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On judges when the rule of law is under attack

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Abstract

This article analyses why the judiciary is such a main focus of those who attack liberal democracy today, how these attacks are shaped, how to recognise them, and how judges can counter them. First it addresses the connections between democratic decline and rule of law backsliding. Then it addresses some historical perspectives and compare the present situation to autocracies and totalitarian experiences in Europe in the twentieth century. Finally, it discusses different measures taken by autocratic rulers to limit judicial control, how to distinguish such measures from measures of legitimate legal reform, and how to counter such measures.

Key words

Judges; rule of law; backsliding

Resumen

Este artículo analiza por qué el poder judicial es hoy uno de los principales objetivos de quienes atacan la democracia liberal, cómo se configuran estos ataques, cómo reconocerlos y cómo pueden contrarrestarlos los jueces. En primer lugar, aborda las conexiones entre el declive democrático y el retroceso del Estado de derecho. Después aborda algunas perspectivas históricas y compara la situación actual con las autocracias y las experiencias totalitarias en Europa en el siglo XX. Por último, analiza las diferentes medidas adoptadas por los gobernantes autocráticos para limitar el control judicial, cómo distinguir dichas medidas de las medidas de reforma legal legítima y cómo contrarrestarlas.

Palabras clave

Jueces; Estado de derecho; retroceso

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1. Decline of Democracy and the Courts

Law and legal institutions are increasingly in the focus of current discussions over the future of democracy. Different projects measuring the state of democracy in the world agree that democracy is currently on the decline (Herre 2022). The V-Dem democracy report 2024 states that the level of democracy enjoyed by the average global citizen in 2023 is down to 1988 levels (Nord *et al.* 2024, p. 6). The last 30 years of democratic advances is now eradicated. Freedom House states that "In every region of the world, democracy is under attack by populist leaders and groups that reject pluralism and demand unchecked power to advance the particular interests of their supporters, usually at the expense of minorities and other perceived foes."[1]

Democracy is a term that has many uses, from the mere holding of competitive elections for offices of power to more maximalist uses that include checks on executive power, protections of civil liberties, a critical media, and active civil society. Many, when referring to a decline in democracy, refer to such maximalist understandings of democracy (Knutsen *et al.* 2024). A common term for such maximalist understandings of democracy is *liberal democracy* (Huq and Ginsburg 2018, p. 87).

Liberal democracy combines the idea of 'rule by the people' with the protection of individual rights. This gives *law* a pivotal role – not only as the set of norms recognized in society as legal, but also in the broader sociological sense where law includes legal institutions, practices, communication, values, and systems of formal and tacit knowledge (Deflem 2008).

In the form of legislation, law is the central means through which the rule of the people is expressed. At the same time, law places limits on legislation and the use of state power through the recognition and protection of rights. Once such rights are protected through various safeguards, such as judicial oversight, independent courts, and complaints mechanisms, tensions may arise. A basic tension between 'the rule of law' and the sovereignty of the people is apparent in many areas of contemporary society.

An answer to such a friction may be for the legislature or the executive power to seek to limit the function of legal institutions or to take control over them. Examples include battles over legal institutions in so-called 'illiberal democracies', civil society's use of courts for climate litigation and subsequent claims of judicialization of politics, struggles over how to balance family rights and children's welfare in domestic and international courts, suspension of rights to combat emergency situations like the war against terror and the COVID-19 pandemic. Much has been said about such conflicts under various labels, such as the rise of "populism", "rule of law backsliding", attacks on liberal democratic constitutionalism and separation of powers and the varieties, complexities, and contradictions in the relationship between populist movements and constitutional law (see Bogdandy and Sonnevend 2015, Rovira Kaltwasser *et al.* 2017, Kosař *et al.* 2019). EU legal scholarship has critically discussed available enforcement mechanisms to protect and strengthen legal institutions in such situations (Scheppele *et al.* 2020, Pech 2022).

[1] See: https://freedomhouse.org/issues/democracies-decline

In order to protect democracy by countering attacks on the judiciary it is necessary to recognize what is going on. A main purpose of this article is to explain why the courts, and the judiciary are such a main interest of those in power who attack liberal democracy today and how they go about attacking them. After all, there is the option that many autocratic rulers have used of just by-passing the courts or using them for pure show-trail purposes. First, I will address the connections between democratic decline and rule of law backsliding. This will show the connections on a conceptual level. Then I will present some historical perspectives and compare the present situation to autocracies and totalitarian experiences in Europe in the twentieth century. This will show how modern-day autocrats can grab power without resorting to the oppressive means of the dictators of the past. Finally, I will discuss the different measures taken by autocratic rulers to limit judicial control. The purpose here is to show how to distinguish autocratic measures from measures of legitimate legal reform, and how to counter the dismantling of the rule of law.

2. Rule of Law Backsliding

There is a close connection between democratic decline and rule of law backsliding, at least when democracy is understood in the form of liberal democracy. Rule of law backsliding has been defined as "the process through which elected public authorities deliberately implement governmental blueprints which aim to systematically weaken, annihilate or capture internal checks on power with the view of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party" (Pech and Scheppele 2017, p. 10). Central to this definition is the systematic and intentional capture of the legal institutions. Rule of law backsliding is therefore more than just defects in judicial independence and legal autonomy.

Some, such as Pech and Scheppele, even see the terms democratic decline and rule of law backsliding as interchangeable (Pech and Scheppele 2017, p. 11). Liberal democracy presupposes a system of institutional constraints on elected rulers and means of holding the rulers accountable (Boese *et al.* 2022, p. 14). The legal order and the courts constitute important elements of such institutional constraints. Therefore, efforts to abolish judicial checks on the legislative and executive powers, can be seen as attacks on liberal democracy itself.

The judiciary seem to be at the core of many battles over democracy (See Moliterno and Čuroš 2021 for an overview. See also COM(2022) 55 final). Poland forms a paradigmatic example. The Polish Law and Justice Party, PIS, had reform of the courts as an explicit part of their political platform when they campaigned for power. One of their first political actions was taking control over the Constitutional Tribunal. The tribunal was first paralyzed by different means such as court packing and refusal to publish its decisions, and then subsequently turned into an enabling institution for the government (Sadurski 2019). Next was the takeover of the National Council of the Judiciary, giving the majority party control over the appointment of judges and court presidents. Later, the Supreme Court and the ordinary judges were on the line.[2]

[2] For an overview over the successive measures taken by the PIS government against the courts see ECtHR *Grand Chamber Grzęda v. Poland*, paragraphs 14-28.

Hungary has seen a similar development. Here, the constitution was changed to transfer the power to appoint judges to the Constitutional Court to the National Assembly, and to limit the access to constitutional justice. By lowering the retirement age for Hungarian judges, the government sought control over the composition and management of the ordinary judiciary. The central administration of courts was reorganized, giving the majority party control over the appointment of judges and court presidents, and over the disciplinary proceedings against judges (Gyöngyi 2020).

Also in Romania, the courts were targeted by the government (Danilet 2020, pp. 113–116). Major issues were the creation of a Section for the Investigation of Offences in the Judiciary (SIIJ), the system of civil liability of judges and prosecutors, early retirement schemes, entry into profession, and the status and appointment of high-ranking prosecutors. In addition to the justice system, certain magistrates were persecuted on an individual basis. These reforms were political attacks following an increasing enforcement by the courts of laws against corruption. From 2005, people who saw themselves above the law were sentenced to long prison terms. Prosecutors conducted investigations against networks of businessmen, politicians, and judges.

The central role of the judiciary is not limited to Europe. Also hybrid regimes in Latin America employ the courts and take measures to control them in order to increase and consolidate autocratic power (Sanchez-Urribarri 2011).

Attacks on liberal institutions may be the first step of the road to dictatorships. This is, however, not a necessary end. With notable exceptions such as Russia and China, many non-democratic governments today are far from the totalitarian systems that dominated many countries during the last century. Some argue that the democratic decline that can be witnessed in many countries, is not the same as a breakdown of democracy. Few countries where democracy has declined, have tuned into the totalitarian oppression of twentieth century fascism or Soviet communism. Democracy and autocracy should not be seen as a dichotomy, and many countries that experience democratic backsliding may revert to a democratic state (Brownlee and Miao 2022). This emphasizes the need for a careful approach when addressing and evaluating different measures that holders of power take against the courts. Defenders of liberal democracy should not revert to the sweeping generalizations and slogans that characterize populist movements.

3. Historical Perspectives

Nevertheless, attacks on democratic institutions are real in many countries, and the legal order is at the core of such events. Autocratic rulers seek to control both the judiciary as such, as well as legal autonomy in a broader sense, understood as claims and processes through which law is defined or applied on its own terms. Our times is not the first when democracies have been under attack and where autocrats have strived to take control over society. The twentieth century witnessed the totalitarian systems of fascism/Nazism and Soviet Communism in many countries. In some, but not all cases, such regimes came to power by toppling democratic governments, in countries with established legal orders recognizing the basic elements of the rule of law.

It is beyond question that the outcomes of the autocratic rule in totalitarian societies such as Germany and the Soviet Union are in no way comparable to the situation in countries subject of this article. Not only the outcomes, but also the means of autocratization have

changed compared to the last century. Nevertheless, it makes sense to study and compare the methods of seizing power and in particular, how the judicial institutions were dealt with.[3] Whereas outright coups and election day frauds were more common in the twentieth century, the decline of democracy in the past decades often happened by executive aggrandizement, that is when "elected executives weaken checks on executive power one by one, undertaking a series of institutional changes that hamper the power of opposition forces to challenge executive preferences" (Bermeo 2016, p. 10). This weakening of checks regularly takes place by legal means, by establishing new institutions, but also by the use of existing courts and legislators. Control over the judiciary then becomes central, both to avoid legal obstacles and to ensure judicial compliance with the aims of the regime.

Many polities are governed both through legality and by unregulated force. In some societies, under some parts of their history, legality has hardly had any place at all. This seemed to be the case in the Soviet Union in the early stages after the revolution and was the case under the military dictatorship of Argentina with the tens of thousands of killings and disappearances thorough acts by the military or groups controlled by the military. In other polities, courts and repression by law coexisted with unregulated terror such as in Nazi Germany with its legal order and the SS operating at the same time.

Previous autocrats and dictators dealt differently with the courts than many of the present times. Some, such as Nazi Germany and many of the fascist regimes, encapsuled the legal order and pursued their policies mainly outside of the law, creating what was famously termed by Ernst Fraenkel *the Dual State*. Central to Fraenkel's theory is the prevalence of what he called the *normative state* despite the rise of the political and oppressive *prerogative state*. By the prerogative state Fraenkel referred to the "governmental system which exercises unlimited arbitrariness and violence unchecked by any legal guarantees", and by the normative state "an administrative body endowed with elaborate powers for safeguarding the legal order as expressed in statutes, decisions of the courts, and activities of the administrative agencies" (see Meierhenrich 2018, pp. 183–187). Both existed simultaneously, but the normative state existed under the acquiescence of the prerogative state. The Gestapo and the SS had the power to transfer entire spheres of life from the jurisdiction of the normative state to the prerogative state.

Others, such as Soviet Russia, abandoned courts as they were all together, so that judicial functions such as we know them in the Western legal tradition, ceased to exist (Graver 2019, p. 90). When a legal order was rebuilt, the judges were prohibited from an autonomous interpretation and application of the law, and were under the direct instruction of the Party and the procurator, even in individual cases.

In both cases, legal policy, understood as efforts to capture and transform the legal institutions, was not a main concern of those in power. The courts were marginalized, both as impediments to policy-making of the rulers and as means of implementing their policy. In the case of the Nazi and Fascist states this left the courts with a measure of autonomy and independence that made a transition of these institutions into the post-authoritarian liberal democracies of Western Europe possible (see Graver 2018).

[3] For a detailed analysis of this see Graver 2015.

The use og unregulated force is not unknown today, but it is more the exception, such as in the early phases of president Bush's "war on terror" or in the use of police violence against minorities or outcast groups of society. Some mix of legality and unregulated force seems to be present in every society, albeit this does not say much of the nature of the state and polity, since the mix may vary enormously both by the importance of the two elements and the relationship between them. The difference between a "normal" and a "criminal" state, writes Otto Kirchheimer in his book on political justice, is "the degree to which such islands are kept under control and whether they are encroaching on wider and wider fields of social activities" (Kirchheimer 1961, p. 322).

In many states where democracy is on the decline today, those in power do not dismantle the courts as in the Soviet Union or side-step them like in the Dual State. Instead, they employ measures to control the judges and prevent them from exercising normal judicial review. They work through the courts instead of by-passing them. The means are often clad in terms that are difficult to distinguish from reforms that are necessary and normal in any country where the main institutions have room for improvement, such as reaching a better balance between judicial independence and accountability and increasing the efficiency of the courts.

4. Means of undermining judicial control

In the 2020 Rule of Law Report on the rule of law situation in the European Union the Commission addressed the circumstances for the judiciary in Poland and stated that "Poland's justice reforms since 2015 have been a major source of controversy, both domestically and at EU level, and have raised serious concerns, several of which persist" (COM(2020) 580 final).

What the Commission described as "a major source of controversy", can be described as an ongoing tug of war between the EU institutions and the Polish government over different aspects of autonomy of law. The concern of the EU was over the autonomy of the judiciary of Poland, and the Polish government was fighting to achieve autonomy from national legal constraints and from European intervention.

The Polish measures were incremental, and became more and more overt attacks on judicial independence, although some observers right from the beginning described the process at "Rule of Law backsliding" (Pech and Scheppele 2017). In the end, the sum of measures were such that the ECtHR could conclude that the "breaches in the procedure for the appointment of judges to the Chamber of Extraordinary Review and Public Affairs of the Supreme Court were of such gravity that they impaired the very essence of the applicants' right to a 'tribunal established by law'" (ECtHR *Dolinska-Ficek and Ozimek v. Poland*, para. 350).

The EU initially faced challenges with defining the development legally under the framework of the EU treaties. One explanation for this may be difficulties in dealing with the concept of judicial independence and separating this concept from formal rules governing the judiciary and the courts. After all, such formal rules differ among the Member States, and it is difficult to require of one Member State that the appointment of judges should be separate from the executive power, when it is the established practice in other Member States that the judges are appointed by the executive. Even when there has been an increase in the establishment of formal guarantees and fixed procedures to

ensure judicial independence in most countries, the rules and models are by no means the same (Sibert-Fohr 2012, 1279–1360, 1306–1311). This makes it difficult to assess the real judicial independence in a specific legal order by regarding and assessing the formal arrangements.

Strategies to undermine judicial checks on the legislative and executive powers, encompass a broad range of measures, some general and well-known across the board of authoritarian regimes, and some tailored to the specific circumstances. The direct measures of the former Soviet and Nazi regimes, such as legislation abolishing courts or restricting their jurisdiction, or establishing politicized special courts, are not among the prominent measures today. On the other hand, taking control over central courts by court packing, is still a measure in use. András Sajó, in his study on the constitutional set-up of illiberal democracies, gives an overview of the measures employed (Sajó 2022). Covering different regimes such as Hungary, Poland, Turkey and Venezuela, the techniques he describes are simple and similar. One challenge when assessing the current rule of law backsliding is that the measures employed are such that they in other settings can be perfectly legitimate reforms of the judicial system. For example, the measures taken to reduce the number of first instance courts in Norway and Slovakia have quite different implications for independence and accountability, despite their similarity in form (see Čuroš and Graver 2020).

According to Sajó, the measures first target the constitutional courts, or in jurisdictions without constitutional courts, the apex courts. In order for the regime to appear constitutional, constitutional review as such is not abandoned. This makes taking control over the court by other means imperative. Changing the composition of the courts by court packing and dismissal of sitting judges is a common approach. The sitting judges can be dismissed by general means such as the lowering of the age of retirement, or individually, by trumping up criminal charges and by disciplinary measures and impeachment. Changes in appointment procedures are also common.

Once the constitutional review is captured, much is accomplished from the point of view of the illiberal ruler. Ordinary courts can often be controlled by legislation, since positive law is often observed by judges even if it has an illiberal or authoritarian content (Graver 2016, chap. 4). The judges are nevertheless often victim of the standard populist attacks against the elites, and are charged with being corrupt, inefficient and indifferent to the plight of ordinary people. Common measures to control the judiciary at all levels include changes in the bodies that appoint judges and court presidents to obtain executive control over the choice of judges, introduction of forms of administrative and disciplinary control with judges and changes in the judicial personnel to purge the courts of oppositional judges.

Measures that seem modest when compared with other means of oppression, turn out in a different light in the modern autocracies. Here the same methods appear as the vanguard of attacks on liberal democracy. This illustrates the importance of a contextual approach when examining and evaluating the relations between those who hold power over the legislative and executive functions of a state and the courts.

This difficulty is further emphasized by the fact that some of the measures and methods seem perfectly legitimate as measures of court reform and administration in countries where the rulers loyally accept the basic elements of division of power. There are some

basic ambiguities in the relationship between judicial review and democracy and in the relationship between judicial independence and holding judges accountable, that can be exploited by autocratic rulers. As pointed out by Sajó, the rule of law bears an inherent readiness to endorse its own abuse by containing elements that limit its applicability (Sajó 2022, p. 239).

In addition, as Petra Gyöngyi shows, also new values, such as the values of New Public Management may contribute and be used as a disguise to dismantle rule of law guarantees for judicial functioning (Gyöngyi 2019, p. 205). In her study of Hungary she shows how arguments of ensuring a balanced workload between courts, selecting adequately qualified judges and effective communication of the judiciary with its surroundings became a threat to the rule of law values of guaranteeing the neutrality of the judicial branch, merit-based judicial selections and the equality among candidates for the judicial office as well as the principle of a lawful judge.

5. Recognizing rule of law attacks

How then, do we distinguish between measures that are bona fide attempts to increase the efficiency and accountability of the judicial institutions and measures that undermine judicial independence and the rule of law? After all, courts are not separate from state power, but part of it. In most states, courts are part of the state in a wider sense. Generally, the executive bodies of a state have policies in place to ensure the quality of judicial activities as well as their harmonisation with the aims and goals of the state in general. Such policies may include the requirement of legal education to employ positions as judge in the courts, requirements, and control over the recruitment of judges, the establishment of organisational structures and judicial hierarchies etc. Also, more informal means may be employed. The rules governing the use of different policies towards the judges, and the actual practice of the executive authority varies among states.

This is one area where states governed by the rule of law differ from states that do not accept or abide by these standards. The social role of the judiciary and the habitus of judges and those acting for the government are historically dependent (Graver 2018). The way judges are appointed in different countries illustrate this. In many of the old democracies of Western Europe, judges are appointed by the executive power, without this raising concerns about judicial independence. In other countries, political control over the appointment of judges is perhaps *the* basic issue.

All this emphasizes the need for a contextual and holistic approach when evaluating measures taken to reform the judicial system. States cannot be prevented from taking legitimate and legitimate decisions to reform the judiciary. Such measures may be necessary to ensure the proper functioning of the courts and thus to the protection of the rule of law. As pointed out by Peter Čuroš, measures of court reform may be necessary to maintain public trust if the level of trust is low and may also be necessary to ensure an effective administration of the courts (Čuroš 2023). The experience precisely from Slovakia illustrates how important it is for society to have measures to hold judges accountable. How then do we distinguish between measures that are legitimate reforms and measures that undermine the role of the courts in protecting the rule of law? (Čuroš 2023).

To distinguish it is necessary to look at both subjective and objective elements. The aim or intent behind the measures are important. Čuroš emphasizes the need to distinguish between a breach of independence when representants of executive, legislative or judicial power seek to affect the outcome of cases pending before the court from the breaches of independence that reside in the insufficient separation of the branches of state power. This distinction can be drawn by regarding the legislator's intention and the formal compliance with international recommendations. These indicators are, however, not decisive. The main point is whether the legislator has an ultimate goal of interfering with judicial decision-making and so avoid government accountability for particular deeds according to a need and thus accomplish a change in the judge's position as a neutral arbiter.

Bojarski, in his work on judicial resistance in Poland, adds an objective criterion. The activities aimed at limiting judicial independence must be in violation of the law (Bojarski 2023, p. 84). By violation of law he means confirmed "breach(es) of the law, or rule of law standards accepted by the state itself and enshrined in its national law, including constitution, and international law." (*ibid*.) That there is a manifest breach of domestic law is one of the three main criteria of the so-called Ástráðsson-test of the ECtHR for assessing whether a body is a "tribunal established by law" under article 6 of the ECHR (*Guðmundur Andri Ástráðsson v. Iceland)*.

How to identify reform measures as attacks on judicial independence has been addressed several times by the ECtHR and the EUCJ in cases against the governments of Poland and Hungary. While judicial independence requires rules to ensure independence and impartiality of judges, neither Article 6 nor any other provision of the ECHR requires States to adopt a particular constitutional model governing in one way or another the relationship and interaction between the various branches of the State. Nor do they require those States to comply with any theoretical constitutional concepts regarding the permissible limits of such interaction. The question is always whether, in a given case, the requirements of the ECHR have been met (see, inter alia, *Kleyn and Others v. Netherlands*, § 193, and the case-law cited).

Measures that may be difficult to evaluate as "reform" or "attack" on the judiciary may appear in a different light when seen as part of a pattern rather as isolated events. In its judgment in *Grzęda v. Poland*, the ECtHR stated:

> The Court notes that the whole sequence of events in Poland (see paragraphs 14–28 above) vividly demonstrates that successive judicial reforms were aimed at weakening judicial independence, starting with the grave irregularities in the election of judges of the Constitutional Court in December 2015, then, in particular, remodelling the NCJ and setting up new chambers in the Supreme Court, while extending the Minister of Justice's control over the courts and increasing his role in matters of judicial discipline. (…) As a result of the successive reforms, the judiciary – an autonomous branch of State power – has been exposed to interference by the executive and legislative powers and thus substantially weakened. The applicant's case is one exemplification of this general trend. (*Grzęda v. Poland*, para. 348)

The CJEU has emphasized this point similarly in its ruling in *A.K. and others*, where it stated that: "one or other of the factors thus pointed to by the referring court may be such as to escape criticism per se and may fall, in that case, within the competence of, and choices made by, the Member States." It went on to state, however, that when taken

together, the different factors may throw doubt on the independence of a court or its members, despite the fact that, when those factors are taken individually, that conclusion is not inevitable (C-585/18, C-624/18 & C-625/18 | *A.K. v. Krajowa Rada* para. 142).

The main point therefore, is to review particular reforms of measures in light of both other reforms and practices. Rulers seeking to curb or incapacitate the courts seldom admit that this is their intent and aim of a measure. On the contrary, they often try to portray the course of action as a necessary reform of institutions in need of reform to function according to the demands of the rule of law, for example by increasing accountability to fight corruption or to solve problems of lack of efficiency. When seen in a larger context, the real intent may be revealed.

In Case C-718/21, *L.G. v Krajowa Rada Sądownictwa*, the EUCR ruled that the Chamber of Extraordinary Control and Public Affairs of the Supreme Court of Poland did not constitute a 'court or tribunal' within the meaning of Article 267 TFEU. The EUCR stated that the guarantees of independence and impartiality "presuppose rules, particularly as regards the composition of the body and the appointment of its members, that are such as to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it." It reiterated the contextual approach by stating that "the fact that a body, such as a national council of the judiciary, which is involved in the procedure for the appointment of judges is, for the most part, made up of members chosen by the legislature cannot, in itself, give rise to any doubt as to the independence of the judges appointed at the end of that procedure." But it then continued: "However, according to that case-law, the situation is different where that fact, combined with other relevant factors and the conditions under which those choices were made, leads to such doubts being raised." One such relevant factor was that substantial amendments to the law on the council appointing judges (the National Council of the Judiciary (KRS) were made at the same time as the adopting of a substantial change of the Supreme Court where a number of new members were to be appointed.

The circumstances of the case were quite clear. Here the question was whether the Chamber of Extraordinary Control and Public Affairs of the Sąd Najwyższy (Supreme Court) was a 'court or tribunal' within the meaning of Article 267 TFEU. The reason for doubt was that the appointment of the three members concerned of the Chamber of Extraordinary Control and Public Affairs was made on the basis of proposals from the National Council of the Judiciary (KRS), a body whose independence has been called into question on numerous occasions, and after Supreme Administrative Court had suspended the enforceability of the resolution entailing the proposal. The EUCJ based its finding on the ruling of the ECtHR in *Dolińska-Ficek and Ozimek v. Poland* which had found that the appointments demonstrated, on the part of the executive, an utter disregard for the authority, independence and role of the judiciary and deliberately sought to interfere with the effective course of justice (§ 339). The law had been changed so that it lacked sufficient guarantees of the independence of the KRS from the legislative and executive authorities and the appointments were made based on a resolution that had been suspended by the order of the Supreme Administrative Court of Poland.

6. Appearance and trust in impartiality

One cannot only look at the level of rules and formal institutional arrangements. Legal norms and legal actors (that constitute the legal order) vary in their dependence on power relations, social networks, and institutions, as well as values, cultural norms, gender relations, science, and bodies of knowledge. It is therefore difficult to determine dependence or independence of a judge or a court by looking at the existence or lack of certain formal rules. In fact, there are findings that suggest a negative correlation between high degrees of formal independence and judicial independence as measured for example by the rule of law index (Gutmann and Voigt 2020). Countries, such as the Scandinavian countries and the UK have high levels of judicial independence and rule of law in indexes that measure such things, and at the same time a relatively low level of formality in the protection of these values.

An important element in the assessment that is highlighted both by the ECtHR and the EUCJ is the confidence which courts must inspire in the public in a democratic society (C-585/18, C-624/18 & C-625/18 | *A.K. v. Krajowa Rada* para. 127). Paramount is the confidence which the courts in a democratic society must inspire in the public, and first and foremost in the parties to the proceedings. Confidence and trust are basically empirical questions that are difficult to determine objectively. Here, opinions of international organisations and bodies may be important indicators (*Dlinska-Ficek and Ozimek v. Poland*, para. 343).

In A.B and others, the EUCJ, with reference to its ruling in A.K. and others, emphasised that "guarantees of independence and impartiality required under EU law presuppose rules (…) that are such as to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it" and reinforced the contextual approach to the question of judicial independence that it developed in A.K. and others, stating for example that "account should also be taken of other relevant contextual factors which may also contribute to doubts being cast on the independence of the KRS (National Council of the Judiciary) and its role in appointment processes such as those at issue in the main proceedings, and, consequently, on the independence of the judges appointed at the end of such a process." (*A.B. and others v Krajowa Rada Sądownictwa and Others*, para. 132). It pointed to the fact that the reform of the National Council of the Judiciary took place in conjunction with the adoption of the new Law on the Supreme Court, which lowered the retirement age of the judges of the Supreme Court, and applied that measure to judges currently serving in that court. Therefore, the establishment of the National Council of the Judiciary in its new composition took place in a context in which it was expected that many positions would soon be vacant in the Supreme Court.

The EUCJ concluded that:

> It must be observed that such legislative amendments, particularly when viewed in conjunction with all the contextual factors mentioned in (…) this judgment, are such as to suggest that, in this case, the Polish legislature has acted with the specific intention of preventing any possibility of exercising judicial review of the appointments made on the basis of those resolutions of the KRS and likewise, moreover, of all other appointments made in the Sąd Najwyższy (Supreme Court) since the establishment of

> the KRS in its new composition. (*A.B. and others v Krajowa Rada Sądownictwa and Others*, para. 138)

According to the case-law of the ECtHR, there is a basic requirement that the judicial body "presents an appearance of independence" (*Findlay v. the United Kingdom*, § 73, *Tsanova-Gecheva v. Bulgaria*, § 106). This requirement is expressed by the EUCJ as a whether the rules prevent "legitimate doubts from arising, in the minds of individuals, as to the independence" (*A.B. and others,* para. 136). Conclusive assessments of independence can therefore not be drawn from the existence or non-existence of particular rules or arrangements. States, after all, have different ways of organising their courts.

The ECtHR has underlined the close link between independence and the notion of "objective impartiality", that is if there is any "legitimate reason to fear a lack of impartiality" (*Castillo Algar v. Spain*, § 45). The assessment must therefore take into consideration the specific context of the legal order under examination. In distinguishing between the disciplinary system for judges of Portugal and the Ukraine, the ECtHR stated, regarding the finding of a breach of Article 6 in the case of *Volkov* from Ukraine: "these findings should be regarded as a criticism based on the circumstances of the case and applicable in a system with serious structural deficiencies or an appearance of bias within the disciplinary body for the judiciary, as was the case in the specific context of the Ukrainian system at the time, rather than as a general conclusion." (*Castillo Algar v. Spain*, para. 158). Based on this, the Court found that the fact that the judges who performed the review of the acts of the disciplinary board could themselves be subject to disciplinary measures by the same board, was problematic in the Ukraine but not in Portugal.

Context then, is everything. One must look at the intent behind the measures. These might not be openly stated but can be inferred from a pattern of measures employed. The overall appearance of judicial independence is another factor. Legitimate doubts and lack of trust are factors that must be taken into account. This is not only a matter of formal rules, but also of tradition and legal culture. There are many ways of safeguarding judicial independence, and formal rules are not even necessary. Formal rules differ among the States, and it is difficult to require of one State that the appointment of judges should be separate from the executive power, when it is the established practice in other States. But formal rules are not without importance. Having such rules in place may be crucial where the lack of trust is high, and the tradition of respecting judicial independence is lacking or weak.

7. Explaining the Centrality of Legal Policy

Why is it that present day autocrats see the legal order and the courts as such an important adversary? Why do they not just encapsule the courts or by-pass them as former day autocrats? After all, there are many other institutions of liberal democracy that seek to keep the power of the executive and the legislature in check besides the courts. Autocrats in many other situations have sought to control power more directly, by taking control over the military, by limiting political expression and by incapacitating political opponents. In countries where this has taken place, it has seldom been met with serious opposition from the courts, judges seem to succumb to power (see for example

Graver 2016, p. 53). It is therefore not evident why the courts should be the first target of modern autocrats.

Many different factors may contribute to the answers to these questions. One such factor may be that present day autocrats are less ambitious and more restrained when it comes to their aim to control society. Another may be that courts are simply more important and powerful as obstacles for autocrats than they were in the last century. Judicial institutions today are tied in network relations to international courts and their conditions and operation are under scrutiny by international institutions such as the OSCE Office for Democratic Institutions and Human Rights, the Consultative Council of European Judges, the UN Special Rapporteur on the Independence of Judges and Lawyers, the Venice Commission, the Council of Europe, the EU and many others. Yet another may be explanations more specific to the states and societies in question. Autocrat rulers may see benefits in using the courts to pursue their policies. Some have seen "autocratic legalism", the use, abuse and non-use of law in the service of the executive branch as a primary mechanism facilitating authoritarianism (Corrales 2015).

7.1. The Rise of Judicial Power and Political Backlash

Courts are obviously more powerful in Europe today than they were in the last century. Jurisdiction to exercise judicial review of the legislative and executive powers is in many jurisdictions a relative recent phenomenon. Going back a few decades, we have many examples of the legal order and legal institutions operating in an autonomous and independent way, without challenging legislation or executive decisions. The courts of countries such as England, Denmark, Sweden and many others were certainly independent, but had limited powers to review legislation and other acts of the state. We do not have to go further back than to 1990 and the famous Factortame I decision of the EUCJ, to find a legal situation where English courts had no powers to grant an interim injunction against the government (*The Queen v Secretary of State for Transport*). As late as in the 1980's, judicial review with legislation was not universally recognized in the countries of Western Europe (Smith 1995).

The rise of judicial review, based on the protection of liberal rules and values, leaves a narrower scope of action for populist politics. This makes incapacitation of the courts and important objective. Sometimes, mighty forces in society attack the courts out of self-interest. This has notably been the case in Romania, where the justice reforms came as a response to the growing effectiveness of the courts in combatting corruption in the leading levels of society (Danilet 2020).

One of the most fundamental legal changes in recent history has been the rise of international law. The historical origins of human rights are sometimes traced centuries or even thousands of years back in time but apart from international humanitarian law it was not until after WWII that the development of international (human rights) conventions and international courts took off, and it was not until the 1970s that these began to seriously impact national law (Alston 2013). This was a development which accelerated significantly after the end of the Cold War, only to slow down again and encounter increasing resistance during the last two decades (Lagoutte *et al.* 2007, Huneeus and Madsen 2018, Lohne 2019). Taken together, these diverse developments

have strengthened and supported the autonomy of law. But also lead to challenges and outright attacks.

In Europe, Europeanisation has been a main driver of the development of judicial control over legalization and the executive. This has been a main function both of the European Union and of the European Convention on Human Rights. Within EU law, the principles of direct effect and the precedence of EU law requires national courts to refuse to apply any conflicting provision of national legislation (*Amministrazione delle Finanze dello Stato v Simmenthal SpA*). The adoption of Human Rights acts to implement the European Convention gave national courts in most European Countries the power to declare invalid or inoperative legislation that contradicts the rights of the convention. Both these developments lead to an increase in what was early characterized as a process of judicialization of politics, that is an expanse of the province of the courts at the expense of the politicians and/or the administrators (Vallinder 1994).

Empowering courts to exercise control over administrative and legislative decisions is in many cases the result of willed politics of elected parliaments and parliamentarian governments. After all, the legislation implementing the European Convention and subordinating national legislation to it has been passed by parliamentary majorities. In Norway, the basic human rights were embedded in the constitution with two-thirds majority in 2014. There has thus been a consistent electoral majority in many countries favoring judicial limitations of the decisions of the same majority. The judicialization of politics is, however, not solely the result of majority politics. Courts have gained powers also by expansive interpretation of constitutions and international instruments.

Political criticism of the judicialization of politics is not something reserved for autocratic rulers. As courts have gained power over politics, they have increasingly come under criticism (Follesdal 2020, Stiansen and Voeten 2020). A rise of judicial self-governance in Europe through the introduction of judicial councils and independent court administration has influenced the concept of separation of powers. In some cases this has led to a lack of accountability and societal control which has enabled actors within the judiciary to grab power over the courts and use it for their own purposes (Kosař 2016).

Particularly in intermediate regimes between democracy and autocracy, courts have a strategic importance. "In these intermediate political regimes, courts can function in different ways. They can be the catalysts of the process of democratization and the guardians of constitutionalism when the rule of law is under attack. Or courts can play a negative role if they help an authoritarian political leadership to survive or do nothing to defend a constitutional democracy when it is in danger," writes Mátjás Bencze (2021, p. 1283). This dual potential of the courts may explain why they are targeted by majority rulers who wish to dismantle liberal democracy.

Judicialization of politics is a trend to put increasing areas of political and administrative decisions under the scrutiny of the courts. It alters the balance between democratic accountability and judicial control. Discussions over the right balance between democratic accountability and judicial control are both legitimate and necessary. In European law we know this discussion under the labels of "subsidiarity" and "margin of appreciation". The wish to constrain judicial control over politics is not limited to autocratic rulers.

7.2. Path Dependency and Historical and Societal Context

Legal change may seem sudden and dramatic when observed from the outside, for example when a new retirement age is introduced or when a new disciplinary chamber is created within a Supreme Court. Closer observation may show, however, how changes are made as part of a larger historical context. Zoltan Flech points to the "historical tradition of monolith public law and politics, subordinate organizational culture, underdeveloped jurisprudence, and the non-democratic and anti-liberal attitudes of the staff" as "the main explanatory factors for the persistent truncation of judicial independence" in present-day Hungary (Fleck 2021, p. 1315). Sanchez-Urribarri points out how the path to submissiveness of the Venezuelan Supreme Court under Chavez was largely based on institutional weaknesses that are rooted in the pre-Chávez era (Sanchez-Urribarri 2011, p. 864).

The legal concepts, organization of rules and historical experiences often explain the form that legal change takes on the micro level (Bell 2013). Even such a dramatic change as the fall of state socialism in Soviet Russia and the Central and Eastern European states was incremental and slow when seen from a legal perspective (Markovits 2007). Yugoslavia introduced an Act on Suppression of Unfair Competition and Monopolistic Agreements in 1974; Hungary passed its Act on the Prohibition of Unfair Economic Activities in 1984; and Poland established administrative courts in 1980 and a Constitutional Tribunal in 1985. "On the other side of the watershed of 1989, socialist legal features of the past have continued into the present. (…) The procurator general's task to watch over the general observance of the laws still serves to help post socialist citizens with the enforcement of their rights" (Markovits 2007, p. 248). This shows that the transition from communism to democracy that took place in Central and Eastern European states 1989–1991 was not a sudden revolution. In many cases legal foundations of this break were enacted years in advance.

On a more macro level, both Nazi Germany's and Soviet Russia's dealings with the courts may be explained by path dependency and the two countries' different embeddedness in the Western legal tradition (see Graver 2019). Maybe such factors also may contribute to explain the centrality of the judiciary in the policies of Poland and Hungary as well. Still, after three decades, remnants of the socialist past can be found in the legal orders. Referring to Hungary, Zoltán Szente highlights state paternalism and the dominant role of textual interpretation of the law in judicial practice as examples of factors deeply entrenched in legal culture (Szente 2021).

Many parts of central and Eastern Europe were under the domination of the Austrian Hungarian empire before 1918. Austria-Hungary reformed its judicial system in the 18th and 19th centuries, and based it on the Prussian bureaucratic model (Bencze 2021, p. 1287). Although this model had bureaucratic traits, it also emphasized an independent judiciary with high standards of independent and incorrupt conduct.

The situation of the judiciary deteriorated in many of the successor countries to the Habsburg monarchy after the first world war. Politicians interfered in the workings of the courts, and low salaries of the judges lead to corruption (Kühn 2021, p. 1233).

One of the effects of the communist take-over of Hungary was to strengthen the bureaucratic character of judicial work.[4] During communism, Hungarian judges were under political scrutiny by local organizations of the Communist Party and by court presidents who had wide-ranging powers in managing the whole judiciary. Judges were under the explicit obligation to uphold "socialist legality", and party membership, although not compulsory, was indispensable to the judicial career and promotion. Criminal cases "on which (there was) uncertainty or disagreement among the heads of competent organs" has to be brought before the Coordination Committee, composed of the secretary of the communist party responsible for administrative matters, the Minister of the Interior, the Minister of Justice, the Chief Prosecutor and the President of the Supreme Court (Szente 2021, pp. 1320–1322).

Similar processes took place in other Central European countries. In Czechoslovakia, "the communist regime was very efficient in taking advantage of the valid laws governing the administration of the judiciary. Those laws enabled the new totalitarian power to assume complete control of the entire judicial system over a period of several months without actually transforming the system in any significant way" (Kühn 2021, p. 1236). The power of the court presidents made it easy for the government to take control by controlling these key positions. Kühn even characterizes the strong position of court presidents as the "Achilles' heel of judicial independence in the continental legal system" (Kühn 2021, p. 1239).

The political transition of 1989 did not include structural reforms of the judicial system. Bencze explains this with the fact that judges were generally conceived of as neutral bureaucrats in the late socialist period, and not as servants of the communist regime (Bencze 2021, p. 1289). A result of this was that the control with judges by their superiors continued into the liberal democratic regime. At the same time, the formalistic legal approach to judicial reasoning continued. The Hungarian judiciary continues to be highly centralized and under administrative control, as it was under the communist regime. This makes it more susceptible to disciplining measures from the regime.

8. Judicial resistance of measures attacking the courts

In most cases judges comply with measures dismantling the rule of law, even if the measures break with the past. Resistance against the state is not a normal judicial reaction (see Graver 2015, Chapter 4). The ability of judges to resist political pressure depends on the internal organizational model of the courts and judicial ideology (Bencze 2021). It is an integral part of the judicial role that the judge should apply the law whether he or she personally agrees with it or not. This also applies when the regime is authoritarian. The judge's personality should not influence the act of judging. This is an important part of the rule of law and that law should be applied equally to all. Most judges stay in their positions when authoritarian forces come to power and continue to apply the law as the authorities see it, even when the authorities come to power illegally and use the law to oppress opposition and to implement their policies.

Judicial compliance often goes beyond basing judicial decisions on the law. The law is often open to interpretation. To avoid judicial interference in the exercise of power,

[4] Peter Čuroš makes the same point for the Czechoslovakian judiciary, see Čuroš 2021, p. 1257.

rulers need the judiciary to interpret the law in accordance with their interests and needs, that is to break down the autonomous interpretation and application of the law that characterizes the rule of law. The Hungarian rulers use the constitution and informal means to influence the attitudes of the judges and the means of legal interpretation. The constitution contains several provisions which are aimed at guiding the functioning of the courts and limiting their interpretative autonomy (Szente 2021, p. 1324). The basic law article 28 states that

> [i]n the course of the application of law, courts shall interpret the test of the legal regulations primarily in accordance with their purposes and with the Fundamental Law. Primarily, the preamble of the legal regulation, and the reasoning of the legal regulation or its amendment shall be taken into account when the purposes of the legal regulations are established. When interpreting the Fundamental Law or legal regulations, it shall be presumed that they serve moral and economical purposes which are in accordance with common sense and the public good.

By this, the constitution specifies exactly what should be understood concerning the purpose of a legal act and limits the judges' teleological approach to the aims stated by the legislator itself in the preamble and the preparatory material. This threatens to reduce judicial interpretation into a mechanical exercise, in line with the heritage of the communist time (Gyöngyi 2020, p. 205). As pointed out by Andras Sajó, political loyalty can be, and has been, coated in the logic of formalistic, legitimate judicial reasoning. Formalism also helps to declare sensitive applications to the courts as inadmissible (Sajó 2022, p. 184).

Closely related to their approach to law and legal method, is the way the judges see themselves, their *habitus* in the meaning of Pierre Bourdieu, individual and collective practices generated by history. Habitus is "a subjective, but not individual, system of internalized structures, schemes of perception, conception, and action common to all members of the same group or class" (Bourdieu 1977, p. 86). Bourdieu defines habitus as "systems of durable, transposable dispositions, structured structures predisposed to function as structuring structures, that is, as principles which generate and organize practices and representations that can be objectively adapted to their outcomes without presupposing a conscious aiming at ends or an express mastery of the operations necessary in order to attain them" (Bourdieu 1990, p. 54). Habitus, as structured and structuring dispositions is thus a part of an informal institution of shared rules and traditions within a group or community that work outside officially sanctioned channels. It defines "things to do or not to do, things to say or not to say, in relation to a probable, 'upcoming' future (un à venire), which (…) puts itself forward with an urgency and a claim to existence that excludes all deliberation" (Bourdieu 1990, p. 53).

In sociological terms judicial independence is something that must be part of the habitus of the practices of the legal profession, and form part, not only of the orthodoxy of a society based on the rule of law, but also its doxa, the tacit knowledge, practices and dispositions of the actors within the legal institutions. In this way it can form the sense of reality and become natural and inevitable to everyone. As mental structures the doxa and orthodoxy produce ethical dispositions as well as consensus about the sense of the world – things go without saying because they come without saying.

The habitus of judges comes close to what John Bell describes as the *institutional judicial culture*: "a set of beliefs and attitudes that give shared meaning to an activity" (Bell 2006, p. 4). As Bell points out, this includes unconscious features. Therefore, the analysis of the habitus or institutional culture is a matter of interpretation and construction, the reality of which "depends on the degree of correspondence between it and the perception of the act" (*ibid*.). One test of such correspondence is evidence that those thus described could recognise themselves in the presentation without distortion.

Peter Čuroš claims that "Habitus as the underlying structure of the Slovak judiciary seems to rest in the inclination of the stronger players within the judiciary to form alliances to govern the judicial branch, as well as an inclination of the silent majority to submit to this power for pragmatic reasons" (Čuroš 2021, p. 1259). He argues that there is a continuity in judicial habitus from a subservient, oppressed instrument of power during communist rule to a structurally independent yet mentally dependent branch of state power of the present (Čuroš 2021, p. 1251). He points out that judicial independence is about the judicial mentality and self-image, of the judges to not surrender to pressure, as well as on the part of influential players, like politicians, superiors, and business leaders, not to interfere and put pressure on judges.

A general problem of safeguarding the rule of law as functioning limits on political power seems to be the lack of internalisation of the values and attitudes underlying the rule of law in the legal and broader legal-cultural, political and societal frameworks of the former communist countries (see Gyöngyi 2019, p. 206).

In addition to rules, practices, appearance and trust, judicial independence is thus also a frame of mind, a mentality of judges and an element of legal culture (Laffranque 2014, p. 148). Judges need the ability to take ethical and moral leadership and at the same time be responsive to external demands (Sibert-Fohr 2012, p. 1300).

Such a frame of mind is not only important for judges. In order for liberal democracy to work, institutional and cultural guarantees must be taken seriously by actors who act in good faith. If the main approach of those in power is "to find gaps in legal prohibitions in order to execute the transactions that enhance government power," (Sajó 2022, p. 242) the rule of law breaks down as a protector of liberal democracy.

9. How should we deal with it?

Autocrats seeking to establish their position by limiting the function of legal institutions or to taking control over them exploit tensions that are inherent in liberal society between democracy and the rule of law. There is a close connection between democratic decline and rule of law backsliding, where elected public authorities deliberately and systematically weaken, annihilate or capture internal checks on power with the view of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party.

However, not all critique by the executive and the legislative power of the judiciary are signs that the rule of law is being attacked or dismantled by rulers wishing to operate without the constraints of liberal democracy. Division of power with its checks and balances will necessarily give rise to occasional conflicts and differences of opinion over policy measures and the legitimate jurisdiction of courts over politics. It is when one

power seeks to do away with the powers of another branch all together that liberal democracy is threatened.

As the analysis above has shown, there are often no clear and "hard" indicators that identify a measure directed at reforming of reorganizing the legal institutions as a hostile measure aiming to take control over the courts of empowering them. Also, the ability of judges and others to react to such measures vary, depending on the historical and cultural traditions of a given society. In one country, having the executive appoint judges is detrimental to judicial independence, in another this is the normal procedure without necessary negative effects on judicial independence.

Overcoming the difficulty of identifying measures as attacks on the rule of law, not legitimate instances of reform of the judiciary and the legal order, is but one of the obstacles faced by international institutions. The EU experience has shown many other obstacles and inefficiencies in dealing with rule of law backsliding in Member States (see Pech *et al.* 2021). This shows that international obligations and institutions are not sufficient to protect society from democratic decline and rule of law backsliding. The values of democracy and liberty must be protected from within society for the protection to be effective.

The action of lawyers, judges, prosecutors, and other members of the legal community may be of great significance. The research inspired by Carpick, Halliday and Feeley on the role of the legal complex in the development of liberal rights shows the importance of legal elites in the development of the rule of law. Through studies of many countries at different times, they have shown how members of the legal profession in different positions within the legal order, the administration and the private sector mobilize as a legal complex in favor of political freedoms. As Liu and Halliday write in their book on defense lawyers in China:

> Over the last four hundred years and across the world, individual and collective action by lawyers, and often a wider range of legally trained occupations such as judges or legal academics, to transform illiberal politics into an open and liberal political society can repeatedly be observed. In this new political society, institutions and practices are both transformed and maintained such that the structures of society press insistently, even if unevenly and episodically, towards basic legal freedoms, vibrant civil societies, and moderate states. (Liu and Halliday 2016, p. xi)

The studies of legal complexes show how members of the legal profession regularly organize themselves as a pressure group in situations that are critical in the struggle for political freedom. This is something that consistently happens in the name of the law and with some support both from the bar, judges, public lawyers, and legal scholars, often in collaboration with civil society organizations. Members from different parts of the legal profession come together in temporary clusters as segments of the legal complex. The connect through professional or personal networks, temporal alliances over profiles cases, in formal or informal communities and many other ways.

A driving force behind such mobilization is probably that the elements of political freedom for which they struggle, such as due process and the independence of the different legal professions, are in the interest of these legal professions. Lawyers thus contribute to the rule of law by pursuing their own professional interests.

The same insights can be applied to the reverse situation where the rule of law is under attack. Lukasz Bojarski has shown how the legal culture in Poland was able to put up a defense, despite its communist legacy, thanks to the involvement of civil society organizations in the defense of judicial independence (Bojarski 2024).

The Polish example shows how important civil society and specialized social organizations can be in the face of attacks on the rule of law, courts and their independence, and liberal democracy in general (Bojarski 2024, p. 1382). This is an important message to defenders of democracy and rule of law in all places where these values are under attack.

National actors, however, need support from the international community. International institutions such as the ECtHR and the CJEU are established to ensure and protect the rule of law in the Member States. The existence of international institutions is a main difference from the situation in Europe up until the last half of the twentieth century. Experience from the last decades show, however, that it is difficult for international institutions to influence strong political currents in individual states. International law and international institutions can be disregarded by political leaders.

What international institutions can do, however, is to give arguments and legitimacy to those struggling for the rule of law their national environments. Vague and many-faceted concepts such as the rule of law and judicial independence can be given a more objective and operational meaning by the judicial practice of international courts. This may contribute to strengthening the position of domestic actors. The last years in Poland show many examples of this, with more than 50 cases lodged by Polish judges at the ECtHR against the government in 2018–2021. In this setting, the judicial dialogue that is established between national courts and supranational courts in Europe takes on a new significance. What is at stake is not only the dissemination and respect for human rights. We now deal with the actual essence of legal protection in modern society. This is an important challenge for the institutions of Europe and a defining moment for the future of the rule of law.

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