetheless, the project documented examples of good practice where judges referenced ECtHR case-law, and sought to balance the duration or intensity of pre-trial detention.[16]

Policy Recommendations from the Project

Drawing on its research, stakeholder consultations, and comparative analysis, the RELEASE project formulated a set of policy recommendations aimed at national authorities, EU institutions, and judicial actors. These recommendations target both the structural and procedural dimensions of pre-trial detention, with a view to fostering a culture of legality, proportionality, and mutual trust. These include, in particular:

15 Handbook, 22–25.
16 Handbook, 26–33.

- developing regular, mandatory training programmes for judges, prosecutors, and defence lawyers on the use of alternatives to pre-trial detention, ECHR case-law, and EU instruments such as the ESO;
- implementing digital access to case files to facilitate timely preparation by all parties involved, especially in urgent detention proceedings;
- engaging civil society and the media to promote informed public discourse about the legitimate and proportionate use of pre-trial detention, countering narratives that equate detention with justice;
- adopting and operating modern technological means to facilitate alternative measures (electronic surveillance, geo-location);
- activating the judicial police or probation officers charged with the implementation of alternative measures;
- promoting the practical implementation of the European Supervision Order through awareness-raising, training, and exchange of good practices.[17]

Conclusions

By documenting national divergences, identifying structural and procedural barriers, and highlighting good practices, the RELEASE project has contributed to a more nuanced and evidence-based understanding of the use of pre-trial detention and its alternatives. The findings show that meaningful change requires more than legislative action. It involves reshaping institutional capacity and fostering cross-professional collaboration.

For EU institutions, the project's outputs offer evidence to inform future policy development and judicial cooperation instruments. For national stakeholders, the project provides a roadmap for enhancing compliance with EU and ECHR standards, as well as a set of profession-oriented good practices.

17 Policy Brief, 14–22.

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The Defendant's Attitude During the Main Trial and Its Impact on the Verdict: An Interdisciplinary Legal-Psychological Analysis

Abstract: The correct evaluation of evidence, particularly the testimony of the accused, who plays a key role in both the pre-trial and trial stages, is an important task that the justice system is seeking to address, not only in Poland, but also internationally. An increasing number of research papers deal with the influence of psychological aspects on the distortion of judgments, such as the impact of the "halo effect" or "pure exposure". To date, however, the impact of the defendant's attitude on the severity of the punishment has not been systematically studied. In view of the above, this study seeks to verify the research hypothesis, which assumes that the defendant's attitude during the main trial affects the content of the verdict, is related to the punishment imposed, and is also determined by subjective factors.

Keywords: evidence, psychological assessment of credibility, evidence of the defendant's explanations

Introduction

In every court proceeding, the process of evidentiary assessment plays a crucial role in determining the outcome of the trial, including the final verdict. However,

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the Code of Criminal Procedure does not provide precise guidelines on how the credibility of evidence should be evaluated. The principle of free evaluation of evidence, coupled with the legislature's lack of a strict obligation for courts to justify each judgment in detail, creates challenges both for the judge, who must render a fair decision based on an accurate assessment of the evidence, and for those seeking to review the reasoning behind the evaluation process.

Modern forensic psychology has increasingly examined the psychological factors influencing judicial decision-making. Prior study has explored the effects of cognitive biases, such as the halo effect and the mere exposure effect, on the assessment of evidence. However, a key evidentiary element in a criminal trial is the defendant himself. The defendant plays a central role at both the pre-trial and trial stages and serves as a primary and direct source of evidence. Notwithstanding the significance, the potential impact of the defendant's demeanor on the content of the verdict—particularly the severity of the sentence imposed–remains largely unexamined.

Defendants employ various strategies during trial interrogations as part of their defense.

These strategies can generally be classified into three main categories:

1) The defendant responds to all questions posed;
2) The defendant answers only the questions asked by their defense counsel;
3) The defendant refuses to answer any questions.

It is essential to underscore that under criminal procedure, defendants have the right to provide explanations but are under no obligation to do so. They may refuse to testify or decline to answer specific questions without providing a justification. Furthermore, in exercising their right to defense, defendants are permitted to alter or retract their previous statements, and providing false explanations is not subject to criminal liability.

The Rationale for the Study

The impetus for the study arose from a preliminary hypothesis, formulated through observations of court proceedings, suggesting a high likelihood of correlation between an accused who provides coherent and logical responses to all questions and the perception of their greater credibility. While the principle of the presumption of innocence, in its subjective dimension, mandates a neutral stance by judicial authorities—including the court—toward the accused and the content of their statements, the practical application of the principle may differ.

Conversely, it is plausible that a correlation exists between an accused who refuses to answer questions and a presumption–albeit implicit–of guilt, which may, in turn, result in a more severe sentence. This is despite the fact that the Code of Criminal Procedure explicitly grants the accused the right to remain silent. It is important to emphasize that, *de jure*, neither a refusal to admit guilt, a lack of remorse, nor a failure to respond to questions constitutes an aggravating circumstance warranting a harsher sentence. However, within the framework of evidentiary assessment—particularly under the principle of free evaluation of evidence—such factors may influence judicial perception and sentencing outcomes.

Given the fundamental nature of the issue, the concern raised appears well founded. The findings of the study have the potential to provide valuable guidance to both courts and defendants in the strategic selection of defense tactics.

Objectives of the Study

The primary objective of the study is to test the hypothesis that the attitude of the accused during the main trial, based on the three identified behavioral variants, affects the content of the verdict and is correlated with the severity of the sentence imposed, with subjective factors playing a role in the determination. This does not imply a presupposed violation of the accused person's right to remain silent by the adjudicating authority, but rather that the chosen defense strategy carries inherent consequences.

A secondary, overarching aim is to analyze the techniques and methods employed by defendants in exercising their right to defense during interrogations at the main hearing. Additionally, the study seeks to establish whether a correlation exists between an accused person's legal representation and their courtroom demeanor, contrasting this with the behaviors typically exhibited by self-represented defendants.

The final objective is to identify the most effective defense strategies, offering practical insights for both defense attorneys and accused persons facing the critical decision of selecting the most advantageous approach to their defense.

Study Methodology

The study was conducted using an analysis of official court documents. To obtain relevant data, the study employed a methodical review of court records from a sample of N = 12 case files, selected from cases adjudicated before the Regional Court of Poznań during the study period (2018–2024). The content analysis encompassed the decision to initiate proceedings, the indictment, the minutes of hearings, and the final judgment in each case.

In defining the general study population, the following criteria were taken into account:

1) The period during which the case was adjudicated;
2) The nature of the offense to which the case pertained;
3) The court in which the case was heard.

The study included only those cases in which a substantive ruling–whether in the form of an acquittal or a conviction–was issued between 2018 and 2024. Specifically, the study comprised criminal cases pending heard the Regional Court of Poznań and adjudicated by judges of the criminal division. Each case under review involved an indictment containing a charge under Article 148 of the Criminal Code, i.e., a charge of murder.

A study questionnaire was employed as a data collection instrument to systematically gather information relevant to the study.

Study Organization and Course of Study

The study project was conducted over a period of nine months. The initial phase involved a comprehensive review of existing literature on the subject, enabling the researcher to become familiar with previously identified issues at the intersection of law and psychology. The review also highlighted the potential for legal professionals to incorporate psychological insights into their work. Accordingly, a thorough examination of selected resources was undertaken before proceeding with the empirical study.

Subsequently, study questionnaires were designed, empirical material was collected, and in the later stages of the project, the data was analyzed and a scientific article was prepared. The purpose of the study questionnaires was to facilitate the collection of essential data for the study.

Before proceeding with the case file review, permission was sought from the President of the Regional Court to obtain file references for murder cases (i.e., cases under Article 148 of the Criminal Code) that had concluded with final judgments before the court between 2014 and 2024. Upon receiving authorization, the researcher was provided with a list of fifty-nine case file references matching the request. From these, twenty-five cases with the most recent final judgments (i.e., cases concluded between 2021 and 2024) were selected, and a request for access to these files was submitted. Permission was granted for access to twelve case files, albeit without the right to make photocopies. The researcher was also informed that access to the remaining files would not be permitted due to an order from the Head of Court Division and ongoing procedural activities within those cases.

Access to Case Files and Study Process

Permission to review case files was granted for the following cases: III K 98/21, III K 87/22, III K 85/21, III K 404/20, III K 514/21, III K 538/22, III K 350/22, III K 207/22, III K 97/20, III K 188/22, III K 295/22, and III K 543/21.

The examination of the files was conducted over two sessions. The first review took place on December 18, 2024, and the second on January 20, 2025. Additionally, an interview with a presiding judge was conducted on January 20, 2025.

During the study, each case file was thoroughly analyzed, and pre-prepared study questionnaires facilitated the systematic collection of data regarding the defendant's behavior during the trial proceedings and the corresponding sentencing outcomes.

Study Findings

Case 1: III K 514/21

In the case, a criminal complaint was filed on June 19, 2021, leading to pre-trial proceedings being initiated on June 21, 2021. The indictment was filed by the prosecutor on November 29, 2021, charging the defendant with an offense under Article 148 § 1 of the Criminal Code.

The defendant, a 26-year-old male, was represented during the trial by a privately retained legal counsel.

At the start of the main hearing, the defendant was duly instructed in accordance with the provisions of the Code of Criminal Procedure. He provided an initial statement upon receiving the instruction and maintained a consistent position throughout the proceedings. He answered all questions addressed to him.

In his final statement, the defendant expressed remorse, stating, "I request the lowest possible penalty. I deeply regret what happened."

On March 15, 2022, the court of first instance sentenced the defendant to eight years' imprisonment.

The defendant appealed the verdict on April 13, 2022, but the sentence was upheld on appeal.

Case 2: III K 404/20

In the case, a criminal complaint was filed on October 22, 2019, and pre-trial proceedings commenced on November 23, 2019. The indictment was submit-

ted by the prosecutor on November 26, 2020, qualifying the offense under Article 148 § 1 of the Criminal Code.

The defendant, a 45-year-old male, was represented by two privately retained defense attorneys.

At the beginning of the main hearing, the defendant was duly instructed in accordance with the Code of Criminal Procedure. He provided an initial statement after receiving the instruction and maintained it throughout the proceedings, answering all questions posed to him.

In his final statement, the defendant stated, "I agree with my defense attorneys. I believe I am ready to reintegrate into family life and live without alcohol. The psychologists in Łódź, where I was hospitalized, helped me a great deal. I miss my family deeply and wish to apologize for what happened." (The defendant became emotional and wept.)

On September 15, 2021, the court of first instance sentenced the defendant to six years' imprisonment. Both the defendant and the prosecutor filed appeals on November 22, 2021, and November 17, 2021, respectively. Following appellate review, the sentence was increased to twelve years' imprisonment.

Case 3: III K 98/21

In the case, a criminal complaint was originally filed on April 4, 1994. Pre-trial proceedings commenced on April 5, 1994, but were discontinued due to the inability to identify the perpetrator. A subsequent investigation was initiated on February 28, 1995. The indictment was ultimately filed by the prosecutor on February 26, 2021, with charges under Article 148 § 1 of the Criminal Code, in conjunction with Article 11 § 1, Article 168 § 1, and Article 10 § 2 of the Criminal Code.

The defendant, a 53-year-old male, was represented by two court-appointed public defenders.

During the trial, the defendant was instructed in accordance with the provisions of the Code of Criminal Procedure. However, he refrained from providing any statements and responded only to questions posed by his defense counsel.

In his final statement, he expressed remorse, stating, "I deeply regret what happened. I want to clarify that I had no intention to rape or murder Z.M. I sincerely apologize to her family and ask for their forgiveness. I also request leniency from the Court."

On May 27, 2021, the court of first instance sentenced the defendant to twenty-five years' imprisonment. The defendant filed an appeal on July 5, 2021, but the appellate court upheld the original sentence.

Case 4: III K 87/22

In the case, a criminal complaint was filed on December 24, 2020, and pretrial proceedings commenced on December 29, 2020. The indictment was filed by the prosecutor on March 9, 2022, charging the defendant under Article 148 § 1 of the Criminal Code.

The defendant, a 41-year-old male, was represented by a privately retained legal counsel.

At the outset of the trial, the defendant was duly instructed in accordance with the provisions of the Code of Criminal Procedure. However, he declined to provide any statements and refused to answer any questions throughout the proceedings.

In his final statement, he asserted, "I regret what happened. It was an accident—I never intended to kill anyone. I am not a murderer, as the prosecutor claims. I am not a bad person."

On May 9, 2022, the court of first instance sentenced the defendant to twenty-five years' imprisonment. The defendant filed an appeal on June 14, 2022, but the appellate court upheld the original sentence.

Case 5: III K 85/21

In the case, a criminal complaint was filed on March 13, 2020, and pretrial proceedings commenced on March 13, 2020. The indictment (against two persons, A.W. and M.K.) was filed by the prosecutor on February 22,

2021, charging the defendant under Article 148 § 1, Article 207 § 1a kk, Article 207 § 2 of the Criminal Code in conjunction with Article 160 § 2 of the Criminal Code in conjunction with Article 11 § 2 of the Criminal Code (A.W) and Article 207 § 1a and Article 207 § 12 of the Criminal Code in conjunction with Article 160 § 2, Article 157 § 1 and Article 11 of the Criminal Code (M.K).

The defendant (A.W.), a 22-year-old female, was represented by a privately retained legal counsel.

The defendant (M.K.), a 23-year-old male, was represented by a privately retained legal counsel, too.

At the start of the main hearing, defendants were duly instructed in accordance with the provisions of the Code of Criminal Procedure. They both gave explanations at the beginning of the main hearing, but A.W. changed them after the taking of evidence. They answered selectively to the questions put to them.

In her final statement, she asserted, "I don't want to say anything," while he stated "I move for acquittal."

On March 21, 2022, the court of first instance sentenced the defendant to fifteen years' imprisonment (A.W) and four years and six months' imprisonment (M.K.). The defendants (A.W. and M.K.) and the prosecutor filed appeals on April 30, 2022, April 25, 2022 and April 21, 2022, respectively. Following appellate review, the sentence was increased to twenty-five years' imprisonment (A.W.), and six years' imprisonment (M.K.).

The study will only take into account the data concerning A.W., because only she was responsible for the criminal act under Article 148 of the Criminal Code.

Case 6: III K 543/21

In the case, a criminal complaint was filed on April 1, 2021, and pre-trial proceedings commenced on April 2, 2011. The indictment was submitted by the prosecutor on December 13, 2021, qualifying the offense under Article 148 § 1 of the Criminal Code.

The defendant, a 32-year-old male, was represented by a court-appointed public defender.

At the outset of the main hearing, defendants were duly instructed in accordance with the provisions of the Code of Criminal Procedure. The defendant did not provide a full explanation during the trial, claiming that the explanations read out to him from the preparatory proceedings explanations were not his. On several occasions, he explained certain points in a fragmentary manner, contradicting what he had explained in the preparatory proceedings. However, he refrained from providing any statements and responded only to questions posed by their defense counsel.

In his final statement, he asserted, "I don't want to say anything."

On April 13, 2022, the court of first instance sentenced the defendant to twenty-five years' imprisonment. The defendant filed an appeal on May 18, 2022, but the appellate court upheld the original sentence.

Case 7: III K 538/22

In the case, a criminal complaint was filed on January 15, 2022, and pre-trial proceedings commenced on January 17, 2022. The indictment was submitted by the prosecutor on December 5, 2022, with charges under Article 148 § 1 (point 1 and 2), and Article 197 § 3 (point 1) of the Criminal Code in conjunction with Article 197 § 4 of the Criminal Code in conjunction with Article 11 § 2, Article 157 § 2, Article 291 § 1 of the Criminal Code in conjunction with Article 12 § 1 and 245 of the Criminal Code.

The defendant, a 60-year-old male, was represented by a court-appointed public defender.

At the beginning of the main hearing, the defendant was duly instructed in accordance with the Code of Criminal Procedure. He provided an initial statement after receiving the instruction but changed this several times. Mostly, he answered the questions put to him.

In his final statement, he asserted, "I move for acquittal."

On October 13, 2023, the court of first instance sentenced the defendant to twenty-five years' imprisonment. Both the defendant and the prosecutor filed appeals on November 27, 2023, and November 12, 2023, respectively. Following appellate review, the sentence was increased to life imprisonment.

Case 8: III K 305/22

In the case, a criminal complaint was filed on March 6, 2022, and pre-trial proceedings commenced on March 6, 2022. The indictment was submitted by the prosecutor on August 9, 2022, qualifying the offense under Article 148 § 1 of the Criminal Code.

The defendant, a 33-year-old female, was represented by privately retained legal counsel.

At the outset of the trial, the defendant was duly instructed in accordance with the provisions of the Code of Criminal Procedure. However, she declined to provide any statements. She maintained her explanations from the pre-trial proceedings and answered all questions addressed to her.

In her final statement, she asserted, "I am requesting the lowest possible sentence because I was defending myself and did not plan it."

On March 8, 2023, the court of first instance sentenced the defendant to twelve years' imprisonment. The defendant appealed the verdict on April 12, 2023, but the sentence was upheld on appeal.

Case 9: III K 295/22

In the case, a criminal complaint was filed on October 31, 2021, leading to the initiation of pre-trial proceedings on October 31, 2021. The indictment was filed by the prosecutor on July 4 2021, charging the defendant with an offense under Article 148 § 1 and Article 190 § 1 of the Criminal Code.

The defendant, a 40-year-old female, was represented by a court-appointed public defender.

At the beginning of the main hearing, the defendant was duly instructed in accordance with the Code of Criminal Procedure. She provided an initial statement after receiving the instruction and maintained it throughout the proceedings, answering all questions posed to her.

In her final statement, she asserted, "I am not asking for anything."

On January 4, 2023, the court of first instance sentenced the defendant to eight years' imprisonment. Both the defendant and the prosecutor filed appeals on February 6, 2023, and February 3, 2023, respectively. Following appellate review, the sentence was increased to eight years and one month' imprisonment.

Case 10: III K 207/22

In the case, a criminal complaint was filed on March 11, 2022, and pre-trial proceedings commenced on March 12, 2022. The indictment was submitted by the prosecutor on May 14, 2022, with charges under Article 148 § 1 of the Criminal Code in conjunction with Article 13 § 1 of the Criminal Code.

The defendant, a 41-year-old female, was represented by a privately retained legal counsel.

In his final statement, he asserted, "she pleads that he did not mean to kill the victim and for the lowest possible sentence."

At the beginning of the main hearing, the defendant was duly instructed in accordance with the Code of Criminal Procedure. He provided an initial statement after receiving the instruction and changed his explanations to a minor extent throughout the proceedings, answering all questions posed to him.

On July 28, 2022, the court of first instance sentenced the defendant to twelve years' imprisonment. The defendant appealed the verdict on October 3, 2022. Following appellate review, the sentence was increased to ten years and one month' imprisonment.

Case 11: III K 188/22

In the case, a criminal complaint was filed on December 15, 2021, and pre-trial proceedings commenced on December 15, 2021. The indictment was submit-

ted by the prosecutor on April 19, 2022, with charges under Article 148 § 1 of the Criminal Code.

The defendant, a 58-year-old male, was represented by a court-appointed public defender.

During the trial, the defendant was instructed in accordance with the provisions of the Code of Criminal Procedure. However, he refrained from providing any statements and responded only to questions posed by their defense counsel.

In his final statement, he asserted, "I am asking the court not to give me so much because I will not live to see it. I want to say that he did not give me the money I had earned. That is all."

On September 7, 2022, the court of first instance sentenced the defendant to twenty-five years' imprisonment. The defendant appealed the verdict on October 13, 2022. Following appellate review, the sentence was increased to fifteen years' imprisonment.

Case 12: III K 97/20

In the case, a criminal complaint was filed on July 3, 2019, and pre-trial proceedings commenced on March 11, 2020. The indictment was submitted by the prosecutor on March 11, 2020, with charges under Article 148 § 1 of the Criminal Code.

The defendant, a 31-year-old female, was represented by a privately retained legal counsel.

At the outset of the main hearing, the defendant was duly instructed in accordance with the provisions of the Code of Criminal Procedure. She only made a preliminary statement after the inquest, when the public was excluded. She answered all questions directed to him.

In her final statement, she asserted, "She puts in like a defender. She states that she regrets what happened and thinks about it every day and says it will be with her for the rest of her life."

On September 21, 2020, the court of first instance sentenced the defendant to twelve years' imprisonment. Both the defendant and the prosecutor filed

appeals on November 16, 2020, and November 13, 2020, respectively. Following appellate review, the sentence was reduced to eight years' imprisonment. Subsequently, the public prosecutor filed a cassation, after which the sentence was increased to ten years' imprisonment.

Conclusions

In the cases reviewed, the primary charge was the commission of an offense under Article 148 of the Criminal Code (murder). In certain instances, additional charges were brought, including rape or abuse. The majority of defendants (eight) were male, while four were female. The youngest defendant was 22 years old, and the oldest was 60. Half of the defendants (six) retained a private legal counsel, whereas the remaining six were represented by court-appointed public defenders. A key observation is that the defendants represented by privately retained attorneys generally received lower and more varied sentences than those represented by public defenders (see Charts 3 and 4).

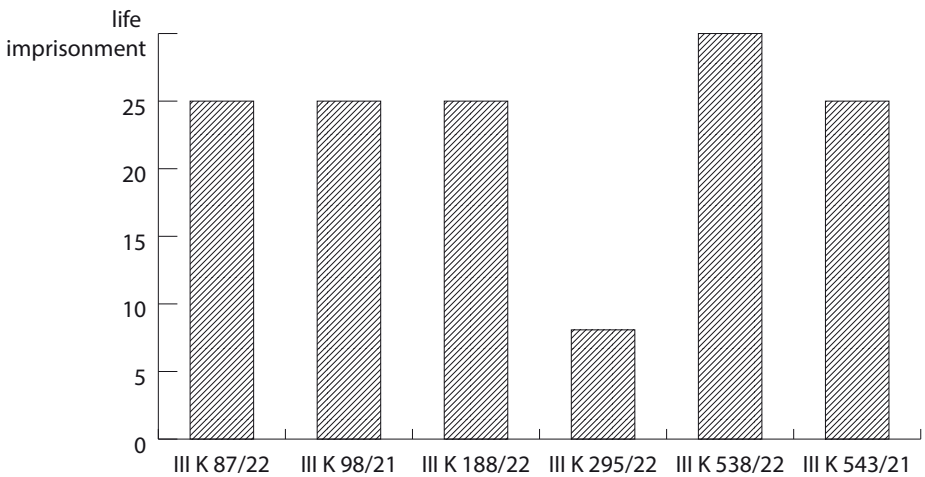
Sentencing Trends

It was determined that the average sentence imposed for murder, calculated by equating life imprisonment to 30 years for statistical purposes, amounted to 16.91 years' imprisonment.

Furthermore, all defendants represented by privately retained attorneys actively participated in their trials by responding to all questions posed. However, the strategies adopted varied among these defendants:

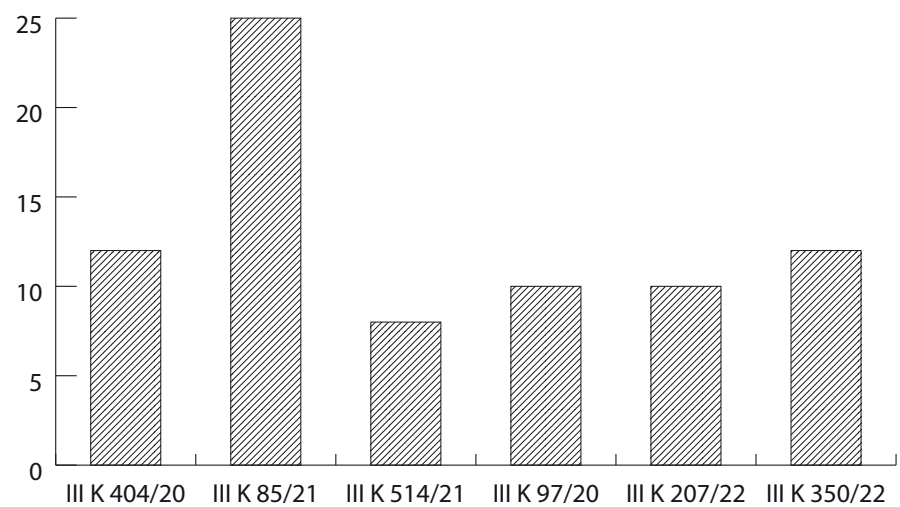
- Three defendants only answered their defense counsel's questions;
- One defendant refused to answer any questions;
- Two defendants answered all the questions posed.

Chart 1: Sentencing Outcomes for Defendants Represented by Public Defender



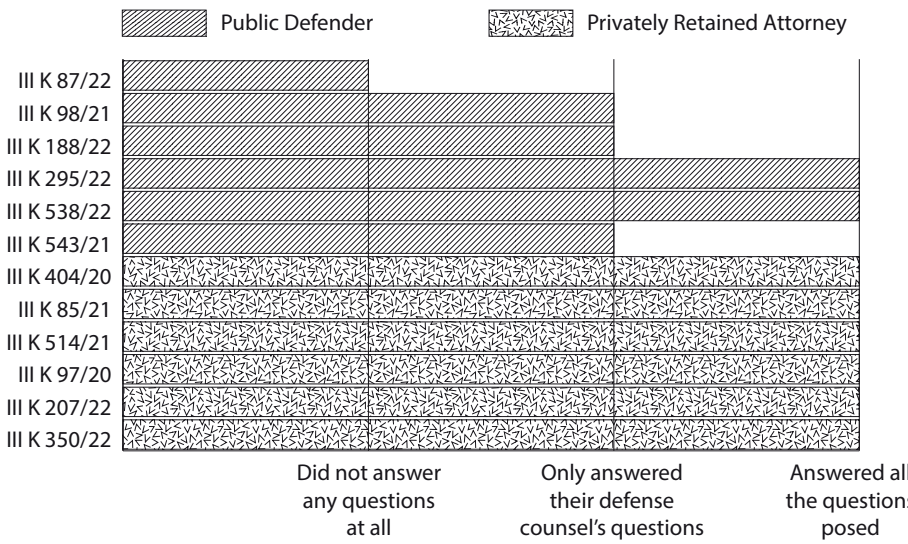
Source: own compilation based on the author's research

Chart 2: Sentencing Outcomes for Defendants Represented by Privately-Retained Attorney



Source: own compilation based on author's research

Chart 3: Comparative Analysis of Defendant Conduct Based on Legal Representation—Public Defender vs. Privately Retained Attorney



Source: own compilation based on author's research

Impact of Defendant Conduct on Sentencing

A comparison of sentencing outcomes indicates that a defendant who refused to answer any questions (III K 87/22) was sentenced to 25 years' imprisonment. Likewise, two of the three defendants who answered only their defense counsel's questions (III K 543/21, III K 98/21) also received 25-year sentences. The third such defendant (III K 188/22) initially received a 25-year sentence, later reduced to 15 years on appeal.

It appears that harsher sentences were imposed on defendants who either refused to answer questions entirely or answered selectively. This suggests that courts may perceive such behavior as an attempt to construct an alternative narrative, potentially leading judges to view the defendant's statements as a premeditated defense tactic, thereby undermining credibility. Moreover, cooperation with the court, particularly by answering all questions, is generally regarded as a mitigating factor in sentencing.

In contrast, defendants who engaged fully in the trial process, whether represented by private counsel or public defenders, generally received lighter sentences. In most of these cases (III K 295/22, III K 350/22, III K 207/22, III K 97/20, III K 404/20, III K 514/21), the sentences did not exceed 12 years. Notably, each of these defendants expressed remorse during sentencing.

Cases Involving Severe Social Harm

Two cases—III K 85/21 and III K 538/22—were distinguished by the extreme social harm of the offenses:

- In case III K 85/21, the indictment included charges under Article 148 § 1, Article 207 § 1a, Article 207 § 2, Article 160 § 2, and Article 11 § 2 of the Criminal Code.
- In case III K 538/22, the indictment cited violations of Article 148 § 2 (points 1 and 2), Article 197 § 3 (point 1), Article 197 § 4, Article 11 § 2, Article 157 § 2, Article 291 § 1, Article 12 § 1, and Article 245 of the Criminal Code.

In these cases, despite the defendants' active participation in trial proceedings, the court imposed sentences of 25 years' imprisonment and life imprisonment, respectively.

- The first case involved a 22-year-old woman who, in an effort to avoid conflict with her landlord, sought to quieten her crying infant by smothering the child with a quilt. On one such occasion, the child suffocated and died.
- The second case concerned a 60-year-old man who raped and killed a woman he had met that evening, inflicting severe injuries, including trauma to the vagina and anus and the displacement of intestines outside the abdominal cavity.

Both defendants initially provided statements after being instructed but later altered their testimony. The male defendant changed his version of events multiple times, while the female defendant modified her statements following

the presentation of evidence. Neither defendant expressed remorse or apologized. During final submissions, the female defendant declined to comment, while the male defendant simply requested acquittal.

The court may have interpreted the lack of remorse and refusal to acknowledge culpability as an indication of the defendants' indifference to their crimes and a potential risk of recidivism. The gravity of these offenses warranted special condemnation, and in such cases, even cooperative behavior during the trial may not mitigate sentencing due to the high likelihood of reoffending. Conversely, when the social harm of an offense is less severe, and a defendant demonstrates remorse and regret, rehabilitation remains a viable prospect.

Defense Representation and Sentencing Disparities

An analysis of Charts 1 and 2 reveals that defendants represented by private attorneys generally received more lenient sentences. Since all such defendants chose to answer questions during their trials, it appears that their active engagement played a significant role in sentencing outcomes.

One potential explanation for the discrepancy is the long-standing issue of inadequate compensation for public defenders, which has been the subject of debate within the legal profession. It is plausible that court-appointed attorneys, due to their low remuneration, may adopt less engaged defense strategies. Advising a defendant to remain silent or answer only selective questions may require less preparation and familiarity with case files. The approach, however, undermines the constitutional right to an effective defense and raises concerns about the fairness of legal representation.

Summary of Key Findings

1) Both the defendant's attitude and level of engagement during trial proceedings significantly influence sentencing outcomes. Subjective factors, particularly the defendant's cooperation and participation, are pivotal in judicial decision-making.

2) Defendants employ diverse defense strategies, including full engagement, selective responses, or complete silence. The study indicates that defendants with private attorneys tend to answer questions, while those with public defenders often adopt alternative tactics.
3) The most effective defense strategy appears to be full cooperation with the court, including providing consistent testimony, answering all questions, and expressing remorse for the offense. Such behavior is associated with more favorable sentencing outcomes.

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The National Referendum in the Polish Legal Tradition

Abstract: This article provides a concise historical-legal analysis of the national referendum in the Polish constitutional tradition from 1918 to the present. It examines how successive political systems—the Second Republic, the People's Republic of Poland and the Third Republic—shaped both the normative framework and the practical functioning of the referendum. The study shows that despite its constitutional status as an instrument of direct democracy, the referendum has been used predominantly for political or legitimising purposes, with genuine civic participation being limited in practice. Only the 1997 constitutional referendum and the 2003 EU accession referendum fulfilled a substantive democratic role. The article highlights long-term patterns of instrumentalisation and the structural barriers that have hindered the consolidation of the referendum as an authentic expression of popular sovereignty.
Keywords: national referendum, direct democracy, Polish constitutional law, political instrumentalisation, history of law, direct democracy mechanisms

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Introduction

The national referendum, one of the constitutionally envisaged forms of direct democracy, occupies a distinctive position within the Polish legal order, although its actual systemic function has undergone significant transformations across successive periods of the state's history. Even the mere act of asking about the purpose of the referendum and the reasons why this instrument is considered useful from a constitutional perspective leads to broader reflections on the extent to which the mechanism of the popular vote has influenced political reality and the dynamics of public life, as well as how it has shaped collective opinion. Such an analysis is necessary because, in Poland's history, the referendum has been used in radically different ways—both as a tool for legitimising the actions of those in power and as an element of political mobilisation, devoid of any independent deliberative value, and as an institution enabling citizens to exert a genuine influence on the direction of state policy.

From a historical-legal perspective, it is difficult to speak of the existence of genuine forms of direct democracy prior to Poland's independence being regained in 1918. This is due to the fact that it was only in the period of the Second Republic that political rights were extended to all citizens of the state, and not merely to members of the nobility. Only then could the Polish constitutional system be described as democratic in any meaningful sense and any discussion of the level of civic participation undertaken. It is true that in the period of what is termed the First Republic of Poland certain embryonic forms of bottom-up exercise of power emerged (albeit confined to a narrow stratum of the aristocratic estate), and, as an example one may cite the Third of May "referendum" of the February local dietines (Pol. *sejmiki*), whose purpose was to ascertain the opinion of the nobility on the adoption of the Constitution of 3 May.[3] In my view, however, designating this series of events as a referendum

3 This process was described in detail by Wojciech Szczygielski, *Referendum trzeciomajowe: Sejmiki lutowe 1792 roku* (Wydawnictwo Uniwersytetu Łódzkiego, 1994).

is inappropriate and misleading. It would be more rational to define them as an instrument introducing a deliberative dimension into the law-making process.

This article analyses the use—and attempted use—of the national referendum in the Polish legal system from 1918 to the present day. Its aim is to reconstruct the transformations of this institution against the background of successive stages in the development of the state system, and to assess the extent to which it has constituted an instrument for giving effect to the principle of popular sovereignty. Within the adopted research perspective, particular importance is attached to several fundamental questions, the formulation of which determines the direction of the analyses undertaken in the subsequent parts of the article.

Firstly, the inquiry focuses on how the place of the referendum was shaped within the constitutional arrangements of the Second Republic, the People's Republic of Poland (PRL) and the Third Republic, both at the normative and at the practical level. The analysis thus covers the constitutional drafts of the inter-war period, the incidental and profoundly distorted use of the referendum in 1946, the evolution of the provisions and practice in the late PRL, and the gradual institutionalisation of this form of participation after 1989, especially in the light of the solutions adopted in the 1997 Constitution.

Secondly, it is necessary to examine the political, social and legal factors that determined the way in which the institution of the referendum was constructed and the grounds for its use in successive epochs. This concerns both the pre-war ideological disputes surrounding the representative system, and the logic of authoritarian power in the People's Republic, where the referendum was subordinated to legitimising goals, as well as the conditions of the pluralist political scene of the Third Republic, in which referendal practice has often reflected the interests of current parliamentary majorities or the ambitions of members of the executive.

Thirdly, the analysis considers the extent to which referendums held in Poland have constituted a genuine instrument of direct democracy, enabling

citizens autonomously to express their will in matters of public importance, and the extent to which they have been reduced to a means of political instrumentalisation. From this perspective, it is essential to determine whether referendum procedures have fostered public deliberation and strengthened civic participation, or whether—as in 1946—they have become part of propagandistic activities devoid of real significance for the decision-making process.

Fourthly and finally, it is necessary to define criteria allowing for an assessment of the quality and significance of the referendums conducted in Poland. On the basis of historical-legal analyses that take into account, inter alia, the abuses of the 1940s, the conditions of referendum campaigns, the formulation of questions, turnout, and normative effects, one may distinguish in particular: (1) the procedural standard and degree of integrity in the organisation of voting, including the independence of commissions and the possibility of controlling the process; (2) the neutrality, clarity and non-misleading character of referendum questions; (3) the conditions of the campaign, encompassing the level of informational pluralism and the freedom and substantive nature of public debate; (4) the actual level of citizen participation, understood more broadly than mere turnout; (5) the real impact of the referendum outcome on the decision-making process; and (6) the conformity of referendal practice with the constitutional function of the referendum, namely the strengthening of the power of the people, rather than the pursuit of short-term political aims.

The structure of the article reflects the chronology of constitutional changes and the evolution of the institution. The first part discusses the concepts and constitutional projects of the Second Republic, in which, despite the lack of practical application, the first modern concepts of the national referendum took shape. The next part presents the experience and consequences of the 1946 referendum, as well as the functioning of the referendum in the realities of the People's Republic of Poland, including its legitimising and consultative roles. The following section concerns the period of constitutional transformation and the first decades of the Third Republic, covering, inter alia, constitutional and

ratification referendums. The final part is devoted to referendal practice after 2003, marked by an increased number of initiatives and a rise in the instrumentalisation of issue-specific referendums, particularly visible in 2015 and 2023.

In this way, the study seeks to offer a comprehensive account of the historical-legal position of the national referendum in Poland, encompassing both its normative framework and the real practice of its application. The research perspective so outlined makes it possible to evaluate the degree to which the functions attributed to this institution within a democratic system have been realised, and to identify the enduring patterns of its instrumentalisation.

The Second Republic—Attempts to Introduce the National Referendum into the Polish Legal System

In the interwar period, the institution of the national referendum did not find expression either at the normative level or in practice. One may, of course, point to several examples of instruments of direct democracy used at that time. The popular plebiscites held in Warmia, Masuria, Powiśle and Upper Silesia may serve as such examples. Even if one were to regard a plebiscite as a form of referendum, it must be clearly stated that the above-mentioned votes were popular ballots of a regional, not nationwide, character.

This does not mean, however, that the national referendum was absent from legal discourse. In the course of work on the March Constitution, four drafts of the basic law were presented: these were drawn up by the Polish Socialist Party (PPS), the Polish People's Party "Wyzwolenie" (PSL-Wyzwolenie), the Constitutional Labour Club (the "American" draft), and Władysław Wróblewski (the "French" draft). All provided for citizen participation in the direct exercise of power. The most far-reaching of these[4] was the draft prepared by the Union of Polish Socialist Deputies under the leadership of Mieczysław

4 Piotr Uziębło, *Demokracja partycypacyjna: Wprowadzenie* (Centrum Badań Społecznych, 2009), 170.

Niedziałkowski in 1920.[5] Under this proposal, pursuant to Article 51 of the constitution, any statute or resolution of the Sejm could be submitted to a popular vote: by a resolution of the Sejm, at the request of the President and the Council of Ministers supported by one-third of the total number of deputies, at the request of the Chamber of Labour (Pol. *Izba Pracy*) in specified cases, or at the request of at least 100,000 citizens holding active electoral rights.

The PSL-Wyzwolenie draft, based largely on Włodzimierz Wakar's *Foundations of the Order of the Polish Republic*,[6] also contained provisions on a national referendum, although they were not as far-reaching as those in the PPS proposal. They were to concern, for example, consent to the restriction of civil liberties.[7] The draft likewise provided for a popular initiative by 500,000 citizens seeking either the renewed submission of an adopted statute to a vote, or the ordering of a referendum in relation to it.[8]

Very interesting proposals can also be found in the draft prepared in 1919 by Józef Buzek.[9] Supported by deputies of the Constitutional Labour Club, this advocated the introduction of a federal presidential system modelled on that of the United States.[10] Chapter III, entitled "The Direct Participation of the People in the Exercise of Legislative Power", was devoted to citizen participation. Under its provisions, a referendum was to be ordered in the event of any constitutional amendment, with respect to certain tax statutes, in relation to resolutions authorising the contracting of agrarian loans, and as a result of popular initiative (with the exception of budgetary and emergency statutes).

5 Związek Polskich Posłów Socjalistycznych under the guidance of Mieczysława Niedziałkowskiego, *Projekt Konstytucji Rzeczypospolitej Polskiej* (PPS, 1920).

6 Włodzimierz Wakar, *Podstawa ładu Rzeczypospolitej Polskiej: (wniosek)* (Drukarnia Synów St. Niemiry, 1919), 5.

7 Sejm Ustawodawczy, *Sprawozdanie Stenograficzne z 35 Posiedzenia Sejmu Ustawodawczego z dnia 9 maja 1919 r*. (Drukarnia Piotra Laskauera, 1919), 36.

8 Kancelaria Senatu, *Zarys instytucji referendum jako formy demokracji bezpośredniej: Referendum ogólnokrajowe w Polsce* (Kancelaria Senatu, 2013), 7.

9 Józef Buzek, *Projekt konstytucji Rzeczypospolitej Polskiej* (Drukarnia Państwowa, 1919).

10 Krzysztof Prokop, "W poszukiwaniu systemu rządów u progu niepodległości (1918–1921)," *Miscellanea Historico-Iuridica* 17, no. 1(2018): 37.

Other interesting systemic arrangements were put forward in the draft attributed to Władysław Wróblewski,[11] known as the "French" draft because it was inspired by the Constitution of the Third French Republic.[12] It envisaged the possibility of holding a referendum in two situations involving a lack of agreement between the two chambers of Parliament. First, where a legislative deadlock arose because the Sejm and the Senate were unable to reach the procedurally required consensus. Secondly, where one chamber refused to assent to a proposed constitutional amendment, 300,000 citizens could request that a referendum be organised on the matter.[13]

During the work on the March Constitution, the dividing line in the dispute over the referendum ran between the political right and the left, the latter being advocates of introducing this institution.[14] Representatives of the right, such as Deputy Bolesław Fichna of the Christian Democratic NZR, argued that given the difficult situation of the state and its ethnically heterogeneous structure, such regulations should be approached with great caution.[15] The risk of manipulation and the low level of education of the population were frequently invoked.[16] For that reason, for example, Buzek's draft stipulated that, in the case of local referendums establishing or amending regional constitutions, such a referendum could only be held if the illiteracy rate in the region did not

11 Kancelaria Senatu, *Zarys instytucji referendum jako formy demokracji bezpośredniej*, 6; Marian Kallas, "Wstępy w projektach Konstytucji z lat 1919–1921," *Prawo Kanoniczne: Kwartalnik Prawno-Historyczny* 52, no. 3–4 (2009): 398; Robert Jastrzębski, "Realizacja postanowień Konstytucji Rzeczypospolitej Polskiej z dnia 17 marca 1921 roku w zakresie wymiaru sprawiedliwości," *Krakowskie Studia z Historii Państwa i Prawa* 16, no. 2(2023): 205.

12 Kancelaria Senatu, *Zarys instytucji referendum jako formy demokracji bezpośredniej*, 6.

13 Kancelaria Senatu, *Zarys instytucji referendum jako formy demokracji bezpośredniej*, 6.

14 Kancelaria Senatu, *Zarys instytucji referendum jako formy demokracji bezpośredniej*, 7; Przemysław Krzywoszyński, "Z dyskusji nad referendum w Polsce Ludowej," *Czasopismo Prawno-Historyczne* 61, no. 1(2009): 174; Uziębło, *Demokracja partycypacyjna*, 169.

15 Sejm Ustawodawczy, *Sprawozdanie Stenograficzne z 35 Posiedzenia Sejmu Ustawodawczego*, 46.

16 Kancelaria Senatu, *Zarys instytucji referendum jako formy demokracji bezpośredniej*, 7.

exceed 10% (Article 3).[17] However, none of these solutions found its way into the final text of the 1921 Constitution.

It appears that in the interwar period this was the only real opportunity to implement mechanisms of direct democracy. In the constitutional practice of that time, there was evident instability in the political system, which enabled the growth in social support and political strength of the Sanacja movement. The August Amendment of 1926 substantially strengthened the position of the executive in relation to the legislature, while the April Constitution was filled primarily with duties rather than with rights and freedoms of citizens, which were not even set apart in its systematic structure.[18] The functioning of the state under that constitution was brutally interrupted by the outbreak of the Second World War in 1939.

Ill-Begotten—The Disastrous Experience of the First Nationwide Referendum in Polish History

After the Second World War, as a result of the decisions taken at the Yalta Conference, among other factors, the Republic of Poland found itself within the USSR's sphere of influence,[19] which undertook to ensure that free elections would be held in Poland as rapidly as possible.[20] However, uncertain of victory, the communists postponed the calling of such elections. The victory in November 1945 of the Smallholders' Party in Hungary, which was in opposition to the local communist

17 Buzek, *Projekt konstytucji Rzeczypospolitej Polskiej*.

18 Tadeusz Maciejewski, *Historia ustroju i prawa sądowego Polski* (C.H. Beck, 2017), 308.

19 Dariusz Dudek, "Referendum—instrument czy iluzja władzy polskiego suwerena?," *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 80, no. 1(2018): 169.

20 Jan Snopko, "Przebieg referendum ludowego z 30 czerwca 1946 roku w powiecie augustowskim w *świetle* raportu szefa Powiatowego Urzędu Bezpieczeństwa Publicznego w Augustowie," *Studia Podlaskie*, no. 17(2007/2008): 353; Mariusz Żuławnik, *Referendum ludowe z 30 czerwca 1946 roku w Płocku i powiecie płockim* (Archiwum IPN, 2023), 216; Adam Dziurok and Małgorzata Świder, eds., *Referendum ludowe w 1946 roku oraz wybory do Sejmu Ustawodawczego w 1947 roku na Górnym Śląsku* (IPN, 2017), 7.

party,[21] is said to have prompted Władysław Gomułka to postpone the election date.[22] It was nevertheless necessary to legitimise the authorities by means of a ballot, and this constituted the first reason for ordering a referendum.[23]

Moreover, such a vote was considered to be an ideal test of the actual level of support for the communist camp and of acceptance of the change in the political situation.[24] It also made it possible to consolidate the new authorities, to organise more effectively the apparatus of repression against the opposition (above all, the Polish People's Party, PSL), and to create opportunities for electoral fraud.[25] As K. Drażba notes, even before the proposal to hold a referendum was publicly announced, the Political Bureau of the Polish Workers' Party (PPR) established a secret State Security Commission tasked with coordinating the activities of the army and security organs in combating the armed underground and "securing" the referendum. As a rule, this popular vote was treated as a substitute for parliamentary elections,[26] a kind of proxy referendum.[27] What is particularly striking, however, is that when the Polish Socialist Party (PPS) formally came forward with the proposal to hold a referendum, it

21 Snopko, "Przebieg referendum ludowego z 30 czerwca 1946 roku w powiecie augustowskim," 353; Krzysztof Drażba, *Urna to jest taki pniak. Wrzucisz "nie", wychodzi "tak": Referendum z 30 czerwca 1946 r. w Polsce na przykładzie województwa gdańskiego* (IPN, 2016), 17.

22 Andrzej Cylwik, "Referendum 1946 r. na Pomorzu w *świetle* odtajnionych raportów amerykańskich," *Studia Gdańskie. Wizje i rzeczywistość*, no. 19(2022/2023): 170.

23 Anna Maciąg, "Historyczny kontekst referendum lokalnego w Polsce," *Folia Iuridica Universitatis Wratislaviensis* 7, no. 2 (2018): 45.

24 Żuławnik, *Referendum ludowe z 30 czerwca 1946 roku w Płocku i powiecie płockim*, 216; Snopko, "Przebieg referendum ludowego z 30 czerwca 1946 roku w powiecie augustowskim," 353–54.

25 Drażba, *Urna to jest taki pniak*, 80; Snopko, "Przebieg referendum ludowego z 30 czerwca 1946 roku w powiecie augustowskim," 353; Zrzeszenie Wolność i Niezawisłość, *Wnioski z referendum a wybory* (WiN, 1946), 1; Adam Dziurok and Bernard Linek, eds., *Górny Śląsk w Polsce Ludowej. Tom 1. Przełomy i zwroty* (IPN, 2017), 43.

26 Sabina Grabowska, "Referendum ogólnokrajowe w Polsce—analiza przypadku," *Studia Politologiczne* 53, 2019: 102; Kancelaria Senatu, *Zarys instytucji referendum jako formy demokracji bezpośredniej*, 7; Zrzeszenie Wolność i Niezawisłość, *Wnioski z referendum a wybory*, 1.

27 Krzywoszyński, "Z dyskusji nad referendum w Polsce Ludowej," 178.

was supported by Stanisław Mikołajczyk himself.[28] This resulted from the fact that opposition circles likewise viewed the popular vote as an opportunity to test their own support.[29]

On 26–28 April 1946, at a session of the State National Council (Krajowa Rada Narodowa, KRN), which had in effect become a self-appointed parliament of the Republic,[30] two statutes were adopted: the Act on the Popular Vote and the Act on the Conduct of the Popular Vote.[31] The Act of 27 April 1946 on the Popular Vote was the first legal act to introduce into Polish law the institution of the nationwide referendum.[32] The detailed procedure for conducting such a referendum was set out in the Act of 28 April 1946 on the Conduct of the Popular Vote.[33] The franchise was granted to all citizens possessing full legal capacity, who had reached the age of 21, had not been deprived of public rights by a final court judgment after 22 July 1944, and were not at that time serving a custodial sentence. The key provisions of the Act that enabled manipulation of the result concerned the manner of appointing electoral commissions and the design of the ballot.

The referendum was ordered by the General Commissioner for the Popular Vote,[34] together with a deputy, elected by the Presidium of the State National Council.[35] Members of the district electoral commissions were appointed by

28 Grabowska, "Referendum ogólnokrajowe w Polsce—analiza przypadku," 101–02; Krzywoszyński, "Z dyskusji nad referendum w Polsce Ludowej," 175; Żuławnik, *Referendum ludowe z 30 czerwca 1946 roku w Płocku i powiecie płockim*, 221–22.

29 Drażba, *Urna to jest taki pniak*, 8 and 18.

30 Żuławnik, *Referendum ludowe z 30 czerwca 1946 roku w Płocku i powiecie płockim*, 216.

31 Grabowska, "Referendum ogólnokrajowe w Polsce—analiza przypadku," 98–99.

32 Journal of Laws of 1946, no. 15, item 104.

33 Journal of Laws of 1946, no. 15, item 105.

34 This position was held by Wacław Barcikowski—First President of the Supreme Court, vice-chairman (later chairman) of the Alliance of Democrats (which was in coalition with the Polish Workers' Party), a member of the Presidium of the State National Council, and later Deputy Marshal (Deputy Speaker) of the Sejm and member of the Council of State.

35 The Commissioner and the Deputy were appointed by a resolution adopted by the following members: President Bolesław Bierut, Stanisław Szwalbe, Stanisław Grabski, Michał Żymierski, Roman Zambrowski, and Wacław Barcikowski: Uchwała Prezydium Krajowej

the voivodship national councils, and their chairs were appointed by the General Commissioner. The composition of the local electoral commissions, which directly conducted the vote, was determined by the chair of the district electoral commission (as chair), by the district (municipal) national councils (three members), and by the district authority of general administration.[36] The General Commissioner exercised virtually unlimited supervision over the work of the commissions, and his orders were not subject to appeal. The legal basis for the 1946 referendum consisted of ad hoc acts, which expired upon the issuance of the General Commissioner's Proclamation on the Results of the Popular Vote of 30 June 1946.[37]

Article 3 of the Act on the Popular Vote provided that the vote was to be held on 30 June 1946 throughout the entire territory of the state. Under Article 2 of the same Act, the questions put to the citizens were as follows[38]:

1) *Do you support the abolition of the Senate?*
2) *Do you wish the future Constitution to preserve the economic system introduced by the agrarian reform and the nationalisation of the basic branches of the national economy, while maintaining the statutory rights of private initiative?*
3) *Do you wish to consolidate the western borders of the Polish State on the Baltic, the Oder and the Lusatian Neisse?*

The questions were formulated in a highly artful manner so that the majority of voters would answer them in the affirmative, thereby creating an impres-

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Rady Narodowej z dnia 10 maja 1946 r. o powołaniu Generalnego Komisarza Głosowania Ludowego i jego zastępcy (Polish Monitor of 1946, no. 40, item 78).

36 That is, the county starosties (Pol. *starostwa powiatowe*), established pursuant to: Dekret Polskiego Komitetu Wyzwolenia Narodowego z dnia 21 sierpnia 1944 r.—Prawo o organizacji i zakresie działania administracji ogólnej I instancji (Journal of Laws of 1944, no. 6, item 27).

37 Polish Monitor of 1946, no. 61, item 115.

38 Załącznik do ustawy z dnia 28 kwietnia 1946 r. o przeprowadzeniu głosowania ludowego [Appendix to the Act of 28 April 1946 on the Conduct of the Plebiscite] (Journal of Laws, no. 15, item 105).

sion of social unanimity and of support for the communist authorities.[39]They are a classic example of so-called sham questions.[40] This drafting technique also aimed to make it more difficult for the opposition to agitate against them.[41] Nonetheless, the PSL, seeking to distinguish itself from the PPR, campaigned for a negative vote on the abolition of the Senate,[42] although it had itself previously advocated unicameralism in its programme,[43] but they regarded this point as the least important of the three issues.[44]

The Democratic Bloc of parties (PPR, PPS, the People's Party—SL, and the Democratic Party—SD, under the leadership of the PPR) called for a mass "3 × YES" vote.[45] It justified its position, inter alia, by claiming that it would ensure: openness of political life, the consolidation of sincere democrats, the strengthening of the achievements of the popular masses, the defeat of reaction, the prevention of the return of fascism and German imperialism,[46] political stabilisation,[47] and the rapid reconstruction of the state, which, it was argued, required a government enjoying the confidence of the other states of the world.[48]

A notable technique of social engineering was the tailoring of propaganda messages to specific social groups, such as women,[49] peasants, repatriates, sol-

39 Dziurok and Linek, eds., *Górny* Śląsk *w Polsce Ludowej*, 42; Drażba, *Urna to jest taki pniak*, 19.

40 Remigiusz Chęciński, *Referendum ogólnokrajowe w polskim systemie prawnym po 2 kwietnia 1997 r.* (UAM, 2019), 34.

41 Drażba, *Urna to jest taki pniak*, 19–20.

42 Dziurok and Linek, eds., *Górny* Śląsk *w Polsce Ludowej*, 42; Drażba, *Urna to jest taki pniak*, 8.

43 Kancelaria Senatu, *Zarys instytucji referendum jako formy demokracji bezpośredniej*, 7–8.

44 Żuławnik, *Referendum ludowe z 30 czerwca 1946 roku w Płocku i powiecie płockim*, 222.

45 Cylwik, "Referendum 1946 r. na Pomorzu w świetle odtajnionych raportów amerykańskich," 171; Michał Siedziako, "Socjotechnika w procesie przejmowania władzy w Polsce przez komunistów (1944–1948)," *Historia i Polityka* 54, no. 47 (2024): 133.

46 Krzywoszyński, "Z dyskusji nad referendum w Polsce Ludowej," 177.

47 Drażba, *Urna to jest taki pniak*, 36.

48 Drażba, *Urna to jest taki pniak*, 98.

49 It is especially worth noting: Biblioteka Narodowa, *Dlaczego kobiety głosować będą trzy razy tak* (Zakład Graficzny "Książka", 1946).

diers, the intelligentsia, youth, and former concentration camp prisoners.[50] No less important a component of the propaganda effort was the negative messaging directed at the strongest opposition party, the PSL.[51] The alleged vices of the Peasant Party were said to include: internal quarrels, a negative attitude towards agrarian reform, links with the pro-independence underground,[52] reactionism and backwardness, representing Western interests,[53] as well as responsibility for the country's political and economic failures.[54] Moreover, PSL politicians were reminded that they had themselves been supporters of unicameralism, while the Senate was simultaneously subjected to ridicule.[55]

With regard to the second question, consequentialist arguments were advanced, attempting to demonstrate the effectiveness of the proposed solutions for the working masses.[56] Propaganda also appealed directly to the emotions of voters, invoking, for example, historical peasant wrongs[57] and social exploitation.[58] At the same time, the PPR denied that there were any plans to collectivise agriculture.[59] As to the question on borders, anti-German sentiments were skilfully exploited.[60] The aggressiveness of the campaign was accom-

50 Drażba, *Urna to jest taki pniak*, 36.
51 Kamila Churska-Wołoszczak, "Prasa województwa pomorskiego w okresie referendum ludowego i wyborów do Sejmu Ustawodawczego," *Studia Medioznawcze*, no. 56(2014): 165.
52 Churska-Wołoszczak, "Prasa województwa pomorskiego w okresie referendum ludowego i wyborów do Sejmu Ustawodawczego," 166.
53 Drażba, *Urna to jest taki pniak*, 31–32.
54 Zrzeszenie Wolność i Niezawisłość, *Wnioski z referendum a wybory*, 9
55 Churska-Wołoszczak, "Prasa województwa pomorskiego w okresie referendum ludowego i wyborów do Sejmu Ustawodawczego," 173; Drażba, *Urna to jest taki pniak*, 32.
56 Churska-Wołoszczak, "Prasa województwa pomorskiego w okresie referendum ludowego i wyborów do Sejmu Ustawodawczego," 173.
57 Biblioteka Narodowa, *Dlaczego kobiety głosować będą trzy razy tak*, 4.
58 Dziurok and Linek, eds., *Górny* Śląsk *w Polsce Ludowej*, 69.
59 Drażba, *Urna to jest taki pniak*, 36; Siedziako, "Socjotechnika w procesie przejmowania władzy w Polsce przez komunistów (1944–1948)," 129.
60 Przemysław Krzywoszyński, "Zagadnienia narodowościowe w perspektywie polskich plebiscytów i referendów (1920, 1921, 1946)," *Annales Universitatis Mariae Curie-Skłodowska* 58, no. 2(2011): 40; Drażba, *Urna to jest taki pniak*, 38–40.

panied by ruthless terror directed at the opposition.[61] This encompassed such activities as: arrests[62] (around 5,500 people, 90% of them PSL members),[63] torture,[64] beatings,[65] surveillance,[66] confiscation of property,[67] dismissals from employment,[68] political murders,[69] and censorship.[70]

The communists were heavily over-represented on the electoral commissions. PSL representatives constituted a clear minority on the commissions, especially among chairs and vice-chairs (country-wide they accounted for a mere 4.3% of their total number).[71] This alone created ample opportunity for abuses, and in addition communist representatives had decisive influence over the choice of chairs and vice-chairs.[72] A quorum for the validity of a commission's resolution was three members, and it sufficed for the chair and one member to vote in favour.[73] Moreover, there was no institution of polling agent, who might have monitored the commissions' actions, and PPR members present in polling stations openly campaigned in line with the Democratic Bloc's

61 Dziurok and Świder, eds., *Referendum ludowe w 1946 roku oraz wybory do Sejmu Ustawodawczego w 1947 roku na Górnym Śląsku*, 5.
62 Siedziako, "Socjotechnika w procesie przejmowania władzy w Polsce przez komunistów (1944–1948)," 134.
63 Drażba, *Urna to jest taki pniak*, 51.
64 Mirosław Pietrzyk, "Szefowie inowrocławskiej bezpieki w latach 1945–1965," *Aparat Represji w Polsce Ludowej 1944–1989*, no. 1(2015): 277.
65 Pietrzyk, "Szefowie inowrocławskiej bezpieki w latach 1945–1965," 277; Siedziako, "Socjotechnika w procesie przejmowania władzy w Polsce przez komunistów (1944–1948)," 134.
66 Snopko, "Przebieg referendum ludowego z 30 czerwca 1946 roku w powiecie augustowskim," 355.
67 Siedziako, "Socjotechnika w procesie przejmowania władzy w Polsce przez komunistów (1944–1948)," 134.
68 Siedziako, "Socjotechnika w procesie przejmowania władzy w Polsce przez komunistów (1944–1948)," 134.
69 Siedziako, "Socjotechnika w procesie przejmowania władzy w Polsce przez komunistów (1944–1948)," 134; Drażba, *Urna to jest taki pniak*, 50–51.
70 Drażba, *Urna to jest taki pniak*, 39.
71 Drażba, *Urna to jest taki pniak*, 23.
72 Dziurok and Linek, eds., *Górny* Śląsk *w Polsce Ludowej*, 44.
73 Zrzeszenie Wolność i Niezawisłość, *Wnioski z referendum a wybory*, 6.

position.[74] Polling stations were sometimes closed before the official end of voting; ballot papers were substituted, and, in breach of the law, separate districts were created for the Security Office (UB), Citizens' Militia (MO) and the army, where, under pressure from superiors, voters were instructed to vote "3 × YES".[75] There were even cases of votes being cast in the names of the deceased.[76] Many more irregularities could be listed; the foregoing ones are merely the most significant.

At the counting stage, mass falsification occurred. In almost all districts, ballot boxes were removed from the polling stations and transported to the offices of the district chiefs (Pol. *starostwa*), the Citizens' Militia or the Security Offices, where selected members of the commissions counted (and falsified) the votes.[77] It should be added that the voting method made it very easy to convert a "NO" vote (a single stroke) into a "YES" vote (a cross), and this was done on a large scale.[78] Protocols were also falsified.[79]

The official results are therefore widely, and with good reason, regarded as spurious. Nonetheless, it is useful to recall them and to juxtapose them with the actual figures in tabular form. It should also be noted that turnout was officially reported at 90%.[80]

74 Zrzeszenie Wolność i Niezawisłość, *Wnioski z referendum a wybory*, 6; Drażba, *Urna to jest taki pniak*, 74–75.

75 Zrzeszenie Wolność i Niezawisłość, *Wnioski z referendum a wybory*, 6–7; Drażba, *Urna to jest taki pniak*, 74–75.

76 Zrzeszenie Wolność i Niezawisłość, *Wnioski z referendum a wybory*, 7.

77 Czesław Osękowski, "Referendum z 30 czerwca 1946 r. na ziemiach przekazanych Polsce po II wojnie *światowej*," *Dzieje Najnowsze*, no. 3(1995): 92; Drażba, *Urna to jest taki pniak*, 95.

78 Osękowski, "Referendum z 30 czerwca 1946 r. na ziemiach przekazanych Polsce po II wojnie światowej," 92; Zrzeszenie Wolność i Niezawisłość, *Wnioski z referendum a wybory*, 8.

79 Osękowski,"Referendum z 30 czerwca 1946 r. na ziemiach przekazanych Polsce po II wojnie światowej," 93.

80 Ogłoszenie Generalnego Komisarza głosowania ludowego o wyniku głosowania ludowego z dnia 30 czerwca 1946 r. (Polish Monitor of 1946, no. 61, item 115).

	Official results (per cent "YES")[81]	Actual results (per cent "YES")
Question no. 1	68%	26.9%[82] or 30.5%[83]
Question no. 2	77.2%	42%[84] or 44.5%[85]
Question no. 3	91.4%	66.9%[86] or 68.3%[87]

The people's referendum of 30 June 1946 did not constitute, euphemistically speaking, a model example of the operation of liberal direct democracy: it was rather its negation. It consisted of a campaign full of contempt, lies and demagogic propaganda, a lack of pluralism in the referendum administration, terror against opposition activists and, finally, massive falsification of the results. Despite this, it had significant practical effects, above all, in the form of opening the road to power for the communists. The first nationwide referendum in the history of Poland was an event, from the point of view of democratism and civic participation, downright tragic, strongly inscribing a reserve towards civic democracy into social consciousness. Civic democracy was for the communists not only unnecessary, but could also constitute a threat to them. For this reason, the 1946 referendum had an ad hoc and inci-

81 Ogłoszenie Generalnego Komisarza głosowania ludowego o wyniku głosowania ludowego z dnia 30 czerwca 1946 r.

82 Krzywoszyński, "Z dyskusji nad referendum w Polsce Ludowej," 178; Grabowska, "Referendum ogólnokrajowe w Polsce—analiza przypadku," 102; Kancelaria Senatu, *Zarys instytucji referendum jako formy demokracji bezpośredniej*, 9.

83 Osękowski, "Referendum z 30 czerwca 1946 r. na ziemiach przekazanych Polsce po II wojnie światowej," 95.

84 Dudek, "Referendum—instrument czy iluzja władzy polskiego suwerena?," 170; Krzywoszyński, "Z dyskusji nad referendum w Polsce Ludowej," 178; Grabowska, "Referendum ogólnokrajowe w Polsce—analiza przypadku," 102.

85 Osękowski, "Referendum z 30 czerwca 1946 r. na ziemiach przekazanych Polsce po II wojnie światowej," 95.

86 Krzywoszyński, "Z dyskusji nad referendum w Polsce Ludowej," 178; Dudek, "Referendum—instrument czy iluzja władzy polskiego suwerena?," 170; Grabowska, "Referendum ogólnokrajowe w Polsce—analiza przypadku," 102; Kancelaria Senatu, *Zarys instytucji referendum jako formy demokracji bezpośredniej*, 9.

87 Osękowski, "Referendum z 30 czerwca 1946 r. na ziemiach przekazanych Polsce po II wojnie światowej," 95.

dental character, and in the Constitution of the PRL of 1952 this mechanism was not foreseen.[88]

The 1987 Referendum—A Return to the Idea of Direct Democracy in the Final Phase of the People's Republic of Poland

In the People's Republic of Poland (PRL), demands for greater participation were only rarely articulated, though they did appear from time to time. For example, in 1974 Antoni Rost and Lucjan Zawartowski published an article entitled "*On Forms of Direct Democracy*", in which they called for supplementing representative democracy with participatory mechanisms.[89] In 1983 work began, under the auspices of the Patriotic Movement for National Rebirth (PRON),[90] on a draft referendum statute, which contributed significantly to its eventual adoption.[91] At the level of state leadership, however, the first to advance such an idea was the Government Spokesman, Jerzy Urban.[92] In July 1984, he wrote in a letter to General Wojciech Jaruzelski: "Perhaps public life could be invigorated by some referendum … on a developmental issue in the socio-economic sphere which concerns everyone."[93] This opened a discussion

88 Małgorzata Podolak, "Instytucja referendum w Polsce," *Annales Universitatis Mariae Curie-Skłodowska* 14, 2007: 4; Grabowska, "Referendum ogólnokrajowe w Polsce—analiza przypadku," 99; Kancelaria Senatu, *Zarys instytucji referendum jako formy demokracji bezpośredniej*, 8; Maciąg, "Historyczny kontekst referendum lokalnego w Polsce," 45.

89 Antoni Rost and Łucjan Zawartowski, "W sprawie form demokracji bezpośredniej," *Ruch Prawniczy*, no. 1(1974): 1–2.

90 Grabowska, "Referendum ogólnokrajowe w Polsce—analiza przypadku," 103; Krzywoszyński, "Z dyskusji nad referendum w Polsce Ludowej," 185.

91 Krzywoszyński, "Z dyskusji nad referendum w Polsce Ludowej," 185; Kancelaria Senatu, *Zarys instytucji referendum jako formy demokracji bezpośredniej*, 9.

92 Łukasz Komorowski, "Referendum z 29 listopada 1987 roku w województwie poznańskim," in *Wielkopolska i… nie tylko*, eds. Konrad Białecki et al. (Instytut Historii UAM, 2018), 231.

93 Robert Skobelski, "Goodbye PRL. Referendum z 29 listopada 1987 roku (ze szczególnym uwzględnieniem województwa zielonogórskiego)," *Res Gestae. Czasopismo Historyczne* 17, 2023: 223

on the use of this instrument. A decision was ultimately taken to hold a referendum in 1987. That decision formed part of the broader policy of "democratisation" and the intensification of so-called social consultations.[94] Initially, it was considered whether the referendum should not concern rudimentary constitutional issues such as the establishment of the office of President or the creation of a second parliamentary chamber.[95] In the end, however, the decision was taken to focus on economic matters and citizens' issues in the strict sense.

To give effect to the will of the party leadership, a constitutional amendment was necessary.[96] This was the purpose of the Act of 6 May 1987 amending the Constitution of the Polish People's Republic.[97] A new paragraph 3 was added to Article 2 of the basic law,[98] enabling the "working people" to express their will in a referendum and containing a statutory delegation to regulate the principles and procedure for the conduct of referendums. This delegation was implemented by the Act on the Referendum and Social Consultations adopted on the same day.[99] That Act provided for the possibility of holding a popular vote on "key" issues of importance for the development of the state or for the interests and living conditions of citizens. Such a vote could be conducted at the national or local level. Matters relating to state defence were excluded from the scope of the referendum. The right of referendum initiative was granted to the Sejm, the Council of State, the Council of Ministers and the National Council of the Patriotic Movement for National Rebirth. A referendum was

94 Krzywoszyński, "Z dyskusji nad referendum w Polsce Ludowej," 185; Mariusz Baranowski et al., eds., *Przestrzeń publiczna i państwo dobrobytu* (Wydawnictwo Naukowe Wydziału Nauk Społecznych Uniwersytetu im. Adama Mickiewicza, 2016), 174.

95 Skobelski, "Goodbye PRL," 224; Komorowski, "Referendum z 29 listopada 1987 roku w województwie poznańskim," 232; Dudek, "Referendum—instrument czy iluzja władzy polskiego suwerena?," 171.

96 Skobelski, "Goodbye PRL," 225.

97 Journal of Laws of 1987, no. 14, item 82.

98 "Sprawowanie władzy państwowej przez lud pracujący następuje także poprzez wyrażanie woli w drodze *referendum*. Zasady i tryb przeprowadzania *referendum* określa ustawa"—The Constitution of the PRL in the version effective from May 12, 1987, to June 16, 1988.

99 Ustawa z dnia 6 maja 1987 r. o konsultacjach społecznych i referendum [Act of May 6, 1987 on Social Consultations and Referendum] (Journal of Laws of 1987, no. 14, item 83).

ordered by the Sejm by a two-thirds majority in the presence of at least half of the statutory number of deputies. The Act laid down methods for formulating questions, which could be either "variant"[100] or binary (alternative).[101] The referendum result was binding if at least half of those entitled to vote supported one of the responses. The franchise was granted to citizens present in the country who held the right to vote in elections to the Sejm. The detailed procedure for conducting the referendum, including the rules of procedure of referendum commissions and the templates of ballot papers, was specified in the Resolution of the Council of State of 17 September 1987 on the detailed rules and procedure for the conduct of a referendum.[102]

On 7 October 1987, the National Council of PRON addressed the Marshal of the Sejm with a proposal to hold a nationwide referendum.[103] A decisive reason for agreeing to a popular vote was the economic collapse[104] and the crisis of confidence in the authorities, which had become clearly visible during the "Carnival of Solidarity", as well as during and after martial law, and intensified particularly in the late 1980s.[105] The referendum, set for 29 November 1987, contained two questions[106]:

1) *Do you support the full implementation of the programme for radical recovery of the economy submitted to the Sejm, aimed at a clear improvement in the living conditions of society, knowing that this requires going through a difficult two- to three-year period of rapid change?*

100 Selection of the preferred response from the proposed options.
101 Voting in favour of or against the proposed solution.
102 Journal of Laws of 1987, no. 28, item 158.
103 Grabowska, "Referendum ogólnokrajowe w Polsce—analiza przypadku," 103.
104 Baranowski et al., eds., *Przestrzeń publiczna i państwo dobrobytu*, 173; Skobelski, "Goodbye PRL," 224.
105 Krzywoszyński, "Z dyskusji nad referendum w Polsce Ludowej," 185; Skobelski, "Goodbye PRL," 224; Baranowski et al., eds., *Przestrzeń publiczna i państwo dobrobytu*, 174.
106 Uchwała Sejmu Polskiej Rzeczypospolitej Ludowej z dnia 23 października 1987 r. w sprawie szczegółowego określenia przedmiotu referendum [Resolution of the Sejm of the People's Republic of Poland of October 23, 1987, regarding the detailed definition of the subject of the referendum] (Polish Monitor of 1987, no. 32, item 245).

2) *Do you support a Polish model of profound democratisation of public life, aimed at strengthening self-government, extending citizens' rights and increasing their participation in governing the country?*

During the campaign, the authorities urged citizens to vote "2 × YES".[107] This was done in a manner typical of the ruling Polish United Workers' Party (PZPR), through pompous and catchy slogans[108] disseminated by the media,[109] as well as direct agitation conducted by party activists,[110] who were mobilised through the creation of "civic committees", among other means[111] The Solidarity opposition called for a boycott of the vote.[112]

Turnout amounted to 67.32%. Of those who voted, 66.04% supported the first question and 69.03% the second.[113] Although the Security Service (SB) was used to monitor and hinder opposition activity (an "object case" codenamed "Consultation" was opened),[114] it must nonetheless be clearly stated that in comparison with the June 1946 referendum, the 1987 vote was incomparably more democratic in character. The event formed part of the broader current of change through which the PRL was about to pass: economic crisis, the decline of public trust in the authorities, strikes,[115] the strengthened position of Solidarity, and the increasingly imminent prospect of a change of ruling camp.[116] Already in 1988, a series of informal meetings took place in Magdalenka near Warsaw between representatives of parts of the opposition and of the PRL

107 Skobelski, "Goodbye PRL," 227–28.
108 Skobelski, "Goodbye PRL," 227–28.
109 Baranowski et al., eds., *Przestrzeń publiczna i państwo dobrobytu*, 174.
110 Komorowski, "Referendum z 29 listopada 1987 roku w województwie poznańskim," 242.
111 Skobelski, "Goodbye PRL," 227.
112 Dziurok and Linek, eds., *Górny* Śląsk *w Polsce Ludowej*, 256; Baranowski et al., eds., *Przestrzeń publiczna i państwo dobrobytu*, 171.
113 Obwieszczenie Centralnej Komisji do Spraw Referendum z dnia 30 listopada 1987 r. o wyniku referendum ogólnokrajowego przeprowadzonego dnia 29 listopada 1987 r. (Polish Monitor of 1987, no. 34, item 294).
114 Komorowski, "Referendum z 29 listopada 1987 roku w województwie poznańskim," 244.
115 Referring to the strikes of 1988: Anna Materska-Sosnowska, "Okrągły Stół po dwudziestu latach. Stan dyskusji politycznej," *Studia Politologiczne* 15, 2009: 118
116 Wojciech Polak and Sylwia Galij-Skarbińska, "Jak oceniać okrągły stół?," *Fides, Ratio et Patria. Studia Toruńskie*, no. 7(2017): 206.

government.[117] During those meetings, the date was agreed for the so-called Round Table talks, whose aim was to effect a far-reaching reform of the state system in agreement with sections of the opposition.[118] As a result partially free parliamentary elections were scheduled for 4 June 1989,[119] which produced the Tenth-Term Sejm of the PRL, the "contract Sejm".

Referendums in the Process of Shaping the Constitutional System of the Third Republic

On 31 December 1989, the Act of 29 December 1989 amending the Constitution of the Polish People's Republic entered into force.[120] It changed the title of the basic law to the "Constitution of the Republic of Poland" and gave new wording to Article 2,[121] adapting it to the new constitutional and social conditions—the bearer of sovereignty became the People (Pol. *Naród*), exercising authority through their representatives or by way of referendum. The Act of 6 May 1987 on Social Consultations and the Referendum remained unchanged until 8 September 1995. Provisions explicitly referring to the values of the former system were left intact ("for the fuller realisation of socialist democracy", "defence of the State and the Armed Forces of the Polish People's Republic", "other social organisations of the working people"), as were references to the Patriotic Movement for National Rebirth, the Council of State and the national councils. This fact suggests that little importance was attached at that time

117 Arkadiusz Plewik, "Transformacje partii postkomunistycznych i ich wpływ na system polityczny Rzeczypospolitej Polskiej," *Studenckie Zeszyty Naukowe*, no. 23(2022): 37.

118 Krystyna Trembicka, *Okrągły Stół w Polsce. Studium o porozumieniu politycznym* (Wydawnictwo Uniwersytetu Marii Curie-Skłodowskiej, 2003), 223.

119 Polak and Galij-Skarbińska, "Jak oceniać okrągły stół?," 207.

120 Journal of Laws of 1989, no. 75, item 444.

121 Article 2:

1. In the Republic of Poland, supreme power belongs to the Nation.
2. The Nation exercises power through its representatives elected to the Sejm, Senate, and national councils; the exercise of power also occurs through the expression of will in a referendum. The principles and procedure for conducting a referendum are specified by law.

to the institution of the referendum and that there were no serious plans to use it beyond employing the referendum form for the adoption of the new constitution.

In the so-called Small Constitution,[122] adopted on 17 October 1992, Article 19 regulated the national referendum. The right to order a referendum was conferred on the Sejm and on the President with the consent of the Senate. This solution remains in force to this day. The Small Constitution also introduced, and still in force today, the rule governing the binding effect of a referendum: its outcome would be binding if more than half of those entitled to vote took part in the ballot. On 23 April 1992, a constitutional statute was adopted on the procedure for preparing and adopting the Constitution of the Republic of Poland.[123] It was then decided that the Constitution of the Republic of Poland would be adopted by way of a referendum. The referendum was to be ordered by the President after the basic law had been adopted by the National Assembly. The referendum would be binding if a majority of those taking part in the vote supported the adoption of the new constitution, regardless of turnout. Adoption of the constitution in the referendum obliged the President to sign it and to order its immediate publication in the Journal of Laws.

In the period between 1989 and 1993, proposals to hold a nationwide referendum were put forward on several occasions. However, none of the formally submitted projects were taken up for consideration by the Sejm. This was due in part to the premature termination of parliamentary terms in 1991 and 1993, but above all, to the lack of political will to hold such a vote. Between 1989 and 1991 referendums were proposed on: the future of nuclear energy, the adoption of a new constitution, the continued existence of the Senate, the date of new parliamentary elections, abortion, and reprivatisation. In the fol-

122 Ustawa konstytucyjna z dnia 17 października 1992 r. o wzajemnych stosunkach między władzą ustawodawczą i wykonawczą Rzeczypospolitej Polskiej oraz o samorządzie terytorialnym [Constitutional Act of October 17, 1992, on the mutual relations between the legislative and executive authorities of the Republic of Poland and local government] (Journal of Laws of 1992, no. 84, item 426).

123 Journal of Laws of 1992, no. 67, item 336.

lowing parliamentary term, 1991–1993, two proposals were submitted for referendums on abortion.[124]

The initiators of referendums were primarily opposition deputies, and referendum initiatives were treated as a means of drawing attention to the issue that was to be the subject of the vote, or as a way of pushing through legislative proposals for which a parliamentary majority could not be assembled.[125] It is therefore hardly surprising that the parliamentary majority, which possessed both the power to enact statutes and the power to decide on holding a referendum, had little interest in making use of this instrument.

By means of the Act of 22 April 1994,[126] the possibility was introduced of holding a referendum on the principles on which the new Constitution was to be based. This possibility, however, was not used. The advanced stage of work on the new Constitution and the plan to submit it to a referendum for adoption led to the adoption of a new Referendum Act.[127] That statute set out rules concerning the form of the questions (binary or multi-option) and the circle of persons entitled to vote, as well as the territorial scope of the vote. As regards the latter, an exception was introduced for the constitutional referendum—it could also be held outside the country. A four-year moratorium was imposed on re-submitting to a referendum a matter that had already been the subject of a referendum. As to the bodies empowered to order a referendum and the conditions for a binding result, the solutions of the Small Constitution were repeated. The right of referendum initiative was granted to the Sejm, the Council of Ministers and a group of 500,000 citizens. Chapter 2 of the Act contained provisions regulating the procedure for the constitutional referendum. The pro-

124 Kancelaria Senatu, *Zarys instytucji referendum jako formy demokracji bezpośredniej*, 9.

125 System Informacyjny Sejmu RP, http://orka.sejm.gov.pl, Senat RP.

126 Ustawa konstytucyjna z dnia 22 kwietnia 1994 r. o zmianie ustawy konstytucyjnej o trybie przygotowania i uchwalenia Konstytucji Rzeczypospolitej Polskiej [Constitutional Act of April 22, 1994, amending the Constitutional Act on the procedure for preparing and adopting the Constitution of the Republic of Poland] (Journal of Laws of 1994, no. 61, item 251).

127 Ustawa z dnia 29 czerwca 1995 r. o referendum [Act of June 29, 1995, on referenda] (Journal of Laws of 1995, no. 99, item 487).

visions of the 1995 Referendum Act relating to the constitutional referendum were of an ad hoc nature and therefore lapsed with the adoption of the 1997 Constitution.

During the 1995 presidential campaign, on 19 October, Lech Wałęsa submitted a draft resolution ordering a referendum on the universal affranchissement (Pol. *powszechne uwłaszczenie*) of citizens. Poles were to answer the main question—*Should universal enfranchisement of citizens be carried out in Poland?*—and then choose between variants:

I. The subject-matter of enfranchisement should be:
   1) property owned by the State Treasury,
   2) property owned by the State Treasury and municipal property;

II. Under the universal enfranchisement of citizens there should be established:
   1) a fund for the universal enfranchisement of citizens,
   2) a fund for the universal enfranchisement of citizens, a social insurance fund, a pension fund and a reprivatisation fund;

III. The following should be eligible to participate in the universal enfranchisement of citizens:
   1) persons who have held Polish citizenship for at least five years and are permanently resident in the country,
   2) persons who hold Polish citizenship and are permanently resident in the country,
   3) persons who hold Polish citizenship and are resident in the country or abroad;

IV. Universal enfranchisement of citizens should be carried out in the form of:
   1) gratuitous transfer,
   2) partial payment,
   3) credit.

The proposed date of the referendum was 21 January 1996.[128] The project referred back to a campaign promise made by the President five years earlier under the slogan "one hundred million for everyone".[129] The proposal gave rise to serious doubts as to the clarity of its wording and the construction of the questions. The vote in the Senate took place on 2 November 1995, three days before the first round of the presidential election. As it was supported mainly by members of the NSZZ "Solidarity" Senate Club, the project was rejected.[130] The following day Wałęsa submitted a new, much simplified proposal containing a single question: *Are you in favour of universal affranchissement of citizens?*[131] It was adopted without debate on 17 November, two days before the second round of the presidential election. Senators from all post-Solidarity groupings and from the Polish People's Party (PSL) supported the project, outvoting the left-wing senators and thus agreeing to the holding of the referendum on 18 February 1996.

After the second round of the presidential election, a group of deputies from the then SLD–PSL parliamentary majority submitted a motion to hold, on the same day, a second referendum with the following questions:

1) *Do you support satisfying, from privatised state assets, the claims of pensioners, disability pensioners and public-sector employees arising from judgments of the Constitutional Tribunal?*
2) *Do you support allocating part of the privatised state assets to general pension funds?*

128 Krystyna Leszczyńska, "Instytucja referendum ogólnokrajowego zarządzanego przez Prezydenta RP za zgodą Senatu," *Studia Politologiczne* 42, 2016: 75.

129 Mariusz Kowalski, "Referenda 'uwłaszczeniowe' 1996," in *Atlas Wyborczy Polski*, ed. Mariusz Kowalski and Przemysław Śleszyński (Instytut Geografii i Przestrzennego Zagospodarowania PAN, 2018), 77.

130 Leszczyńska, "Instytucja referendum ogólnokrajowego zarządzanego przez Prezydenta RP," 75.

131 Zarządzenie Prezydenta Rzeczypospolitej Polskiej z dnia 29 listopada 1995 r. w sprawie przeprowadzenia referendum o powszechnym uwłaszczeniu obywateli [Order of the President of the Republic of Poland of November 29, 1995, regarding the conduct of a referendum on the universal privatization of citizens' property] (Journal of Laws of 1995, no. 138, item 685).

3) *Do you support increasing the value of National Investment Fund share certificates by including additional enterprises in the programme?*

This motion was adopted by the governing coalition with the support of deputies from the Freedom Union (UW), at whose request a fourth, additional question was added[132]:

4) *Do you support including privatisation vouchers in the affranchissement programme?*[133]

As a result, two referendums were held on 18 February 1996: one ordered by the President and one by the Sejm. The referendum campaign was marked by two main camps: the newly elected President Aleksander Kwaśniewski, who, together with the Freedom Union, urged voters to cast "5 × YES" votes, and right-wing circles, led by NSZZ "Solidarity" and the Catholic Church, which advocated voting "yes" in the presidential referendum and on the first three questions of the Sejm referendum, and "no" on the question concerning privatisation vouchers. The obscurity of the questions, Lech Wałęsa's electoral defeat, the pronounced reticence of the governing coalition towards the referendum, the complexity of the subject-matter (which made public debate difficult) and the limited polarisation of positions all contributed to a disastrous turnout. Despite high percentages of "yes" votes on all questions (between 72.52% and 94.54%), the turnout of well below half of those entitled to vote (32.4% in the presidential referendum and 32.44% in the Sejm referendum) meant that the referendums were not binding.

The referendums nonetheless had certain political effects, including political consultations involving the President, the government and opposition

132 Kowalski, "Referenda 'uwłaszczeniowe' 1996," 77; Uchwała Sejmu Rzeczypospolitej Polskiej z dnia 21 grudnia 1995 r. w sprawie przeprowadzenia referendum o niektórych kierunkach wykorzystania majątku państwowego [Resolution of the Sejm of the Republic of Poland of December 21, 1995, regarding the conduct of a referendum on certain directions for the utilization of state property] (Journal of Laws of 1995, no. 154, item 795).

133 Uchwała Sejmu Rzeczypospolitej Polskiej z dnia 21 grudnia 1995 r. w sprawie przeprowadzenia referendum o niektórych kierunkach wykorzystania majątku państwowego [Resolution of the Sejm of the Republic of Poland of December 21, 1995, regarding the conduct of a referendum on certain directions for the utilization of state property] (Journal of Laws of 1995, no. 154, item 795).

forces and the Prime Minister's declaration that the government would take voters' opinions into account.[134] The Sejm also adopted a resolution calling on the government to devise a programme of affranchissement and to implement it by 2000.[135] However, the low turnout and the ambiguity of the questions[136] allowed each political force to invoke the "will of the people"[137] with a considerable degree of freedom, while the issue of affranchissement gradually lost political salience,[138] especially in the face of current political questions such as the fall of Józef Oleksy's government,[139] the finalisation of work on the new Constitution and accession to NATO.

The affranchissement issue resurfaced in the 1997 parliamentary and the 2000 presidential election campaigns, raised by Solidarity Electoral Action (AWS)[140] and its leader Marian Krzaklewski.[141] The adoption of the Act of 8 September 2000 on the Principles for Implementing the Programme of Universal Affranchissement of Citizens of the Republic of Poland was intended as a trap for Aleksander Kwaśniewski, who was seeking re-election against Krzaklewski.[142]

134 Kowalski, "Referenda 'uwłaszczeniowe' 1996," 84.

135 Rezolucja Sejmu Rzeczypospolitej Polskiej z dnia 29 sierpnia 1996 r. w sprawie podjęcia przez Rząd działań w związku z przeprowadzonym referendum w dniu 18 lutego 1996 r. [Resolution of the Sejm of the Republic of Poland of August 29, 1996, regarding the Government's actions following the referendum held on February 18, 1996] (Polish Monitor of 1996, no. 55, item 503).

136 See Andrzej K. Piasecki, "Błędy, zaniechania i manipulacje polityków na przykładzie referendów w Polsce w 1996 i 2015 roku," *Polityka i Społeczeństwo* 15, no. 2(2017): 110–11; Andrzej Suwalski, "Ekonomiczno-społeczne zagadnienia sporu o powszechne uwłaszczenie," *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 59, no. 1(1997): 81–83.

137 Piasecki, "Błędy, zaniechania i manipulacje polityków na przykładzie referendów w Polsce w 1996 i 2015 roku," 114–15.

138 Krzysztof Patkowski, "Masowa prywatyzacja w Polsce jako jeden z elementów budowania społeczeństwa obywatelskiego," Środkowoeuropejskie *Studia Polityczne*, no. 2(2007): 235–36.

139 Andrzej K. Piasecki, "Demokracja bezpośrednia w Polsce po 1989 roku," *Przegląd Sejmowy*, no. 1(2006): 15.

140 Kowalski, "Referenda 'uwłaszczeniowe' 1996," 84.

141 Patkowski, "Masowa prywatyzacja w Polsce jako jeden z elementów budowania społeczeństwa obywatelskiego," 116–17.

142 Patkowski, "Masowa prywatyzacja w Polsce jako jeden z elementów budowania społeczeństwa obywatelskiego," 235–36.

The presidential veto—justified, inter alia, by constitutional doubts—did not, however, prevent Kwaśniewski from winning in the first round of the 2000 presidential election.[143] At the same time, the failure of that Act brought the affranchissement issue to an end as a significant topic in domestic politics.[144] The low turnout in the affranchissement referendums was one of the main arguments for abandoning the idea, introduced by the constitutional statute of 22 April 1994, of a preliminary referendum on the contents of the new constitution.[145]

The new Constitution was adopted by the National Assembly on 2 April 1997.[146] On the same day, the President issued an order to hold a constitutional referendum.[147] The ballot paper for that referendum, held on 25 May 1997, contained a single question: *Are you in favour of the adoption of the Constitution of the Republic of Poland passed by the National Assembly on 2 April 1997?*.

The attitude of political parties to the draft basic law effectively reflected their support for, or opposition to, the then ruling coalition.[148] The governing parties—the Democratic Left Alliance (SLD), the Polish People's Party

143 Posiedzenie połączonych Komisji Skarbu Państwa, Uwłaszczenia i Prywatyzacji oraz Finansów Publicznych, "Biuletyn z posiedzenia komisji," https://orka.sejm.gov.pl/Biuletyn.nsf/0/488080823AED3186C1256B73003C992E?OpenDocument; Prezydent Rzeczypospolitej Polskiej, *Decyzja Prezydenta RP w sprawie ustawy o powszechnym uwłaszczeniu* (Archiwum Kancelarii Prezydenta RP, 2000), https://www.prezydent.pl/kancelaria/archiwum/archiwum-aleksandra-kwasniewskiego/aktualnosci/rok-2000-i-starsze/decyzja-prezydenta-rp-w-sprawie-ustawy-o-powszechnym-uwlaszczeniu,33891,archive; Sejm Rzeczypospolitej Polskiej, *Rejestr dokumentów wniesionych na posiedzeniu Sejmu Rzeczypospolitej Polskiej nr 2201* (Sejm Rzeczypospolitej Polskiej, 2000), https://orka.sejm.gov.pl/Rejestrd.nsf/wgdruku/2201/$file/2201.pdf.

144 Patkowski, "Masowa prywatyzacja w Polsce jako jeden z elementów budowania społeczeństwa obywatelskiego," 236.

145 Sławomir Jakubczak, "Komisja Konstytucyjna Zgromadzenia Narodowego," *Przegląd Sejmowy*, no. 1(1996): 192; Ustawa konstytucyjna z dnia 22 kwietnia 1994 r. o zmianie ustawy konstytucyjnej o trybie przygotowania i uchwalenia Konstytucji Rzeczypospolitej Polskiej [Constitutional Act of April 22, 1994, amending the Constitutional Act on the procedure for preparing and adopting the Constitution of the Republic of Poland] (Journal of Laws of 1994, no. 61, item 251).

146 Journal of Laws of 1997, no. 78, item 483.

147 Journal of Laws of 1997, no. 31, item 174.

148 Marcin Rachwał, "Referendum jako forma udziału obywateli w kierowaniu sprawami państwa," *Studia Prawnicze*, no. 2(2005): 156; Andrzej K. Piasecki, *Referendum w III Rzeczypospolitej* (Wydawnictwo Naukowe PWN, 2005), 176.

(PSL) and Labour Union (UP)—supported the Constitution. The Freedom Union (UW), then in opposition, also declared its support; its leader Tadeusz Mazowiecki was co-author of the compromise preamble.[149] The main opponents of the draft were right-wing parties, above all, the Movement for the Reconstruction of Poland (ROP) and the extra-parliamentary Solidarity Electoral Action (AWS), which at that time constituted the principal opposition force.[150] For the AWS leadership, the referendum campaign became an opportunity to consolidate post-Solidarity circles around a common rejection of the liberal—left constitutional project.[151] An important factor in the course of the campaign was also the position of the Catholic Church. In a resolution of its 288th plenary meeting, the Polish Episcopate stated that the draft Constitution "raises serious moral objections", which significantly influenced the formation of public opinion among the faithful.[152]

The campaign was marked by a relatively high degree of political mobilisation but only moderate public interest. Despite a broad information campaign–including the distribution of the constitutional text, together with a presidential address, to around one million households–public opinion research indicated limited faith among citizens in the referendum's real impact on the final content of the Constitution.[153] The referendum nevertheless contributed to broad civic education regarding the institutions of state power and helped create conditions for the development of civil society.[154]

149 Piasecki, *Referendum w III Rzeczypospolitej*, 176.

150 In the 1993 elections, many small right-wing parties did not cross the electoral threshold, resulting in right-wing parties securing only 38 seats in the Sejm. This allowed left-wing and liberal groups to have a dominant influence on the shape of the adopted constitution.

151 Piasecki, *Referendum w III Rzeczypospolitej*, 176.

152 Piasecki, *Referendum w III Rzeczypospolitej*, 176.

153 Dudek, "Referendum—instrument czy iluzja władzy polskiego suwerena?," 178; Michał M. Wiszowaty, "Referenda dla obywateli: rekomendacje dotyczące zmian w polskiej regulacji prawnej instytucji referendów zaproponowane przez organizacje społeczne skupione wokół Instytutu Spraw Obywatelskich," in *Aktualne problemy referendum*, eds. Beata Tokaj et al.(Krajowe Biuro Wyborcze, 2016), 117.

154 Piasecki, *Referendum w III Rzeczypospolitej*, 176.

The active involvement of President Aleksander Kwaśniewski, who strongly supported the campaign for adoption of the Constitution, had a significant influence on the final outcome of the referendum. Mobilisation of the president's electorate probably prevented the defeat of the supporters of the basic law.[155] The 1997 campaign was thus not only an act of legitimising the new constitutional order but also a prelude to the forthcoming parliamentary elections, which determined its strongly politicised character.[156]

Of the 28,324,965 citizens entitled to vote, turnout in the referendum was 42.86%. A total of 11,969,755 valid ballot papers were cast. 6,398,316 citizens (52.71% of valid votes) voted in favour of the Constitution, while 5,571,439 (45.87%) voted against.[157] Under the constitutional statute on the procedure for preparing and adopting the Constitution of the Republic of Poland,[158] there was no turnout threshold; consequently, the result of the referendum meant that the Constitution was adopted.

A territorial analysis of the results reveals clear geographical differentiation in support. The new basic law was accepted mainly in the northern and western voivodeships, whereas opposition predominated in the south and east of the country. This pattern largely overlapped with the results of the 1995 presidential election: regions that had supported Lech Wałęsa largely rejected the constitutional draft.[159]

Adoption of the Constitution by referendum had far-reaching systemic consequences, marking the final end of the period of constitutional transition

155 Piasecki, *Referendum w III Rzeczypospolitej*, 176.

156 Piasecki, "Demokracja bezpośrednia w Polsce po 1989 roku," 15.

157 Skorygowane obwieszczenie Państwowej Komisji Wyborczej z dnia 8 lipca 1997 r. o wynikach głosowania i wyniku referendum konstytucyjnego przeprowadzonego w dniu 25 maja 1997 r. [Corrected announcement of the National Electoral Commission of July 8, 1997, regarding the results of the voting and the outcome of the constitutional referendum held on May 25, 1997] (Journal of Laws of 1997, no. 75, item 476).

158 Journal of Laws of 1992, no. 67, item 336.

159 Rachwał, "Referendum jako forma udziału obywateli w kierowaniu sprawami państwa," 156.

after 1989.[160] The new basic law established a durable model of a democratic, law-governed and social state based on the principles of popular sovereignty, political pluralism and separation of powers.[161] In legal terms, the referendum result conferred on the new Constitution the highest degree of legitimacy, deriving from the direct participation of citizens in the constitution-making process.[162] The adoption of the 1997 Constitution of the Republic of Poland thus meant the institutional consolidation of the principles of the democratic state and the end of the provisional constitutional arrangements in force since the Small Constitution of 1992. This act, sanctioned by the will of the citizens, entrenched the constitutional model of the Third Republic and marked the formal culmination of the state's democratisation.[163] The decision taken in the referendum, after seven years of work conducted by three successive parliaments[164] and in the context of intense political engagement in the campaign, endowed the new Constitution with strong democratic legitimacy, recognised by all the significant political forces despite their divergent views on its adoption.

Referendums in the First Decades of the Constitution of the Republic of Poland of 2 April 1997

The new Constitution of the Republic of Poland entered into force on 17 October 1997.[165] It established three types of nationwide referendum, distinguished by the subject-matter of the decision: a referendum on matters of particular

160 Rachwał, "Referendum jako forma udziału obywateli w kierowaniu sprawami państwa," 151.

161 Piotr Winczorek, "Kilka uwag o polskich referendach", *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 76, no. 2(2014): 52.

162 Dudek, "Referendum – instrument czy iluzja władzy polskiego suwerena?," 179.

163 Piasecki, *Referendum w III Rzeczypospolitej*, 176.

164 See Ryszard Mojak, "Geneza, prawnoustrojowe zasady i prawne procedury tworzenia i uchwalenia Konstytucji Rzeczypospolitej Polskiej z 2 kwietnia 1997 r.," *Gdańskie Studia Prawnicze* 15, 2018: 99–134.

165 The signing by the President and the publication in the Journal of Laws of the Constitution took place on July 16, 1997 (Journal of Laws of 1997 nr 78 item 483), and according to Article 234, the Constitution came into force three months after its publication.

importance to the state (Article 125), a ratification referendum (Article 90), and a referendum approving amendments to the Constitution (Article 235). Statutory regulation of the ratification and approving referendums was only adopted on 14 March 2003[166]; up to that point, their operation in the legal system was based solely on the constitutional provisions. The 2003 Act abolished the "cooling-off" period for matters already voted on in a referendum on matters of particular importance and introduced provisions governing the conditions for the binding effect of ratification and approving referendums.

A referendum on matters of particular importance serves to allow citizens to decide on an issue of major significance and has a binding effect on the authorities competent in the matter. It is ordered by the Sejm or by the President with the consent of the Senate. A motion to the Sejm to hold such a referendum may be submitted by a group of at least one-fifth of the statutory number of deputies, the Senate, the Council of Ministers, or a group of at least 500, 000 citizens. It may concern any issue connected with the functioning of the state,[167] with the exception—where the referendum is held at the request of a group of citizens—of matters relating to state expenditure and revenue, in particular taxes and other public charges, the defence of the state, and amnesty.

A ratification referendum is a constitutive element of the procedure for granting consent to the ratification by the President of an international agreement under which an international organisation or body is conferred competences of organs of state authority in certain matters. A ratification referendum offers an alternative to the statutory route for granting consent to ratification. The choice of procedure is made by the Sejm in the form of a resolution (Article 90(4)).

166 Ustawa z dnia 14 marca 2003 r. o referendum ogólnokrajowym [Act of March 14, 2003, on nationwide referenda] (Journal of Laws of 2003, no. 57, item 507).

167 Jan Boć, "Komentarz do artykułu 125 Konstytucji RP z 2 kwietnia 1997 r.," in *Konstytucje Rzeczypospolitej oraz komentarz do Konstytucji RP z 1997 r.*, eds. Jan Boć and Ryszard Balicki (Kolonia Limited, 1998), 207; Chęciński, *Referendum ogólnokrajowe w polskim systemie prawnym po 2 kwietnia 1997 r.*, 64–65 and 67–69.

A approving referendum serves to approve amendments to the Constitution where they concern provisions contained in Chapters I, II or XII of the Constitution and where one of the entitled entities so requests. The approving referendum is ordered by the Marshal of the Sejm at the request of at least one-fifth of the statutory number of deputies, the Senate or the President of the Republic. The possibility, enjoyed by this closed circle of actors, of demanding the holding of an approving referendum in a legally binding way functions as a systemic safeguard, preventing hasty changes to the most important chapters of the Constitution and ensuring that such changes require broad social consensus.

For a referendum on matters of particular importance and a ratification referendum to be binding, more than half of those entitled to vote must take part in the ballot. No turnout requirement applies to an approving referendum: adoption of the constitutional amendment requires the support of a majority of those voting, while the absence of consent results in the loss of binding force of the statute amending the Constitution.

The next event of key importance for the future of the state after the adoption of the Constitution was accession to the European Union. The Republic of Poland submitted its formal application for EU membership in April 1994, and negotiations continued until 13 December 2002.[168] As a result, an Accession Treaty was signed; however, because it transferred to an international organisation certain competences of the organs of the Republic of Poland, it had to be ratified either by statute or by referendum. Acting on the basis of Article 90(1) of the Constitution, the Sejm, in its Resolution of 17 April 2003 on ordering a nationwide referendum on expressing consent to the ratification of the Treaty concerning the accession of the Republic of Poland to the European Union, decided to choose a referendum as the form of consent to ratification.

168 Marcin Chruściel and Karol Kloc, "Polska w Unii Europejskiej—proces akcesyjny i priorytety polskiej polityki w ramach UE", *Poliarchia*, no. 1(2013): 94 and 99.

The referendum question was: *Do you agree to the accession of the Republic of Poland to the European Union?*[169] Under § 4 of the Resolution, the ballot paper contained an explanation stating that a "YES" vote signified consent to the ratification of the Accession Treaty. In this case, a turnout requirement applied for the result to be binding: more than half of those entitled to vote had to take part. Concerns on the part of the state authorities that this threshold might not be met were understandable in light of turnout in preceding elections and the referendums of 1996 and 1997.[170] For this reason a two-day vote was chosen.[171] Pro-turnout measures included the possibility of voting abroad and in student dormitories,[172] as well as a provision for referendum campaigning in radio and television programmes.[173]

Supporters of accession included the government, the President, various associations and parties such as SLD, PSL, PO and PiS. A very intensive information campaign was conducted, headed by the Office for the European Referendum.[174] The campaign was to be based on mass information activities. At the same time, informational programmes directed at specific social groups, such as entrepreneurs and rural residents, were continued.[175] Negative campaigning

169 Uchwała Sejmu Rzeczypospolitej z dnia 17 kwietnia 2003 r. o zarządzeniu ogólnokrajowego referendum w sprawie wyrażania zgody na ratyfikację Traktatu dotyczącego przystąpienia Rzeczypospolitej Polskiej do Unii Europejskiej [Resolution of the Sejm of the Republic of Poland of April 17, 2003, regarding the ordering of a nationwide referendum on the consent for ratification of the Treaty on the Accession of the Republic of Poland to the European Union] (Journal of Laws of 2003, no. 66, item 613).

170 Rachwał, "Referendum jako forma udziału obywateli w kierowaniu sprawami państwa," 151; Teresa Sasińska-Klas, "Stosunek Polaków do Unii Europejskiej przed i po referendum unijnym (w świetle badań opinii publicznej)," in *Media a integracja europejska*, eds. Teresa Sasińska-Klas and Agnieszka Hess (Wydawnictwo Uniwersytetu Jagiellońskiego, 2004), 123.

171 Dudek, "Referendum—instrument czy iluzja władzy polskiego suwerena?," 175.

172 Kancelaria Senatu, *Zarys instytucji referendum jako formy demokracji bezpośredniej*, 12.

173 Kancelaria Senatu, *Zarys instytucji referendum jako formy demokracji bezpośredniej*, 12; Agnieszka Stępińska, "Telewizyjna kampania referendalna jako arena rywalizacji politycznej. Referendum unijne w Polsce w 2003 r.," *Środkowoeuropejskie Studia Polityczne*, no. 1(2005): 40.

174 Andrzej K. Piasecki, "Referendum akcesyjne z 2003 r.: próba bilansu," *Annales Universitatis Paedagogicae Cracoviensis. Studia Politologica*, no. 2(2004): 156.

175 Piasecki, "Referendum akcesyjne z 2003 r.," 156.

was also used against Eurosceptics, for example, by the Young Democrats Association linked to the Civic Platform (PO).[176] For the positive outcome of the referendum, however, in addition to turnout, the position of the Church was of fundamental importance. For a long time, this position remained ambivalent, even though support for EU accession among the clergy was higher than the average.[177] The letter of the Episcopate of 2 May 2003 was also inconclusive. It was Pope John Paul II who, in a speech marking the 25th anniversary of his pontificate, closed the discussion with his famous words: "Europe needs Poland. Poland needs Europe".[178] The leading role in the Eurosceptic narrative was played by representatives of the League of Polish Families (LPR) and Self-Defence (Samoobrona).[179] Anti-EU campaigns were emotional in tone and, given the nature of the objection, negative.[180] They often took the form of short, catchy and at times substantively dubious slogans such as: "Europajace" [a derogatory neologism], "Slaves of the EU", "Do you know these dates: 2004, 1939, 1795, 1793, 1772?"[181] or "Yesterday Moscow, today Brussels".[182]

The vote took place on 7 and 8 June 2003 between 6 a.m. and 8 p.m., and turnout reached 58.5%, thus exceeding the constitutional threshold. The result was announced on 11 June 2003. A total of 13, 514, 872 voters supported EU accession, while 3,935,655 opposed it, yielding 77.45% "YES" and 22.55% "NO".[183] The President ratified the treaty on 23 July 2003, and it entered into

176 Piasecki, "Referendum akcesyjne z 2003 r.," 153.
177 Piasecki, "Referendum akcesyjne z 2003 r.," 153.
178 Piasecki, "Referendum akcesyjne z 2003 r.," 153.
179 Piasecki, "Referendum akcesyjne z 2003 r.," 147.
180 Piasecki, "Referendum akcesyjne z 2003 r.," 166; Stępińska, "Telewizyjna kampania referendalna jako arena rywalizacji politycznej," 51.
181 Piasecki, "Referendum akcesyjne z 2003 r.," 166.
182 Maria Marczewska-Rytko, "Kampania przed referendum akcesyjnym Polski do UE w kontekście doradztwa politycznego," *Roczniki Nauk Społecznych*, no. 1(2014): 89.
183 Obwieszczenie Państwowej Komisji Wyborczej z dnia 9 czerwca 2003 r. o wyniku ogólnokrajowego referendum w sprawie wyrażenia zgody na ratyfikację Traktatu dotyczącego przystąpienia Rzeczypospolitej Polskiej do Unii Europejskiej [Announcement of the National Electoral Commission of June 9, 2003, on the results of the nationwide referendum regarding the consent for the ratification of the Treaty on the Accession of the Republic of Poland to the European Union] (Journal of Laws of 2003, no. 103, item 953).

force on 1 May 2004. The accession referendum was the first referendum ordered on the basis of the 1997 Constitution. It was unprecedented: never before had a constitutive ratification referendum been held in Poland. At the same time, it marked a watershed in the state's history, making it possible for Poland to join the European Union. Despite the frequent appearance in public debate of slogans of low constructive value, the referendum must be evaluated positively. The very strong and effective engagement of pro-European actors took the form of democratic mobilisation, thanks to which public debate flared up around major social, political and economic issues. All of this took place with general respect for the principles of the rule of law.

Another situation in which a ratification referendum could have been used was the adoption of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (the so-called Lisbon Treaty).[184] It was signed by the leaders of the Member States of the European Communities, including Poland, on 13 December 2007. On 25 February 2008, a governmental bill was submitted to the Sejm on granting consent to the ratification of this agreement. Three days later, the Sejm adopted a resolution choosing the statutory route for granting consent. The statute was adopted by the Sejm on 1 April 2008, and the following day it was approved by the Senate. Only later, on 10 April 2009, did the President ratify the treaty, which entered into force on 1 December 2009.[185]

From the entry into force of the 1997 Constitution, nationwide referendums on matters of particular importance to the state have been held twice—in 2015 and 2023. In that period, referendum initiatives were taken on 20 occasions:

184 Traktat z Lizbony zmieniający Traktat o Unii Europejskiej i Traktat ustanawiający Wspólnotę Europejską [Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community] (Journal of Laws of 2009, no. 203, item 1569).

185 Rządowy projekt ustawy o ratyfikacji Traktatu z Lizbony zmieniającego Traktat o Unii Europejskiej i Traktat ustanawiający Wspólnotę Europejską, sporządzonego w Lizbonie dnia 13 grudnia 2007 r. [Government draft bill on the ratification of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, drawn up in Lisbon on December 13, 2007.], Sejm print no. 280, https://orka.sejm.gov.pl/proc6.nsf/opisy/280.htm.

No.	Date of motion	Initiator	Subject-matter	Outcome
1	21.04.1998	Opposition deputies (PSL)	Reform of the territorial division and system of the Republic of Poland	Rejected by the Sejm
2	23.09.1999	Opposition deputies (PSL)	Reprivatisation (property taken over in 1944–1962)	Rejected by the Sejm
3	20.01.2000	Citizens' initiative (agent: Stanisław Żelichowski, opposition deputy, PSL)	Privatisation and reprivatisation of forests	Rejected by the Sejm
4	03.11.2000	Citizens' initiative (agent: Józef Zych, opposition deputy, PSL)	Costs of reprivatisation (property taken over in 1944–1962)	Rejected by the Sejm
5	15.10.2002	Citizens' initiative (agent: Marek Kotlinowski, opposition deputy, LPR)	Sale of Polish land to foreigners	Rejected by the Sejm
6	18.03.2004	Opposition deputies (PiS)	Privatisation and participation in the war in Iraq	Not considered
7	29.10.2008	President Lech Kaczyński	Direction of health-care reform	Rejected by the Senate
8	15.10.2010	Opposition deputies (PiS)	Inclusion of State Forests in the public finance sector ("which would ultimately lead to their privatisation")	Not considered
9	02.03.2012	Opposition deputies (PiS)	Poland's acceptance of the ACTA agreement	Not considered

No.	Date of motion	Initiator	Subject-matter	Outcome
10	30.03.2012	Citizens' initiative (agent: Piotr Duda, President of NSZZ "Solidarity")	Maintaining the retirement age at 60 for women and 65 for men	Rejected by the Sejm
11	15.06.2012	Opposition deputies (PiS)	Renegotiation of the climate and energy package	Rejected by the Sejm
12	08.11.2013	Citizens' initiative	School starting age of six, compulsory pre-school for five-year-olds, history curriculum, abolition of lower secondary schools (*gimnazja*), "preventing the closure of public schools and pre-schools"	Rejected by the Sejm
13	18.11.2013	Opposition deputies (PiS)	Construction of nuclear power plants in Poland	Withdrawn by the proposers
14	19.11.2013	Opposition deputies (PiS)	Abolition of compulsory schooling from age six	Rejected by the Sejm
15	23.06.2014	Citizens' initiative (agent: Jan Szyszko, opposition deputy, PiS)	Maintaining the status quo of State Forests and renegotiation of the Accession Treaty in respect of land purchases by foreigners	Not considered
16	21.05.2015	President Bronisław Komorowski	Single-member constituencies, public funding of political parties, rule of resolving doubts in tax law in favour of the taxpayer	Referendum held

No.	Date of motion	Initiator	Subject-matter	Outcome
17	04.09.2015	President Andrzej Duda	Retirement age, State Forests, compulsory schooling from age six	Rejected by the Senate
18	20.04.2017	Citizens' initiative (agent: Sławomir Broniarz, President of the Polish Teachers' Union)	Preventing the abolition of lower secondary schools (*gimnazja*)	Referred to committee, not considered further, rejected by the Sejm
19	25.07.2018	President Andrzej Duda	Directions of systemic changes in the Republic of Poland	Rejected by the Senate
20	17.08.2023	Deputies' motion (committee motion, initiated by deputies of the ruling PiS party)	"Sale" of state assets, retirement age, barrier on the border with Belarus, acceptance of migrants	Referendum held

Source: Information System of the Sejm of the Republic of Poland, http://orka.sejm.gov.pl/; Senate of the Republic of Poland, https://www.senat.gov.pl/prace/proces-legislacyjny-w-senacie/.

In ten cases, the initiators were deputies (including, in two cases, committees), in four the President, in seven a group of citizens. Only two of them obtained the support of the governing bodies—in 2015, the presidential one, and in 2023, the parliamentary (committee) one. Three presidential projects were rejected by the Senate; the Sejm rejected ten projects at the first reading, four were referred to the first reading and then work on them was discontinued, one was withdrawn. It is worth noting that the number of submitted motions rose unprecedentedly in the 7th term and returned to a low norm in the following years. In the third term of both parliaments, 4 projects were submitted, in the next—2, in the fifth and sixth, one each, in the record seventh as many as 9, in the eighth, two, and one in the ninth.

Almost half of the projects originated from deputies, with opposition parliamentarians being their authors in the decisive majority. Citizens' motions arose mainly from the inspiration of parliamentarians, who were also plenipotentiaries of the initiative committees.[186] Signature-collecting actions by opposition deputies were used to publicize the subject of the proposed referendum and, as a form of pressure on the Sejm, intended to increase its chances in the vote. These undertakings were also a way for the politicians leading them to gain public attention and a method of promoting a given party. Of the citizens' motions, four arose from the inspiration of opposition parliamentarians, and two from trade unions. Among the topics of the proposed referenda, two threads clearly stand out—privatization and education.

The Instrumentalisation of the Referendum to Serve Short-Term Political Interests

During the 2015 presidential election, alongside the candidates of Law and Justice (PiS) and Civic Platform (PO), then locked in a ten-year confrontation, a further popular non-party candidate emerged, centred on Paweł Kukiz. In his campaign, he advocated the introducing various instruments of direct democracy, but, first and foremost, single-member constituencies and an end to the public funding of political parties.[187] Despite his high result (almost 21%), voters decided that the second round would be contested by Andrzej Duda and Bronisław Komorowski.[188] However, both needed the votes of Kukiz's

186 Tomasz Koziełło, "Obywatelska inicjatywa referendalna w III Rzeczypospolitej na poziomie ogólnokrajowym," *Roczniki Nauk Społecznych* 47, no. 1(2019).

187 Paweł Kukiz did not have a written programme document listing demands, but he repeated those slogans many times, and they may be reflected in his Kukiz'15 movement's 2015 programme titled *Strategia dla Polski*.

188 Obwieszczenie Państwowej Komisji Wyborczej z dnia 11 maja 2015 r. o wynikach głosowania i wyniku wyborów Prezydenta Rzeczypospolitej Polskiej, zarządzonych na dzień 10 maja 2015 r. [Announcement of the National Electoral Commission of May 11, 2015, on the voting results and the outcome of the presidential election in the Republic of Poland, scheduled for May 10, 2015] (Journal of Laws of 2015, item 650).

supporters.[189] On 13 May 2015 (between the two rounds),[190] Komorowski, the incumbent President, therefore decided to submit to the Senate a draft resolution ordering a referendum on three issues:

1) *Do you support the introduction of single-member constituencies in elections to the Sejm of the Republic of Poland?*
2) *Do you support the continued financing of political parties from the state budget?*
3) *Do you support introducing a general rule that doubts as to the interpretation of tax law provisions are resolved in favour of the taxpayer?*[191]

The draft was approved by the Senate on 21 May 2015, after a heated debate,[192] and on 17 June, the President signed the resolution,[193] which was published in the Journal of Laws on 19 June 2015; the referendum date was set for 6 September of that year.[194] President Komorowski thus sought to win the favour of Paweł Kukiz's electorate by ordering a referendum that included questions corresponding to Kukiz's key demands.

189 Chęciński, *Referendum ogólnokrajowe w polskim systemie prawnym po 2 kwietnia 1997 r.*, 93; Grabowska, "Referendum ogólnokrajowe w Polsce—analiza przypadku," 109.

190 Druk nr 899 Senatu Rzeczypospolitej Polskiej z 13.05.2015 r. [Print no. 899 of the Senate of the Republic of Poland from May 13, 2015].

191 Postanowienie Prezydenta Rzeczypospolitej Polskiej z dnia 17 czerwca 2015 r. o zarządzeniu ogólnokrajowego referendum [Decision of the President of the Republic of Poland of June 17, 2015, regarding the ordering of a nationwide referendum] (Journal of Laws of 2015, item 852).

192 Uchwała Senatu Rzeczypospolitej Polskiej z dnia 21 maja 2015 r. w sprawie wyrażenia zgody na zarządzenie przez Prezydenta Rzeczypospolitej Polskiej ogólnokrajowego referendum [Resolution of the Senate of the Republic of Poland of May 21, 2015, regarding the consent to order a nationwide referendum by the President of the Republic of Poland], Senate print no. 295.

193 Postanowienie Prezydenta Rzeczypospolitej Polskiej z dnia 17 czerwca 2015 r. o zarządzeniu ogólnokrajowego referendum [Decision of the President of the Republic of Poland of June 17, 2015, regarding the ordering of a nationwide referendum] (Journal of Laws of 2015, item 852).

194 Postanowienie Prezydenta Rzeczypospolitej Polskiej z dnia 17 czerwca 2015 r. o zarządzeniu ogólnokrajowego referendum [Decision of the President of the Republic of Poland of June 17, 2015, regarding the ordering of a nationwide referendum] (Journal of Laws of 2015, item 852).

Serious legal doubts were raised by the first question, which dealt with single-member constituencies. Some constitutional lawyers took the view that deciding on constitutional matters by means of an issue-specific referendum (Pol. *referendum problemowe*) was impermissible. This position was adopted by Michał Wiszowaty,[195] Ryszard Piotrowski,[196] and Bogusław Banaszak,[197] among others, although it was opposed in a legal opinion for the Senate by Wojciech Orłowski[198] and Marek Chmaj.[199]

The campaign was highly unusual[200]; for the initiator it was politically crucial only in relation to the second round of the presidential election, whereas the vote itself took place a month after the new President had taken office. As a result, most of the political scene—including the very initiator–had lost interest in the referendum.[201] Komorowski himself described it as an "orphan".[202]

195 Michał Wiszowaty, "Dlaczego w obecnym stanie prawnym referendum nt. JOW nie może się odbyć?," konstytuty.pl, published 13 May 2015, https://www.konstytuty.pl/archives/2216.

196 Krzysztof Lepczyński, "Piotrowski: Referendum ws. JOW będzie niezgodne z konstytucją. Komorowski przed Trybunał Stanu? Radykalny pogląd," Gazeta.pl, published 13 May 2015, https://wiadomosci.gazeta.pl/wiadomosci/7,114871,17910224,piotrowski-referendum-ws-jow-bedzie-niezgodne-z-konstytucja.html.

197 Bogusław Banaszak, "Opinia prawna na temat zgodności z Konstytucją materii pytań zawartych w projekcie postanowienia Prezydenta Rzeczypospolitej Polskiej o zarządzeniu krajowego referendum (druk senacki nr 899)—w szczególności pytania dotyczącego jednomandatowych okręgów wyborczych z odniesieniem się do bieżących głosów konstytucjonalistów w tej kwestii," in *Projekt postanowienia Prezydenta RP o zarządzeniu ogólnokrajowego referendum—opinie prawne* (Kancelaria Senatu Biuro Analiz i Dokumentacji, 2015), 6.

198 Wojciech Orłowski, "Opinia prawna na temat zgodności z Konstytucją materii pytań zawartych w projekcie postanowienia Prezydenta RP o zarządzeniu krajowego referendum (druk senacki nr 899), w szczególności pytania dotyczącego jednomandatowych okręgów wyborczych z odniesieniem się do bieżących głosów konstytucjonalistów w tej kwestii," in *Projekt postanowienia Prezydenta RP o zarządzeniu ogólnokrajowego referendum—opinie prawne*, 17.

199 Marek Chmaj, "Dopuszczalność zarządzenia przez Prezydenta Rzeczypospolitej Polskiej ogólnokrajowego Referendum w sprawie, m.in. jednomandatowych okręgów wyborczych, w trybie art. 125 Konstytucji," in *Projekt postanowienia Prezydenta RP o zarządzeniu ogólnokrajowego referendum—opinie prawne*, 12.

200 Grabowska, "Referendum ogólnokrajowe w Polsce—analiza przypadku," 111.

201 Piasecki, "Błędy, zaniechania i manipulacje polityków na przykładzie referendów w Polsce w 1996 i 2015 roku," 107–08; Chęciński, *Referendum ogólnokrajowe w polskim systemie prawnym po 2 kwietnia 1997 r.*, 93.

202 "Komorowski: Referendum zostało sierotą po przegranych przeze mnie wyborach," Wprost.pl, published 11 September 2015, https://www.wprost.pl/520715/bronislaw-komorowski-referendum-zostalo-sierota-po-przegranych-p.html.

These moves appear strikingly similar to those made by President Lech Wałęsa in relation to the affranchissement referendum. Both referendums were ordered for reasons of immediate political expediency, between the first and second rounds of a presidential election, and after their defeat both candidates withdrew from active participation in the referendum campaign.[203]

A central issue was whether turnout would exceed the 50% threshold, which did not seem obvious,[204] although few expected the participation rate to be quite so low. Of more than 30.5 million eligible voters, only 2,383,041 went to the polls. A little over 232,000 votes were cast on each question, which meant turnout of around 7.8%—far too low for the referendum to be considered binding. Accordingly, it had purely consultative effect. The first question received 78.75% "yes" answers, the second 17.37%, and the third 94.51%.

The cost of the referendum was slightly over 71.5 million PLN.[205] It was dubbed "the most expensive opinion poll in Europe",[206] and it is difficult to evaluate it positively. From its very genesis—rooted in the short-term need to boost electoral support—through the financial burden on the state and the organisation and mediocrity of the campaign, to the turnout disaster, the referendum contributed to the trivialisation and instrumentalisation of the institution in Polish political practice, stripping it entirely of seriousness and discouraging society from forms of direct democracy. This is all the more disheartening given that it constituted the first nationwide referendum on matters of particular importance to the state under the 1997 Constitution. Although the instrumental

203 This analogy was described in detail by Andrzej K. Piasecki in "Błędy, zaniechania i manipulacje polityków na przykładzie referendów w Polsce w 1996 i 2015 roku."

204 Surveys from the end of August hovered around 50%—see the CBOS poll (51%) of 24 August 2015: CBOS, *Polacy o wrześniowym referendum zarządzonym przez prezydenta Bronisława Komorowskiego*, Komunikat z badań nr 121/2015 (Fundacja Centrum Badania Opinii Społecznej, 2015).

205 Informacja o wydatkach z budżetu państwa poniesionych na przygotowanie i przeprowadzenie referendum ogólnokrajowego w dniu 6 września 2015 r. [Information on the expenditures from the state budget incurred for the preparation and conduct of the nationwide referendum held on September 6, 2015], Szef Krajowego Biura Wyborczego February 5, 2016

206 "Raport. Wrześniowe referendum," TVN24, published 7 September 2015, https://www.tvn24.pl/raporty/wrzesniowe-referendum,1004%20.

political use of the popular vote (and its ad hoc deployment without proper preparation in relation to issues of genuine importance for the state)[207] deserves a strongly negative evaluation, the referendum nonetheless offered a modest opportunity to stimulate debate on systemic reform.[208]

It was, however, not the last such case. On 8 August 2023, the President issued an order calling parliamentary elections,[209] and nine days later the Sejm adopted a resolution on ordering a nationwide referendum on matters of particular importance to the state to be held on the same day as the elections—15 October 2023.[210] Four questions were drafted:

1) *Do you support the sale of state assets to foreign entities, leading to Poles losing control over strategic sectors of the economy?*
2) *Do you support raising the retirement age, including restoring the increased retirement age of 67 for women and men?*
3) *Do you support the removal of the barrier on the border between the Republic of Poland and the Republic of Belarus?*
4) *Do you support the admission of thousands of illegal immigrants from the Middle East and Africa, in accordance with the forced relocation mechanism imposed by the European bureaucracy?*

The political situation at the time was ambiguous. In July, polling averages showed support at 33.7% for PiS and 12.5% for Confederation (Pol.

207 Tomasz Adam, "Fasadowość instytucji referendum ogólnokrajowego—wybrane zagadnienia," in *Aktualne problemy* referendum, eds. Beata Tokaj et al. (Krajowe Biuro Wyborcze, 2016), 20.

208 Piasecki, "Błędy, zaniechania i manipulacje polityków na przykładzie referendów w Polsce w 1996 i 2015 roku," 106; Adam, "Fasadowość instytucji referendum ogólnokrajowego—wybrane zagadnienia," 11.

209 Postanowienie Prezydenta RP z dnia 8 sierpnia 2023 r. w sprawie zarządzenia wyborów do Sejmu Rzeczypospolitej Polskiej i do Senatu Rzeczypospolitej Polskiej [Decision of the President of the Republic of Poland of August 8, 2023, regarding the ordering of elections to the Sejm and Senate of the Republic of Poland] (Journal of Laws of 2023, item 1564).

210 Uchwała Sejmu Rzeczypospolitej Polskiej z dnia 17 sierpnia 2023 r. o zarządzeniu referendum ogólnokrajowego w sprawach o szczególnym znaczeniu dla państwa [Resolution of the Sejm of the Republic of Poland of August 17, 2023, on ordering a nationwide referendum on matters of special importance to the state] (Journal of Laws of 2023, item 1636).

Konfederacja),[211] and despite the latter's leaders publicly rejecting the idea of a coalition, it was widely predicted that such a coalition might nonetheless materialise. Support for the rest of the opposition (KO + Third Way + the Left) stood at 47.1%.[212] The government of Mateusz Morawiecki (comprising PiS, Sovereign Poland and the Republican Party) and the parliamentary majority behind it needed to strengthen their position. For that reason, they decided to order a referendum that would display the convergence between the views of the ruling parties and those of citizens, thereby improving their public image.[213] It is not difficult to see that the questions were drafted so that the vast majority of Poles would be inclined to answer them in the affirmative—another example of so-called sham questions.[214] The mechanism is similar to that used in 1946, although that vote and its campaign were incomparably less democratic, which is beyond doubt.

The first question contained the phrase "sale of state assets to foreign entities, leading to Poles losing control over strategic sectors of the economy". It concerned an issue that had not been the subject of any ongoing public debate and, moreover, was formulated in what might be deemed a strongly suggestive way at least[215]—particularly given that "sell-off" (Pol. *wyprzedaż*) in ordinary Polish usage denotes selling something at reduced prices.[216]

The second question likewise concerned a matter that was not at the centre of an animated public discussion. It should also be recalled that it was Donald Tusk's government and the then parliamentary majority that decided to raise

211 See https://ewybory.eu/sondaze/.

212 See https://ewybory.eu/sondaze/.

213 Magdalena Musiał-Karg and Fernando Casal Bértoa, *Polskie wybory parlamentarne i referendum w 2023 roku. Jak zepsuć "święto demokracji"* (Fundacja im. Stefana Batorego, 2023), 9; Mikołaj Małecki, "Referendum narusza Konstytucję, wyniki nie będą wiążące. Należy odmówić udziału w propagandowej szopce," *Dogmaty Karnisty*, 13.10.2023: 5.

214 Chęciński, *Referendum ogólnokrajowe w polskim systemie prawnym po 2 kwietnia 1997 r.*, 34.

215 Musiał-Karg and Casal Bértoa, *Polskie wybory parlamentarne i referendum w 2023 roku*, 4; Małecki, "Referendum narusza Konstytucję, wyniki nie będą wiążące," 3.

216 See: *sell-off* definition of PWN's Dictionaries of the Polish language: https://sjp.pwn.pl/sjp/wyprzedaz;2540347.html.

the retirement age in 2012,[217] a decision that became the object of sustained PiS criticism.[218] The question was therefore intended to remind voters of that decision (as indicated by the phrase "restoring the increased age of 67") and of PiS's subsequent lowering of the retirement age back to 65.[219] Moreover, it is difficult to imagine that a majority of citizens would favour a longer working life.[220] The question thus had a propagandistic and non-substantive character.

The third question also addressed a largely self-evident matter. The Ninth-term Sejm had decided to finance, from the state budget, the construction of a barrier on the border with Belarus,[221] which attracted criticism from part of the opposition.[222] With a view to recalling this decision, the question was formulated in this way, although no significant demands were at that time being made in public debate for the barrier's removal; rather, protests had been voiced ex ante against its construction.[223] Like the preceding question, it had no genuine problem-solving value and served solely to promote the government's actions.

The fourth question merits the strongest condemnation. Not only did it presuppose an unlawful procedure and contain a false presupposition about the alleged illegality of the compulsory relocation mechanism "imposed" by

217 Ustawa z dnia 11 maja 2012 r. o zmianie ustawy o emeryturach i rentach z Funduszu Ubezpieczeń Społecznych oraz niektórych innych ustaw [Act of May 11, 2012, amending the Act on pensions and annuities from the Social Insurance Fund and certain other acts] (Journal of Laws of 2012, item 637).

218 PIS, *10 lat temu rząd PO-PSL podniósł wiek emerytalny* (PIS, 2023), https://pis.org.pl/aktualnosci/10-lat-temu-rzad-po-psl-podniosl-wiek-emerytalny.

219 Ustawa z dnia 16 listopada 2016 r. o zmianie ustawy o emeryturach i rentach z Funduszu Ubezpieczeń Społecznych oraz niektórych innych ustaw [Act of November 16, 2016, amending the Act on pensions and annuities from the Social Insurance Fund and certain other acts] (Journal of Laws of 2017, item 38).

220 Małecki, "Referendum narusza Konstytucję, wyniki nie będą wiążące," 3–5.

221 Ustawa z dnia 29 października 2021 r. o budowie zabezpieczenia granicy państwowej [Act of October 29, 2021, on the construction of state border security] (Journal of Laws of 2021, item 1992).

222 "Politycy PO od początku nie chcieli zapory na granicy. W Sejmie głosowali przeciw jej budowie," Polskie Radio 24, published 14 August 2023, https://polskieradio24.pl/artykul/3224822,politycy-po-od-poczatku-nie-chcieli-zapory-na-granicy-w-sejmie-glosowali-przeciw-jej-budowie.

223 "Politycy PO od początku nie chcieli zapory na granicy."

the EU,[224] it also employed the informal expression "European bureaucracy", intended to discredit European institutions.[225]

The referendum was also accompanied by normative doubts. On 7 July 2023, an amendment to the National Referendum Act was promulgated, omitting the standard 14-day *vacatio legis*.[226] This would have been lawful had it been recognised that, in this instance, an important interest of the state required the normative act to enter into force immediately and that the principles of the democratic state ruled by law did not stand in the way (Article 4(1)–(2) of the Act on the Publication of Normative Acts and Certain Other Legal Acts).[227] It is, however, difficult to identify here any such important state interest, as opposed to a party-political one. Similar doubts arise in relation to the "legislative standstill" (Pol. *cisza legislacyjna*), a rule shaped in case law (rather than in positive law) that amendments to electoral law should not be introduced within six months of a vote.[228] The non-literal formulation of this principle facilitated the justification of action *praeter legem*.

For obvious reasons, the referendum campaign was intertwined with the parliamentary campaign. PiS sought to mobilise its electorate as strongly as possible, while parts of the opposition called for a boycott of the referendum and for voters to refuse to take the referendum ballot paper[229]—itself a source of controversy—or simply denigrated the referendum's significance.[230]

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224 Marta Pachocka, *Relokacje—referendum w Polsce w 2023 roku a polityka azylowa Unii Europejskiej* (Fundacja im. Stefana Batorego, 2023), 7–8.

225 Musiał-Karg and Casal Bértoa, *Polskie wybory parlamentarne i referendum w 2023 roku*, 4.

226 Ustawa z dnia 7 lipca 2023 r. o zmianie ustawy o referendum ogólnokrajowym [Act of July 7, 2023, amending the Act on nationwide referenda] (Journal of Laws of 2023, item 1628).

227 Ustawa z dnia 20 lipca 2000 r. o ogłaszaniu aktów normatywnych i niektórych innych aktów prawnych [Act of July 20, 2000, on the publication of normative acts and certain other legal acts] (Journal of Laws of 2000, no. 62, item 718).

228 Agata Pyrzyńska, "Instytucja ciszy legislacyjnej w polskim prawie wyborczym," *Krytyka Prawa*, no. 1(2023): 217–18.

229 Jakub Szymczak, "Lewica namawia do odmowy pobrania kart referendalnych," Oko.press, published 5 October 2023, https://oko.press/na-zywo/wybory-na-zywo-oko-press/lewica-namawia-do-odmowy-pobrania-karty-referendalnej.

230 "Donald Tusk: uroczyście unieważniam referendum. Rzecznik rządu: przykład tego, jak Tusk podchodzi do słowa demokracja," PAP, published 16 August 2023, https://www.

From the perspective of the ruling party, the referendum turned out to be a failure. Turnout was 40.91%,[231] insufficient for the result to be binding, whereas turnout in the parliamentary elections held the same day was exceptionally high by Polish standards (74.38%).[232] This means that nearly 10 million voters refused to take the referendum ballot, which illustrates the effectiveness of opposition mobilisation.

The 2023 issue-specific referendum must be assessed very negatively. It was ordered for political and short-term purposes, concerned topics that were in part marginal to public debate or formulated in a non-substantive manner, and the questions were phrased in a way that suggested an affirmative answer. It was a popular vote intended to mobilise a particular party's electorate to participate in the parliamentary elections, to strengthen the position of the outgoing government, and to attract undecided voters by associating the referendum issues with the ruling party. In this way, it ran counter to the very *ratio legis* of mechanisms of direct democracy.

Conclusion

The history of Polish referendums began with lofty, yet never implemented, ideas of civic participation in the Second Republic. The first practical use of the institution served to legitimise a criminal regime, leaving a long-lasting trauma in social consciousness. The experiences of 1987–2003 were ambivalent, yet they offered hope that this decision-making form might develop into a useful complement to representative democracy. Unfortunately, political

pap.pl/aktualnosci/donald-tusk-uroczyscie-uniewazniam-referendum-rzecznik-rzadu-przyklad-tego-jak-tusk.

231 Obwieszczenie Państwowej Komisji Wyborczej z dnia 17 października 2023 r. o wynikach głosowania i wyniku referendum przeprowadzonego w dniu 15 października 2023 r. [Announcement of the National Electoral Commission of October 17, 2023, on the voting results and the outcome of the referendum held on October 15, 2023] (Journal of Laws of 2023, item 2234).

232 Obwieszczenie Państwowej Komisji Wyborczej z dnia 17 października 2023 r. o wynikach wyborów do Sejmu Rzeczypospolitej Polskiej przeprowadzonych w dniu 15 października 2023 r.

practice over the past twenty years has led to its grotesque instrumentalisation in the service of the current interests of political parties. A referendum has never been held on the basis of a citizens' initiative. Of all the referendums conducted, only once was the initiator not from the same political camp as the body taking the final decision (President Wałęsa and a Senate with a left-wing majority). This illustrates the real dominance of public authorities over a mechanism that, by definition, was intended to embody the direct exercise of power by the People.

In Poland, the institution of the nationwide referendum has generally not been applied in conformity with the standards appropriate to it. It has frequently served to legitimise those in power (1946, 1987, 2023) or to attract voters (1996, 2015), which amounted to its instrumentalisation for short-term political ends.

It is, however, worth drawing some distinctions and stating clearly that the highest-quality popular votes were the non-issue-specific referendums of 1997 and 2003. This correlation is not accidental and follows not only from the subject-matter involved, but from the simple method of formulating the questions. Above all, it stemmed from the fact that these referendums concerned only the approval of decisions already taken by state organs, and the bodies ordering them had little room for manoeuvre as regards the content of the questions. This created a certain generality in the subject-matter, which in turn limited the scope for manipulation and instrumentalisation. These referendums also had the most substantive campaigns (although not entirely free from unconstructive slogans). The 1997 referendum provided strong democratic legitimacy for the Constitution as the fundamental legal act, while the ratification referendum did so for Poland's presence in the European Union. The fact that these key decisions were taken directly by the People means that they do not appear to have been imposed on citizens by the political class. It is worth noting that Poles remain today among the most pro-European societies in the European Union.[233]

233 See researches of Eurobarometer: https://www.europarl.europa.eu/at-your-service/pl/be-heard/eurobarometer.

On the other hand, the 1946 referendum ought to be treated as distinct. Given the time at which it was held (fully forty years before the next referendum), the specific circumstances of the country, the nature of the post-war world, and above all the level of non-democracy involved, it is difficult to compare that vote with any other popular ballot. Its distinctiveness lies in the extremely low level of integrity, conditioned by the factors just mentioned.

A review of Poland's referendal experience reveals a consistent absence of binding issue-specific referendums. Insufficient turnout–resulting partly from the legal framework (from the original "majority of those entitled" clause, through the 50% turnout threshold, to contemporary proposals for further lowering that threshold) and partly from a lack of social trust in the authorities' intentions—has prevented such votes from acquiring real force. The various reform proposals advanced over time, including suggestions to abandon turnout thresholds or to revise the structure of the questions, do not resolve the fundamental problem: since the beginning of the transformation, the referendum in Poland has never been entrusted to citizens as an instrument of initiative, but has instead remained a mechanism controlled by public authorities.

Moreover, analysis of referendal questions shows a recurring pattern: the use, in issue-specific referendums, of evaluative formulations, terminology suggesting the "proper" way to vote, and the bundling together of issues that are not substantively related. This tendency, already present in the referendum proposals of the 1990s, emerged in full clarity in 2015 and 2023, when the construction of the questions turned the referendum into an instrument of agitation and mobilisation for a specific electorate, devoid of deliberative value. Thus, rather than serving to resolve defined issues, the institution was absorbed into the logic of electoral competition, aimed at securing additional legitimacy or mobilising particular segments of the electorate.

The history of the nationwide referendum in Poland demonstrates that this mechanism, despite its constitutional entrenchment, has been used primarily as a tool of legitimation, serving to confirm the positions of state organs rather

than as a genuine instrument for the People to decide on matters of state. The patterns of its functioning inherited from 1946 and reinforced by subsequent instances of instrumental use, have prevented the consolidation of the referendum as a mature form of direct democracy. Consequently, although present in the Polish legal order for almost eight decades, the institution has not attained an autonomous character; it has remained dependent on political interests rather than constituting an authentic emanation of the sovereign's will.

Finally, in answering the question of how referendums have affected political reality, a certain paradox becomes visible: despite the rather negative assessment of their use, their impact has been considerable. The tragic 1946 referendum was fully implemented; the 1987 referendum related to processes that in fact took place; the constitutional and accession referendums had significant consequences in the legal as well as the political and social spheres; the referendums of 1996, 2015 and 2023, owing to turnout failure, contributed to the gradual (1996) or abrupt (2015, 2023) loss of salience of the issues they addressed. Yet they nevertheless exerted some influence on the electoral campaigns with which they were associated (though not necessarily in the manner intended by their initiators), as well as on legal reality (for instance, the introduction of the rule that doubts in tax law are resolved in favour of the taxpayer). The referendum is thus an instrument that can powerfully shape legal and political reality and social consciousness. The use of such a significant mechanism should be accompanied by robust good practices, which have not developed in Poland. In this context, the instrumentalisation of the referendum for short-term political purposes is all the more reprehensible and dangerous.

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Customs Officers under Martial Law in Ukraine: Constitutional and Administrative Dimensions

Abstract: This article explores the legal status and functional transformations of customs officers in Ukraine during the period of martial law. It examines the constitutional framework of emergency governance, the administrative specifics of public service under crisis, and the practical implications of accelerated legal procedures and ad hoc appointments in the customs system. Drawing on comparative constitutional insights and doctrinal commentary, the study highlights structural deviations from standard service models and the legal uncertainty surrounding the rights and responsibilities of customs personnel in wartime. The article argues for a clearer statutory delineation of the emergency public service regime to enhance legal predictability, institutional accountability, and resilience. The findings are based on legal analysis and doctrinal sources from Ukraine, Poland, France, Germany, and the UK.

Keywords: martial law, public service, legal status, constitutional emergency, Ukraine, customs officers, administrative law

Introduction

The introduction of martial law in Ukraine in 2022 triggered significant institutional and legal transformations across the public sector. Among the most

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affected were customs authorities, whose dual function—as both a fiscal institution and an agent of border control—placed them at the intersection of administrative continuity and national security. The wartime context brought with it not only procedural acceleration and normative improvisation, but also a reconfiguration of public service standards in terms of recruitment, discipline, accountability, and legal protection.

This article explores how Ukraine's legal and institutional framework governing customs officers has adapted—or failed to adapt—to the extraordinary demands of wartime governance, with a focus on constitutional boundaries, legal certainty, and the integrity of rule-based public service.

The analysis is grounded in both domestic and comparative legal sources, including the experiences of Poland, France, Germany, and the United Kingdom. These jurisdictions provide useful reference points for understanding the legal treatment of public servants during emergencies, and the structural safeguards required to ensure that exceptional measures do not become permanent deviations.

By tracing the constitutional foundations of martial law and analysing its implications for the legal status of customs officers, the article contributes to a more precise understanding of emergency public service. It argues that the current hybrid model of service—marked by temporary appointments, limited oversight, and functional ambiguity—undermines institutional stability and calls for a more coherent legal framework. The study proposes legal and structural clarifications to enhance resilience, transparency, and adherence to rule-of-law standards, even under conditions of exceptional threat.

This study applies the doctrinal legal method combined with comparative analysis and jurisprudential interpretation, drawing on primary legislation, case law, and institutional policy documents from Ukraine and selected EU states. In addition, a functional analysis of the customs administration under wartime conditions is applied to assess the practical implications of institutional reform and operational deviations.

This article addresses the following questions: (1) How has the legal status of customs officers evolved under martial law in Ukraine? (2) To what extent do current institutional practices conform to constitutional and comparative legal standards? (3) What legal reforms are necessary to ensure the resilience and legality of emergency public service?

Constitutional Regulation of Martial Law: Ukraine and Comparative Lessons

The constitutional framework of martial law in Ukraine, while grounded in legal tradition, faces considerable challenges in ensuring both operational effectiveness and the protection of fundamental rights. Martial law is declared pursuant to Article 106(20) of the Constitution and regulated in detail by the Law of Ukraine "On the Legal Regime of Martial Law" of 2015. However, its practical implementation has revealed interpretative tensions, particularly in relation to the legal status of public servants operating in security-sensitive sectors such as customs.

Comparative constitutional perspectives offer valuable insights into the design and evolution of emergency regimes. In the Polish context, Kęsoń traces the historical development of martial law provisions from the interwar constitutions to the modern framework, highlighting the legal distinction between martial law, a state of emergency, and a state of war.[2] The March Constitution of 1921 vested emergency powers in the Council of Ministers, whereas the April Constitution of 1935 shifted authority to the President, emphasizing executive control. This historical trajectory reflects broader patterns of adaptation in response to shifting security paradigms.

2 Tadeusz J. Kęsoń, "Stan wyjątkowy, stan wojenny i stan wojny w konstytucjach i aktach prawnych Rzeczypospolitej Polskiej [Emergency State, Martial Law and State of War in Constitutions and Legal Acts of the Republic of Poland]," *Rocznik Bezpieczeństwa Międzynarodowego* 8, no. 2 (2014): 158–77, https://doi.org/10.34862/rbm.2014.2.11.

In Poland's contemporary legal order, these distinctions remain critical. As Kęsoń notes, martial law entails a suspension of constitutional rights and a reallocation of powers to the executive, whereas a state of war primarily engages the external dimension of state sovereignty without necessarily altering the internal legal order.[3] The clarity of these distinctions serves to safeguard constitutional boundaries during crises—an issue that remains underdeveloped in the Ukrainian legal system, where terminological and functional overlaps persist.

Poland's experience during the COVID-19 pandemic further illustrates how emergency governance can stretch constitutional limits. Rybski critiques the Polish government's use of ministerial decrees to impose restrictive measures in the absence of a formal state of emergency, framing this practice as a de facto exceptional regime implemented through ordinary legal instruments.[4] A similar pattern emerges in Ukraine, where martial law provisions have been used to justify administrative shortcuts and accelerated procedures in the customs sector, often without explicit legal authorization.

Historical precedents also illuminate the long-term risks of subordinating constitutional protections to emergency imperatives. The introduction of martial law in Poland in 1981, for example, marked not only the suppression of political opposition but also the erosion of labour rights and due process. Seweryński and Skupień emphasize how administrative prerogatives enabled unilateral changes in work conditions and harsh penalties for participation in protests, effectively transforming labour relations into instruments of state discipline.[5] This model of emergency public service—prioritizing obedience and

3 Tadeusz J. Kęsoń, "Stan wojny a stan wojenny—zagadnienia formalno-prawne [State of War versus Martial Law – Formal and Legal Issues]," *Rocznik Bezpieczeństwa Międzynarodowego* 8, no. 2 (2014): 143–57, https://doi.org/10.34862/rbm.2014.2.10.

4 Robert Rybski, "Stan epidemii a stany nadzwyczajne [State of Epidemic vs. States of Emergency]," *Przegląd Konstytucyjny*, no. 1 (2022): 139–65, https://doi.org/10.4467/25442031PKO.22.006.15732.

5 Michał Seweryński and Dagmara Skupień, "The Martial Law and Its Impact on Labour Relations in Poland," Studia Prawno-Ekonomiczne 102 (2017): 107–124, https://www.ceeol.com/search/article-detail?id=555616

control—stands in contrast to contemporary conceptions based on accountability and legal safeguards.

Ukraine's legal system, while formally grounded in constitutional procedures, reflects certain continuities with these authoritarian emergency legacies. The customs administration, for instance, has operated under martial law in a quasi-militarized framework, where rapid appointments, legal improvisation, and executive discretion have prevailed. The absence of a specialized statute governing the public service regime of customs officers exacerbates this problem. In contrast to institutions such as the National Police or the Border Guard, the Customs Service continues to function under general civil service provisions, which are ill-suited to the specific demands of wartime operations.

Moreover, the functional role of customs officers under martial law remains ambiguously defined. Their duties straddle both administrative and quasi-law enforcement functions, yet the legal framework lacks the precision necessary to ensure consistent interpretation and application. This legal uncertainty affects not only procedural guarantees but also the legitimacy of decisions taken under emergency powers.

The comparative lessons drawn from Poland and other jurisdictions underline the importance of maintaining legal clarity and constitutional discipline, even under extreme conditions. A codified distinction between emergency modalities, coupled with specific legal instruments for public service regulation in crisis settings, can help ensure that temporary measures do not erode long-term democratic standards. For Ukraine, this implies the urgent need to delineate the legal status of customs officers through a dedicated statutory act, to clarify the permissible scope of executive discretion under martial law, and to reinforce judicial oversight over administrative decisions affecting public servants.

Legal Status of Customs Officers under Martial Law: Deviations and Institutional Challenges

In the context of sustained armed conflict and institutional stress, the legal status of customs officers in Ukraine has undergone significant transformation. Traditionally understood through the lens of fiscal policy and trade facilitation, the customs service has shifted toward a quasi-security institution under martial law. This functional reconceptualization aligns with broader European trends. Shpak et al. observe that among the eight core functions of EU customs bodies, the security function—especially the prevention of illicit or hazardous goods movement—has gained priority, reflecting a strategic shift from fiscal to protective mandates.[6]

The legislative framework of Ukraine permits direct appointments to customs posts without competition during martial law, which are based on the decisions of the Head of the State Customs Service or the head of a regional customs office.[7] While formally valid, this practice undermines the principles of merit-based recruitment and creates legal fragmentation. Officers operate under a hybrid legal regime shaped by civil service legislation, internal instructions, and martial law decrees, often without clear legal hierarchy.

British administrative law provides a relevant historical parallel. Shimizu highlights how the doctrine of Crown prerogative shaped public service as a non-contractual relationship, allowing for dismissal without legal remedy. Though this model ensured government flexibility during crises, it has become increasingly incompatible with human rights standards.[8]

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6 Nestor Shpak et al., "Modern Trends of Customs Administrations Formation: Best European Practices and a Unified Structure," *The NISPAcee Journal of Public Administration and Policy* 13, no. 1 (2020): 189–209, https://doi.org/10.2478/nispa-2020-0008.

7 Law of Ukraine No. 389-VIII, *On the Legal Regime of Martial Law*, adopted on 12 May 2015, https://zakon.rada.gov.ua/laws/show/389-19, accessed 19 April 2025.

8 Takashi Shimizu, "Igirisu kōmuin ni kansuru kaiko riron no kakuritsu tenkai to koyō keiyaku" [Theories of Dismissal and the Legal Nature of Employment in British Public Service (Part 3)]," *Waseda Journal of Social Sciences* 4, no. 2 (2003): 83–87. https://waseda.repo.nii.ac.jp/record/15539/files/40078_4_2.pdf

German public service law preserves a unilateral statutory relationship between the state and officials. As Aust explains, this design reinforces loyalty, legal certainty, and institutional stability—particularly critical during emergency conditions.[9] Similarly, France employs a flexible but codified approach to contract-based appointments. Tamai notes that 71.9% of local civil servants recruited in 2019 were hired as contract agents, often to fill permanent positions under conditions of need.[10]

In Ukraine, short-term appointments without competition replicate this flexibility but lack the normative safeguards present in French or German systems. The situation is further complicated by institutional improvisation: internal security departments in customs bodies are often staffed by personnel without proper knowledge of customs law, leading to unlawful detentions and procedural overreach. As Chodak rightly argues, effective anti-corruption requires not just law but institutional coordination.[11]

Moreover, the erosion of competition mechanisms jeopardizes professional standards. While justified during emergencies, such measures must remain proportionate and time-bound. The experience of the Polish National Revenue Administration (Pol. Krajowa Administracja Skarbowa, KAS) offers a useful model: combining tax and customs functions, it operates as a uniformed and armed law enforcement body with clearly defined legal mandates, institutional ranks, and accountability mechanisms. The Customs and Revenue Service (Pol. Służba Celno-Skarbowa) exemplifies the benefits of structural coherence under exceptional conditions.

9 Sabrina Aust, "Verbeamtung—in der heutigen Zeit noch notwendig, sinnvoll und erstrebenswert?" (Bachelor's thesis, Hochschule Meißen (FH) und Fortbildungszentrum, 2023), https://opus.bsz-bw.de/hsf/frontdoor/deliver/index/docId/2964/file/Aust_Sabrina-Bachelorarbeit.pdf.

10 Ryo Tamai, "Furansu no chihō kōmuin seido ni okeru keiyaku shokuin no nin'yō seido to sono tokuchō [Contract Appointments in the French Local Civil Service: Institutional Specificity and Legal Trends]," *Kyoto Prefectural University Academic Reports on Public Policy* 14, 2022: 21–27.

11 Paweł Chodak, "Selected Legal Regulations Regarding the Fight Against Corruption," *Journal of Modern Science* 1, no. 40 (2019): 213–34, https://doi.org/10.13166/JMS/105597.

The functional complexity of Ukrainian customs is not matched by an adequate legal framework. Customs officers operate at the intersection of administrative, fiscal, and security domains without a unified statute defining their status, duties, or procedural guarantees. Their legal position differs markedly from that of the National Police or State Border Guard, both of which are governed by specialized legislation and rank-based systems.

Under martial law, customs officers face increased legal and personal risk, often without defined disciplinary protections or complaint procedures. This environment creates conditions for informal enforcement mechanisms based on loyalty, peer pressure, and fear of exclusion—patterns reminiscent of the tribal sanctions described by Stojčević.[12]

International jurisprudence reinforces the importance of legality and equal treatment in public service. In Case T-531/21, the EU General Court rejected claims of inequality due to lack of proof of differential treatment.[13] Similarly, in Case T-250/06 P, transitional promotion rules were upheld as legitimate under conditions of institutional reform. The Court of Justice of the European Union (CJEU) also confirmed in *Christelle Deliège* that selection mechanisms may be justified if they serve the structural needs of the institution.[14, 15]

Domestically, the Supreme Court of Ukraine ruled in Case No. 420/4566/23 that internal orders of the Border Guard Service, though unregistered, may regulate remuneration during martial law if they are the only normative instruments available.[16] This pragmatic interpretation supports operational continuity but underscores the need for codified wartime legal norms.

12 Dragomir Stojčević, "The Sanctioning of Customs," *Annals of the Faculty of Law in Belgrade*, no. 1–4 (1983): 660–64.

13 Judgment of the General Court of 13 March 2024, QN v. Commission, Case T-531/21, EU:T:2024:166, para. 37, https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62021TJ0531.

14 Judgment of the CJEU of 11 April 2000, *Christelle Deliège v. Ligue Francophone de Judo et al.*, Joined Cases C-51/96 and C-191/97, ECLI:EU:C:2000:199, https://curia.europa.eu/juris/document/document.jsf?docid=45230, accessed 19 April 2025.

15 Judgment of the CJEU of 22 May 2008, *Martial Ott and Others v. Commission*, Case T-250/06 P, ECLI:EU:T:2008:164, https://curia.europa.eu/juris/document/document.jsf?docid=108742, accessed 19 April 2025.

16 Judgment of the Supreme Court of Ukraine of 6 March 2025, Case No. 420/4566/23, proceeding No. K/990/8215/24, *Unified State Register of Court Decisions of Ukraine*, https://

The legal status of customs officers includes not only statutory appointment and dismissal procedures but also institutional entitlements. Social guarantees—medical care, housing, pensions—should be treated as structural components of administrative law, not discretionary welfare.[17] Likewise, integrity should be viewed not merely as an ethical ideal but as a legal standard that demands structured and codified verification. The use of polygraph tests in recruitment or assessment, while increasingly common, must be grounded in transparent procedures and legal safeguards to ensure procedural fairness and accountability.

Kioko's study of Kenya's customs service demonstrates that modernization and professional training correlate strongly with performance outcomes, therein emphasizing the need for human resource development alongside digital reform.[18] In Ukraine, competency frameworks should be integrated into job profiles, evaluation systems, and professional education to institutionalize the link between authority and qualification.

Finally, the conceptual structure of customs public service must distinguish between administrative and labour-law models. Rotation, integrity, and professional evaluation must be framed within administrative law logic. Competition for public service posts remains a doctrinal guarantee of objectivity. While suspended under martial law, its erosion must not become normalized. Alternatives such as probationary periods, audits, or post-hiring reviews may serve as interim safeguards.

Safeguards and Institutional Gaps in Emergency Public Service

The institutional architecture of Ukraine's emergency public service faces significant challenges in maintaining legality, accountability, and procedural

reyestr.court.gov.ua/Review/125656580, accessed 19 April 2025.

17 Nataliia Sevostyanova, "System of Legal Guarantees in Public Service Social Security Regulation in Ukraine," *Public Law*, no. 1 (2018): 151–57.

18 Doris M. Kioko, "Effect of Technology Acceptance and Modernization Programs on the Performance of Customs Officers, Mombasa, Kenya" (Master's thesis, Moi University, 2020), https://ikesra.kra.go.ke/server/api/core/bitstreams/d12aa798-97a2-4234-9f3b-37c71695471e/content.

fairness under martial law. While the customs service operates under a dual mandate—facilitating trade and combating customs violations—the wartime environment has strained its legal and operational frameworks. Drawing on comparative insights, judicial precedent, and empirical studies, this section explores the systemic safeguards and structural deficits that affect the customs administration during states of emergency.

Effective prevention of corruption and abuse in public service cannot rely solely on punitive measures. Orlovska and Stepanova argue that institutional resilience depends on proactive integrity mechanisms, internal controls, and ethical leadership, especially in frontline services like the Border Guard and Customs.[19] Their emphasis on culture and organizational design is particularly relevant for customs bodies, which function under heightened risk and discretion during martial law.

The case-law of the CJEU reinforces the primacy of procedural rights even in emergencies. In Case C-72/22 PPU, *M.A. v. Valstybės sienos apsaugos tarnyba*, the Court ruled that states may not deny access to international protection or automatically detain individuals based solely on irregular entry, even under martial law.[20] This judgment affirms that derogations must conform to necessity and proportionality standards under EU law.[21]

In administrative customs enforcement, Haladzhov underscores that investigation mechanisms serve not only a regulatory role but also a public confidence function. His study of Bulgarian customs demonstrates that well-defined administrative procedures—including risk-based targeting and structured sanctions—enhance state capacity and legal legitimacy in border control.[22]

19 Natalya Orlovska and Yuliia Stepanova, "Corruption Prevention System in the Border Guard Agencies (State Border Guard Service of Ukraine as an Example)," *Scientific Journal of Polonia University* 48, no. 5 (2021): 118–25, https://doi.org/10.23856/4815.

20 Advocate General Emiliou, Opinion in Case C-72/22 PPU, *M.A. v. Valstybės sienos apsaugos tarnyba*, 2 June 2022, ECLI:EU:C:2022:431, https://curia.europa.eu/juris/document/document.jsf?docid=260210 (accessed 19 April 2025).

21 Judgment of CJEU of 30 June 2022, *M.A. v. Valstybės sienos apsaugos tarnyba*, Case C-72/22 PPU, ECLI:EU:C:2022:505, https://curia.europa.eu/juris/document/document.jsf?docid=261930, accessed 19 April 2025.

22 Vencislav Haladzhov, "Customs Investigation—State, Problems and Perspectives," *Godishen almanah "Nauchni izsledvaniya na doktoranti"*, no. 11 (2016): 417–32.

The relationship between digital transformation and public sector integrity is also well documented. Mańkowska found strong correlations between e-government implementation and improvements in transparency, efficiency, and corruption reduction across EU states, with a Pearson coefficient of 0.88 in her 2012 dataset.[23] These findings are particularly relevant for Ukraine's wartime digitization of customs processes.

Yet institutional gaps persist. Data from Baden-Württemberg indicate a sharp rise in violence against public servants, with assaults nearly doubling between 2013 and 2022. The regional Landeskonzeption classifies workplace violence as a systemic risk requiring legal safeguards and recognition of frontline civil service status.[24] Similar risks apply to customs officers exposed to heightened operational tension.

Moreover, despite formal harmonization through the Union Customs Code, enforcement decentralization across EU Member States has produced discrepancies in personnel management and risk assessment. Czermińska identifies these divergences as challenges to mutual trust and legal consistency, particularly in officer rotation and joint operations.[25]

In Ukraine, psychological resilience among customs officers has emerged as a critical variable. Virna, Lazorko, and Malimon demonstrate that high emotional commitment to the institution, while often beneficial, may exacerbate stress under duress, thereby highlighting the importance of structured mental health support and managerial awareness.[26]

Another gap involves the reintegration of veterans. Since 2024, the number of customs officers returning from military service or with combat-related

23 Natalia Mańkowska, "E-administracja a efektywność sektora publicznego [E-government and the Efficiency of Public Sector]," *Prace Naukowe Uniwersytetu Ekonomicznego we Wrocławiu*, no. 348 (2014): 200–09, https://doi.org/10.15611/pn.2014.348.18.

24 Ministerium des Inneren, für Digitalisierung und Kommunen Baden-Württemberg, *Ressortübergreifende Landeskonzeption für einen besseren Schutz von Beschäftigten im öffentlichen Dienst vor Gewalt im Arbeitsalltag*, 1st ed. (Stuttgart: GeZ KKP, 2024), 19.

25 Małgorzata Czermińska, "Management of the EU Customs Union—Challenges and Activities," *Przedsiębiorczość i Zarządzanie* 8, no. 2 (2016): 173–86.

26 Zhanna Virna et al., "The Mode of Trust and Experience of Stress in Customs Officers in Ukraine," *Postmodern Openings* 12, no. 3 (2021): 404–25, https://doi.org/10.18662/po/12.3/346.

disabilities has grown markedly. However, tailored reintegration mechanisms and legal guarantees remain underdeveloped, posing risks to both social protection and institutional coherence.

Legal ambiguities also affect employment status. The "idle mode" imposed on regional customs offices due to combat operations lacks a statutory definition within public service law. While the Labour Code regulates idle time in commercial enterprises, its provisions do not account for public authority suspensions, leaving affected officers in legal limbo with regard to pay, status, and continuity.

The dual legal mandate of the State Customs Service further complicates enforcement. Unlike the Security Service of Ukraine or the State Bureau of Investigation, whose law enforcement roles are codified in primary legislation, the SCS's enforcement powers derive from secondary regulations. This limits clarity, particularly when coordinating with other security agencies.

At the policy level, Ukraine's Strategy for Financial Investigations marks a step toward integrating financial intelligence into the criminal justice system.[27] However, structural fragmentation and legal uncertainty remain barriers to full implementation.

EU jurisprudence provides further guidance. In Case T-249/20, *Abdelkader Sabra v. Council*, the General Court emphasized that emergency measures such as asset freezes require specific, substantiated evidence.[28] Similarly, the pending Case C-634/22, *OT and Others*, raises questions about judicial independence under structural reform during emergencies.[29]

Ukrainian courts have echoed these principles. In Case No. 2a-9677/08/0470,[30] the Grand Chamber of the Supreme Court of Ukraine con-

27 Cabinet of Ministers of Ukraine, Strategy for Financial Investigations in the Sphere of Counteracting Criminal Offenses Related to Illicit Income until 2028.

28 Judgment of the General Court of the EU of 16 March 2022, *Abdelkader Sabra v. Council of the EU*, Case T-249/20, ECLI:EU:T:2022:140, https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62020TJ0249.

29 CJEU, OT and Others v Sofiyski gradski sad, Case C-634/22, Judgment of 18 April 2024, ECLI:EU:C:2024:340. https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62022CJ0634 (accessed 19 April 2025).

30 Judgment of the Supreme Court of Ukraine (Grand Chamber) of 10 April 2025, Case No. 2a-9677/08/0470, proceeding No. 11-236зва24, Unified State Register of Court Decisions

firmed that violations of the European Convention do not automatically warrant reopening cases unless restoration of legal status is necessary. In Case No. 9901/364/21, the Court clarified that the President's dismissal of military officials during war must still comply with procedural rules.[31]

Importantly, in Case No. 260/3564/22, the Supreme Court held that failure to allocate budget funds does not excuse non-payment of lawful remuneration, affirming property rights under Protocol No. 1 to the ECHR.[32] Likewise, in Case No. 420/23119/23, the Court upheld Ministry of Defence regulations on martial law bonus eligibility, despite their unregistered status, prioritizing operational necessity.[33]

In its 2023 ruling in Case No. 520/25136/21, the Supreme Court stated that martial law alone does not justify missed procedural deadlines.[34] Authorities must demonstrate specific impediments. This standard reinforces state accountability in wartime litigation.

Comparative Perspectives: Emergency Public Service in Poland, France, and Beyond

Comparative legal analysis reveals significant variation in how states classify and protect public servants operating under emergency conditions. In Poland, customs officers are formally treated as administrative, rather than uniformed, personnel—a distinction that generates systemic inequalities. Wieczorek notes

of Ukraine, https://reyestr.court.gov.ua/Review/126569708, accessed 19 April 2025.

31 Judgment of the Supreme Court of Ukraine (Grand Chamber) of 31 August 2023, Case No. 9901/364/21, proceeding No. 11-96ai23, Unified State Register of Court Decisions of Ukraine, https://reyestr.court.gov.ua/Review/113690636, accessed 19 April 2025.

32 Judgment of the Supreme Court of Ukraine of 6 April 2023, Case No. 260/3564/22, proceeding No. Пз/990/4/22, Unified State Register of Court Decisions of Ukraine, https://reyestr.court.gov.ua/Review/110064913, accessed 19 April 2025.

33 Judgment of the Supreme Court of Ukraine of 28 November 2024, Case No. 420/23119/23, proceeding No. K/990/12653/24, Unified State Register of Court Decisions of Ukraine, https://reyestr.court.gov.ua/Review/123380439, accessed 19 April 2025.

34 Judgment of the Supreme Court of Ukraine of 14 September 2023, Case No. 520/25136/21, proceeding No. K/990/15168/23, Unified State Register of Court Decisions of Ukraine, https://reyestr.court.gov.ua/Review/113485382, (accessed 19 April 2025).

that this classification results in reduced social protection compared to police and fire service officers, despite comparable enforcement duties and occupational risks.[35] Although the Polish Constitutional Tribunal upheld this distinction, it also acknowledged the need for equalized protections for officers performing high-risk duties under Article 2(1)(4–6) of the Customs Service Act.

The case-law of the Court of Justice of the European Union reinforces the need for individualized legal assessments. In Case C-63/23, *Sagrario and Others*, the Court held that national authorities must evaluate the personal circumstances of each individual before refusing to extend legal status, thus reaffirming the principle of procedural fairness, even under emergency regulations.[36]

The tension between emergency legal frameworks and fundamental rights is further illustrated by the pending Case C-760/22, *FP and Others*, where the CJEU was asked to clarify whether remote criminal proceedings during public emergencies comply with the right to be present at one's trial under Directive 2016/343.[37] This reflects broader concerns about procedural erosion under the guise of expediency.

Ukrainian case law demonstrates similar struggles. In Case No. 640/13029/22, the Grand Chamber of the Supreme Court ruled in favour of a military officer seconded to the State Space Agency, affirming that rights to remuneration under Cabinet Resolution No. 168 remain binding regardless of budgetary constraints.[38] The Court reiterated this principle in Case

35 Mariusz Wieczorek, "Zabezpieczenie społeczne funkcjonariuszy Służby Celnej w świetle konstytucyjnej zasady równości [Social Security of the Customs Service Officers in the Light of the Constitutional Principle of Equality]," *Annales Universitatis Mariae Curie-Skłodowska, sectio G – Ius* 62, no. 2 (2015): 285–95.

36 Judgment of the CJEU of 12 September 2024, *Sagrario and Others v. Subdelegación del Gobierno en Barcelona*, Case C-63/23, ECLI:EU:C:2024:739, https://curia.europa.eu/juris/document/document.jsf?docid=290008, accessed 19 April 2025.

37 CJEU, FP and Others v Sofiyski gradski sad, Case C-760/22, Judgment of 04 July 2024, ECLI:EU:C:2024:574, https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62022CJ0760 (accessed 19 April 2025).

38 Judgment of the Supreme Court of Ukraine (Grand Chamber) of 29 August 2024, Case No. 640/13029/22, https://reyestr.court.gov.ua/Review/121753933, accessed 19 April 2025.

No. 260/3564/22, emphasizing that the state may not evade financial obligations due to the alleged lack of appropriated funds.[39]

Further clarification was provided in Case No. 320/10955/23, where the Court examined the constitutional limits of preserving judicial remuneration during military service.[40] While the judge's professional status remained intact, the Court held that salary continuity was not automatic and depended on explicit statutory provisions.

The intersection of domestic and international obligations is apparent in Case No. 826/85/15, following the ECtHR ruling in *Buglov and Others v. Ukraine*. The Supreme Court upheld the reinstatement of an unlawfully dismissed civil servant, noting that although domestic law had not been substantively violated, the excessive length of proceedings breached European standards. The Court thereby acknowledged the dual burden on states to ensure both procedural efficiency and substantive legality.[41]

The issue of delayed payments under martial law was again addressed in Case No. 280/8933/24, where the Court held that the failure to disburse supplementary remuneration violated the servicemember's property rights.[42] This case reaffirmed that wartime disruptions do not nullify legal entitlements and that authorities remain accountable for administrative inaction.

Judicial suspension during military service was also clarified. In Case No. 420/8189/24, the Supreme Court affirmed that proceedings may be suspended

39 Judgment of the Supreme Court of Ukraine (Grand Chamber) of 21 September 2023, Case No. 260/3564/22, Unified State Register of Court Decisions of Ukraine, https://reyestr.court.gov.ua/Review/114021133, accessed 19 April 2025.

40 Judgment of the Supreme Court of Ukraine (Grand Chamber) of 13 March 2025, Case No. 320/10955/23, proceeding No. 11-5апп25, Unified State Register of Court Decisions of Ukraine, https://reyestr.court.gov.ua/Review/126486069, accessed 19 April 2025.

41 Judgment of the Supreme Court of Ukraine (Grand Chamber) of 23 January 2025, Case No. 826/85/15, proceeding No. 11-198зва24, based on: ECtHR, *Buglov and Others v Ukraine, Applications Nos. 28467/18 and others, Unified State Register of Court Decisions of Ukraine*, https://reyestr.court.gov.ua/Review/124904865, accessed 19 April 2025.

42 Judgment of the Supreme Court of Ukraine of 11 April 2025, Case No. 280/8933/24, proceeding No. Пз/990/14/24, Unified State Register of Court Decisions of Ukraine, https://reyestr.court.gov.ua/Review/126550843, accessed 19 April 2025.

only where one party is actively serving in the Armed Forces, and that this suspension ceases when military obligations end. Crucially, the Court emphasized that judicial protection cannot be indefinitely deferred under Article 64(2) of the Constitution.[43]

Procedural discipline remains a key obligation for public authorities. In Case No. 120/11773/23, the Court held that general disruption caused by martial law is not sufficient justification for missing deadlines. Instead, authorities must provide evidence of specific and insurmountable obstacles.[44] This position was upheld again in Case No. 240/15719/21, reinforcing the principle of state responsibility in emergency contexts.[45]

These comparative insights underscore the relevance of European jurisprudence for Ukraine, where the constitutional system is increasingly called upon to reconcile emergency imperatives with enduring principles of legality and institutional accountability.

Conclusions and Recommendations

This article has examined the constitutional, administrative, and comparative dimensions of public service in Ukraine's customs system under martial law. The wartime environment has exposed significant legal and institutional vulnerabilities within the customs administration, ranging from procedural fragmentation and lack of normative clarity to the erosion of safeguards traditionally associated with rule-based public service. The hybrid regime that emerged during the conflict reflects both functional adaptation and legal improvisation,

43 Judgment of the Supreme Court of Ukraine of 25 July 2024, Case No. 420/8189/24, proceeding No. K/990/24460/24, Unified State Register of Court Decisions of Ukraine, https://reyestr.court.gov.ua/Review/120609394, accessed 19 April 2025.

44 Judgment of the Supreme Court of Ukraine of 3 October 2024, Case No. 120/11773/23, proceeding No. K/990/21718/24, Unified State Register of Court Decisions of Ukraine, https://reyestr.court.gov.ua/Review/122069372, accessed 19 April 2025.

45 Judgment of the Supreme Court of Ukraine of 30 January 2025, Case No. 240/15719/21, proceeding No. K/990/9307/24, Unified State Register of Court Decisions of Ukraine, https://reyestr.court.gov.ua/Review/124817733, accessed 19 April 2025.

often at the expense of legal certainty, personnel stability, and institutional coherence.

The comparative analysis confirms that other jurisdictions facing emergencies—such as Poland, Germany, France, and the EU Member States—have adopted diverse models for balancing flexibility with legality. Yet across these systems, certain principles remain constant: procedural fairness, proportionality, and the preservation of legal status as a structural guarantee. Ukrainian jurisprudence increasingly reflects these standards, especially through the decisions of its Supreme Court, which has consistently emphasized the binding nature of legal entitlements, the limits of executive discretion, and the necessity of individualized assessments even under martial law.

At the same time, institutional safeguards remain underdeveloped. The absence of a unified statute on customs officers' legal status contributes to inconsistent application of rights and responsibilities, while short-term appointments and reduced oversight increase exposure to legal uncertainty and abuse. Internal control bodies often lack customs-specific competence, further undermining procedural legality.

To address these challenges, the following policy and legislative recommendations are proposed: (1) Codify the legal status of customs officers in a dedicated statutory act, delineating their rights, duties, ranks, appointment procedures and disciplinary safeguards under both normal and emergency conditions; (2) Introduce transitional evaluation mechanisms (e.g., probationary periods, post-hiring reviews, or competency audits) to compensate for the suspension of competitive recruitment during martial law and ensure long-term professionalization; (3) Institutionalize a personnel reserve and reintegration framework for customs officers mobilized to military service, including tailored legal guarantees, social support, and professional development pathways; (4) Clarify the legal regime governing idle status (prostoi) in the public service, distinguishing it from private sector provisions and ensuring continuity of legal protection for officers in suspended regions; (5) Enhance the authority

and specialization of internal control departments, with a focus on customs law expertise, procedural legality, and due process in enforcement actions; (6) Integrate international human rights standards into administrative procedures and complaint mechanisms, ensuring access to remedies even under emergency restrictions; (7) Support digital transformation and psychological resilience programs in customs institutions, building on empirical evidence that links e-governance and organizational trust to institutional performance and integrity; (9) Monitor and limit the normalization of emergency exceptions, ensuring that temporary derogations do not erode the doctrinal foundations of legality, impartiality, and competence in public service.

Further research should explore the long-term institutional effects of emergency regimes on public administration in post-conflict reconstruction, including the potential need for differentiated legal regimes for frontline public servants. Comparative jurisprudential studies could also help refine the Ukrainian model in light of evolving European standards.

Ultimately, securing a resilient, accountable, and legally coherent customs service under martial law is not merely a matter of operational effectiveness but a test of constitutional maturity and institutional trustworthiness. Legal reform must proceed with both urgency and restraint, ensuring that the response to crisis strengthens rather than weakens the legal foundations of public service.

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