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Deconstructing Judicial Legitimacy: The "Test of Independence" as a Contested Remedy for Poland's Politicized Judiciary

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DECONSTRUCTING JUDICIAL LEGITIMACY: THE "TEST OF INDEPENDENCE" AS A CONTESTED REMEDY FOR POLAND'S POLITICIZED JUDICIARY

Destrutturare le legittimazione del potere giudiziario: il "test di indipendenza" come rimedio controverso per il potere giudiziario politicizzato in Polonia

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Abstract

[Eng.] This article examines the mechanisms for testing judicial independence introduced in Poland following the 2017 reforms of the National Council of the Judiciary. Through an analysis of Supreme Court case law from 2020-2024, the study reveals fundamental paradoxes in applying both the juridical test (Supreme Court resolution of 2020) and the statutory test (2022 Act). The research demonstrates that these mechanisms, rather than restoring legitimacy to the judiciary, have deepened systemic fragmentation through selective application, auto-immunization of questioned judges, and procedural asymmetries between court chambers. The article argues that the test of independence constitutes a symptom of constitutional crisis rather than its remedy, reflecting the impossibility of system self-repair when key oversight institutions have been captured. The Polish case offers broader lessons about the fragility of judicial independence and limitations of formal mechanisms in addressing democratic backsliding.

Keywords: Judicial Independence – Legitimacy Crisis – Poland – Rule of Law – Constitutional Capture – Democratic Backsliding.

[It.] Questo articolo esamina i meccanismi per verificare l'indipendenza giudiziaria introdotti in Polonia dopo le riforme del 2017 del Consiglio Nazionale della Magistratura. Attraverso l'analisi della giurisprudenza della Corte Suprema dal 2020 al 2024, lo studio rivela paradossi fondamentali nell'applicazione sia del test giurisprudenziale (risoluzione della Corte Suprema del 2020) che del test normativo (Legge del 2022). Anziché ripristinare la legittimità, questi meccanismi hanno approfondito la frammentazione sistemica attraverso l'applicazione selettiva e le asimmetrie procedurali. L'articolo sostiene che i test di indipendenza costituiscono sintomi della crisi costituzionale piuttosto che rimedi, riflettendo l'impossibilità di auto-riparazione del sistema quando le istituzioni chiave di controllo sono state catturate. Il caso polacco offre lezioni più ampie sulla fragilità dell'indipendenza giudiziaria e i limiti dei meccanismi formali nell'affrontare l'arretramento democratico.

Parole chiave: indipendenza giudiziaria – crisi di legittimità – Polonia – stato di diritto – cattura costituzionale – arretramento democratico.

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1. INTRODUCTION: THE PARADOX OF THE REMEDY

The rule of law crisis in Poland did not begin in 2017 with the reform of the ordinary judiciary, but significantly earlier, with the frontal assault on the Constitutional Tribunal in 2015. The emergence of the phenomenon of "duplicate judges" in the Constitutional Tribunal, namely persons appointed to positions already filled by properly elected judges, constituted the first systemic violation of the foundations of the constitutional state based on the rule of law. As the European Court of Human Rights stated in its judgment of 7 May 2021 in *Xero Flor v. Poland*, the participation of a "duplicate judge" in the adjudicating composition of the Constitutional Tribunal constitutes a violation of the right to a tribunal established by law, guaranteed by Article 6(1) of the European Convention on Human Rights[1]. It was precisely this capture of the Constitutional Tribunal that paved the way for subsequent stages in the dismantling of judicial independence. This finding must be understood within the broader jurisprudential context. The European Court of Human Rights has consistently recognized that there exist many different systems for selecting and appointing judges across Europe, with no single model applicable to all countries. As the Grand Chamber reaffirmed in *Guðmundur Andri Ástráðsson v. Iceland*[2], while the concept of separation of powers between the executive and judiciary has gained growing importance in the Court's case-law, the Convention permits the appointment of judges by either the executive or legislative branch, provided that those appointed are not subject to any influences or pressures when performing their adjudicatory functions. This principle had been established in earlier cases such as *Maktouf and Damjanović v. Bosnia and Herzegovina* and *Kleyn and Others v. the Netherlands*[3], affirming that Contracting States are afforded a certain margin of appreciation in designing their judicial appointment mechanisms[4]. However, this procedural

[1] ECtHR, 7 May 2021, *Xero Flor w Polsce sp. z o.o. v. Poland*, Application No. 4907/18.
[2] ECtHR [GC], 1 December 2020, *Guðmundur Andri Ástráðsson v. Iceland*, Application No. 26374/18, §§ 207, 230, 243.
[3] ECtHR [GC], 18 July 2013, *Maktouf and Damjanović v. Bosnia and Herzegovina*, Nos. 2312/08 and 34179/08, § 49; ECtHR [GC], 6 May 2003, *Kleyn and Others v. the Netherlands*, Nos. 39343/98 and 3 others, § 193.
[4] On the theoretical foundations of the margin of appreciation doctrine in judicial appointments contexts, see Y. Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, Intersentia, 2002.

autonomy operates within fundamental limits: whatever model a State chooses must ultimately guarantee judicial independence and impartiality. The *Xero Flor* judgment represents not a departure from this established approach, but rather its application to a situation where the appointment procedure crossed the threshold from legitimate national variation into fundamental violation.

The second act of this constitutional drama occurred in 2017, when the legislative power directed its attack on the ordinary courts and the Supreme Court. The Act of 8 December 2017 amending the Act on the National Council of the Judiciary[5], which transferred the competence to elect fifteen judicial members of the NCJ from the judicial community to the Sejm, was not merely a technical modification of the nomination procedure. It was a paradigmatic change, undermining the very essence of the separation of powers and judicial independence, guaranteed by Articles 10 and 186 of the Polish Constitution. As the Court of Justice of the European Union noted in its judgment of 19 November 2019 in A.K. and Others, such changes may lead to the risk of increased influence of the legislative and executive powers on the NCJ and violation of the independence of this body[6].

Paradoxically, it was the Constitutional Tribunal itself – already composed with the participation of "duplicate judges" – that in its judgments of 25 March 2019 (K 12/18) and 23 February 2022 (P 10/19) declared the NCJ reform to be in conformity with the Polish Constitution[7]. This peculiar "self-legitimization" of the defective system by its own, previously captured institutions, represents the quintessence of the crisis facing the Polish judiciary.

In response to this multi-stage legitimacy crisis, the Polish legal system developed a series of mechanisms aimed at verifying the independence and impartiality of judges appointed through the defective procedure. The crucial moment was the adoption by the combined Chambers of the Supreme Court of the resolution of 23 January 2020[8], which introduced a two-stage test for assessing the validity of judgments issued with the participation of judges nominated by the "neo-NCJ". This resolution distinguished between the situation of Supreme Court judges – where appointment through a defective procedure alone results in improper composition of the court – and judges of ordinary courts, where it is necessary to demonstrate that the defectiveness of the appointment process leads, in specific circumstances, to a violation of the standard of independence and impartiality.

Subsequently, the Act of 9 June 2022 amending the Act on the Supreme Court[9] introduced a statutory test of judicial independence and impartiality, which was supposed to constitute the implementation of the so-called milestones of the National Recovery Plan. This test, however, as critics point out, was constructed in a way that «in the intention of its drafters, it was supposed to enable examination of a judge's status only to a very limited extent, while formulating very serious formal requirements»[10].

The paradox of these solutions lies in the fact that the legal system, whose legitimacy was structurally undermined first by the capture of the Constitutional Tribunal and then by the politicization of the judicial

[5] Journal of Laws of 2018, item 3.

[6] CJEU, 19 November 2019, *A.K. and Others*, Joined Cases C-585/18, C-624/18 and C-625/18, paras. 143-144.

[7] Constitutional Tribunal judgment of 25 March 2019, Case K 12/18, Journal of Laws 2019.609; Constitutional Tribunal judgment of 23 February 2022, Case P 10/19, Journal of Laws 2022.480.

[8] Resolution of the combined Chambers: Civil, Criminal and Labour and Social Insurance of the Supreme Court of 23 January 2020, BSA I-4110-1/20.

[9] Journal of Laws of 2022, item 1259.

[10] G. Kasicki, *Testy niezależności sędziów a Konstytucja RP* [in English: *Independence Tests for Judges and the Polish Constitution*], in *In Gremio*, No. 164, 2023, ingremio.org/2023/in-gremio-164/testy-niezaleznosci-sedziow-a-konstytucja-rp/.

nomination procedure, is supposed to legitimize itself through the application of independence tests. This is a peculiar attempt to pull oneself out of the swamp of constitutional crisis by one's own hair. As the European Court of Human Rights noted in *Reczkowicz v. Poland*[11], a procedure for appointing judges which reveals excessive influence of the legislative and executive powers is *per se* incompatible with Article 6(1) of the Convention and constitutes a fundamental irregularity negatively affecting the entire process.

The role of the Constitutional Tribunal in this process is particularly problematic. As it has been correctly observed in legal scholarship, «the Constitutional Tribunal's rulings on matters concerning judicial reform in Poland, including the conformity of the NCJ Act with the Polish Constitution, are not universally recognized as credible and do not constitute a convincing response to allegations of constitutional violations»[12]. The European Court of Human Rights in the *Xero Flor* judgment explicitly stated that the view formulated by the Constitutional Tribunal has no bearing on determining whether the process of appointing judges violated the law, and the Constitutional Tribunal's assessment must be considered arbitrary.

The central thesis of this article is that the test of judicial independence, both in its juridical version (Supreme Court resolution) and statutory version, constitutes a mechanism that simultaneously attempts to repair and legitimize the defective system, thereby creating new tensions and paradoxes. This test operates in the space between formal legality and substantive legitimacy, between the stability of the legal system and the necessity of its fundamental rehabilitation.

This problem extends far beyond Poland's borders. As the European Commission indicates, having already activated for the first time the procedure under Article 7(1) of the Treaty on European Union on 20 December 2017[13], similar challenges concerning judicial independence appear in various EU Member States, making the Polish case a kind of laboratory for testing the limits of democratic constitutionalism's resistance to authoritarian capture.

Yet the comparative dimension requires careful analytical precision. The Polish reforms share superficial similarities with judicial council reforms in other Member States – most notably Spain's 1985 modification of the *Consejo General del Poder Judicial* –, which also increased parliamentary involvement in judicial appointments. However, these similarities in form mask fundamental differences in substance, context, and consequences. The Spanish reform occurred within an established democratic framework, maintaining judicial supermajorities within the Council (12 of 20 members), preserving mechanisms for judicial self-governance, and operating under robust constitutional review. Crucially, the Spanish Constitutional Court retained its independence and legitimacy, providing genuine oversight of the appointment process. Moreover, Spain's reform emerged from democratic deliberation rather than political capture, implementing recommendations from the judiciary itself and enjoying broad cross-party support[14].

The Polish trajectory represents something qualitatively different: a sequential capture strategy in which the capture of the Constitutional Tribunal preceded and enabled the NCJ reform, creating a self-rein-

[11] ECtHR, 22 July 2021, *Reczkowicz v. Poland*, Application No. 43447/19, § 280.

[12] M. Szwed, *Wyroki TK wydane w nieprawidłowych składach. Analiza orzecznictwa TK w latach 2017-2022 oraz możliwych sposobów prawnej regulacji skutków wyroków TK w składach z udziałem nieprawidłowo wybranych osób* [in English: *Constitutional Tribunal Judgments Issued in Improper Compositions. Analysis of Constitutional Tribunal Case Law in 2017-2022 and Possible Legal Ways to Regulate the Effects of Constitutional Tribunal Judgments with the Participation of Improperly Elected Persons*], Helsińska Fundacja Praw Człowieka, 2023.

[13] Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, Brussels, 20.12.2017, COM/2017/0835 final – 2017/0360 (NLE).

[14] On the Spanish CGPJ reform of 1985 (Ley Orgánica 6/1985) and its constitutional context, see P. Andrés Ibáñez, *Tercero en discordia. Jurisdicción y juez del Estado constitucional*, Trotta, 2015, 182-210. The critical distinction between reform and capture is analyzed in W. Sadurski, *Poland's Constitutional Breakdown*, Oxford University Press, 2019, 96-131.

forcing cycle of institutional subordination. Where Spain modified while preserving institutional balance, Poland systematically eliminated checks on executive power. This distinction between reform within democratic constitutionalism and authoritarian legalism explains why formally similar changes produced fundamentally different constitutional consequences. Several Member States indeed maintain ministerial appointment models (Denmark, Sweden), but these operate within robust separation of powers frameworks and independent constitutional review, precisely what Poland's reforms aimed to dismantle.

This article poses a fundamental question: can formal mechanisms for testing judicial independence effectively restore the legitimacy of the judiciary under conditions of systemic violation of the principle of separation of powers, especially when key oversight institutions – such as the Constitutional Tribunal – have themselves been previously captured? Answering this question requires not only a dogmatic analysis of existing legal solutions, but above all critical reflection on the very nature of judicial legitimacy under conditions of constitutional crisis.

This article pursues an analytical rather than comparative approach to judicial independence testing mechanisms. While acknowledging that legitimacy crises have emerged in Hungary, Turkey, Romania, and other jurisdictions experiencing democratic backsliding, the deliberate focus on Poland serves specific analytical purposes. The Polish case offers unique theoretical leverage: nowhere else has the sequential capture of constitutional oversight (the Constitutional Tribunal) preceded and enabled the politicization of judicial appointments (through NCJ reform), creating a closed loop of self-legitimization attempts through independence testing. This specificity makes Poland an ideal case for analysing the fundamental paradox that structures this study: can a system whose legitimacy has been structurally compromised legitimize itself through its own mechanisms? Comparative analysis, while intellectually valuable, would require a separate study with different methodological architecture. The present analytical focus enables deep excavation of the theoretical paradoxes inherent to independence testing under conditions of systemic capture – insights that can subsequently ground comparative scholarship examining how different jurisdictions navigate similar legitimacy crises through varied institutional responses. Such comparative work represents a natural extension of, rather than a substitution for, the foundational analytical examination undertaken here.

The subsequent parts of the article will present a detailed genealogy of the crisis, an analysis of the mechanisms for testing independence, the paradoxes of their practical application, and critical assessment of alternative approaches to rebuilding judicial legitimacy. Ultimately, this analysis aims not only to critically assess existing solutions, but also to indicate possible ways out of the legitimacy crisis in which the Polish judiciary finds itself after a multi-stage process of its systemic capture.

2. THE GENEALOGY OF CRISIS: FROM "DUPLICATE JUDGE" TO THE CAPTURE OF THE NCJ

2.1 The Phenomenon of the "Duplicate Judge" as a Constitutional Aberration

The genealogy of the legitimacy crisis in the Polish judiciary begins with the emergence in 2015 of a phenomenon unprecedented in democratic states governed by the rule of law – "duplicate judges" in the Constitutional Tribunal. This term, which has entered legal language and public discourse, describes

persons appointed to judicial positions already occupied by other, properly elected judges[15].

This phenomenon was not merely a procedural irregularity. It was an act of constitutional aberration, undermining the very ontology of the judicial function. As a matter of fundamental constitutional logic, a judicial position is indivisible – one cannot be "partially" a judge, just as one cannot be partially a president or prime minister. The appointment of a "duplicate" thus creates a logical paradox: two persons cannot simultaneously occupy the same, indivisible position.

Moreover, the mechanism of "duplication" undermined the fundamental principle of *numerus clausus* of judicial positions. The Constitutional Tribunal consists of fifteen judges – not fourteen, not sixteen, but exactly fifteen. This number is not arbitrary but derives from the constitutional model of this institution. An attempt to fill an already occupied position thus violates not only the rights of a specific judge but the constitutional architecture itself[16].

2.2. The NCJ Reform: From Co-optation to Subordination

The second act of the constitutional drama was the reform of the National Council of the Judiciary carried out by the Act of 8 December 2017[17]. The change in the method of selecting fifteen judicial members of the NCJ – from election by the judicial community to election by the Sejm – constituted a fundamental paradigm shift. The pre-reform model was based on the principle of professional co-optation. Judges elected their representatives to a constitutional body, thereby implementing the principle of professional self-governance. This model, known in various variants in most European countries, assumes that only judges can fully understand and protect the specificity of the judicial function. The post-reform model introduced the principle of political subordination. The Sejm, a body of the legislative power, elects members of the body meant to safeguard the independence of courts from... the legislative power. This construction contains an internal contradiction. As the European Network of Councils for the Judiciary noted when suspending Polish NCJ membership on 17 September 2018, this body ceased to meet the criteria of independence from executive and legislative power[18].

This change was neither accidental nor chaotic. It constituted an element of a deliberate strategy that can be described as sequential capture. First, control was taken over the Constitutional Tribunal, which could have questioned the constitutionality of the reform. Then the NCJ was captured, which nominates judges. Finally, through the neo-NCJ, the filling of judicial positions with persons loyal to political power began[19].

2.3. The Mechanics of Capture: Authoritarian Legalism

The specificity of the Polish case lies in using legal tools for the destruction of law – a phenomenon theorized by Kim Lane Scheppele as "autocratic legalism"[20]. Unlike classical *coups d'état* where law is

[15] ECtHR, 7 May 2021, *Xero Flor w Polsce sp. z o.o. v. Poland*, Application No. 4907/18, § 289.
[16] M. Szwed, *Wyroki TK wydane w nieprawidłowych składach*, cit., 15-16.
[17] Journal of Laws of 2018, item 3.
[18] European Network of Councils for the Judiciary, Communication on suspension of NCJ membership of 17 September 2018, in encj.eu/node/495.
[19] Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, Brussels, 20.12.2017, COM/2017/0835 final – 2017/0360 (NLE).
[20] K.L. Scheppele, *Autocratic Legalism*, in *University of Chicago Law Review*, No. 2, 2018, 545-584. Scheppele's framework

openly violated, autocratic legalists "deploy the law to achieve their aims", using constitutional forms to destroy constitutional substance. These leaders do not simply violate law; they weaponize it, transforming legal institutions into instruments of their own entrenchment.

The Polish trajectory exemplifies Scheppele's core insight: autocratic legalists follow recognizable scripts, "using tactics that they borrow from each other" across jurisdictions. The sequential capture strategy – first neutralizing constitutional review, then subordinating the judicial council, finally controlling appointments – mirrors patterns of Hungary, Turkey, and Venezuela. What Scheppele defines as "legalistic autocracy" emerges not through dramatic rupture but through incremental legal changes, each defensible in isolation but collectively transformative. The method's genius lies in superficial legality: «because these autocrats push their illiberal measures with electoral backing and use constitutional or legal methods», democratic publics struggle to identify when constitutional democracy transitions into its authoritarian shadow.

The Polish adaptation demonstrates particular sophistication in exploiting constitutional ambiguities. Where the Constitution granted the Sejm a role in NCJ member election, the 2017 reform maximized political control while maintaining formal compliance. Where the Constitutional Tribunal possessed review authority, its prior capture ensured validation of subsequent reforms – creating second-order autocratic legalism: using previously captured institutions to legitimize further capture.

The primary technique of this process is legislative inflation: passing many laws in a short time, which hinders control and reaction. Between 2015 and 2017, over a dozen laws concerning the judiciary were passed, often in an accelerated procedure, without consultation. This legislative avalanche served a dual purpose: it overwhelmed both the opposition's capacity to respond and civil society's ability to mobilize against each individual change. By the time one law was analysed and criticized, two more had already been enacted.

The most illustrative example was the midnight passage of the Supreme Court Act in July 2017. The bill was introduced on a Friday, debated through the weekend, and passed in the early hours of Tuesday morning. This gave legal experts, civil society organizations, and international bodies virtually no time to analyse the 100-page document that fundamentally restructured Poland's highest court. The Venice Commission later described this as a "grave irregularity" that violated basic standards of democratic legislation[21].

2.4. The Tension Between Form and Substance: The Paradox of Legitimacy

The capture of the judiciary created a fundamental tension between the form and substance of legitimacy that manifests itself on two critical levels.

At the normative level, provisions enacted according to legislative procedure are simultaneously unconstitutional in a material sense. A paradox of "constitutional unconstitutionality" arises – law is simultaneously legal (procedurally) and illegal (materially)[22]. The Constitutional Tribunal's validation of

builds on earlier work on "abusive constitutionalism" by D. Landau, *Abusive Constitutionalism*, in *UC Davis Law Review*, No. 1, 2013, 189-260, but emphasizes the specifically legal (rather than merely constitutional) character of contemporary authoritarian strategies. For application to the Polish case, see also K.L. Scheppele, *The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work*, in *Governance*, No. 4, 2013, 559-562.

[21] D. Landau, *Abusive Constitutionalism*, cit. 191, 195. See also W. Sadurski, *Poland's Constitutional Breakdown*, cit., 196.

[22] G. Agamben, *State of Exception*, cit., 23-31.

the NCJ reform exemplifies this paradox: a formally valid judgment by a formally existing court that is substantively illegitimate due to the participation of "duplicate judges".

At the institutional level, formally existing institutions are substantially hollowed out of their constitutional content. The NCJ formally remains «the guardian of courts' independence» (Article 186 of the Constitution), but it has actually become a tool for subordinating courts to political power[23]. This creates what can be termed "zombie institutions" – bodies that appear alive but lack their essential constitutional soul. They go through the motions of their prescribed functions while serving entirely different purposes than those for which they were created.

2.5. From Capture to Crisis: Systemic Implications

The described process of capture leads to a constitutional crisis of a systemic character. This is not a crisis of a single institution or procedure, but of the entire constitutional system. The fundamental assumptions of constitutionalism have been undermined: separation of powers, judicial independence, constitutional review of legislation[24]. This crisis has an autopoietic character – it reinforces and reproduces itself[25]. Captured institutions legitimize their own capture, creating a closed circle of self-legitimization. The Constitutional Tribunal with "duplicates" rules on the constitutionality of the NCJ reform, the neo-NCJ nominates judges who rule on the legality of the Constitutional Tribunal and NCJ.

Crucially, this crisis cannot be resolved within the system, as the corrective mechanisms have themselves been captured. This is a situation that Carl Schmitt described as a "state of exception" – a moment when the normal constitutional order is suspended[26]. Paradoxically, however, in the Polish case, the state of exception was introduced not through its formal declaration, but through the use of normal constitutional procedures. This paradox – using constitutionalism against the constitution – constitutes the essence of the Polish crisis and simultaneously a challenge for constitutional theory. How to protect constitutionalism from its own exploitation? How to restore legitimacy to a system that has undermined its own foundations? The mechanisms of testing judicial independence, which will be analysed in the next chapter, attempt to answer these questions.

3. THE TEST OF INDEPENDENCE: BETWEEN EUROPEAN STANDARD AND DOMESTIC PRACTICE

3.1. The Genesis of Tests: Response to Crisis or Its Perpetuation?

The emergence of independence tests as responses to judicial capture illuminates a central paradox of autocratic legalism identified by Scheppele: systems compromised through legal means seek restoration through legal means, creating circular logic where law attempts to remedy law's own weaponization.

[23] European Commission, 2022 Rule of Law Report. Country Chapter on the rule of law situation in Poland, SWD/2022/521 final, 18-19.

[24] Commission Recommendation (EU) 2018/103 of 20 December 2017 regarding the rule of law in Poland, Official Journal of the European Union L 17/50 of 23.01.2018.

[25] N. Luhmann, *Law as a Social System*, Oxford University Press, 2004, 381-382.

[26] C. Schmitt, *Political Theology*, University of Chicago Press, 1985, 5-15.

The tests themselves become artifacts of the very process they purport to remedy – products of a legal system whose legitimacy the tests supposedly restore.

In the face of the systemic legitimacy crisis described in the previous chapter, the Polish legal system developed two competing mechanisms for verifying judicial independence. Paradoxically, both mechanisms emerged from within a system whose legitimacy had been structurally undermined. This raises a fundamental question: can a system afflicted by constitutional crisis test and repair itself?

The first mechanism – the juridical model – emerged as an attempt of judicial self-defence against capture. The resolution of the combined Chambers of the Supreme Court of 23 January 2020[27] was a response to CJEU judgments and represented an attempt to preserve a minimum of system integrity. The second mechanism – the statutory model of 2022[28] – was imposed by political authority as a condition for unlocking European funds from the National Recovery Plan.

This duality of mechanisms reflects a deeper conflict between two visions of legitimacy: juridical (based on European standards and judicial autonomy) and political (based on the will of the legislature and state sovereignty).

3.2. The Juridical Model: The Supreme Court Resolution as an Act of Constitutional Resistance

The resolution of the combined Chambers of 23 January 2020 introduced a differentiated test of independence, distinguishing between the situation of Supreme Court judges and judges of ordinary courts. This differentiation was not arbitrary but resulted from the constitutional position of the Supreme Court as the "guardian of guardians" – an institution exercising judicial supervision over the entire court system[29]. For Supreme Court judges appointed by the neo-NCJ, the resolution adopted the principle of automatic defectiveness. Improper court composition within the meaning of Article 439 § 1(2) of the Code of Criminal Procedure or incompatibility of court composition with legal provisions within the meaning of Article 379(4) of the Code of Civil Procedure occurs *ipso facto*, without the need to examine additional circumstances[30]. This is a kind of "zero test" – the absence of a test as a consequence of the structural impossibility of legitimization.

For judges of ordinary and military courts, the resolution introduced a two-stage test. The first stage consists of determining whether the judge was appointed by the neo-NCJ. This is a formal, objective criterion, verifiable on the basis of documents. The second stage requires examining whether, in the specific circumstances of the case, the defectiveness of the appointment process affected the judge's independence and impartiality. The Supreme Court indicated a catalogue of circumstances subject to assessment, including: the judge's involvement in activities undermining judicial independence, atypical career progression, the nature of promotion (especially "leapfrog promotions"), previous connections with executive bodies[31].

The juridical model suffers from a fundamental problem of self-referentiality. The Supreme Court,

[27] Resolution of the combined Chambers: Civil, Criminal and Labour and Social Insurance of the Supreme Court of 23 January 2020, BSA I-4110-1/20.

[28] Act of 9 June 2022 amending the Act on the Supreme Court and certain other acts, Journal of Laws of 2022, item 1259.

[29] Cfr. Article 183 of the Constitution of Poland and Article 1 of the Act on the Supreme Court.

[30] Supreme Court resolution of 23 January 2020, BSA I-4110-1/20, point 1.

[31] Justification of the Supreme Court resolution of 23 January 2020, BSA I-4110-1/20, 64.

part of whose composition was appointed by the neo-NCJ, rules on the defectiveness of nominations made by the neo-NCJ. A paradox emerges: judges of questioned legitimacy decide on the legitimacy of other judges. An attempt was made to solve this problem through the principle that «a motion to exclude from the composition of an ordinary court a person appointed by the neo-NCJ cannot be examined by a court having such a judge in its composition»[32]. However, as practice shows, this principle is often ignored. As noted in the legal opinion, «there is no known Supreme Court decision on the exclusion of a Supreme Court judge in which a Supreme Court judge nominated by the neo-NCJ would decide on the exclusion of another Supreme Court judge appointed through this procedure»[33]. This auto-immunization of the system undermines the credibility of the juridical model. The system defends itself against criticism of its own legitimacy through persons whose legitimacy is questioned – a classic example of circular reasoning.

3.3. The Statutory Model: The Test as Camouflage

The Act of 9 June 2022 introduced into the Polish legal system the institution of the "test of judicial independence and impartiality". According to Article 29 § 5 of the Act on the Supreme Court, the test consists of examining whether a judge meets the requirements of independence and impartiality, taking into account the circumstances accompanying their appointment and their conduct after appointment[34]. However, the construction of the test contains a number of limitations which – as critics point out – make it a facade mechanism. First, the temporal limitation – the motion can be filed only within 7 days (Article 29 § 8 of the Act on the Supreme Court), which in practice often makes it impossible to gather necessary evidence[35]. Second, Article 29 § 4 explicitly excludes the possibility of questioning a judge's status solely on the basis of circumstances accompanying the appointment. In other words, the mere fact of appointment by the neo-NCJ is not sufficient – it is necessary to demonstrate additional circumstances concerning the judge's conduct after appointment[36]. Third, the formal requirement to indicate in the motion specific circumstances concerning the judge's conduct after appointment may be impossible to fulfil due to lack of access to competition documents or personnel files[37].

The introduction of the statutory test was directly linked to pressure from the European Commission and the conditionality of funds from the National Recovery Plan. The test was supposed to constitute the implementation of the so-called milestone F1.1, guaranteeing a mechanism for verifying judicial independence[38]. However, as commentators aptly note, «in the intention of the drafters, independence tests were supposed to enable examination of a judge's status only to a very limited extent, while formulating very serious formal requirements and in the face of broad, non-appealable powers to

[32] Resolution of the panel of 7 judges of the Supreme Court of 2 June 2022, I KZP 2/22.
[33] Cf. Supreme Court decision of 18 December 2024, I KK 385/23.
[34] Article 29 § 5 of the Act of 8 December 2017 on the Supreme Court (consolidated text: Journal of Laws of 2021, item 1904, as amended).
[35] Article 29 § 8 of the Act on the Supreme Court; Article 42a § 5 of the Act on the System of Ordinary Courts.
[36] Article 29 § 4 of the Act on the Supreme Court.
[37] J. Chlebny, W. Chróścielewski, *Test niezależności i bezstronności sędziowskiej – forma przeciwdziałania kryzysowi w sądownictwie administracyjnym* [in English: *The Test of Judicial Independence and Impartiality – A Form of Counteracting the Crisis in the Administrative Judiciary*], in *Państwo i Prawo*, No. 6, 2024.
[38] Council Implementing Decision (EU) 2022/1264 of 15 July 2022 on the approval of the assessment of the recovery and resilience plan for Poland.

reject motions»[39]. The test was constructed to simulate compliance with European requirements while simultaneously preventing effective questioning of the status of judges nominated by the neo-NCJ. This facade nature of the statutory test is particularly visible when compared with the Ástráðsson test applied by the ECtHR, which examines not only formal legality but above all whether the violation concerned norms of fundamental importance for the rule of law[40]. The statutory test, by excluding examination of the circumstances of appointment itself, ignores the essence of the problem – the structural defectiveness of the nomination procedure.

3.4. Conflict of Models: Between Judicial Autonomy and Political Control

The coexistence of two testing models creates a state of normative contradiction. The Supreme Court resolution of 2020 allows examination of the circumstances of appointment alone (especially for Supreme Court judges), while the 2022 Act excludes this. The resolution requires conducting a test in every case of doubt, the Act limits this to a narrow time window. The Supreme Court has repeatedly confirmed being bound by the resolution of 23 January 2020, stating that «the legal interpretation contained in this resolution is binding and pursuant to Article 87 § 1 of the Act on the Supreme Court, the Supreme Court remains bound by it as a legal principle»[41]. At the same time, the Act of 2022 as a later act should – according to the principle of *lex posterior derogat legi priori* – repeal conflicting regulations. This conflict is not merely technical-legal. It reflects a deeper dispute about the source of judicial legitimacy: does it derive from the autonomy of the judicial power (juridical model) or from the will of the legislature (statutory model)?

Analysis of case law reveals clear **selectivity** in the application of both models. In criminal cases, judges more often apply the juridical model, making exclusions based on the 2020 resolution. For example, in the decision of 14 October 2024, the Supreme Court excluded a Supreme Court judge appointed by the neo-NCJ, applying the test from the resolution, not the statutory test[42]. In civil cases, there is a dominant tendency to apply the statutory test with its restrictive requirements, resulting in much rarer exclusion of judges. As the Supreme Court noted in its decision of 30 October 2024, «there are no grounds to accept that the mere fact of appointing an ordinary court judge upon motion of the currently functioning NCJ [...] is a circumstance that independently justifies recognizing that proceedings conducted with the participation of such a judge are affected by invalidity»[43]. This asymmetry in applying tests undermines system coherence and confirms the thesis about the instrumental use of verification mechanisms.

3.5. Systemic Implications: The Test as a Mirror of Crisis

Analysis of both models of testing independence leads to a paradoxical conclusion: the test has become a mirror of the crisis it was meant to solve. Instead of restoring legitimacy, testing mechanisms

[39] G. Kasicki, *Testy niezależności sędziów a Konstytucja RP* [in English: *Independence Tests for Judges and the Polish Constitution*], in *In Gremio*, No. 164, 2023, ingremio.org/2023/in-gremio-164/testy-niezaleznosci-sedziow-a-konstytucja-rp/.
[40] ECtHR, 1 December 2020, *Ástráðsson v. Iceland*, Application No. 26374/18.
[41] Supreme Court judgment of 10 April 2024, II KK 297/23.
[42] Supreme Court decision of 14 October 2024, III KK 147/24.
[43] Supreme Court judgment of 30 October 2024, II CSKP 1800/22.

deepen system fragmentation, creating competing standards of assessment and reinforcing conflict between segments of the judiciary. The juridical model, though based on European standards, suffers from the problem of self-referentiality. The statutory model, though formally binding, is perceived as facade and ineffective. Both models coexist in a state of tension, creating a hybrid system in which the choice of mechanism depends on the strategic calculations of judges and parties to proceedings.

Moreover, the very necessity of testing judicial independence constitutes an admission of system failure. In a state governed by the rule of law, judicial independence should be an assumption, not a subject of verification. The fact that the Polish system requires continuous testing of the legitimacy of its judges is the most emphatic proof of the depth of the constitutional crisis.

4. PARADOXES OF PRACTICE: A CASUISTIC ANALYSIS

4.1. Between Theory and Judicial Reality

The empirical analysis of the application of independence tests reveals a fundamental discrepancy between the theoretical assumptions of verification mechanisms and their practical functioning. The Supreme Court's case law from 2020-2024 constitutes a peculiar laboratory in which all the pathologies of a system afflicted by a legitimacy crisis are revealed. The paradoxes that emerge from this analysis are not merely technical imperfections but symptoms of a deeper crisis – the impossibility of self-repair of the system by persons whose legitimacy is structurally questionable. The casuistic analysis presented in this chapter examines Supreme Court decisions from 2020-2024 selected according to three complementary criteria designed to capture the structural patterns of independence testing in practice. First, thematic representativeness: cases were chosen to illustrate each major manifestation of the test's paradoxes – selective application across chambers, auto-immunization problems, and procedural asymmetries. Second, institutional significance: preference was given to decisions that either established precedents, generated significant intra-judicial controversy, or prompted intervention by European courts. Third, temporal distribution: cases span the entire period from the 2020 Supreme Court Resolution through the 2022 statutory test implementation, capturing the evolution of testing mechanisms over time. This triangulated approach ensures that the analysis reflects systemic patterns rather than isolated anomalies. While space constraints preclude exhaustive coverage of all relevant jurisprudence, the selected cases provide sufficient empirical grounding to demonstrate the core theoretical claim: that independence testing under conditions of systemic capture reproduces rather than resolves legitimacy deficits.

4.2. Institutional Selectivity: The War of Chambers

Analysis of case law reveals a clear institutional disproportion in the application of independence tests. The Criminal Chamber of the Supreme Court consistently applies rigorous standards resulting from the resolution of the combined chambers of 23 January 2020. The flagship example is the decision of 14 October 2024, in which the Criminal Chamber excluded Supreme Court judge Małgorzata

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Bednarek from hearing a cassation[44]. Significantly, the basis for exclusion was the mere appointment to the Disciplinary Chamber of the Supreme Court, with the Court emphasizing that «deciding cassations by a Supreme Court judge appointed in this way could create in the parties and in public opinion the conviction of the court's lack of impartiality».

A similarly rigorous approach is presented in the decision of 6 June 2024, where the Criminal Chamber of the Supreme Court drew attention to a particularly problematic aspect, *i.e.* the transfer of judges from the Disciplinary Chamber to other chambers[45]. The Court stated that the original appointment as a judge in the Disciplinary Chamber, which did not have the status of a court in the constitutional sense, disqualifies such persons as Supreme Court judges. This mechanism of "transferring" judges from the delegitimized Disciplinary Chamber to other Supreme Court chambers was described as a violation of Article 179 of the Constitution, as the act of nomination by the President to a judicial position is made within a specific competition concerning a specific type of court[46].

This contrasts sharply with the approach of the Civil Chamber, which presents a much more restrictive interpretation of the possibility of questioning judges' status. In the judgment of 30 October 2024, the Supreme Court stated that in light of Article 379(4) of the Code of Civil Procedure, there are no grounds to accept that the mere fact of appointing an ordinary court judge upon motion of the currently functioning National Council of the Judiciary is a circumstance that independently justifies recognizing that proceedings conducted with the participation of such a judge are affected by invalidity[47]. This discrepancy is not accidental. The Civil Chamber more often rejects cassation appeals based on the allegation of defective court composition, requiring appellants to present specific circumstances relating to judges participating in adjudication that indicate their failure to observe the objectively designated standard of an impartial and independent judge[48].

*4.3. The Problem of "*Nemo Iudex in Causa Sua*": System Auto-immunization*

The most glaring paradox of practice is the complete absence of cases in which a Supreme Court judge appointed by the neo-NCJ would exclude another judge appointed through the same procedure. After conducting meticulous research of Supreme Court case law, the author has found no known Supreme Court decision on the exclusion of a Supreme Court judge in which a Supreme Court judge nominated to the office of Supreme Court judge upon motion of the NCJ formed by the Act of 8 December 2017 would decide on the exclusion of another Supreme Court judge appointed through this procedure.

This mutual protection creates a peculiar caste of untouchables – judges who protect each other from questioning of legitimacy. This mechanism is particularly visible in the decision of 18 December 2024, where Supreme Court Judge Marek Siwek – himself previously recognized as lacking legitimacy – refused to consider a motion for exclusion, arguing that it was based exclusively on legal, systemic issues of an unconstitutional character[49].

[44] Supreme Court decision of 14 October 2024, III KK 147/24.
[45] Supreme Court decision of 6 June 2024, IV KK 172/24.
[46] Supreme Court decision of 22 August 2024, II KK 360/23.
[47] Supreme Court judgment of 30 October 2024, II CSKP 1800/22.
[48] Supreme Court decision of 22 February 2024, I CSK 6096/22.
[49] Supreme Court decision of 18 December 2024, I KK 385/23.

The paradox is deepened by the fact that the same Judge Siwek was excluded in case V KO 4/22 by decision of 24 February 2022, where the Supreme Court stated that his participation in hearing the case would lead to the issuance of a judgment by an improperly composed court[50]. Despite this, this judge continues to adjudicate in other cases and refuses to exclude other judges with similar status.

A particularly egregious example of auto-immunization is the decision of 5 June 2024, where a judge appointed by the neo-NCJ refused to exclude other judges appointed through the same procedure, arguing that the statutory test had already been conducted[51]. This creates a situation in which a person of questioned legitimacy decides on the legitimacy of other questioned persons, which constitutes a model example of violation of the principle *nemo iudex in causa sua*.

4.4. Procedural Asymmetry: The Criminal-Civil Dichotomy

In criminal cases, there is a dominant tendency toward broad interpretation of grounds for exclusion. The catalogue of excluded judges is impressive. Małgorzata Bednarek has been excluded multiple times in decisions of 14 October 2024, 25 July 2024, and 14 January 2025[52]. Adam Roch was excluded due to his transfer from the Disciplinary Chamber in the decision of 22 August 2024[53]. Marek Motuk was excluded due to violation of the principle *nemo iudex idoneus in propria causa* in decisions of 5 June 2024[54]. Notably, even the First President of the Supreme Court, Małgorzata Manowska, was excluded along with judges X.Y. and Paweł Wojciechowski in the decision of 5 June 2024[55], demonstrating that no position provides immunity from scrutiny.

In criminal cases, the Supreme Court also applies the test of the "objective observer", recognizing that it is in the interest of the justice system not only to ensure the actual impartiality of the judge, but also preventing the emergence of negative public perception[56].

A diametrically opposite approach is presented in civil cases. Analysis of decisions refusing to accept cassation appeals shows consistent application of narrow interpretation. The Supreme Court routinely states that the appellant has not cited specific circumstances relating to judges participating in adjudication[57]. An example is the decision of 13 September 2024, in which the Supreme Court refused to accept a cassation appeal, despite a judge appointed by the neo-NCJ adjudicating in the composition of the appellate court[58]. The court found that merely indicating this fact is not sufficient, requiring additional evidence of lack of impartiality in the specific case.

4.5. Strategic Use of Tests: Internal Forum Shopping

Analysis of motions for exclusion reveals developed procedural strategies of parties. In criminal cases, defence attorneys routinely file motions for exclusion, knowing of the greater chance of success.

[50] Supreme Court decision of 24 February 2022, V KO 4/22.
[51] Supreme Court decision of 5 June 2024, I Zo 67/24.
[52] Supreme Court decisions: III KK 147/24, III KK 218/24, III KK 436/24.
[53] Supreme Court decision of 22 August 2024, II KK 360/23.
[54] Supreme Court decisions of 5 June 2024, IV KO 47/24 and I KK 240/22.
[55] Supreme Court decision of 5 June 2024, V KB 11/24.
[56] Supreme Court decision of 14 October 2024, III KK 147/24.
[57] Supreme Court decision of 13 September 2024, I CSK 1811/23.
[58] *Ibid.*

In civil cases, parties often forgo this measure, considering it ineffective. A peculiar "internal forum shopping" emerges – parties try to manoeuvre between chambers and compositions, seeking judges of "old" nomination. An example is case III USKP 116/23, in which the appellant successfully achieved the annulment of a judgment by indicating the participation in the appellate court composition of a judge appointed by the neo-NCJ[59].

The statutory test of 2022 has become a tool for blocking motions for exclusion. Judges appointed by the neo-NCJ routinely invoke Article 29 § 4 of the Act on the Supreme Court, which excludes questioning status solely on the basis of circumstances of appointment[60]. An example of instrumentalization is the decision of 18 December 2024, in which a judge rejected a motion for exclusion, arguing that a motion under the statutory test had already been previously rejected[61]. This creates a kind of *res iudicata* regarding legitimacy, preventing further questioning of a judge's status.

4.6. Systemic Consequences: Erosion of Trust and Fragmentation of Case Law

Selectivity and asymmetry in the application of tests lead to complete unpredictability of results. The same allegation of composition defect may be accepted in the Criminal Chamber and rejected in the Civil Chamber. The same person may be excluded in one case and adjudicate in another. An example is Judge Marek Siwek, excluded in case V KO 4/22, but adjudicating and refusing to exclude others in case I KK 385/23[62]. This schizophrenic situation undermines the fundamental principle of legal certainty.

The paradoxes of test application practice deepen the legitimacy crisis instead of solving it. The system that was supposed to restore trust has become an arena of positional warfare between judicial factions. Each decision on exclusion is simultaneously an act of delegitimization of part of the system. Worse, the lack of coherence in applying tests undermines the authority even of those parts of the judiciary that try to maintain standards. Citizens cannot predict whether their case will go to a composition applying the rigorous standards of the Criminal Chamber or the liberal approach of the Civil Chamber.

4.7. Conclusion: The Test as a Mirror of Pathology

The casuistic analysis confirms the thesis that mechanisms for testing independence have become a mirror of system pathology, not a tool for its repair. Selectivity of application, auto-immunization of neo-NCJ judges, asymmetry between procedures – all these phenomena show that the system is unable to cleanse itself. The most eloquent proof of failure is the fact that four years after the resolution of the combined chambers of 2020 and two years after the statutory test, the Polish judiciary is more divided than ever. Tests, instead of verifying independence, have become a tool of factional struggle and deepening institutional chaos.

[59] Supreme Court judgment of 19 March 2024, III USKP 116/23.
[60] Article 29 § 4 of the Act on the Supreme Court.
[61] Supreme Court decision of 18 December 2024, I KK 385/23.
[62] Cf. Supreme Court decisions: V KO 4/22 and I KK 385/23.

5. BETWEEN FORMAL AND SUBSTANTIVE LEGITIMACY: SEARCHING FOR A THIRD WAY

5.1. Beyond Dichotomy: Toward a New Paradigm

The analysis thus far has revealed the fundamental impossibility of resolving the legitimacy crisis of the Polish judiciary within existing mechanisms. Neither the juridical model from the Supreme Court's 2020 resolution nor the statutory test from 2022 is capable of restoring trust in the system. Both models operate within the binary logic of legitimate/illegitimate, creating what Giorgio Agamben might call a "state of exception" – a permanent suspension between legality and illegality[63].

This binary approach fails to capture the complexity of the Polish situation, where judges function in a constitutional twilight zone. They are neither fully legitimate (given their defective appointment) nor completely illegitimate (as they continue to issue binding judgments). This paradox suggests the need for a third way – one that transcends the simple dichotomy between formal legality and substantive legitimacy.

5.2. The Concept of "Graduated Legitimacy"

Instead of treating judicial legitimacy as an absolute state, it might be more productive to conceive it as a spectrum or continuum. This approach recognizes that legitimacy has multiple dimensions – formal, functional, social, and moral – that may not always align. A judge appointed through a defective procedure may still demonstrate functional legitimacy through high-quality jurisprudence and adherence to rule of law principles.

This perspective suggests a model of "graduated legitimacy" where judges could rebuild their legitimacy over time through demonstrated independence, transparency, and accountability. Unlike existing tests that focus retrospectively on the circumstances of appointment, this model would be prospective, evaluating actual judicial performance and behaviour.

The key elements would include: enhanced transparency requirements for judges with questioned appointments, including public disclosure of their judicial philosophy and reasoning in controversial cases; peer review mechanisms involving both domestic and international observers; and gradual verification based on demonstrated independence over a specified period rather than one-time testing.

5.3. The Limits of Legal Solutions

However, any proposed model faces a fundamental limitation: the crisis of the Polish judiciary is not merely legal but deeply political and social. As the analysis has shown, the problem is not technical – it is not about finding the right procedure or test. It is about the breakdown of the basic consensus on the rules of the constitutional game.

Legal mechanisms alone cannot restore what political will has destroyed. The capture of the Constitutional Tribunal and NCJ was possible not because of inadequate legal safeguards, but because

[63] Cf. G. Agamben, *State of Exception*, cit., 23-31.

political actors were willing to violate constitutional norms while maintaining formal legality. No test or procedure can function effectively when those applying it lack commitment to its underlying principles.

Moreover, the very attempt to "solve" the crisis through legal mechanisms may perpetuate it by normalizing the abnormal. By creating tests and procedures for judges of questioned legitimacy, the system implicitly accepts their presence, transforming what should be a temporary crisis into a permanent feature of the legal landscape.

5.4. The Impossibility of Self-Repair

The Polish case ultimately demonstrates the limits of law's capacity for self-repair. When the institutions responsible for maintaining constitutional order have themselves been captured, the system enters a spiral of self-referential legitimation where the defective validates the defective. The tests of independence, whether juridical or statutory, cannot escape this circularity.

The impossibility of systemic self-repair raises questions about external intervention mechanisms. Armin von Bogdandy and collaborators have proposed the "Reverse Solange" doctrine – arguing that when Member States experience systemic deficiencies so severe that mutual trust premises collapse, EU intervention shifts from discretionary to obligatory[64]. Their framework suggests that once constitutional oversight institutions are captured, creating structural impossibility of internal correction, the CJEU through preliminary references can substitute supranational for compromised national review. The Commission's Rule of Law Framework, they argue, should be supplemented by systematic monitoring through a "Systemic Deficiency Committee" insulated from political pressure.

However, these EU-level mechanisms, while theoretically sophisticated, cannot resolve the fundamental paradox this article identifies. First, judicial intervention operates retrospectively and case-by-case, providing individual relief without systemic transformation. Second, political monitoring mechanisms face the same legitimacy deficit they seek to remedy: if captured national institutions lack authority to legitimize themselves, the democratic authorization for EU institutions to delegitimize them remains contested. Third, and most fundamentally, effective external intervention requires such intensive oversight as to suspend Member State constitutional autonomy – raising democratic legitimacy questions different in form but not necessarily in severity from those posed by autocratic capture itself.

The Polish experience thus reveals that external intervention, while potentially necessary when internal self-repair proves impossible, remains insufficient for genuine constitutional restoration. EU mechanisms may provide temporary protection but cannot substitute domestic constitutional culture. The search for solutions beyond both compromised internal mechanisms and democratically problematic external intervention remains an open theoretical and practical challenge.

The search for a third way reveals not a solution but a deeper understanding of the problem. The crisis of judicial legitimacy in Poland is not a puzzle to be solved through clever institutional design. It is a symptom of a broader breakdown of constitutional democracy that can only be addressed through political transformation and the restoration of genuine commitment to the rule of law. Until such trans-

[64] A. von Bogdandy, M. Ioannidis, *Systemic Deficiency in the Rule of Law: What It Is, What Has Been Done, What Can Be Done*, in *Common Market Law Review*, No. 1, 2014, 59-96; A. von Bogdandy, C. Antpöhler, M. Ioannidis, *Protecting EU Values – Reverse Solange and the Rule of Law Framework*, MPIL Research Paper No. 2016-04, 2016.

formation occurs, any mechanism for testing or rebuilding legitimacy will remain what it currently is – a mirror reflecting the pathologies of the system rather than a tool for their correction.

6. CONCLUSIONS: TOWARD A NEW PARADIGM OF JUDICIAL LEGITIMACY

6.1. The Test of Independence as Symptom, Not Cure

The conducted analysis of mechanisms for testing judicial independence in Poland leads to a fundamental conclusion: the test of independence, both in its juridical and statutory versions, is a symptom of a deeper legitimacy crisis, not its solution. Paradoxically, the very need to test judges' independence constitutes the fullest proof of the breakdown of fundamental assumptions of the rule of law. In a functioning constitutional system, judicial independence should be an axiom, not a hypothesis requiring constant verification.

The test of independence reveals three levels of legitimacy crisis. The first level is the institutional crisis – the capture of key institutions (Constitutional Tribunal, NCJ) has deprived the system of internal self-regulation mechanisms. The system cannot repair itself, as the bodies responsible for constitutional review have themselves been delegitimized. The second level is the normative crisis – the coexistence of competing standards for assessing legitimacy (Supreme Court resolution vs. statutory test) creates interpretative chaos and forum shopping. The third level is the epistemological crisis – the system has lost the ability to objectively determine who is a "real" judge and who merely performs adjudicative functions without legitimacy.

The casuistic analysis revealed that the test of independence, instead of solving the problem, deepens the fragmentation of the system. The selectivity of test application between Supreme Court chambers, the self-protective mechanism of neo-NCJ judges, the asymmetry between criminal and civil cases – all these phenomena show that the test has become a tool of factional struggle, not a mechanism for restoring the rule of law.

6.2. Systemic Implications: The Polish Lesson for Europe

The Polish legitimacy crisis of the judiciary is not an isolated phenomenon. Similar processes of "democratic backsliding" are observed in Hungary, Turkey, and to a lesser extent in other EU states. The Polish lesson thus has significance extending beyond national borders.

The first lesson concerns the fragility of democratic institutions. The Polish case shows how quickly a judicial system can be delegitimized while maintaining the appearance of legality. It took only five years (2015-2020) for a system functioning since 1989 to be structurally undermined. This is a warning for other democracies: institutions that seem permanent can be captured using "legal" tools.

The second lesson concerns the role of civil society. In the Polish case, it was precisely non-governmental organizations, judicial associations, and activists who were the main force of resistance against the capture of the judiciary. Without "Iustitia", without civic protests, without monitoring by watchdog organizations, the crisis would be much deeper. This shows that formal legal mechanisms are insufficient and an active civil society ready to defend the rule of law is needed.

The search for a "third way" beyond both formal and substantive legitimacy – explored theoretically through engagement with transitional justice frameworks and practically through analysis of EU intervention mechanisms including Reverse Solange – reveals the depths of the constitutional crisis.

6.3. Epilogue: The Test of Independence as a Mirror

The test of judicial independence in Poland has become a peculiar mirror reflecting all the pathologies of contemporary constitutionalism. It shows what happens when law loses its normative power and becomes merely a tool of political struggle. It shows how fragile democratic institutions are against a determined parliamentary majority. Finally, it shows how difficult it is to repair a system when the repair mechanisms themselves are part of the problem.

The analytical framework developed here opens critical avenues for future scholarship. First, comparative constitutional analysis should examine how independence testing operates across jurisdictions experiencing democratic backsliding (Hungary, Turkey, Venezuela), identifying which institutional configurations enable or prevent self-repair. Second, EU intervention mechanisms require deeper theoretical elaboration – particularly how Reverse Solange and the Rule of Law Framework might effectively address systemic deficiencies when national oversight institutions fail. Third, temporal dimensions of legitimacy reconstruction merit investigation: when, if ever, can courts appointed through defective procedures gain legitimacy through subsequent practice? Fourth, civil society's role in sustaining judicial independence norms during constitutional crises deserves fuller treatment than space permitted here. These research directions share a common thread: moving from diagnosis toward prescriptive frameworks for institutional responses that might succeed where internal self-correction cannot. The Polish case, precisely because of its stark constitutional pathologies, offers theoretical insights extending far beyond Poland's borders.

Ultimately, the Polish lesson is both a warning and a challenge. A warning – that liberal democracy is not given once and for all, that it requires constant defence and cultivation. A challenge – that in the era of "democratic backsliding" we need new tools for protecting the rule of law, extending beyond traditional constitutional mechanisms. The test of independence, conceived as a solution, turned out to be part of the problem. But through its failure, paradoxically, it revealed the true nature of the crisis. This is not a technical crisis that can be solved with better procedures. It is a fundamental crisis concerning the very foundations of judicial legitimacy in a democratic state governed by the rule of law. And only as such can it be effectively addressed.