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ORIGINAL ARTICLE

Judicial relational legal consciousness: authoritarian backsliding as a catalyst of change

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Abstract

Between 2015 and 2023, authoritarian backsliding triggered significant changes in the Polish judiciary, prompting some judges to adopt a new approach in their interpretation of the European Convention on Human Rights, both on and off bench, taking a more explicit stance as individual applicants against the Polish government in the European Court of Human Rights. This article employs the paradigm of relational legal consciousness, attributing this embrace of human rights law to judges' interactions and relationships with various actors, including judicial associations, lawyers, human rights activists, and civil society. Furthermore, the article extends the concept of relationality in legal consciousness to encompass the intricate interplay between law and politics as intertwined social relations and practices. The article's original contribution lies in theorizing judicial legal consciousness in relation to authoritarian backsliding and the resultant liminality of structures and strategies for action.

1 | INTRODUCTION

Poland, once considered a beacon of democratic transition and a model for post-communist countries, underwent a period of authoritarian backsliding between 2015 and 2023, when the

Law and Justice (PiS) party was in power. During their tenure, there was significant concern over the erosion of democratic principles, particularly in the realm of judicial independence. The highest judicial bodies in the country (the Constitutional Court and the Supreme Court) were a key target of PiS, with controversial reforms allowing the government to exert greater control over their decisions.[1] The appointment of loyal judges to key positions and the exercise of executive power over the judiciary's governing body, the National Council of the Judiciary (NCJ), also raised concerns about the politicization of the profession.[2] Meanwhile, judges critical of the government faced harassment and disciplinary proceedings, which were widely criticized as politically motivated. This was accompanied by a smear campaign in the state-owned media, which presented Polish judges as 'a privileged cast: corrupt, criminal and incompetent'[3] and compared those judges who resisted the above changes to the 'protectors of paedophiles and people who are not paying maintenance for their children'.[4]

How did judges react? Some acquiesced; others fought back. Despite the challenges that they faced, judges in Poland were at the forefront of resistance against attacks on their independence, engaging in 'multi-track action in which on- and off-bench mobilization complemented each other as purposeful strategy'.[5] By rallying together under effective leadership and forming strategic alliances with key lawyers and certain independent media outlets, as well as garnering support from international non-governmental organizations (NGOs), judges resisted attacks on their autonomy to uphold their authority.[6] Judicial associations such as IUSTITIA and THEMIS were vocal in their criticism of the government's actions[7] and played an important role in organizing protests and meetings with Polish citizens to raise awareness of the importance of an independent judiciary.[8] Street rallies were a key form of resistance, with judges joining forces with civil-society groups to demand the protection of the rule of law and democratic values.[9] Judges also mobilized on the bench through active petitions to the Court of Justice of the European

[1] L. Pech et al., 'Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action' (2021) 13 *Hague J. on the Rule of Law* 1; W. Sadurski, 'How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding' paper presented at the Bochum University Seminar on Rule of Law and Constitutional Backsliding, Bochum University, April 2022; W. Sadurski, 'Polish Constitutional Tribunal under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler' (2019) 11 *Hague J. on the Rule of Law* 63.

[2] M. Wyrzykowski, 'Experiencing the Unimaginable: The Collapse of the Rule of Law in Poland' (2019) 11 *Hague J. on the Rule of Law* 417.

[3] A. Sanders and L. von Danwitz, 'Defamation of Justice: Propositions on How to Evaluate Public Attacks against the Judiciary' *Verfassungsblog*, 31 October 2017, at <https://verfassungsblog.de/defamation-of-justice-propositions-on-how-to-evaluate-public-attacks-against-the-judiciary/>.

[4] Id.

[5] C.-Y. Matthes, 'Judges as Activists: How Polish Judges Mobilise to Defend the Rule of Law' (2022) 38 *East European Politics* 468, at 481. See also A. Bodnar, 'Polish Road toward an Illiberal State: Methods and Resistance' (2021) 96 *Indiana Law J*. 1059; Ł. Bojarski, 'Resistance against the Rule of Law Backsliding: Judges and Citizens – The Case of Poland' (2023) PhD thesis, University of Oslo.

[6] A. Trochev and R. Ellett, 'Judges and Their Allies: Rethinking Judicial Autonomy through the Prism of Off-Bench Resistance' (2014) 2 *J. of Law and Courts* 68.

[7] Ł. Bojarski, 'Civil Society Organizations for and with the Courts and Judges: Struggle for the Rule of Law and Judicial Independence – The Case of Poland 1976–2020' (2021) 22 *German Law J*. 1344.

[8] B. Grabowska-Moroz and O. Śniadach, 'The Role of Civil Society in Protecting Judicial Independence in Times of Rule of Law Backsliding in Poland' (2021) 17 *Utrecht Law Rev*. 59.

[9] A. Sanders and L. von Danwitz, 'Selecting Judges in Poland and Germany: Challenges to the Rule of Law in Europe and Propositions for a New Approach to Judicial Legitimacy' (2018) 19 *German Law J*. 769; Bojarski, op. cit., n. 7.

Union (CJEU) and requests for preliminary rulings, lobbying the European Commission for litigation, and commencing infringement procedures against the Polish government, as well as urging the European Parliament to invoke Article 7(1) of the Treaty of the European Union (EU), which would suspend certain rights from Poland as a sanction for violating the core principles of EU law.[10]

The unprecedented pinnacle of all of these resistance efforts was that many judges took direct legal action against the Polish government, filing applications to the European Court of Human Rights (ECtHR) in Strasbourg as individual applicants, arguing that their rights – framed with reference to Articles 6, 8, and 10 of the European Convention on Human Rights (ECHR) – had been violated by the government's actions. According to an ECtHR press release in February 2023, there were approximately 300 pending cases concerning the rule-of-law crisis[11] in Poland, a substantive proportion of them submitted by or on behalf of Polish judges.[12] The embrace of the ECtHR by judges acting as petitioners went hand in hand with judges incorporating European human rights jurisprudence into their daily decision making. This was achieved by linking the ECHR to constitutional protections,[13] or by delivering landmark rulings – a stark contrast to the previous preference for legal formalism.

What explains this rapid surge in the reliance on European human rights law and the ECtHR? My main argument is that authoritarian backsliding acted as catalyst for significant changes within the judiciary; specifically, it was productive in making Polish judges more aware of the ECtHR and its jurisprudence as important tools, processes, and practices at their immediate disposal vis-à-vis the state, other legal professionals, and the wider society. How best to frame this turn to human rights law and jurisprudence analytically? I draw on the paradigm of relational legal consciousness introduced by Lynette Chua and David Engel,[14] according to which Polish judges' embrace of international human rights law emerged from the variety of interactions and relationships in which they engaged ('relational embeddedness'[15]) and as a result of the 'communities of meaning' that they co-produced with human rights lawyers, professional associations, civil-society activists, and everyday citizens,[16] thereby contributing to burgeoning research on a 'relationship-based approach to judicial autonomy and the social construction of judicial power'.[17]

[10] Matthes, op. cit., n. 5, pp. 474–477. Given the change in government in 2023 and the resultant legal changes, the European Commission decided on 29 May 2024 to conclude the Article 7 procedure against Poland.

[11] Throughout the article, I use the terms 'authoritarian backsliding' and 'rule-of-law crisis' interchangeably to denote the processes that upset the delicate balance of power among legislative, executive, and judicial branches of government. This led to both institutional and political processes aimed at challenging judicial independence in Poland between 2015 and 2023.

[12] ECtHR Registrar of the Court, 'Non-Compliance with Interim Measure in Polish Judiciary Cases' press release ECHR 053, 16 February 2023, at <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-7573075-10409301&filename=Non-compliance%20with%20interim%20measure%20in%20Polish%20judiciary%20cases.pdf>.

[13] J. Ferejohn, 'Independent Judges, Dependent Judiciary: Explaining Judicial Independence' (1998) 72 *Southern California Law Rev*. 353.

[14] L. J. Chua and D. M. Engel, 'Legal Consciousness Reconsidered' (2019) 15 *Annual Rev. of Law and Social Science* 335.

[15] K. Li, 'Relational Embeddedness and Socially Motivated Case Screening in the Practice of Law in Rural China' (2016) 50 *Law & Society Rev*. 920.

[16] A. Tungnirun, 'Practising on the Moon: Globalization and Legal Consciousness of Foreign Corporate Lawyers in Myanmar' (2018) 5 *Asian J. of Law and Society* 49.

[17] Trochev and Ellett, op. cit., n. 6, p. 69.

Yet the explanatory power of relationality in legal consciousness research does not end here. I propose that 'the porosity of boundaries'[18] extends also to seeing 'both law and politics as social relations and practices'.[19] By making law dependent on politics, the rule-of-law crisis resulted in an existential threat to the independent judiciary.[20] It trapped the Polish legal system in a state of 'permanent liminality',[21] whereby the 'wholesale collapse of order and loss of background structure push[ed] agency to the forefront and produce[d] re-orientations in modes of conduct and thought'.[22] The crisis, therefore, had a productive aspect, giving rise to judicial resistance through individual applications to the ECtHR against the Polish government, which in turn had concrete political implications. This article's original contribution centres on theorizing judicial legal consciousness in relation to authoritarian backsliding and the resultant liminality of structures and strategies for action. While scholars of legal consciousness have long advocated that perceptions of law are 'moulded by political culture',[23] the explicit acknowledgement of law–politics relations allows for a more nuanced and fine-grained understanding of authoritarian backsliding as a catalyst of change within the Polish judicial profession.

This article proceeds in four principal parts. After a note on methodology, Section 3 presents the qualitative change within the Polish judiciary: how judges have embraced and related to the ECtHR as an institution and a source of law. Sections 4 and 5 explain these changes, drawing on the paradigm of relational legal consciousness; Section 4 presents the different communities of meaning that judges engage with and co-produce, and Section 5 identifies these new orientations as emergent qualities of the rule-of-law crisis and the liminality of the legal and political order. Section 6 discusses the implications of the interplay of law and politics for theorizing relational legal consciousness.

2 | METHODOLOGY

The methodology of this article is grounded in a constructivist, qualitative approach, drawing on extensive interviews with key actors in the field. I spent over five months in Poland between 2021 and 2022, conducting in-depth interviews with individual independent judges across various levels of the Polish justice system, including those based in low-level courts (district and regional), appellate courts, and the Supreme Court. These judges specialized in both criminal and civil law cases, and some were members of professional judicial organizations such as IUSTITIA or THEMIS. Additionally, I spoke with human rights lawyers representing applicants before the ECtHR and lawyers from the Polish Ombudsman's office. The legal professionals I interviewed

[18] Chua and Engel, op. cit., n. 14, p. 347.

[19] C. Boukalas, 'Politics as Legal Action/Lawyers as Political Actors' (2013) 22 *Social & Legal Studies* 395, at 395.

[20] The PiS reforms led to a schism in the judicial community between those judges who resist the attacks on their independence and those who agreed with and supported the legal reforms (sometimes called 'neo-judges'). In this article, I employ the term 'independent judiciary' to refer to the first group; see K. Markiewicz, 'Court Composition and Its Invariability as Elements of a Court Established by Law during COVID-19 Pandemic: Lessons from Poland' (2022) 5 *Access to Justice in Eastern Europe* 263.

[21] A. Szakolczai, *Reflexive Historical Sociology* (2000).

[22] B. Thomassen, 'Thinking with Liminality: To the Boundaries of an Anthropological Concept' in *Breaking Boundaries*, eds B. Thomassen et al. (2018) 39, at 52.

[23] M. Hertogh and M. Kurkchiyan, '"When Politics Comes into Play, Law Is No Longer Law": Images of Collective Legal Consciousness in the UK, Poland and Bulgaria' (2016) 12 *International J. of Law in Context* 404, at 415.

ranged from general advocates (barristers) and legal advisors (counsels) practising in different regions of the country, to in-house jurists connected with particular human rights NGOs, and lawyers specializing in non-discrimination cases who pursued strategic litigation before the Polish domestic courts and the ECtHR.

The socio-legal context for my fieldwork was significant, as it was conducted during the biggest rule-of-law crisis since the democratic changes of 1989. Poland became the first EU member state to be subject to both the special monitoring procedure of the Council of Europe and the EU's exceptional Article 7(1) procedure of the Treaty of the European Union.[24] The Venice Commission 2020 report highlighted that the Polish legal order was facing a schism between old judicial institutions and judges on one side and new bodies and judges created or appointed based on legislative amendments in 2017 on the other, leading to the risk of legal chaos.[25] This made my fieldwork extremely difficult and sensitive as judicial independence, constitutional freedoms, and the rule of law became a matter of acute political conflict. Due to my positionality as both a Polish citizen and a socio-legal scholar living abroad, gaining access to, and the trust of, respondents required several weeks of effort using gatekeepers and references.

In total, I conducted 40 formal interviews and had several shorter conversations at conferences and events during my fieldwork. The interviews lasted between 30 minutes and three hours, with some respondents interviewed twice via phone when new legal developments arose. All interviews were conducted in Polish and audio recorded (whenever the participants did not consent to audio recording, extensive handwritten notes were taken).[26] Alongside the interviews, this study employs a contextual analysis of pertinent texts and news items. These sources range from government-issued documents to legal papers, reports, and non-state media pieces. This analysis serves to provide a thorough understanding of the context in which the study took place.

The interviews were analysed using the thematic analysis approach, which is a flexible and theoretically grounded technique for exploring qualitative data.[27] Rather than focusing on predetermined themes, this approach allowed for open exploration of the data and permitted me to make decisions about the themes identified.[28] Notably, change was the theme that surfaced most frequently during these conversations. As the dominant theme, it captured the essence of the judges' reflections on their practices of embracing ECtHR law and jurisprudence. Following the identification of change as the organizing theme, the subsequent steps involved a nuanced exploration of the temporal aspects, focusing on the events before and after the perceived transformations to ensure empirical saturation. This approach ensured a robust empirical foundation,

[24] A. Mechlinska, 'When Is a Tribunal Not a Tribunal? Poland Loses Again as the ECtHR Declares the Disciplinary Chamber Not to Be a Tribunal Established by Law in *Reczkowicz* v. *Poland*' *Strasbourg Observers*, 26 October 2021, at <https://strasbourgobservers.com/2021/10/26/when-is-a-tribunal-not-a-tribunal-poland-loses-again-as-the-european-court-of-human-rights-declares-the-disciplinary-chamber-not-to-be-a-tribunal-established-by-law-in-reczkowicz-v-poland/>.

[25] European Commission for Democracy through Law (Venice Commission), *Poland: Joint Urgent Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on Amendments to the Law on the Common Courts, the Law on the Supreme Court, and Some Other Laws* (2021) 5, at <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI(2020)002-e>.

[26] I conducted interviews with approximately equal numbers of men and women. Though gender differences did not appear to be a significant factor affecting the analysis, I report the gender of my respondents in individual quotations to reflect the balance in the sampling.

[27] V. Braun and V. Clarke, 'Using Thematic Analysis in Psychology' (2006) 3 *Qualitative Research in Psychology* 77.

[28] Id., p. 80.

allowing for the systematic coding of the judges' self-proclaimed shifts in attitude vis-à-vis the ECtHR through a structured and empirically grounded process.

3 | LEGAL FORMALISM OR JUDGES AS 'THE MOUTHPIECES OF THE LAW'

In order for the argument about change to be cogent, it is important to present the attitudes of the Polish judiciary towards the ECtHR's jurisprudence and human rights law prior to the rule-of-law crisis. There are many authoritative sources that talk about the integration of Polish law with European human rights standards – for example, how the different laws and legal institutions have been adapting under the influence of the ECtHR jurisprudence since Poland joined the Council of Europe and Polish citizens obtained the right to individual petition to the ECtHR on 1 May 1993.[29] However, there is a dearth of literature on how the ECHR was regarded by the judges themselves. For example, Wojciech Sadurski praised the Constitutional Court, the main partner and interlocutor of the ECtHR in Poland, as 'activist' relative to what it became on gradual politicization and rule-of-law backsliding since 2015 – hence the tendency to idealize the past.[30] Aleksandra Gliszczyńska-Grabias and Wojciech Sadurski also, however, pointed to the many shortcomings of the Polish Constitutional Court judgments post-1989, such as those concerning the state–Church relationship, which required media broadcasters to respect Christian values, curtailed women's reproductive rights, and allowed the ritual slaughter of animals.[31] While the Polish Constitutional Court was an established judicial actor 'contributing to European integration' and 'limiting legislative and executive powers in a democratic process', it definitely 'lacked vigour' in implementing its anti-majoritarian mission concerning the human rights of sexual minorities.[32] Marie Dembour and Magdalena Krzyżanowska-Mierzewska, in their survey of how the low-level Polish courts responded to and accommodated human rights law ten years after Poland's accession to the Council of Europe and its recognition of the ECtHR jurisdiction, were even more critical: '[L]ower courts continue to this day to avoid any reference to European human rights law.'[33] While in the early 1990s this reluctance might have been attributed to an unclear relationship between national and international law,[34] Dembour and Krzyżanowska-Mierzewska struggled to explain the persistence of low-level courts' ignorance of human rights law following the entry into force of the new Polish Constitution (1997) and

[29] For an overview, see A. Bodnar, *Wykonywanie Orzeczeń Europejskiego Trybunału Praw Człowieka W Polsce: Wymiar Instytucjonalny* [*Implementation of Judgements of the European Tribunal for Human Rights in Poland: Institutional Dimension*] (2018). See also M. Dembour and M. Krzyżanowska-Mierzewska, 'Ten Years On: The Popularity of the Convention in Poland' (2004) 5 *European Human Rights Law Rev*. 400; A. Drzemczewski and M. A. Nowicki, 'The Impact of the ECHR in Poland: A Stock-Taking after Three Years' (1996) 3 *European Human Rights Law Rev*. 261.

[30] W. Sadurski, 'Partnering with Strasbourg: Constitutionalisation of the European Court of Human Rights, the Accession of Central and East European States to the Council of Europe, and the Idea of Pilot Judgments' (2009) 9 *Human Rights Law Rev*. 397; Sadurski, op. cit. (2019), n. 1.

[31] A. Gliszczyńska-Grabias and W. Sadurski, 'Freedom of Religion versus Humane Treatment of Animals: Polish Constitutional Tribunal's Judgment on Permissibility of Religious Slaughter: Judgment of the Constitutional Tribunal of Poland of 10 December 2014, K 52/13' (2015) 11 *European Constitutional Law Rev*. 596.

[32] Sadurski, op. cit. (2019), n. 1, p. 64.

[33] Dembour and Krzyżanowska-Mierzewska, op. cit., n. 29, p. 402.

[34] Drzemczewski and Nowicki, op. cit., n. 29, p. 261.

suggested that a generational change was needed for the ECHR to fully enter 'the legal culture of Poland'.[35]

Many socio-legal scholars would agree that the judicial community in Poland was conservative, with a very limited tradition of what the literature refers to as 'judicial activism'.[36] There is a solid historical explanation for this trend. Prior to 1989, law was considered secondary to the political goals of state socialism, and the judiciary was hardly independent.[37] With the changes of 1989 and the newly gained judicial independence, judges turned to the black-letter text of the law as the main (and only) reference point for their decisions, to avoid accusations of outside interference. Denis Galligan and Marcin Matczak, in their excellent socio-legal study of the use of discretion in Polish courts based on interviews with judges and analysis of judgments from the 1990s, proclaimed judges to be 'the mouthpieces of the law' (*usta ustawy* in Polish). This term was chosen to describe a very narrow, formal, and legalistic interpretation of law adopted by judges in which they were guided solely by the legal text in front of them.[38]

Polish judges were definitely not unique in their embrace of legal formalism; this practice was widespread among judges in Central and Eastern Europe. On the one hand, Peter Cserne identified formalism as 'a persistent feature of the judicial style' as 'bad heritage', 'characterized by a rigid statist conception of law and formalist theory of adjudication' and 'considered and condemned as a sign of a limited mind, blind conservatism, incompetence or lack of transparency'[39]; on the other, he noted that formalism could be an active and conscious response to the 'purposive, principle-based and value-laden reasoning required or imposed by the Court of Justice of the European Union or the European Court of Human Rights'.[40] Here, formalism as 'noble heritage' was seen by Eurosceptic and nationalist commentators as 'an embodiment of courts' commitment to the rule of law' combined with 'national pride and regional self-confidence'.[41] Rafał Mańko even postulated that legal formalism should be formally acknowledged as 'a separate legal family' among the EU member states, given that 'hyper-positivism' was 'the dominant working legal thought in Poland', especially when combined with the 'almost uninterrupted continuity of legal institutions (courts, legal professions) and the system of legal education and judicial appointments'.[42] I would, however, be critical of the argument concerning the alleged continuity of judicial appointments as it ignores substantive generational change among the Central and Eastern European judiciary. The popular slogan 'Decommunize the judiciary' was used tactically by PiS reformers without

[35] Dembour and Krzyżanowska-Mierzewska, op. cit., n. 29, p. 402.

[36] K. D. Kmiec, 'The Origin and Current Meanings of "Judicial Activism"' (2004) 92 *California Law Rev*. 1441.

[37] A. Ledeneva, 'Telephone Justice in Russia' (2008) 24 *Post-Soviet Affairs* 324; K. Hendley, '"Telephone Law" and the "Rule of Law": The Russian Case' (2009) 1 *Hague J. on the Rule of Law* 164; K. Hendley, 'Are Russian Judges Still Soviet?' (2007) 23 *Post-Soviet Affairs* 240; T. Kyselova, 'Dualism of Ukrainian Commercial Courts: Exploratory Study' (2014) 6 *Hague J. on the Rule of Law* 178.

[38] D. Galligan and M. Matczak, 'Formalism in Post-Communist Courts: Empirical Study of Judicial Discretion in Polish Administrative Courts Deciding Business Cases' in *Judicial Reforms in Central and Eastern European Countries*, eds R. Coman and J. M. de Witte (2007) 227; M. Matczak, 'The Clash of Powers in Poland's Rule of Law Crisis: Tools of Attack and Self-Defense' (2020) 12 *Hague J. on the Rule of Law* 421.

[39] P. Cserne, 'Discourses on Judicial Formalism in Central and Eastern Europe: Symptom of an Inferiority Complex?' (2020) 28 *European Rev*. 880, at 884. See also M. Matczak et al., 'Constitutions, EU Law and Judicial Strategies in the Czech Republic, Hungary and Poland' (2010) 30 *J. of Public Policy* 884.

[40] Cserne, id., p. 885.

[41] Id., p. 885. See also M. Bobek, 'A New Legal Order, or a Non-Existent One? Some (Early) Experiences in the Application of EU Law in Central Europe' (2006) 2 *Croatian Yearbook of European Law & Policy* 265, at 297.

[42] R. Mańko, 'Survival of the Socialist Legal Tradition? A Polish Perspective' (2013) 4 *Comparative Law Rev*. 1.

acknowledging that many of the judges received their professional appointments in the late 1990s and 2000s and *de facto* learned about communism from history textbooks.

When I asked judges to reflect on the past practice of referring to the ECtHR jurisprudence, the interviewees largely confirmed its marginal relevance for day-to-day judicial practice, as foretold by Dembour and Krzyżanowska-Mierzewska:[43]

> I rather doubt that prior to 2015 we were looking at the European Convention or other [international human rights]. Yes, we were aware that such a thing existed, but in practice it was neither used nor appeared in court practice. Maybe sometimes the lawyers would raise it in the courtroom. Maybe in rare Supreme Court rulings there were some mentions or references to these international acts … Until 2015, I had the impression that this was completely a marginal issue. (judge, male, appellate court)

Many other judges were equally frank in admitting that they rarely used the jurisprudence of the ECtHR. One judge drew on a popular phrase from *Star Wars* when reflecting on the distance between the ECtHR and their own professional, everyday practice:

> Only five years ago, I treated the ECtHR as a court from a galaxy far, far away. There were some cases regarding pre-trial detention, excessive length of proceedings. Something was going on there, but I thought it was all resolved [in Polish law]. I have never previously tried to refer to the jurisprudence of the ECtHR when deciding cases – I am a criminal judge – concerning personal searches, for example, or the possibility of using coercive measures by the police. I thought: 'We have a sound legal system – why go so far?' (judge, female, district court)

Adam Bodnar, a prominent legal scholar and a former Civil Rights Ombudsman in Poland, would see these attitudes as characteristic of the initial period of the ECHR adaptation, when Poland struggled with perennial problems inherited from the legal system pre-1989 – protracted and lengthy legal proceedings, unregulated rents, overcrowding in prisons, lengthy pre-trial detention[44] – but these problems, in the opinion of the judges I interviewed, were not considered to pose an existential threat to the legal system. Interviewees were certain – perhaps complacent – in thinking that the Polish state would solve them sooner or later, in one way or another. One judge compared these cases to the buttons of a coat that needed to be fastened but ultimately neither threatened nor compromised the integrity of the coat itself: '[A]fter all, you can still wear the coat and keep sewing on the buttons as you go along' (judge, female, district court). There is also a certain persistent inertia and legacy of this thinking among the judges who have now petitioned the ECtHR, as one judge told me with a smirk: '[U]ntil 2015, I associated the ECtHR with cases of convicted felons who appeared before me, and complained about poor prison cell conditions, etc. Now I've joined them. It probably does not reflect well on me' (judge, male, appellate court). This quote reveals the uneasiness with which this judge embraced his new role as a petitioner before the ECtHR, demonstrating that this was not only a new experience for him personally but also for the judiciary as a whole. Judges who did draw on international human rights instruments, or request a preliminary ruling from the

[43] Dembour and Krzyżanowska-Mierzewska, op. cit., n. 29.

[44] Interview with author, Warsaw, June 2022.

CJEU, were previously considered eccentrics (at best) or harmless nerds (at worst) among their colleagues:

> Other judges would tell me: 'Look, our nerd is again knocking on all the doors, leaving no stone unturned. Why can't he just tick this case off, improve his statistics?' Now the perception of these judges [petitioning international courts] is changing, because they push the jurisprudence forward and may bring about systemic change. (judge, male, regional court)

It is revealing how the discussion on the application of international human rights instruments made the interviewees reflect on themselves and their own positionality within the legal profession. They consistently saw themselves as bureaucrats or clerks – confirming the formalist thesis – with a heavy and ever-increasing workload, which could be managed only by routinizing their approach to cases to ensure that their judgments were not reversed by the appellate courts so that the statistical, quantitative indicators of their performance remained healthy.[45] The judges were embedded in a conservative and rigid structure, which did not leave much room for manoeuvre, and which they reproduced through their actions, approaches to decision making, and education models:

> Aspiring judges have been taught in a way that did not require a creative interpretation of the rules. There were some guiding judgments of a higher court, where it was clarified that, for example, a robbery with a dangerous weapon means that this dangerous weapon is, for example, a broken bottle, a crowbar, etc. It was so very simplistic. No one really required any creative interpretation. The judges' own intellectual invention was rather met with criticism of the higher courts, or with misunderstanding. (judge, male, regional court)

The structural rigidity of the judicial profession became the defining feature of judges' conservatism, a 'convenient' shortcut and effortless explanation to lean on while managing the ever-increasing workloads. Yet it was also something that the interviewees secretly aspired to leave behind. As the quote below reveals, the judges invoked this image of themselves in the cognitive relational process of 'looking backward to look forward'.[46] The healthy dose of self-criticism in describing their routinized actions and comparing themselves to 'post office clerks' might be an indicator that the mirror that they put to themselves reflected somewhat an image of the past:

> In fact, judges are not special. We are craftsmen, legal clerks. We might as well work at the post office or at the cobbler's workshop. We have learned a dozen laws, several codes, and operate like this because it's convenient. It doesn't require any effort. We have been using the same one shovel for many years, we are used to it, and it is difficult for us to take any other tool or any better tool. I often came across this way of thinking: who cares about a European court? Now, I am convinced that in recent

[45] For Russia, see K. Hendley, *Everyday Law in Russia* (2017); Hendley, op. cit. (2007), n. 37; K. Hendley, 'The Unsung Heros of the Russian Judicial System: The Justice-of-the-Peace Courts' (2012) 5 *J. of Eurasian Law* 337.

[46] G. Gavetti and D. Levinthal, 'Looking Forward and Looking Backward: Cognitive and Experiential Search' (2000) 45 *Administrative Science Q*. 113.

> years there have been rulings by Polish judges that directly refer to international law, and judges have begun to interpret this law in a creative way. (judge, male, appellate court)

4 | RELATIONAL LEGAL CONSCIOUSNESS: ACTORS AND RELATIONSHIPS

Chua and Engel, in their 2019 article 'taking stock' of legal consciousness scholarship, put forward an argument that '[l]egal consciousness research should be imagined on a continuum ranging from individualistic conceptualizations of thought and action to interactive, co-constitute approaches'.[47] Their article put the relational paradigm explicitly on the map of legal consciousness research, which the authors themselves acknowledge 'has been a matter of degree rather than kind' given that legal consciousness, as a collective phenomenon, has never been theorized in a social vacuum.[48] The relational or co-constitutive model of legal consciousness is pluralist in itself. It explicitly acknowledges 'other individuals as co-creators of consciousness' and views legal consciousness 'as a fully collaborative phenomenon'.[49] As a result, legal consciousness, defined 'as ways in which people understand, experience, or act in response to law',[50]

> can take on as many different forms as there are relationships – among couples, families, groups, associations, communities, and so on. Because individuals have multiple relationship[s], they participate in – and help to constitute – multiple forms of collective legal consciousness.[51]

Judicial resistance as a site of legal consciousness production emerged not in a vacuum but in relation to other groups of legal professionals in Poland. The judiciary is relationally embedded within a broader collective actor, defined by Lucien Karpik and Terrence C. Halliday as the 'legal complex': 'a cluster of legal actors related to each other in dynamic structures and constituted and reconstituted through a variety of processes'.[52] The collective action and mobilization of these various legal actors around a specific issue and at a particular historical moment is explicitly relational as it is 'enabled through discernible structures of ties'.[53] The turn to mobilize human rights law and ECtHR jurisprudence was therefore relationally embedded across a network of significant others – namely, human rights lawyers, domestic and transnational law associations, NGOs, and, finally, Polish citizens – which is an example of what Alexei Trochev and Rachel

[47] Chua and Engel, op. cit., n. 14, p. 335.

[48] Id., p. 344. See also M. Kurkchiyan, 'Perceptions of Law and Social Order: A Cross-National Comparison of Collective Legal Consciousness' (2010) 28 *Wisconsin International Law J*. 146; D. Cowan, 'Legal Consciousness: Some Observations' (2004) 67 *Modern Law Rev*. 929. For an alternative review of legal consciousness scholarship, see S. Halliday, 'After Hegemony: The Varieties of Legal Consciousness Research' (2019) 28 *Social & Legal Studies* 859.

[49] Chua and Engel, op. cit., n. 14, p. 347.

[50] L. J. Chua, 'Constitutional Interpretation and Legal Consciousness: Out of the Courts and onto the Ground' (2023) 20 *International J. of Constitutional Law* 1937, at 1939.

[51] Chua and Engel, op. cit., n. 14, p. 347.

[52] L. Karpik and T. C. Halliday, 'The Legal Complex' (2011) 7 *Annual Rev. of Law and Social Science* 217, at 220.

[53] Id., p. 221.

Ellett dubbed '21st-century transnational elite networks'.[54] Not only do the various institutional and personal ties give rise to a particular form of legal consciousness,[55] but they are also explicitly invoked when reflecting on the recent turn to international human rights. In the interviews, the judges highlighted how their turn to human rights jurisprudence was marked by their various relationships as 'intertwined and mutually constitutive processes'.[56]

4.1 | Lawyers and advocates

The first group of reference for the judges were the lawyers, a professional group to which the judges themselves belong. As Łukasz Bojarski observed, 'in Poland lawyers traditionally did not identify themselves with "one legal profession" but with different legal occupations or professions like judges, prosecutors, notaries, or attorneys-at-law grouped in two professions: advocates and legal advisors'.[57] Advocates and legal advisors were in the vanguard of those embracing human rights law and ECtHR jurisprudence in Poland.[58]

The Human Rights Commission was established in Poland in November 1990 by the National Bar Council (NRA or Naczelna Rada Adwokacka in Polish) and headed by Marek Antoni Nowicki, later an investigative judge at the European Commission of Human Rights in Strasbourg (1993–1999). The first Polish translation of the ECHR was published in *Palestra*, the oldest legal periodical of the NRA, in its November/December 1991 issue, which coincided with Poland's accession to the Council of Europe. Since then, *Palestra* has published numerous articles on developments in the jurisprudence of the ECtHR. The most significant judgments concerning Poland, previously reviewed in *Palestra*, have been included in the volume *Around the European Convention*, authored by Nowicki and published by Wolters Kluwer, now in its eighth edition. The Human Rights Commission run seminars, international conferences, and exchange programmes with leading human rights professional organizations and universities in Europe and the United States (US) to ensure that the ECHR is popularized as a tool for lawyers in the region. The Human Rights Commission, together with the Polish Helsinki Foundation for Human Rights and the Warsaw office of the Council of Europe (the latter headed by Hanna Machińska), became the sponsors as well as co-creators of an entire infrastructure of knowledge around the ECtHR. As a result, Poland has consistently ranked in the top five countries whose citizens submitted the highest number of applications to the ECtHR since its accession to the Council of Europe. The lawyers represented individual applicants, and often spearheaded important or landmark cases. Since 2004, there has been an active group of human rights lawyers pursuing strategic litigation at the Helsinki Foundation.[59] This NGO was among the top players in terms of bringing litigation and

[54] Trochev and Ellett, op. cit., n. 6, p. 80.

[55] S. Liu and T. C. Halliday, *Criminal Defense in China: The Politics of Lawyers at Work* (2016).

[56] Chua and Engel, op. cit., n. 14, p. 347.

[57] Bojarski, op. cit., n. 7, p. 1346.

[58] M. A. Nowicki, 'Komisja Praw Czlowieka Nra: Autorskie Kalendarium Tego, Co Bylo Najwazniejsze W Pionerskim Dziesiecioleciu 1990–2000' ['Human Rights Commission by National Council of Advocates: A Personal Calendarium of What Was Most Important in the Pioneering Decade of 1990–2000'] (2014) 59 *Palestra: Pismo Adwokatury Polskiej* 36.

[59] A. Sańczuk, *Po Stronie Wolnosci: 25 Lat Helsinksiej Fundacji Praw Czlowieka W Polsce* [*On the Side of Freedom: 25 Years of Helsinki Human Rights Foundation in Poland*] (2015) 75, at <https://hfhr.pl/publikacje/po-stronie-wolnosci-25-lat-helsinskiej-fundacji-praw-czlowieka>.

offering expertise (*amicus curiae*) before the ECtHR.[60] As Halliday observed, 'repeatedly, it is the alliance of an organized bar and bold judiciary that energizes and enables the defence of basic legal freedoms'.[61] It is perhaps not surprising, then, that professional human rights lawyers in particular were identified by the interviewed judges as the prime movers behind the turn to human rights:

> There is an army of lawyers who help us pro bono and without whom we would simply die. You can't imagine that I would be able to write a good complaint to the ECtHR [after so many years of ignoring it]. These lawyers, they know this stuff. I fully trust them. (judge, male, appellate court)

For lawyers, the turn to the ECtHR was dictated by both practical and symbolic considerations. Given the reforms of the Polish legal system, it was important to move the 'conflict' to an international level; to guarantee that the legal mechanisms were effective (independent); and to ensure that the first significant successes before the ECtHR had the potential to mobilize broader European public opinion against the democratic backsliding in Poland:

> 'There is nothing more we can do here in our country, we won't win anything in your favour, so you have to try before the ECtHR' – such a practical point of view prevailed in my case … Even if, for example, these complaints do not prove to be effective or the requests [for a preliminary ruling from the CJEU] turn out to be stupid, it will still be a success because Europe will find out about what is really going on in our country. (judge, male, appellate court)

4.2 | Professional judicial associations

The approach and strategy advanced by human rights lawyers was very much developed in consultation with the professional judicial associations in Poland, IUSTITIA and THEMIS – another set of important actors in the relational legal consciousness formation. There is burgeoning research about how judicial associations in Poland, but also in other democratically backsliding Eastern European countries such as Hungary or Romania, employed diverse repertoires of action and discursive strategies to resist the rule-of-law crisis.[62] The resistance tactics of judicial associations 'on the ground' in Poland were a very important factor behind the mobilization of the ECtHR. The many members of judicial associations have climbed a steep learning curve in a very short time; they now offer expertise to the ECtHR by submitting *amicus curiae* in a number of leading and strategic rule-of-law cases. They are well networked (both offline and online) and exchange information, strategies of action, and future directions for mobilization. Most of all, they are highly determined:

[60] R. A. Cichowski, 'Civil Society and the European Court of Human Rights' in *The European Court of Human Rights between Law and Politics*, eds J. Christoffersen and M. R. Madsen (2011) 77; M. Szwed and K. Wiśniewska, *Kierunek Strasburg: Nowy Przystanek W Walce O Praworzadnosc? Raport O Polskich Sprawach Przed Etpc*. [*Towards Strasbourg: A New Direction in the Struggle for the Rule of Law? Report on Polish Cases before the ECtHR*] (2020).

[61] T. C. Halliday, 'Why the Legal Complex Is Integral to the Theories of Consequential Courts' in *Consequential Courts: Judicial Roles in Global Perspective*, eds D. Kapiszewski et al. (2013) 337, at 338.

[62] L. Puleo and R. Coman, 'Explaining Judges' Opposition When Judicial Independence Is Undermined: Insights from Poland, Romania, and Hungary' (2023) 31 *Democratization* 47; Matthes, op. cit., n. 5.

> It is enough to show us one case that has a potential to make a tiny hole in this allegedly unbreakable wall. And we'll stick our finger in, and we will drill further. And then we'll put a spoon in. And then we'll stick a ladle or something even bigger. Eventually, the wall will collapse. (judge, female, district court)

The mobilization of European human rights that defines judicial legal consciousness in Poland is relational and dynamic in its very essence and form:

> We work very closely together here. This is an amazing example of a cooperation among different legal professions. Here, complaints to the ECtHR are written by judges who are *de facto* applicants, together with lawyers. We also immediately inform each other about what is going on, in what directions the lawyers see the development of the case law. We're all looking for materials, we're all exchanging information, and this is the entire think tank that was created pro bono. (judge, female, regional court)

Polish judicial associations have successfully mobilized the support of their international colleagues from Western and Eastern European countries, even Turkey. As Trochev and Ellett have shown, the likelihood of success for collective off-bench resistance increases when judges can garner support from other influential groups.[63] A demonstration dubbed the Rally of a Thousand Gowns took place in Warsaw in January 2020, where judges, barristers, and legal professionals from across Europe donned their professional attire to protest against the so-called 'muzzle law'. This bill sought to empower the Disciplinary Chamber of the Supreme Court (renamed the Chamber of Professional Responsibility in 2022) to punish judges who engaged in 'political activity', which was defined, among other things, as questioning the political independence of the same Disciplinary Chamber. The sanctions could include a fine, a reduction in salary, or termination of employment. The rally drew representatives from legal professional organizations from around the world, who expressed solidarity with Polish judges and ordinary citizens. According to media reports, the protest attracted around 30,000 participants.[64] The interviewees referred to this event and the relationships with European colleagues as formational of their broader European outlook, reflecting on the solidarity and understanding that they received in support of their mobilization to protect their professional independence:

> In our relations with the European judges who, three to four years ago, looked at us with the level of compassion with which you might look at a distant poor relative – that has changed. The Dutch, the Germans, the French, etc. – [now] it's not sympathy, it's full understanding. They say: 'Hey, this is starting to happen with us too, or it will start happening soon. We are also beginning to see the weakening of judicial independence in our countries … What you are doing here in Poland can be a kind of lesson because we can learn from it and somehow try to use it at home.' (judge, male, regional court)

[63] Trochev and Ellett, op. cit., n. 6, p. 78.

[64] A. Szęśniak et al., 'Imponujący Pokaz Odwagi Sędziów i Solidarności Obywateli: 30 Tysięcy Osób W Marszu Tysiąca Tóg' ['An Impressive Display of Judges' Courage and Citizens' Solidarity: 30,000 People in the Rally of a Thousand Gowns'] *Oko.press*, 11 January 2020, at <https://oko.press/idzie-marsz-tysiaca-tog-zobacz-relacje-live/>.

4.3 | Civil society

Civil-society actors are another group in relation to whom the judicial legal consciousness of embracing human rights law is being co-constructed. Bojarski defined civil-society organizations (CSOs) as 'groups of citizens who associate for a chosen purpose in the form of associations, foundations, or less formal initiatives'.[65] Civil society plays a crucially significant role, Bojarski claimed, when it comes to its 'support for the judiciary, their struggle for independent courts, and their defence of liberal values under attack' in Poland.[66] While Bojarski's research focused on CSOs' support for the independent judiciary in Poland from a historical perspective (that is, from the final decade of communism, through 1989 and the post-communist transition, up to the democratic backsliding of 2015–2020), he also claimed that 'what we are currently witnessing in Poland is a noteworthy phenomenon with no precedent, both concerning the character of the relationship between judges and CSOs and the striking scale and diversity of interaction and cooperation'.[67] Indeed, the interviews showed that CSOs constitute an important reference point in the formation of judges' legal consciousness. One of the judges gave me the following reason for her application to the ECtHR, clearly demonstrating the broader social context of her claim:

> I applied to the ECtHR, but I maintain a healthy distance from my position as a judge – let's just say I know I am not invaluable to the justice system. Being a judge is a service. I always say this at various demonstrations: 'We stand here for you, for the citizens. Court is for the weakest [in society]. If you have nowhere else to go, to complain, your neighbour does not react, the public officers do not react, you get hurt, then you go to court. Whether it is perfect or not. But as long as the court is free, it will listen to you.' (judge, female, regional court)

It is, however, important not to romanticize or exaggerate the general public's support for the independent judiciary. A large-N, mixed-method sociological study conducted by Jan Winczorek and Karol Muszyński in Poland showed the general population's 'relative indifference towards the threat of dismantlement of the rule of law'.[68] The PiS reforms 'have provoked neither efficient opposition nor public discontent', which the authors attributed to the widely perceived 'justice gap': 'failings in access to justice provision' pre-2015.[69] However, regardless of civil society's actual role and involvement, it and NGOs did act and were perceived as 'a significant other' on the relational continuum in judicial legal consciousness formation.

Aside from the various physical actors – lawyers, domestic and international professional associations, and broader civic society – there are also other important factors that could relationally explain the judicial turn towards the ECtHR. The following section examines how the politically induced rule-of-law crisis – perceived by judges as an existential threat – and the resultant liminality have co-produced change in judicial understandings and practices relating to law.

[65] Bojarski, op. cit., n. 7, p. 1347.

[66] Id., p. 1346.

[67] Id.

[68] J. Winczorek and K. Muszyński, 'The Access to Justice Gap and the Rule of Law Crisis in Poland' (2022) 42 *Zeitschrift für Rechtssoziologie* 5, at 6–7.

[69] Id., p. 6.

5 | RELATIONAL LEGAL CONSCIOUSNESS: CRISIS AND LIMINALITY

There is potentially no concept in sociology more relational than liminality. Derived from the Latin word *limen* meaning 'threshold', liminal space is the 'betwixt and between'[70] location of cultural action, in which meaning is produced. Originally coined by the French ethnologist Arnold van Gennep in 1960 as a specific phase in the rite of passage,[71] it was brought into wider scholarly use by Victor Turner, who also experimented conceptually with the term.[72] For Turner, a 'liminal phase' referred to almost anything 'in which there was a normally short-lived period of upending of a prior hierarchy and during which power reversals occurred, or at least appeared to have occurred'.[73] While Turner has been criticized for leaving the term open and malleable, liminality's impressive career in sociology has been attributed exactly to its 'possibilities for flexible adaptation and application'.[74] Shmuel Eisenstadt proposed that 'the concept of liminality could re-address the question of change and continuity in large-scale settings'.[75] As recently argued by Bjørn Thomassen, 'the most far-reaching suggestion about liminal situations concerns the wider claim that whole societies can experience them during crisis or the collapse of order'.[76]

The 2015–2023 rule-of-law crisis in Poland could be seen as a liminal period, during which the traditional norms and values of democratic societies were being challenged, and new forms of governance and political organization emerged:[77]

> [T]he liminality period is at once unstructured and highly structuring: the most basic rules of behaviour are questioned, doubt and scepticism about the existence of the world are radicalized. However, the problematizations, formative experiences, and reformulations of being that arise during the liminality period proper feed the individual (and his/her cohort) with a new structure and set of rules that, once established, glide back to the level of the taken-for-granted.[78]

In Poland, this liminal period was characterized by uncertainty, instability, and a sense of unease caused by the democratic backsliding.[79] The main legal institutions, such as the Constitutional

[70] V. Turner, *The Forest of Symbols: Aspects of Ndembu Ritual* (1967) 93.

[71] A. van Gennep, *The Rites of Passage* (1960).

[72] H. Wels et al., 'Victor Turner and Liminality: An Introduction' (2011) 34 *Anthropology Southern Africa* 1.

[73] Id., p. 1.

[74] Id.

[75] S. N. Eisenstadt, *Power, Trust, and Meaning: Essays in Sociological Theory and Analysis* (1995), cited in Thomassen, op. cit., n. 22, p. 51.

[76] Thomassen, id., pp. 50–51.

[77] C. Mouffe, *For a Left Populism* (2018).

[78] Thomassen, op. cit., n. 22, pp. 51–52.

[79] M. Bernhard, 'Democratic Backsliding in Poland and Hungary' (2021) 80 *Slavic Rev*. 585; L. Cianetti et al., 'Rethinking "Democratic Backsliding" in Central and Eastern Europe: Looking beyond Hungary and Poland' (2018) 34 *East European Politics* 243; L. Pech and K. L. Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) 19 *Cambridge Yearbook of European Legal Studies* 3; Sadurski, op. cit. (2019), n. 1; N. Sitter and E. Bakke, 'Democratic Backsliding in the European Union' in *Oxford Research Encyclopedia of Politics* (2019); D. Waldner and E. Lust, 'Unwelcome Change: Coming to Terms with Democratic Backsliding' (2018) 21 *Annual Rev. of Political Science* 93.

Tribunal (CT), were staffed with judges loyal to the ruling party, making the tribunal a 'mere enabler' of the government.[80] Meanwhile, in its two recent landmark judgments (Cases K 6/21 and K 7/21), the CT rejected the primacy of ECtHR jurisprudence, accused the ECtHR of violating the principle of subsidiarity, and paved the way for the Polish government to ignore its judgments, especially in matters of judicial independence.[81] It specifically withdrew from the ECtHR's sphere of competence – with regard to Article 6(1) – itself and the entire organization of the Polish judicial system (the laws specifying the scope and mode of operation of the justice system, and methods of electing members of the NCJ). One judge characterized this resultant uncertainty, and the extent of the legal chaos, as follows:

> Please excuse my electrical metaphor, but all the fuses or mechanisms of checks and balances responsible for the protection of the rule of law in Poland have become unplugged. They don't work. Of course, it is not a desirable situation when the rule of law in Poland can only be protected by international courts, but this is the situation we are in – they basically replace the Polish Constitutional Tribunal to a large extent at the moment. (judge, male, regional court)

This quote clearly attributes the judicial turn to international human rights to authoritarian backsliding, the liminality of the political order, and the loss of trust and confidence in the highest state institutions. The many independent reports and the interviews with the judges revealed that the chaos and uncertainty not only concerned the highest judicial bodies; through the reforms of the NCJ, they spread through all of the different levels of the justice system.[82] The uncertainty over the legality of common judicial appointments made turning to the ECtHR's jurisprudence the safest option when delivering judgments:

> You don't know who adjudicates in the appellate court, so even if you see a helpful ruling in the database, the first thing you have to do is check the composition of the bench so you do not refer to a ruling issued by a judge whose status may be questioned later on. It turns out that the safest solution is to rummage through the Strasbourg jurisprudence. We started to refer to this jurisprudence. In fact, thanks to this crisis of the rule of law in Poland, Strasbourg has entered the judiciary practice in Poland. This is the only positive from the whole situation. (judge, female, district court)

While the interviewees were careful not to bring politics into the conversation, and repeated as mantra that they were 'apolitical', their active resistance against the government cannot be interpreted as completely outside of the political realm. The turn to human rights jurisprudence as the

[80] A detailed description of the political conflict over the CT between Civic Platform and PiS lies beyond the scope of this article. To understand the basic details of the illegitimate election and appointment of judges, see Sadurski, op. cit. (2019), n. 1.

[81] A. Ploszka, 'It Never Rains but It Pours: The Polish Constitutional Tribunal Declares the European Convention on Human Rights Unconstitutional' (2021) 15 *Hague J. on the Rule of Law* 51; A. Kubal and M. Mrowicki, 'Pushback or Backlash against the European Court of Human Rights? A Comparative Case Study of Russia and the Democratically Backsliding Poland' (2024) 9 *Russian Politics* 135.

[82] K. Kovács and K. L. Scheppele, 'The Fragility of an Independent Judiciary: Lessons from Hungary and Poland – and the European Union' (2018) 51 *Communist and Post-Communist Studies* 189; M. Mastracci, 'Judiciary Saga in Poland: An Affair Torn between European Standards and ECtHR Criteria' (2020) 9 *Polish Rev. of International and European Law* 39; Markiewicz, op. cit., n. 20; Szwed and Wiśniewska, op. cit., n. 60.

defining feature of the newly emergent legal consciousness was invoked in saviour-like rhetoric as a 'weapon' in the 'fight' to protect judicial independence: 'We judges try to fight and resist. But we are judges, so we can only use legal instruments. These complaints to the ECtHR or requests [for a preliminary ruling] to the CJEU are, among others, our weapons' (judge, male, appellate court). This choice of language demonstrates that while the judges were trying to 'avoid becoming political actors, they turned into societally relevant legal activists aiming to defend the rule of law'.[83] As Trochev and Ellett explained in the context of hybrid regimes, a scenario that Poland approached during authoritarian backsliding, 'the judiciary is progressively more politicized, politics are increasingly judicialized, and key political questions are regularly framed as legal questions or disputes'.[84] For example, the interviewees referred to the internationalization of the conflict with the executive as a potential tactical result of mobilizing the ECtHR. They symbolically drew on the ECtHR to make their quest for independence more significant and internationally relevant: 'Strasbourg Court, Luxembourg Court – it's also a form of publicizing the situation in Poland. It's for tactical reasons, so that the Polish case does not disappear from the international, European agenda' (judge, male, appellate court). By attaching their names to the cases filed to the ECtHR, judges were openly challenging the Polish government, essentially taking legal action against the Polish state, which they themselves represent and have sworn to protect. In some extreme cases, these individual applications concerned Article 8, where judges complained of privacy infringements and public abuse stemming from political smear campaigns.[85] Some judges claimed to have regularly experienced acts of physical and verbal aggression in public, which were motivated by the authorities' defamatory actions against them.[86] The judges were clearly uncomfortable with this situation and experienced the vulnerability that comes from feeling exposed:

> I look with some embarrassment when I see my name on the ECtHR website. It never occurred to me that I would find myself in such a phrase as 'X, Y, Z versus Poland'. It's completely absurd. I'm approaching this whole thing by trying to completely separate it from the personal. It was public interest that was the main motive for filing this complaint. This is also paradoxical. If I said this before the ECtHR, this complaint would be thrown into the bin, because it should concern my individual rights and freedoms. But the real reason is to use my case as a pretext. However, I feel embarrassed – that's obvious. Who wouldn't feel embarrassed? Taking your own country to an international tribunal, saying that the system of governance in this country is such that it violates one's rights and freedoms. This whole situation does not give me any satisfaction. (judge, male, high court)

To summarize, if it had not been for the politically induced rule-of-law crisis, perceived by the judges as existential, their embrace of international human rights instruments would have remained tentative at best. Therefore, crisis-induced liminality came with its own potential, 'when possibilities lay open',[87] and necessitated new creative solutions. In accordance with Ewick and

[83] Matthes, op. cit., n. 5, p. 481.

[84] Trochev and Ellett, op. cit., n. 6, p. 82.

[85] Sanders and von Danwitz, op. cit., n. 3.

[86] See *Tuleya* v. *Poland (No. 2)*, ECtHR App. No. 51751/20.

[87] Thomassen, op. cit., n. 22, p. 51.

Silbey's legal consciousness argument, 'resistance represents a consciousness of both constraint and autonomy, power and possibility'.[88] I therefore argue that the crisis and its accompanying state of liminality in Poland were transformational for judicial legal consciousness, compelling judges to embrace human rights arguments in defence of their independence and autonomy.

6 | DISCUSSION: THEORIZING RELATIONALITY IN LEGAL CONSCIOUSNESS – THE INTERPLAY OF LAW AND POLITICS

What does the Polish judicial case study mean for theorizing relationality in legal consciousness? The empirical material clearly shows that the turn to human rights among Polish judges in terms of the day-to-day application of ECtHR jurisprudence and petitioning the court – marking a significant change within their legal consciousness – took place with reference to the various social actors with whom the judges either forged new alliances or strengthened existing ones. The intense work within judicial associations and the opening up of new, multi-track pathways to legal resistance was only possible due to the expertise of human rights lawyers, while participation in street protests placed the judges 'shoulder to shoulder' with the general public.

The theoretical potential of relationality does not, however, end with the discussion of social actors as co-producers of the ways in which other people 'experience, understand, and act in relation to law'.[89] Given the porosity of borders between law and other social systems, relationality has the potential to capture how one's ideas about law are co-constituted through the broader interaction and interplay between these different social spheres.[90] This goes beyond saying that attitudes to law are shaped 'by experiences within a country's specific political-legal order'[91]; rather, it is to note that politics or political change play a major role in the production of legal consciousness, co-constructing ideas about law and relationship-based behaviour. Chua recently implicitly acknowledged the role of broader social norms in influencing legal consciousness formation:

> [L]egal consciousness emerges from and evolves as a result of interactions with social norms, relationships, and legal rules … Sometimes, social norms, such as those related to religion, gender, or community, exert greater influence than state laws and constitutions over people's thoughts and actions. Other times, it is the opposite.[92]

In their comparative study of collective legal consciousnesses in the UK, Poland, and Bulgaria, Marc Hertogh and Marina Kurkchiyan pointed to an intricate relationship between legal and political consciousness. They observed that peoples' 'perceptions of law are, to a large extent, defined by perceptions of the political system'; the political system is therefore considered an important source of law and condition for legal reform.[93] While Hertogh and Kurkchiyan's study was

[88] P. Ewick and S. Silbey, 'Narrating Social Structure: Stories of Resistance to Legal Authority' (2003) 108 *Am. J. of Sociology* 1328, at 1336.

[89] Chua and Engel, op. cit., n. 14, p. 336.

[90] D. J. Galligan, *Law in Modern Society* (2007).

[91] W. M. Reisinger et al., 'Popular Legal Attitudes and the Political Order: Comparative Evidence from Georgia, Russia and Ukraine' (2021) 73 *Europe-Asia Studies* 36, at 36.

[92] Chua, op. cit., n. 50, p. 1943.

[93] Hertogh and Kurkchiyan, op. cit., n. 23, pp. 405, 415.

conducted with members of the general public, it is difficult to believe that judges would be immune to this process; indeed, if anything, they would be more acutely aware that

> perceptions of law are not just shaped by first-hand personal experience of law or the relevance of law to personal interests, but also by a broader interpretation of the political process, and – even more so – by the degree of trust that they have in the foundations of their political system.[94]

Given the blatant political interference with the Polish judicial system between 2015 and 2023, which was perceived as an existential threat by many of the judges I interviewed, it is undeniable that these experiences significantly influenced their understandings and use of law. This demonstrates how legal consciousness transforms in an environment of perceived deep political crisis, capturing 'the multiple and shifting relations of co-determination among politics and law, without collapsing them into one another'.[95]

In that sense, judicial legal consciousness is formed in relation to judicial political stance. While this claim might sound perfectly acceptable for debating the sources of emergent legal consciousness with regard to the broader general public or human rights lawyers, it becomes epistemologically uncomfortable when used with reference to the judiciary as a particular legal professional group, especially considering that judges are 'a specific type of actor, different from politicians, citizens or economic actors, above the day-to-day pressures of politics'.[96] Whether judges should or should not be political actors has been a matter of much debate. In the North American context, the criticism of judicial activism has often centred around judges using (and abusing) their power to invalidate arguably constitutional actions by other branches of the government (executive or legislative), failing to adhere to precedent, engaging in judicial legislation and result-oriented judging, and departing from interpretive methodology.[97] In the context of the Global South, the scholarship has focused on the informal connections between judges and various stakeholders (or 'audiences'), both within and beyond the judicial system. These connections illustrate the slippery slope of the relationality between law and politics as they are formed on the basis of shared political interests, common ideas, social identities, and, in some cases, even clientelist obligations.[98] In the context of European or civil-law debates, judges becoming

[94] Id., p. 415.

[95] Boukalas, op. cit., n. 19, p. 415.

[96] Matthes, op. cit., n. 5, p. 470.

[97] C. R. Sunstein et al., *Are Judges Political? An Empirical Analysis of the Federal Judiciary* (2006); J. S. Schacter, 'Putting the Politics of "Judicial Activism" in Historical Perspective' (2018) *Supreme Court Rev*. 209; Kmiec, op. cit., n. 36; C. Green, 'An Intellectual History of Judicial Activism' (2009) 58 *Emory Law J*. 1195; J. Greenberg, 'Jurisdiction, Politics, and Truth-Making: International Courts and the Formation of Translocal Legal Cultures' in *International Court Authority*, eds K. J. Alter and L. R. Helfer (2018) 403; C. Gardner Geyh, 'Can the Rule of Law Survive Judicial Politics?' (2011) 97 *Cornell Law Rev*. 191.

[98] Y. Kureshi, 'When Judges Defy Dictators: An Audience-Based Framework to Explain the Emergence of Judicial Assertiveness against Authoritarian Regimes' (2021) 53 *Comparative Politics* 233; B. Dressel et al., 'The Informal Dimension of Judicial Politics: A Relational Perspective' (2017) 13 *Annual Rev. of Law and Social Science* 413; R. Hoque and M. M. Khan, 'Judicial Activism and Islamic Family Law: A Socio-Legal Evaluation of Recent Trends in Bangladesh' (2007) 14 *Islamic Law and Society* 204; A. H. Mollah, 'Judicial Activism and Human Rights in Bangladesh: A Critique' (2014) 56 *International J. of Law and Management* 475.

political actors has been closely tied to judicial control over political authority,[99] the potential for the abuse of power, or 'role substitution', whereby judges, 'faced with the evident collusion of the political system', consider it necessary for another institution – the judiciary – 'to fill the void and restore the threat of punishment for those indulging in corrupt practices'.[100] Politicization is detrimental to judicial reputation, which 'famously lacks the purse or the sword'.[101]

Eastern European judges' foray into human rights and their political stance as applicants before the ECtHR against the Polish government is significant in this context, but also different, in that the rule-of-law crisis – most evident in Poland and Hungary – essentially created a political backdrop for their on- and off-bench resistance, threatening the *sine qua non* condition of judicial function within polity and society, and thereby their independence. Following Trochev and Ellett, who studied judicial autonomy in hybrid political systems in Russia, Central Asia, and Africa, I ultimately agree that under the conditions of authoritarian backsliding the 'neat distinction between law and politics … does not exist'.[102] The transformation of Polish judges' legal consciousness towards embracing European human rights law and jurisprudence highlights a process of political evolution, with judges acting as an interest and status group.[103] As Trochev and Ellett poignantly observed, resisting judges frequently are not motivated to act based on 'a sense of mission or duty to protect citizens', even though 'they often articulate their resistance against interference in the context of safeguarding liberty and the rule of law'.[104] Critically, the Polish judges' turn to the ECtHR marked by their departure from the safe ivory towers of legal formalism ultimately left them exposed and rather more vulnerable to public scrutiny, much like activists engaged in resisting human rights violations.[105] The judges' vulnerability lay in their open confrontation with government policies, as they not only drew on the ECtHR's jurisprudence in their in-court decision making but also became individual applicants to the ECtHR. From the standpoint of the Polish government, engaged in the process of dismantling institutional checks and balances, the active involvement of an independent European court proved to be profoundly vexatious and easily dubbed 'political'.

The political echoes that mark judicial legal consciousness are, however, subtle and self-limiting. As argued by John Morijn, the judges' venture into politics 'was reactive, not proactive; defensive, not offensive'.[106] The relational legal consciousness of Polish judges underscores the intricate interplay between law and politics, and demonstrates how judges, under existential attack, are forced to become political actors and mobilize informal political resources domestically and transnationally off-bench 'to protect their autonomy against interference and, if

[99] D. Nelken, 'The Judges and Political Corruption in Italy' (1996) 23 *J. of Law and Society* 95; D. della Porta, 'A Judges' Revolution? Political Corruption and the Judiciary in Italy' (2001) 39 *European J. of Political Research* 1.

[100] della Porta, id., p. 4.

[101] N. Garoupa and T. Ginsburg, *Judicial Reputation: A Comparative Theory* (2019) 2.

[102] Trochev and Ellett, op. cit., n. 6, p. 84.

[103] Nelken, op. cit., n. 99, p. 99.

[104] Trochev and Ellett, op. cit., n. 6, p. 71. See also L. Hilbink, 'The Origins of Positive Judicial Independence' (2012) 64 *World Politics* 587.

[105] Kubal, op. cit., n. 64.

[106] J. Morijn, 'European Judges, Civil Society Organisations and Dissensus: Solidarities, Strategies, and Silver Linings' Dissensus over Liberal Democracy Conference Keynote, Université Libre de Bruxelles, 20 October 2023, at <https://gem-diamond.eu/blog/european-judges-civil-society-organisations-and-dissensus-solidarities-strategies-and-silver-linings>.

successful, construct their judicial power'.[107] The Polish judicial case study opens up new avenues for understanding how the judiciary's evolving role impacts professional legal consciousness and emphasizes the multifaceted nature of relationality, providing a nuanced perspective on authoritarian backsliding as productive of new forms of legal consciousness.

7 | CONCLUSION

This article, based on a case study of the changes in Polish judges' understanding and use of the ECtHR's jurisprudence and their petitioning the court as individual applicants, has offered two advancements for theorizing relational legal consciousness. First, it has demonstrated how judicial legal consciousness of embracing the ECtHR is co-constituted with reference to various actors: human rights lawyers, domestic and transnational judicial associations, NGOs, and Polish civil society. Second, it has revealed how relationality, as an intrinsic quality of legal consciousness theorizing, extends beyond social actors towards broader social relations such as the interdependence between law and politics. The politically induced rule-of-law crisis – perceived by the judges as an existential threat – created a state of liminality, where old rules, practices, and customs of drawing on domestic law no longer applied. This required new, creative solutions to protect judicial independence and ensure the legality of judges' everyday decisions. The judges responded by filing suits against the Polish state to the ECtHR and accumulating informal political resources off-bench. The turn to European human rights demonstrates how legal consciousness responds to political changes, and how it is relationally positioned vis-à-vis broader claims about the condition of a political system.

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[107] Trochev and Ellett, op. cit., n. 6, p. 85.